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Law Reporting Bureau

No. 23
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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 5/8/26-5/14/26

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.

For May 8, 2026 through May 14, 2026, the following preliminary appeal statements were filed:

ALMODOVAR v CITY OF NEW YORK (— AD3d —, 2026 NY Slip Op 02053):

APL-2026-00060

1st Dept. App. Div. order of 4/7/26; affirmance; sua sponte examination of whether the order appealed from finally determines the action within the meaning of the Constitution and whether a substantial constitutional question is directly involved in the order appealed from; **Motions and Orders—Judiciary Law section 21—Application by Letter**; Supreme Court, New York County, in effect, granted the branches of plaintiff's motion to reargue and, upon reargument, amended the order dated April 25, 2024 to reflect that the complaint is dismissed with prejudice, and otherwise adhered to the original determinations in the April 25 and May 15, 2024 orders, and denied the branches of plaintiff's motion to vacate the April 25 and May 15, 2024 orders or, alternatively, for leave to amend the complaint; App. Div. affirmed.

PEOPLE v ANDINO (REYNALDO) (242 AD3d 470):

APL-2026-00050

1st Dept. App. Div. order of 10/7/25; affirmance; leave to appeal granted by Ch. J. Wilson, 4/27/26; **Crimes—Search Warrant—Whether the search warrant application contained reasonable cause to believe that the property sought may be easily and quickly destroyed or disposed of, or that notice may endanger life or safety, such that the no-knock warrant provision was valid**; Supreme Court, New York County, convicted defendant of criminal possession of a weapon in the third degree and criminal possession of a controlled substance in the third degree, and sentenced him to concurrent one year terms; App. Div. affirmed.

CRONEMEYER v CITY OF NEW YORK (— AD3d —, 2026 NY Slip Op 02056):

APL-2026-00061

1st Dept. App. Div. order of 4/7/26; affirmance; sua sponte examination of whether the order appealed from finally determines the action within the meaning of the Constitution and whether a substantial constitutional question is directly involved in the order appealed from; **Motions and Orders—Whether defendants’ motion to dismiss the complaint was properly granted; whether there is a private right of action under the New York State Constitution’s Free Exercise Clause**; Supreme Court, New York County, granted defendants’ motion to dismiss the complaint and denied plaintiff’s cross-motion to compel discovery as moot; App. Div. affirmed.

MENDEZ v ASSEMBLIES OF GOD (247 AD3d 652):

APL-2026-00054

1st Dept. App. Div. order of 3/26/26; affirmation; sua sponte examination of whether the order appealed from finally determines the action within the meaning of the Constitution and whether a substantial constitutional question is directly involved in the order appealed from; **Motions and Orders—Whether the motion to dismiss was properly denied; alleged constitutional violations**; Supreme Court, New York County, denied defendants Assemblies of God National Youth Ministries, The General Council of the Assemblies of God, and National Royal Rangers Ministries’ motion to dismiss the complaint as against them under CPLR 3211; App. Div. affirmed.

MUNSON v NYSDCJS (— AD3d —, 2026 NY Slip Op 02017):

APL-2026-00058

3rd Dept. App. Div. order of 4/2/26; reversal; **Records—Freedom of Information Law—Whether respondent’s central registry of police officers and peace officers certified to serve in the state under Executive Law § 845 must be disclosed, in whole or part, under the Freedom of Information Law; whether the Appellate Division impermissibly broadened the scope of the exemptions invoked by respondent and exceeded its remand order; whether petitioners are entitled to attorney’s fees**; Supreme Court, Albany County, on remand, partially granted petitioners’ application, in a combined proceeding under CPLR article 78 and action for declaratory judgment, to annul a determination of respondent denying petitioners’ Freedom of Information Law Request; App. Div., with two Justices dissenting, reversed and dismissed the petition.

MATTER OF UCS v PERB (246 AD3d 471):

APL-2026-00059

1st Dept. App. Div. order of 2/10/26; affirmance; leave to appeal granted by the Appellate Division, 4/30/26; **Civil Service—Collective Bargaining—Whether the courts below applied the appropriate standard of review in this CPLR article 78 proceeding challenging a determination, after a hearing, of respondent State Public Employment Relations Board (PERB); whether PERB’s determination, finding that petitioner failed to engage in collective bargaining negotiations over its COVID-19 testing and vaccine policies in violation of the Public Employees’ Fair Employment Act (Taylor Law) was properly upheld; whether the remedy directing petitioner to make bargaining unit members whole was authorized and applied reasonably**; Supreme Court, New York County, denied the petition of the New York State Unified Court System (UCS) seeking to annul the November 8, 2023 determination of respondent State Public Employment Relations Board finding, after a hearing, that UCS failed to engage in collective bargaining negotiations over its COVID-19 testing and vaccine policies in violation of the Public Employees’ Fair Employment Act (Taylor Law), granted the motions to dismiss the petition, and dismissed the proceeding brought under CPLR article 78.

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REPORTS OF CASES
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STATE OF NEW YORK

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VOLUME 45
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[— NE3d —, — NYS3d —]

In the Matter of DAVID M. MILLER, a Justice of the Wolcott Village Court, Wayne County.

Decided December 18, 2025

PROCEDURAL SUMMARY

CONSIDERATION, by the Court of Appeals, on its own motion, pursuant to New York Constitution, article VI, § 22 and Judiciary Law § 44 (8), of whether the Honorable David M. Miller should be suspended from the office of Justice of the Wolcott Village Court, Wayne County, and whether suspension should be with or without pay.

HEADNOTE

Judges — Suspension from Office

The Court of Appeals, on its own motion, pursuant to New York Constitution, article VI, § 22 and Judiciary Law § 44 (8), suspended a Village Court Justice from office, with pay, effective immediately.

OPINION OF THE COURT

On the Court's own motion, it is determined that the Honorable David M. Miller is suspended with pay, effective im-

mediately, from the office of Justice of the Wolcott Village Court, Wayne County, pursuant to New York Constitution, article VI, § 22 and Judiciary Law § 44 (8).

Concur: Chief Judge WILSON and Judges GARCIA, SINGAS, CANNATARO, TROUTMAN and HALLIGAN. Judge RIVERA took no part.

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OF

DECISIONS RENDERED DURING THIS PERIOD EMBRACED IN THIS VOLUME

FIRST DEPARTMENT, APRIL, 2026

(April 2, 2026)

1 350 East Houston Street, LLC, et al., Respondents-Appellants, v Travelers Indemnity Company of America et al., Respondents, and Copps Foundations, Inc., Appellant-Respondent/Third-Party Plaintiff-Appellant-Respondent. Noble Construction Group, LLC, Third-Party Defendant-Respondent. [— NYS3d —]—

Indemnity—Contractual Indemnification—Excavation Work—Damage to Neighboring Building

Insurance—Disclaimer of Coverage—Notice of Claim—Timeliness

Disclosure—Penalty for Failure to Disclose—Preclusion—Expert Disclosure

Order, Supreme Court, New York County (Verna L. Saunders, J.), entered on or about October 18, 2024, which, to the extent appealed from as limited by the briefs, conditionally granted plaintiffs’ motion for summary judgment on their claim for contractual indemnification as against defendant/third-party plaintiff Copps Foundations, Inc. and, in effect, denied plaintiffs’ motion for an order declaring that they are entitled to unconditional contractual indemnification from Copps; and denied, as moot, so much of plaintiffs’ motion as sought summary judgment in its favor against defendant Temple Insurance Company (mot seq No. 007), unanimously affirmed, without costs. Order, same court and Justice, entered on or about October 18, 2024, which denied Copps’s motion for summary judgment dismissing plaintiffs’ cause of action as against it for negligence and all cross-claims as against it for purported negligence (mot seq No. 8), unanimously affirmed, without costs. Order, same court and Justice, entered on or about October 18, 2024, which granted Temple’s motion for summary judgment dismissing the complaint as against it (mot seq No. 9), unanimously affirmed, without costs. Order, same court and Justice, entered on or about October 18, 2024, which granted

the motion of third-party defendant Noble Construction Group, LLC to file a late motion, and, upon consideration of the motion (mot seq No. 10), granted Noble's motion for summary judgment dismissing the third-party complaint and for judgment in its favor on its counterclaim against Copps for contractual indemnification, unanimously modified, without costs, on the law, to deny Noble's motion insofar as it sought dismissal of the third-party complaint, reinstate the third-party complaint, and conditionally grant Noble summary judgment on its counterclaim against Copps for contractual indemnification, and otherwise affirmed, without costs. Order, same court and Justice, entered on or about October 18, 2024, which denied plaintiffs' motion to preclude defendant Peterson Geotechnical Construction LLC from submitting an expert affidavit in opposition to plaintiffs' motion for summary judgment (mot seq No. 11), unanimously affirmed, without costs.

Plaintiff 350 East Houston Street, LLC, the owner of premises located at 11 Avenue C in Manhattan, contracted with Noble to provide construction management services for a project to construct a building on the premises. Noble entered into a trade contract with Copps to perform support of excavation and foundation piles work on the project; Copps, in turn, subcontracted with Peterson to install micropiles and a dewatering system. Temple issued Copps an excess liability policy containing the usual exclusions for late notice of occurrences and claims, and a prohibition against voluntary payments or assumption of obligations without the insurer's consent. In March 2017, the owner of a building adjacent to the project gave notice that the excavation work had damaged the foundation of that adjacent building, causing the building to shift.

Supreme Court properly found that plaintiffs were entitled to contractual indemnification from Copps on the condition that 350 East Houston, the owner of the premises, was found to be free from negligence. The intent to provide contractual indemnification under section 12.2 (b) of the trade contract between Noble and Copps is clear and unambiguous, requiring indemnification for "all claims, losses, damages . . . demands, costs and expenses" related to damage to real property "in any way or measure . . . caused by, arise out of or in connection with the Work" (see *Bradley v Earl B. Feiden, Inc.*, 8 NY3d 265, 274 [2007]; *Drzewinski v Atlantic Scaffold & Ladder Co.*, 70 NY2d 774, 777 [1987]). Under this language, the contractual indemnification provision was triggered because the damage to the neighboring building arose out of the work under the trade

contract—specifically, the micropiling provided for in the contract (see *Mancusi v Avalonbay Communities, Inc.*, 199 AD3d 463, 464 [1st Dept 2021]). The indemnification clause also does not condition 350 Houston Street’s right to indemnification on a finding of fault by Copps (see *Rivera v Columbia Hicks Assoc. LLC*, 203 AD3d 524, 525 [1st Dept 2022]).

Speculation by Copps’s expert that demolition of the gas station near the property might have contributed to the shifting of the neighboring building did not raise an issue of fact. On the contrary, 350 East Houston hired an engineer to conduct a prework inspection of the neighboring building in August 2016; the inspector’s report, along with the fact that the building did not begin to shift until March 2017, well after the inspection, contradict the conjecture by Copps’ expert that removal of the gas station sometime before inspection could have been a contributing cause, or even the only cause, of the damage.

Nevertheless, contrary to plaintiffs’ arguments, Supreme Court correctly declined to declare that plaintiffs were entitled to unconditional indemnification. The record presents triable issues of fact as to whether 350 East Houston took part in a decision to reject Copps and Peterson’s recommended change in the means and methods to be used for the micropiling work after Copps and Peterson found unexpected subsurface conditions. Thus, a factfinder could rationally determine that 350 East Houston’s negligence was a proximate cause of the damages (see *e.g. Mancusi*, 199 AD3d at 464).

Supreme Court correctly denied Copps’s motion for summary judgment as to the negligence claim and contribution cross-claims against it, as the record presents triable issues of fact as to whether Copps directed or controlled the work at issue (see *905 5th Assoc., Inc. v Weintraub*, 85 AD3d 667, 668 [1st Dept 2011]; see also *Brothers v New York State Elec. & Gas Corp.*, 11 NY3d 251, 258 [2008]).

Supreme Court also properly granted Temple’s motion for summary judgment dismissing 350 East Houston’s insurance coverage claim against it on the ground that it was untimely notified of the claim. Temple demonstrated that it did not receive notice of the neighboring property’s claim against 350 East Houston as soon as practicable, as required by the policy, but instead received notice when served with process in this action almost 11 months later and well after plaintiffs resolved the neighbor’s claim and performed repairs. The record does not contain any documentary proof of a mailing (see *Matter of Allstate Ins. Co. [Patrylo]*, 144 AD2d 243, 246 [1st Dept 1988]). Indeed, plaintiffs proffer no mailing receipt or tracking infor-

mation for the shipping label, and they fail to contest the averment of Temple's attorney that he searched for the tracking number shown on the label but was unable to find any shipment on the FedEx website. Moreover, plaintiffs' settlement of the claim with the neighbor before serving notice gave rise to "an irrebuttable presumption of prejudice" (Insurance Law § 3420 [c] [2] [B]). In addition, the settlement deprived Temple of the opportunity to investigate the incident or defend against the neighbor on 350 East Houston's behalf (*see id.* § 3420 [c] [2] [C]; *Hartford Fire Ins. Co. v Hudson Excess Ins. Co.*, 238 AD3d 667, 668 [1st Dept 2025]).

As to the third-party action, Supreme Court providently exercised its discretion to consider Noble's late summary judgment motion "on good cause shown" for the delay (CPLR 3212 [a]; *see Brill v City of New York*, 2 NY3d 648, 652 [2004]). Noble's counsel explained that the deadline was miscalendared and that he did not notice the error because of his own health and family circumstances. The record also shows that counsel contacted all other parties two weeks after the deadline when he realized, upon signing the stipulations seeking to adjourn the three other motions, that he had missed the deadline. Given the broad discretion afforded Supreme Court to consider a late motion, Noble's counsel offered a satisfactory explanation for the untimeliness (*see Bank of N.Y. Mellon v Davis*, 209 AD3d 426, 426 [1st Dept 2022]).

However, Supreme Court should not have dismissed Copps's third-party claims against Noble for common-law indemnification and contribution. The record evidence raises triable issues of fact as to the extent of any negligence by Copps and Noble related not only to supervision of Peterson's work, but also as to whether Noble bears responsibility for the pre-incident decision to reject Copps and Peterson's recommended change in means and methods (*see* CPLR 1401; *McCarthy v Turner Constr., Inc.*, 17 NY3d 369, 377-378 [2011]; *Trump Vil. Section 3 v New York State Hous. Fin. Agency*, 307 AD2d 891, 895 [1st Dept 2003]). Contrary to Noble's contention, Copps does not seek purely economic loss resulting from a breach of contract; rather, plaintiffs sued Copps separately for negligence in the exercise of its supervision over Peterson's work (*see Board of Educ. of Hudson City School Dist. v Sargent, Webster, Crenshaw & Folley*, 71 NY2d 21, 26, 28 [1987]).

Similarly, summary judgment to Noble on the third-party counterclaim should have been granted only conditionally, given the triable issues regarding direction and control over the means and methods employed (*see e.g. Mancusi*, 199 AD3d at 463-464).

Finally, Supreme Court providently exercised its discretion in denying plaintiffs' motion to preclude Peterson from offering an affidavit or report from its expert in opposition to its summary judgment motion and at trial (*see* CPLR 3126 [2]; *MSCI Inc. v Jacob*, 120 AD3d 1072, 1075 [1st Dept 2014]). Peterson's expert disclosure was insufficient because plaintiffs were "not . . . enlightened to any appreciable degree about the content of this expert's anticipated testimony" (*Chapman v State of New York*, 189 AD2d 1075, 1075 [3d Dept 1993]; *see* CPLR 3101 [d] [1] [i]). Nonetheless, the conclusion that a party failed to comply with a discovery notice does not require unconditional granting of a preclusion motion (*see Chapman*, 189 AD2d at 1075). The law is well settled that in order to impose the drastic remedy of preclusion, a court must determine that the offending party's failure to comply with disclosure "was willful, deliberate and contumacious" (*Siegmán v Rosen*, 270 AD2d 14, 15 [1st Dept 2000]). Plaintiffs have not sustained this burden, nor have they shown prejudice, as they were able to address the expert's opinions in reply and received Peterson's theories of the case well in advance of trial (*see Rivera v Montefiore Med. Ctr.*, 123 AD3d 424, 425-426 [1st Dept 2014], *affd* 28 NY3d 999 [2016]).

We have considered the remaining contentions and find them unavailing. Concur—Manzanet-Daniels, J.P., Mendez, Pitt-Burke, Higgitt, Hagler, JJ.

2 In the Matter of A.D. and Others, Children Alleged to be Neglected. K.D., Appellant; Administration for Children's Services, Respondent. [— NYS3d —]

Parent, Child and Family—Abused or Neglected Child—Person Legally Responsible

Parent, Child and Family—Abused or Neglected Child—Domestic Violence in Presence of Children—Derivative Neglect of Other Children

Order of disposition, Family Court, New York County (Grace Obama-Layat, J.), entered on or about May 6, 2024, which, to the extent appealed from as limited by the briefs, determined, after a fact-finding hearing, that respondent was a person legally responsible for the children D.A. and K.D., neglected K.D. and the child S.D., and derivatively neglected D.A. and the child A.D., unanimously affirmed, without costs.

Family Court providently determined that respondent was a person legally responsible for K.D. and D.A. during the relevant period (*see Matter of Yolanda D.*, 88 NY2d 790, 796 [1996]). Respondent was in a romantic relationship with their mother for a period of one and a half years and is the father of their half-sibling, S.D. (*see Matter of Samantha M.*, 56 AD3d

299, 300-301 [1st Dept 2008], *lv denied* 11 NY3d 716 [2009]). Respondent also frequently stayed in the home with the mother and the children, provided for the family financially, and took the children to school and on family outings (*see Matter of Matthew C. [Joshua L.]*, 183 AD3d 457, 457-458 [1st Dept 2020]; *Matter of Jayline R. [Jose M.]*, 110 AD3d 419, 420 [1st Dept 2013]).

A preponderance of the evidence supports the finding that respondent neglected K.D. and S.D. by committing an act of domestic violence against the mother in their presence (*see Matter of J.A. [Jermaine M.]*, 233 AD3d 428, 428 [1st Dept 2024]; *Matter of Jermaine K.R. [Jermaine R.]*, 176 AD3d 648, 649 [1st Dept 2019]). Respondent brandished a firearm and physically assaulted the mother in close proximity to the children, thereby placing their emotional well-being at imminent risk of harm (*see Matter of J.A.*, 233 AD3d at 428; *Matter of Jermaine K.R.*, 176 AD3d at 649). The mother also testified that, after the incident, K.D. was very distressed and appeared scared, which is sufficient to show that his emotional well-being had been impaired by the altercation (*see e.g. Matter of Jermaine K.R.*, 176 AD3d at 649).

The evidence supported the finding of derivative neglect on behalf of A.D. and D.A. because respondent's actions demonstrated such an impaired level of parental judgment as to create a substantial risk of harm to any child in his care (*see Matter of Matthew C. [Joshua L.]*, 183 AD3d 457, 458 [1st Dept 2020]; *Matter of Sapphire R. [Christopher R.]*, 219 AD3d 730, 732 [2d Dept 2023]). The fact that D.A. and AD. were not present in the home when the incident occurred does not preclude a finding of derivative neglect (*see Matter of Kaylin P. [Derval S.]*, 159 AD3d 658, 659 [1st Dept 2018]). Concur—Manzanet-Daniels, J.P., Mendez, Pitt-Burke, Higgitt, Hagler, JJ.

3 Henry Ahdab, Respondent, v New York City Housing Authority, Respondent/Third-Party Plaintiff-Respondent, and Sahara Construction Corp., Appellant/Third-Party Defendant-Appellant, et al., Defendant. [251 NYS3d 662]—

Judgments—Default Judgment—Vacatur—Reasonable Excuse

Order, Supreme Court, Bronx County (Erik L. Gray, J.), entered May 6, 2025, which denied the motion of defendant Sahara Construction Corp. to vacate the default judgments entered against it and to compel plaintiff and defendant/third-party plaintiff New York City Housing Authority (NYCHA) to accept Sahara's late answers to the amended complaint and third-party complaint, unanimously affirmed, without costs.

Supreme Court providently denied Sahara's motion to vacate NYCHA's default judgment against it because Sahara failed to offer a reasonable excuse for its delay in attempting to file an answer to the third-party complaint (*see Rodgers v 66 E. Tremont Hgts. Hous. Dev. Fund Corp.*, 69 AD3d 510, 510 [1st Dept 2010]). Sahara's excuse of confusion does not constitute a reasonable excuse (*see Hereford Ins. Co. v Interdependent Acupuncture PLLC*, 234 AD3d 410, 410 [1st Dept 2025]); nor do its excuses of unfamiliarity with the legal system and trouble retaining an attorney (*see Besler v Uzieri*, 179 AD3d 628, 628 [1st Dept 2020]).

Sahara's proffered excuse that it believed that the matter was being handled by its insurer also was not reasonable (*see Gecaj v Gjonaj Realty & Mgt. Corp.*, 149 AD3d 600, 604 [1st Dept 2017]; *Martucci v 500 W25th Owner LLC*, 224 AD3d 545, 545 [1st Dept 2024]). Sahara's representative averred that he received service of NYCHA's motion for a default judgment in summer 2023, yet Sahara waited until March 15, 2024, to file its motion for vacatur. Given Sahara's failure to proffer a reasonable excuse for its default, it is unnecessary to consider whether it has a meritorious defense to NYCHA's claims.

In light of the foregoing, Supreme Court properly denied the branch of Sahara's motion to compel plaintiff and NYCHA to accept its late answers to the amended complaint and the third-party complaint as academic. Concur—Manzanet-Daniels, J.P., Mendez, Pitt-Burke, Higgitt, Hagler, JJ.

4 In the Matter of Country-Wide Insurance Company, Respondent, v National Indemnity Company, Appellant. [— NYS3d —]—

Arbitration—Confirming or Vacating Award—Arbitrator Jurisdiction—Denial/Disclaimer of Coverage

Order, Supreme Court, New York County (Eric Schumacher, J.), entered May 2, 2024, which granted the petition of Country-Wide Insurance Company to confirm an arbitration award and denied respondent's cross-motion to vacate the award and dismiss the petition to confirm, unanimously reversed, on the law, with costs, the petition denied, the cross-motion to vacate the award granted, and the petition dismissed.

Supreme Court should have granted respondent's cross-motion to vacate the arbitration award issued by Arbitration Forums Inc. (AFI) and dismiss the petition to confirm the award because the AFI did not have jurisdiction to decide the proceeding. At the root of the arbitration is a vehicle collision for which petitioner paid its insureds' claims under its no-fault

coverage. Petitioners and its insureds sought to recover the funds from respondent, the insurer of the owner of the other vehicle involved in the collision. Respondent sent a letter disclaiming coverage because the vehicle involved in the collision was not a covered auto listed on the relevant policy schedule (the disclaimer letter). Over a year after receiving this letter, petitioner commenced the instant arbitration against respondent, pursuant to section 5105 of the Insurance Law, seeking subrogation reimbursement of its payment to its insured in connection with the collision. Respondents did not file the disclaimer letter in response. However, after an award was issued in petitioner's favor, respondent submitted a Post-Decision Inquiry with AFI, attaching the disclaimer letter.

This was in satisfaction of AFI rule 3-9, which provides that a responding insurance company may assert the coverage defenses of no liability policy in effect, denial of coverage up to 60 calendar days after the decision publication date and a minimum of 60 calendar days before the statute of limitations expires. The submission also rendered section 5105's mandatory arbitration provision inapplicable because respondent "in good faith assert[ed] a defense of lack of coverage" and "specific written consent of mandatory arbitration" was not obtained from respondent (11 NYCRR 65-4.11 [a] [6]). Moreover, AFI rule 2-4 provides that "[i]f a denial/disclaimer of coverage is being pled . . . the party will be ruled out of jurisdiction so long as a copy of the denial/disclaimer of coverage letter to the party seeking liability coverage for the loss is submitted as evidence." Thus, the jurisdictional basis for the award issued by AFI in this loss transfer proceeding was vitiated upon respondent's submission of its Post-Decision Inquiry attaching the disclaimer letter. Concur—Manzanet-Daniels, J.P., Mendez, Pitt-Burke, Higgitt, Hagler, JJ.

5 Beth Efran, Appellant, v Shawn Efran, Respondent. [251 NYS3d 663]—

Actions—Stay—Matrimonial Action

Order, Supreme Court, New York County (Ariel D. Chesler, J.), entered August 14, 2025, which, to the extent appealed from as limited by the briefs, granted defendant's motion to dismiss the complaint pursuant to CPLR 3211 (a) (4) and denied plaintiff's motion to vacate a prior order staying the action, unanimously affirmed, without costs.

Plaintiff commenced a divorce proceeding in 2022 seeking dissolution of her marriage to defendant (matrimonial action). In September 2024, defendant was expected to sell a 51% inter-

est in a marital asset, Efran Films Canada (EFC), after which, by court order in the matrimonial action, he was to place 65% of the proceeds in escrow. Shortly before the sale was to close, plaintiff initiated the instant action, purportedly on behalf of Efran Films, Inc. (EFI), another marital asset in which each party is a 50% shareholder, and there are no other shareholders. In this action, plaintiff primarily alleges that defendant had transferred assets from EFI to EFC during the parties' marriage.

The court providently granted defendant's motion to dismiss this action under CPLR 3211 (a) (4), as the corporate claims are merely an attempt to litigate, relitigate, or circumvent issues central to the matrimonial action (*see Boronow v Boronow*, 71 NY2d 284, 290 [1988]; *Rossignol v Rossignol*, 82 AD3d 1335, 1337 [3d Dept 2011]; *cf. Kelley v Galina-Bouquet, Inc.*, 155 AD2d 96 [1st Dept 1990] [Court denied the defendant-husband's motion to dismiss his plaintiff-wife's separate breach of employment contract action against him and his corporation based on claims, in part, pre-dating the marriage as being unrelated to the issue of equitable distribution in the pending divorce action, which is not the case herein]). The claims in this action were, and continue to be, asserted by plaintiff in the matrimonial action.

Accordingly, to the extent plaintiff argues that the court improvidently stayed this instant action pending determination of the parties' motions, the issue is moot. In any event, the court acted well within its broad discretion to stay the action to ensure the integrity of the matrimonial action given that its claims involve the same parties and operative facts (*see 215 W. 84th St Owner LLC v Ozsu*, 209 AD3d 401, 401 [1st Dept 2022]).

We have considered plaintiff's remaining arguments and find them unavailing. Concur—Manzanet-Daniels, J.P., Mendez, Pitt-Burke, Higgitt, Hagler, JJ.

6 *Ellen's Stardust, Inc., et al., Respondents, v Getzel, Schiff & Pesce, LLP, Appellant.* [251 NYS3d 664]—An appeal having been taken to this Court by the above-named appellant from an order of the Supreme Court, New York County (Andrew Borrok, J.), entered on or about February 7, 2025, and said appeal having been argued by counsel for the respective parties; and due deliberation having been had thereon, and upon the stipulation of the parties hereto dated March 19, 2026, it is unanimously ordered that said appeal be and the same is hereby withdrawn in accordance with the terms of the aforesaid stipulation. Concur—Renwick, P.J., Kennedy, Rodriguez, Pitt-Burke, O'Neill Levy, JJ.

7 Stephanie T. Foster, Appellant, v John H. Foster, Respondent. [— NYS3d —]

Husband and Wife and Other Domestic Relationships—Support—Modification of Pendente Lite Award

Husband and Wife and Other Domestic Relationships—Support—Maintenance—Termination of Temporary Maintenance

Order, Supreme Court, New York County (Ta-Tanisha James, J.), entered October 21, 2025, which, to the extent appealed from as limited by the briefs, granted defendant husband's motion to terminate a pendente lite spousal support order of the same court (Kelly O'Neill Levy, J.), entered October 17, 2022, insofar as directing that plaintiff wife's total spousal support award be reduced, retroactive to the filing date of the motion, to her monthly rental payment through December 31, 2025, unanimously reversed, on the law, without costs, and the husband's motion denied in its entirety.

Supreme Court erred in modifying the pendente lite award of spousal support (*see Haron v Azoulay*, 131 AD3d 822, 823 [1st Dept 2015]). Initially, the husband's retirement was not a sudden or unanticipated event warranting termination of the interim support order. On the contrary, in 2022, in opposition to the wife's pendente lite motion, he represented that he was effectively retired from his job at a private equity firm and did not anticipate any further significant income from the firm, an assertion that ultimately proved inaccurate.

Moreover, the husband failed to establish that continued compliance with the pendente lite order would impair his ability to meet his own reasonable expenses (*see Anonymous v Anonymous*, 63 AD3d 493, 496-497 [1st Dept 2009], *appeal dismissed* 14 NY3d 921 [2010]). A comparison of the husband's 2021 and 2025 statements of net worth reveals that his liquid assets have not been depleted and, in several of his accounts, have actually increased. His monthly expenses have decreased only marginally between 2021 and 2025, and his tax returns between 2019 and 2023 show substantial capital-event income in multiple years. In addition, the husband's anticipated retirement income is the same as the amount he claims to have received in 2022. Without proof that the pendente lite award was so onerous as to deprive the husband of income and assets to meet his own expenses, he has not met the high threshold required to disturb a temporary award designed to maintain the status quo.

Supreme Court also improvidently exercised its discretion in terminating temporary maintenance based primarily on the length of the parties' marriage and the duration of interim pay-

ments already made (*see Emmanuel D. v Ximena D.*, 73 Misc 3d 1208[A], 2021 NY Slip Op 50975[U], *11-12 [Sup Ct, Kings County 2021]). By terminating interim support because the husband had paid maintenance for a period approximating what might be deemed appropriate under the post-divorce advisory percentages, the court collapsed the statutory distinction between temporary and post-divorce maintenance and treated the advisory schedule as a de facto cap on temporary maintenance. Domestic Relations Law § 236 (B) (5-a) does not authorize such an approach. The reliance on post-divorce durational percentages to end interim support before trial effectively adjudicates the ultimate maintenance determination in advance, without the evidentiary record and statutory analysis required under section 236 (B) (6). Concur—Manzanet-Daniels, J.P., Mendez, Pitt-Burke, Higgitt, Hagler, JJ.

8 In the Matter of J.H., Respondent, v G.H. Appellant. [251 NYS3d 664]—

Parent, Child and Family—Custody—Sole Legal and Physical Custody

Order, Family Court, Bronx County (Judith D. Waksberg, J.), entered on or about January 30, 2025, which denied appellant mother's petition for sole legal and physical custody of the subject child and granted respondent father's petition for sole legal and physical custody, with parenting time to the mother, unanimously affirmed, without costs.

The court properly exercised its discretion in awarding sole custody of the child to the father (*see Matter of Deanna V. v Michael C.*, 179 AD3d 445, 446 [1st Dept 2020]). There is no basis to disturb the court's credibility determinations (*see Matter of Ivan J. v Felicia V.*, 228 AD3d 506, 506 [1st Dept 2024]). The court observed that, based on the father's testimony and the mother's admissions, the child had a pattern of concerning absences and tardiness at school during the mother's custody weeks (*see Matter of Xavier C. v Armetha K.*, 168 AD3d 438, 439 [1st Dept 2019], *lv denied* 32 NY3d 918 [2019]). Moreover, the parents clearly were unable to co-parent (*see Matter of Markis L. v Jacquelyn C.*, 189 AD3d 580, 581 [1st Dept 2020]). The mother demonstrated more frequent and extreme loss of control when interacting with the father in the child's presence (*see Matter of Chirag C. v Jaimie D.*, 226 AD3d 470, 471 [1st Dept 2024], *lv denied* 42 NY3d 907 [2024]). Accordingly, the court's determination that a change in custody was warranted by the totality of the circumstances and was in the child's best interests had a sound and substantial basis in the record (*see Eschbach v Eschbach*, 56 NY2d 167, 172 [1982]; *Matter of*

Jarvis L. v Jasmine L.L., 168 AD3d 423, 423-424 [1st Dept 2019]). Concur—Manzanet-Daniels, J.P., Mendez, Pitt-Burke, Higgitt, Hagler, JJ.

9 *Kemar Holness et al., Respondents, v 421 Kent Development, LLC, et al., Respondents. 421 Kent Development, LLC, et al., Third-Party Plaintiffs-Respondents, v Alabama Iron Works Corp., Third-Party Defendant-Respondent. 421 Kent Development, LLC, et al., Second Third-Party Plaintiffs-Respondents, v Universal Services Group, Ltd., Second Third-Party Defendant-Appellant-Respondent/Third Third-Party Plaintiff-Appellant-Respondent, and Creative Environmental Solutions Corp., Second Third-Party Defendant-Respondent. Centrifugal Associates Group, LLC, Third Third-Party Defendant-Respondent/Fourth Third-Party Plaintiff-Respondent, v J&Z Mechanical Construction Corp., Fourth Third-Party Defendant-Respondent/Fifth Third-Party Plaintiff-Respondent. Metropolis HVAC Contractors, Inc., Fifth Third-Party Defendant-Respondent-Appellant.* [— NYS3d —]

Indemnity—Contractual Indemnification—Construction Project

Order, Supreme Court, New York County (Gerard Lebovits, J.), entered on or about January 3, 2025, which to the extent appealed from as limited by the briefs, denied second third-party defendant Universal Services Group, Ltd.’s motion for summary judgment dismissing the second third-party claims as against it for contractual indemnification, common-law indemnification, contribution, and breach of contract for failure to procure insurance, and denied fifth third-party defendant-Metropolis HVAC Contractors, Inc.’s motion for summary judgment dismissing the fifth-party claims as against it for contractual indemnification, common-law indemnification, contribution, and breach of contract for failure to procure insurance, unanimously affirmed, with costs.

Plaintiffs, a welder and an ironworker employed by third-party defendant Alabama Iron Works Corp., alleged that they were injured when they fell from a Baker scaffold. The scaffold allegedly collapsed when one of its wheels broke, causing the leg of the scaffold to break through a surface cover that was used to waterproof around HVAC ductwork, which Metropolis had installed through a roof penetration. The surface cover masked an open gap between a roof slab and the ductwork, so that the gap was not immediately detectible when standing on the roof. Further, the roof penetration, which was created by making cuts in the roof slab, was made by a trade other than Universal, which was the roofing/waterproofing contractor on the construction project.

Supreme Court properly denied Universal's motion. As to the branch of motion for summary judgment dismissing the contractual indemnification claim, the broad contractual indemnification language contained in the roofing/waterproofing subcontractor agreement between Universal and the general contractor provided that Universal would indemnify the general contractor and project owners for any loss arising out of or in connection with Universal's work. The language also provided that Universal would indemnify the general contractor and owners for loss due to an act or omission of Universal's workers, or where Universal's personnel or equipment were in "the vicinity" of the accident by reason of their performance of the work (*see Cackett v Gladden Props., LLC*, 183 AD3d 419, 422 [1st Dept 2020]). The record presents factual issues as to whether plaintiffs' accident arose out of or in connection with Universal's roofing and waterproofing work, and whether Universal's workers were in the vicinity working on the uncompleted roof at the time of the incident. In addition, the record does not make clear which trade was responsible for applying the surface cover, and whether the surface cover was masked in part by a darker waterproofing material applied over it.

Similarly, Supreme Court properly denied the branches of Universal's motion for summary judgment dismissing the second third-party claims for common-law indemnification and contribution. The record is devoid of testimony by a witness with personal knowledge as to which contractor was responsible for the surface cover placed around the rooftop ductwork, nor did Universal provide its work records to substantiate its witness's testimony that it was not working in the area at the time the accident happened and had no part in placing the surface cover. The record also does not eliminate triable issues of fact as to whether Universal fulfilled its contract responsibilities to inspect the roof and ensure that it was properly waterproofed (*see Naughton v City of New York*, 94 AD3d 1, 10 [1st Dept 2012]).

In addition, because Universal did not tender its policy or a declarations page that set forth the coverage obtained, it also did not carry its prima facie burden on the branch of its motion for summary judgment dismissing the second third-party breach of contract claim (*see Cooper v Bldg 7th St. LLC*, 231 AD3d 533, 534 [1st Dept 2024]).

Moreover, Supreme Court properly denied Metropolis motion. As to the branches of Metropolis' motion for contractual indemnification, common-law indemnification, and contribu-

tion, the indemnification provision in Metropolis's HVAC subcontract broadly applied to any and all claims arising from or out of or resulting from the performance of its work, but only to the extent caused by the acts, omissions, or negligence of Metropolis. Under the terms of the HVAC subcontract, at section 19.1, Metropolis agrees that prevention of accident to workmen engaged or in the vicinity of its work was its responsibility; nevertheless, on its motion, Metropolis did not offer documentary evidence regarding the scope of work responsibilities. Nor did it offer admissible proof based on personal knowledge of the ductwork it performed at the location of the accident. Metropolis has also not yet been deposed.

Supreme Court also properly denied the branch of Metropolis' motion to dismiss the cause of action for breach of contract for failure to procure insurance. The insurance documents submitted by Metropolis on its motion do not show its compliance with the contract requirements, which obligate Metropolis to obtain coverage in the aggregate of \$5 million per occurrence and to submit specific additional insured endorsement forms (see *Garcia v CityMeals-On-Wheels Prop., LLC*, 245 AD3d 558, 560 [1st Dept 2026]; *385 Third Ave. Assoc., L.P. v Metropolitan Metals Corp.*, 81 AD3d 475, 477 [1st Dept 2011], *lv denied* 17 NY3d 702 [2011]). Concur—Manzanet-Daniels, J.P., Mendez, Pitt-Burke, Higgitt, Hagler, JJ. [**Prior Case History: 84 Misc 3d 1262(A), 2025 NY Slip Op 50022(U).**]

10 Hudson ES LLC, Appellant, v First Franklin Financial Corporation, Respondent, at al., Defendant. [251 NYS3d 666]—

Contracts—Contractual Limitation of Liability—"No-Action Clause"—Residential Mortgage-Backed Security Trust

Order, Supreme Court, New York County (Robert R. Reed, J.), entered January 17, 2025, which granted defendant First Franklin Financial Corporation's (First Franklin) motion to dismiss the complaint, unanimously affirmed, with costs.

Supreme Court properly dismissed the complaint as barred by section 10.08 of the Pooling and Service Agreement dated as of January 1, 2007 (PSA) (the no-action clause). It is undisputed that plaintiff did not meet the preconditions for bringing an action listed in the no-action clause because it did not represent 25% of the Voting Rights in the Trust and did not provide the Trustee with 60 days' notice before commencing suit.

Plaintiff's argument that First Franklin may not assert the no-action clause of the PSA as a defense because it was not a party to or a third-party beneficiary of that agreement is unavailing. The purpose of no-action clauses is to avoid duplica-

tive suits and protect the majority interests by mandating that actions be brought by the Trustee (*see Quadrant Structured Prods. Co., Ltd. v Vertin*, 23 NY3d 549, 567 [2014]). In cases involving residential mortgage-backed securitizations, this Court has previously held that entities such as First Franklin, that are not parties or third-party beneficiaries to an agreement, may invoke a no-action clause as a complete defense (*see Freedom Trust 2011-2 v DB Structured Prods., Inc.*, 214 AD3d 406, 407 [1st Dept 2023], *lv denied* 41 NY3d 902 [2024]; *ACE Sec. Corp. v DB Structured Prods., Inc.*, 112 AD3d 522, 523 [1st Dept 2013], *affd* 25 NY3d 581 [2015]).

We have considered plaintiff's remaining arguments and find them unavailing. Concur—Manzanet-Daniels, J.P., Mendez, Pitt-Burke, Higgitt, Hagler, JJ. **[Prior Case History: 84 Misc 3d 1263(A), 2025 NY Slip Op 50028(U).]**

11 J.C. et al., Appellants-Respondents, v Ronald London, M.D., et al., Respondents-Appellants. [251 NYS3d 665]—

Physicians and Surgeons—Malpractice—Proximate Cause—Indication for Surgery

Order, Supreme Court, Bronx County (Michael A. Frishman, J.), entered on or about November 21, 2024, which granted in part and denied in part defendants' respective motions for summary judgment dismissing the complaint, unanimously modified, on the law, to grant defendants' motions in their entirety, and otherwise affirmed, without costs. The Clerk is directed to enter judgment accordingly.

Defendants established prima facie entitlement to summary judgment through their submission of expert affidavits that defendants' respective treatment of plaintiff fell within good and accepted standards of care and that no alleged departure from the applicable standard of care proximately caused plaintiff's injuries (*see Scalisi v Oberlander*, 96 AD3d 106, 120 [1st Dept 2012]). In opposition, plaintiffs submitted an expert affidavit from an anonymous neurosurgery medical doctor, who, contrary to defendants' contention, could opine on the applicable standard of care (*see Limmer v Rosenfeld*, 92 AD3d 609, 609 [1st Dept 2012]). Plaintiffs' expert sufficiently raised some triable issues as to whether defendants deviated from the applicable standard of care (*see Scalisi*, 96 AD3d at 120).

Nevertheless, plaintiffs' expert affidavit was insufficient to raise a triable issue as to proximate causation (*see Foster v Kassab*, 201 AD3d 405, 406 [1st Dept 2022]). Defendants' experts opined that plaintiff's condition in 2015 would not have warranted surgical intervention, and that any symptoms

were properly treated with medication and monitoring. In opposition, plaintiffs' expert did not suggest when surgery was indicated in plaintiff's case between the time of the relevant treatment in 2015 and when plaintiff became symptomatic, at which time plaintiff presented to other healthcare providers in 2020 complaining of "tussive" occipital headaches. Further, plaintiffs' expert does not opine as to how, if at all, different treatment in 2015, including potential surgery, would have changed plaintiff's outcome.

We have considered plaintiffs' remaining arguments and find them unavailing. Concur—Mendez, J.P., Pitt-Burke, Higgitt, Hagler, JJ.

12 The People of the State of New York, Respondent, v Fabian Brown, Appellant. [— NYS3d —]—

Crimes—Sentence—Probation—Conditions

Judgment, Supreme Court, Bronx County (Tara Collins, J.), rendered May 9, 2024, convicting defendant, upon his plea of guilty, of assault in the second degree, and sentencing him to three years of probation, unanimously modified, on the law, to the extent of striking the condition of probation requiring him to pay the surcharge and fees imposed at sentencing, and otherwise affirmed.

Defendant validly waived his right to appeal (*see People v Thomas*, 34 NY3d 545, [2019], *cert denied* 589 US 1302 [2020]), which forecloses review of his excessive sentence claim (*see People v Santiago*, 242 AD3d 519, 520 [1st Dept 2025]). In any event, we perceive no basis for reducing the sentence.

Defendant's challenge to four conditions of his probation as not reasonably related to his rehabilitation survive his valid appeal waiver and do not require preservation (*see People v Alvarez*, 233 AD3d 619, 620 [1st Dept 2024], *lv denied* 43 NY3d 961 [2025]; *People v Arias*, 210 AD3d 593, 594 [1st Dept 2022], *lv denied* 39 NY3d 1109 [2023]; *see also People v Hakes*, 32 NY3d 624, 628 n 3 [2018]). Nevertheless, condition 7 of defendant's probation requiring that he "[a]void injurious or vicious habits; refrain from frequenting unlawful or disreputable places; and . . . not consort with disreputable people" (Penal Law § 65.10 [2] [a], [b]) was providently imposed as reasonably necessary to ensure that defendant "will lead a law-abiding life or to assist him to do so" (Penal Law § 65.10 [1]) given that defendant was armed with a knife, which he used to stab the victim, and he admitted to daily marijuana use since he was 14 years old (*see People v Carrasquillo*, 242 AD3d 424, 425 [1st Dept 2025]).

The court also providently imposed condition 28, requiring defendant to consent to warrantless searches of his person, vehicle, and home for, and to the seizure of, drugs, drug paraphernalia, firearms, or other weapons or contraband (*see People v Rivera*, 239 AD3d 521, 522 [1st Dept 2025], *lv denied* 44 NY3d 1029 [2025]; *cf People v Thomas*, 233 AD3d 568, 569 [1st Dept 2024], *lv denied* 43 NY3d 932 [2025]). The court also providently imposed condition 11, prohibiting defendant from purchasing or possessing firearms, and to surrender the same, since he is not eligible to possess or purchase a firearm under both federal and state law (*see* 18 USC § 922 [g] [1]; Penal Law § 400.00 [1] [c]; *People v Pacha*, 246 AD3d 575, 576 [1st Dept 2026]).

Defendant's valid appeal waiver forecloses review of his as applied constitutional challenge to condition 7 under the First, Fifth, and Fourteenth Amendments (*see People v Lowndes*, 239 AD3d 574, 575 [1st Dept 2025], *lv denied* 44 NY3d 1012 [2025]; *see also People v Johnson*,— NY3d —, —, 2025 NY Slip Op 06528, *1 [2025]). In any event, this claim is unpreserved, and we decline to review it in the interest of justice (*see People v Cabrera*, 41 NY3d 35, 42-51 [2023]; *Lowndes*, 239 AD3d at 575). To the extent that defendant's broad challenge could be construed as a facial challenge, and thus surviving a valid waiver, the issue is unpreserved (*see Cabrera*, 41 NY3d at 42-51), and we decline to review it in the interest of justice.

However, we strike condition number 10 of defendant's probation requiring that he pay the mandatory surcharge and other fees as not reasonably related to defendant's rehabilitation, or necessary to ensure that he will lead a law-abiding life (*see People v Wood*, 239 AD3d 484, 484 [1st Dept 2025]). We note that the People do not oppose this relief. Concur—Manzanet-Daniels, J.P., Mendez, Pitt-Burke, Higgitt, Hagler, JJ.

13 The People of the State of New York, Respondent, v Jesse Joucoo, Appellant. [251 NYS3d 666]—Order, Supreme Court, New York County (Abraham L. Clott, J.), entered February 23, 2024, which denied defendant's CPL 440.10 motion to vacate a judgment of conviction, same court and Justice, rendered March 28, 2019, unanimously affirmed.

Defendant's claim that his plea counsel rendered ineffective assistance by failing to negotiate a plea with more favorable immigration consequences is unsupported by the record. The claim that an immigration-favorable plea could have been reached had counsel asked is speculative (*see People v Young*, 150 AD3d 429 [1st Dept 2017], *lv denied* 29 NY3d 1136 [2017]),

and the evidence submitted on the motion and testimony at the hearing failed to establish any reasonable probability that the People would have made such an offer (*see Lafler v Cooper*, 566 US 156, 163-164 [2012]; *Young*, 150 AD3d 429). Concur—Manzanet-Daniels, J.P., Mendez, Pitt-Burke, Higgitt, Hagler, JJ.

14 The People of the State of New York, Respondent, v Samy Martinez-Jaquez, Appellant. [253 NYS3d 616]—

Crimes—Unlawful Search and Seizure—Reasonable Suspicion—Anonymous Tip

Judgment, Supreme Court, New York County (Charles H. Solomon, J.), rendered September 19, 2017, convicting defendant, after a jury trial, of criminal possession of stolen property in the fourth and fifth degrees, two counts of petit larceny, and the unauthorized use of a motor vehicle in the third degree, and sentencing him to an aggregate term of 1¹/₃ to 4 years, unanimously reversed, on the law, the motion to suppress granted, and the indictment dismissed.

At the suppression hearing, the arresting officer testified that at approximately 12:30 a.m. on June 30, 2016, he and his partner received a radio transmission that a black Toyota with Pennsylvania license plate JCS1537 had been carjacked, the car was being tracked in real time, and its current location was near West 165th Street and Amsterdam Avenue in Manhattan. No evidence was presented as to the basis for the transmission or how the vehicle was being tracked. The officers responded to that location and saw a man standing by the trunk of a black Toyota with his hands by his waist in an open-air parking lot. A parking lot attendant confirmed that a black Toyota with Pennsylvania license plate had recently entered the lot. The officers then saw the black Toyota trying to exit. The officer stopped the car by drawing his gun, putting his hand up, and telling it to stop. The officer noticed that the Toyota had no front plate, which was not required in Pennsylvania, and a parking receipt on the windshield for the same license plate number as the stolen vehicle.

Defendant was placed under arrest and searched, during which officers discovered vehicle documents not in defendant's name. Defendant later admitted to taking two cars without their owners' permissions and was identified in a lineup.

Defendant subsequently moved to suppress all physical evidence, statements, and identification as fruits of unlawful forcible stop. The court denied suppression, reasoning that the anonymous radio transmission was sufficiently corroborated by

the real-time tracking of the car, police observations, and the parking lot attendant's confirmation that a black Toyota with Pennsylvania license plates had entered the lot shortly before the police arrived. We disagree.

Defendant's suppression motion should have been granted. The police officer's testimony failed to provide any information that would have corroborated the anonymous radio transmission. Without knowing the source or nature of the tip with respect to either the carjacking report or the real-time tracking, the forcible stop was not justified by a reasonable suspicion (see *People v Walls*, 37 NY3d 987, 989 [2021]; *People v Brown*, 172 AD3d 41, 42 [1st Dept 2019], *lv denied* 33 NY3d 1067 [2019]). The testimony that defendant was standing near the trunk of a black Toyota in a parking lot was not corroborative since such conduct was neither unlawful nor suspicious. The officer's testimony indicated that he only noticed the lack of the front license plate and parking receipt reflecting a matching license number with the carjacked vehicle after he had already forcibly stopped defendant. Thus, this corroborating information cannot justify the officer's actions (see *People v McIntosh*, 96 NY2d 521, 527 [2001]).

To the extent the People rely on *People v Leighton R.* (— NY3d —, 2025 NY Slip Op 06534 [2025]), that case is inapposite to the facts of this case. There, the Court held that the appropriate “standard that must be applied to determine whether police have reasonable suspicion to conduct an automobile stop based upon a contemporaneous report from an anonymous 911 caller,” “is whether an anonymous tip is sufficiently reliable to provide reasonable suspicion under the totality of the circumstances” (*Leighton R.*, — NY3d at —, 2025 NY Slip Op 06534, *1, *4).

In reviewing the developing case law, the *Leighton R.* Court noted that in *Prado Navarette v California* (572 US 393 [2014]) the Court found an “anonymous 911 call was sufficiently reliable to justify a traffic stop where the caller reported that another vehicle had run her off the road and provided a description of the vehicle, including its license plate, as well as the vehicle's approximate location and direction of travel. The Court reasoned that, by reporting a specific vehicle, the caller necessarily claimed eyewitness knowledge of the alleged dangerous driving. That basis of knowledge lends significant support to the tip's reliability” (*Leighton R.*, — NY3d at —, 2025 NY Slip Op 06534, *3 [internal quotation marks and citation omitted]). As further indicia of reliability, *Leighton R.* noted that *Navarette* “emphasized the . . . 911 system's capac-

ity to identify and locate callers” (*Leighton R.*, — NY3d at —, 2025 NY Slip Op 06534, *3; *see also Navarette*, 572 US at 400-401). In finding that the totality of circumstances established reasonable suspicion to stop the defendant’s vehicle in *Leighton R.*, the Court noted that “[t]he anonymous informant used the 911 system to report that he had ‘just been shot,’” which necessarily claimed personal knowledge of the crime (*Leighton R.*, — NY3d at —, 2025 NY Slip Op 06534, *4). Further, the caller provided a description of the shooter and vehicle, and that the police were able to corroborate that information quickly and “within a block from the reported location” (*Leighton R.*, — NY3d at —, 2025 NY Slip Op 06534, *4). However, such reasoning is inapplicable here as there was no claim that the officer acted on a 911 call or verified the radio transmission’s source of information (*see Leighton R.*, — NY3d at — n 3, 2025 NY Slip Op 05634, *4 n 3 [“It remains the case that our courts do not ‘blithely accept as true the accusations of an informant unless some good reason for doing so has been established,’ and therefore a finding of reasonable suspicion must still be based on ‘some minimum, reasonable showing’ that the anonymous tip is reliable” (quoting *People v Griminger*, 71 NY2d 635, 639 [1988])]).

Because defendant’s stop was unlawful, so was the evidence that resulted from it, including physical evidence, identification, and defendant’s statements to law enforcement. Since no other admissible evidence exists to establish the crimes of which defendant was accused, and the prosecution would be unable to secure a conviction on the charges, the judgment of conviction must be vacated, and the indictment dismissed (*see People v Rodriguez*, 41 NY3d 1, 14 [2023]). Concur—Manzanet-Daniels, J.P., Mendez, Pitt-Burke, Higgitt, Hagler, JJ.

15 The People of the State of New York, Respondent, v Alvin Dixon, Appellant. [251 NYS3d 667]—An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Juan M. Merchan, J.), rendered September 11, 2024, said appeal having been argued by counsel for the respective parties, due deliberation having been had thereon, and finding the sentence not excessive, it is unanimously ordered that the judgment so appealed from be and the same is hereby affirmed. Concur—Manzanet-Daniels, J.P., Mendez, Pitt-Burke, Higgitt, Hagler, JJ.

16 The People of the State of New York, Respondent, v Wilfredo Gonzalez, Appellant. [— NYS3d —]—

Judgment, Supreme Court, New York County (Steven M. Statsinger, J.), rendered July 20, 2022, as amended July 28, 2022, convicting defendant, after a jury trial, of persistent sexual abuse, and sentencing him, as a predicate sex offender with a prior violent felony offense, to a term of four years, unanimously affirmed.

The verdict was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]; *see also People v Baque*, 43 NY3d 26, 29-30 [2024]). There is no basis for disturbing the jury's credibility determinations (*see People v Romero*, 7 NY3d 633, 645-646 [2006]). The totality of the evidence, including testimony from the victim and an eyewitness, established that defendant deliberately subjected the victim to sexual contact, and that he acted with the requisite intent to obtain sexual gratification (*see* Penal Law §§ 130.00 [3]; 130.53; *People v Hatton*, 26 NY3d 364, 369 [2015]). Defendant did not preserve any argument that the prosecutor mischaracterized the evidence during summation, and we decline to consider it in the interest of justice (*see People v Carlucci*, 196 AD3d 418, 420 [1st Dept 2021], *lv denied* 37 NY3d 1026 [2021]).

The trial court providently exercised its discretion by admitting evidence of two of defendant's prior incidents of sexual misconduct on the subway (*see People v Morris*, 21 NY3d 588, 597 [2013]). This evidence was relevant to establish defendant's intent, where the charged sexual conduct involved the act of rubbing his unexposed groin against a woman's buttocks in a crowded public area (*see People v Ingram*, 71 NY2d 474, 479 [1988]). "Even if defendant's intent could be inferred from his behavior, the People, who had the burden of proving that element, 'were not bound to stop after presenting minimum evidence'" (*People v McKenzie*, 169 AD3d 557, 558 [1st Dept 2019], *lv denied* 33 NY3d 1033 [2019], quoting *People v Alvino*, 71 NY2d 233, 245 [1987]). "Furthermore, even if defendant's principal defense was that he did not touch the victim at all, . . . portions of the defense cross-examination and summation could be viewed as challenging the proof of the element of intent" (*People v Goode*, 176 AD3d 629, 630 [1st Dept 2019] [internal quotation marks omitted], *lv denied* 34 NY3d 1159 [2020]).

Contrary to defendant's assertion, this case is distinguishable from *People v Weinstein* (42 NY3d 439 [2024]). There, the Court of Appeals held that *Molineux* evidence was improperly admitted "to show defendant's forcible intent . . . , rebut his claim of consent, and explain why complainants were 'hesitant to report these assaults'" (*id.* at 458). The Court instead

concluded that, “as a matter of law,” the People failed to show how the proffered witness testimonies “were necessary for a non-propensity purpose” (*id.* at 458-459). In so holding, the Court first observed that nothing about the complainants’ respective testimonies against defendant were “equivocal” on the issue of their consent to defendant’s conduct so as to warrant *Molineux* evidence (*see id.* at 459). It then explained that there was a “candid acknowledgement that the true purpose of this evidence was to bolster complainants’ credibilities,” which, the Court noted, constituted an “impermissible propensity purpose” (*id.* at 460).

Here, by contrast, the alleged act itself was “equivocal and, unless accompanied by some guilty knowledge, the transaction would not be criminal” (*Alvino*, 71 NY2d at 242-243). Nor was there any explicit or tacit acknowledgment that the People intended to use evidence of defendant’s prior incidents of sexual assault to bolster the complainants’ credibility (*cf. Weinstein*, 42 NY3d at 460). Thus, the trial court properly concluded that *Molineux* evidence directed to the issue of defendant’s intent was admissible (*see McKenzie*, 169 AD3d at 558). The court addressed the potential for prejudice and took steps to minimize any undue prejudicial effect by precluding evidence about an additional incident and providing repeated limiting instructions (*see Morris*, 21 NY3d at 598; *McKenzie*, 169 AD3d at 558).

Defendant was required to preserve his claim that, during a preliminary screening stage of jury selection, the court improperly excused jurors and directed them to exit the courtroom and await further instructions from a court officer (*see People v King*, 27 NY3d 147, 153 [2016]; *People v Casanova*, 62 AD3d 88, 90 [1st Dept 2009], *lv denied* 12 NY3d 852 [2009]). To the extent the record permits review (*see People v Bosa*, 60 AD3d 571, 573 [1st Dept 2009], *lv denied* 12 NY3d 923 [2009]; *People v Branford*, 220 AD2d 203, 203 [1st Dept 1995], *lv denied* 87 NY2d 1017 [1996]), the court appears to have made its own determinations regarding the jurors’ fitness and the proper course of action, so any instructions provided by the court officer were fundamentally ministerial (*see People v Manley*, 241 AD3d 1175, 1176 [1st Dept 2025], *lv denied* 44 NY3d 1053 [2025]; *People v Ocampo*, 206 AD3d 454, 455-456 [1st Dept 2022], *lv denied* 38 NY3d 1152 [2022]). Concur—Moulton, J.P., Pitt-Burke, O’Neill Levy, Michael, Chan, JJ.

17 In the Matter of Barton Mark Perl binder, Petitioner, and Muffy Flouret, Appellant, v Stephen Perl binder et al., Respondents. [— NYS3d —]

Order, Supreme Court, New York County (Joel M. Cohen, J.), entered June 18, 2025, which, to the extent appealed from, denied the request of petitioner Muffy Flouret that the Order of Appointment of Receiver include the provision that the receiver implement a tax-efficient property division method of dissolution, unanimously modified, on the law, to direct that any sales by the receiver be subject to confirmation by Supreme Court or be approved by all parties, and otherwise affirmed, without costs.

Flouret is an aggrieved party with standing to appeal. A “successful party may appeal . . . from a judgment or order in h[er] favor if . . . it does not grant h[er] complete relief” (*Parochial Bus Sys. v Board of Educ. of City of N.Y.*, 60 NY2d 539, 544-545 [1983]). Although neither the petition nor the motions for the dissolution of the corporations and appointment of a receiver asked that ownership of the properties at issue be changed from business entities to tenants-in-common ownership, Flouret clearly requested this in the proposed order that she submitted to the court. Flouret may appeal because she did not obtain this relief.

The motion court did not grant sua sponte relief when it included a provision in the Receivership Order for dissolution by bulk asset sale liquidation. Flouret’s verified petition specifically requested “liquidation, a full accounting, and then distribution of [the corporation’s] assets between its shareholders.” She also alleged, “An omnibus dissolution of the Entities is . . . necessary because the Entities are financially inextricably interwoven.”

However, sales of properties by the receiver should either be confirmed by Supreme Court (*see e.g. Lyons v Salamone*, 32 AD3d 757, 758-759 [1st Dept 2006]) or approved by all parties (*see Furey v Furey*, 104 AD2d 318, 318 [1st Dept 1984], *appeal dismissed* 64 NY2d 646 [1984]). Respondents have stated that they do not oppose this relief, and they have also indicated that the receiver agrees to this.

Although CPLR 2219 (a) provides that an order shall list the papers reviewed in determining a motion, an order “need not be vacated for failure to recite the papers on which it is based” (*Citimortgage, Inc. v Dulgeroff*, 138 AD3d 419, 419 [1st Dept 2016], *lv dismissed* 28 NY3d 1081 [2016]). A fortiori, an order need not be vacated because its recital of the papers on which it is based is incomplete. Indeed, “[t]he recital requirement . . . is designed to identify those papers which should be included in the record on appeal” (*Singer v Board of Educ. of City of N.Y.*, 97 AD2d 507, 507 [2d Dept 1983]), and here, the

record contains the papers needed to decide the appeal, including papers not recited in the order.

“In light of [Flouret’s] failure to request an evidentiary hearing, [she] cannot be heard to argue on appeal that one was required” (*Seligson v Russo*, 16 AD3d 253, 253 [1st Dept 2005], *lv denied* 5 NY3d 706 [2005]). In any event, “[a] hearing is only required where there is some contested issue determinative of the validity of the application” (*Matter of Gordon & Weiss*, 32 AD2d 279, 280 [1st Dept 1969]), which is not the case here.

We have considered Flouret’s remaining arguments and find them unavailing. Concur—Manzanet-Daniels, J.P., Mendez, Pitt-Burke, Higgitt, Hagler, JJ.

18 Joseph Speechio, Respondent, v Starbucks Corp. et al., Appellants. Starbucks Corp. et al., Third-Party Plaintiffs-Appellants, v Eclipse Contracting Corp. et al., Third-Party Defendants-Respondents. [— NYS3d —]—

**Labor—Safe Place to Work—Industrial Code Violation—Tripping Hazard in Passageway—Loose Electrical Wire
Indemnity—Contractual Indemnification—Workplace Accident—Liability of Subcontractor**

Order, Supreme Court, New York County (Arlene P. Bluth, J.), entered September 27, 2024, which, to the extent appealed from, granted plaintiff’s motion for partial summary judgment on his claim pursuant to Labor Law § 241 (6) insofar as predicated on Industrial Code (12 NYCRR) § 23-1.7 (e) (2), and granted the motions of third-party defendants Eclipse Contracting Corp. and DAL Electric Corp. for summary judgment dismissing defendants’ claims for contractual and common-law indemnification, contribution, and attorneys’ fees, unanimously modified, on the law, without costs, to deny that part of DAL’s motion seeking dismissal of defendants’ claim for contractual indemnification and attorneys’ fees, and those claims reinstated, and otherwise affirmed, without costs.

The court properly granted plaintiff partial summary judgment on the Labor Law § 241 (6) claim predicated on a violation of Industrial Code § 23-1.7 (e) (2). Plaintiff testified that he slipped on a piece of loose electrical wire as he walked around a pile of discarded wires in order to retrieve additional work material (*see Sternkopf v 395 Hudson N.Y., LLC*, 227 AD3d 579, 580-581 [1st Dept 2024]; *Castaldo v F.J. Sciame Constr. Co. Inc.*, 222 AD3d 579, 579 [1st Dept 2023]). The pile of discarded wire, which was placed at the site by third-party defendant DAL, the electrical subcontractor, “constituted debris that was not integral to the work being performed at the accident site” (*Sternkopf*, 227 AD3d at 581).

Third-party defendant Eclipse, the carpentry subcontractor that employed plaintiff, established that the accident did not arise out of or result from its work, as was required for it to indemnify defendants pursuant to their subcontract. That plaintiff was injured in the course of performing Eclipse's work alone is insufficient to find that the accident arose from Eclipse's work, particularly since defendant Shawmut, the general contractor, took on the task of disposing DAL's debris (see *Sternkopf*, 227 AD3d at 580-581; *DeGidio v City of New York*, 176 AD3d 452, 454 [1st Dept 2019], *lv dismissed in part & denied in part* 35 NY3d 963 [2020]).

However, the court should have denied DAL's motion for summary judgment dismissing the contractual indemnification and attorneys' fees claims against it. DAL does not dispute the court's finding that the wires that caused the accident were its debris, and DAL admits that it piled the debris. Thus, the accident arose out of or resulted from DAL's work. "The focus of . . . a broadly worded [indemnification] clause is not on the precise cause of the accident but the general nature of the operation in the course of which the injury was sustained" (*Weidtman v Tremont Renaissance Hous. Dev. Fund Co., Inc.*, 224 AD3d 488, 491 [1st Dept 2024] [internal quotation marks omitted]; see *Worth Constr. Co., Inc. v Admiral Ins. Co.*, 10 NY3d 411, 415 [2008]). Furthermore, DAL failed to establish that the indemnification provision, which contains a savings clause, was nonetheless unenforceable under General Obligations Law § 5-322.1 (1) on the ground that defendants were the sole proximate cause of the accident.

The court properly dismissed the common-law indemnification and contribution claims as against Eclipse because plaintiff undisputedly did not suffer the type of "grave injury" enumerated in Workers' Compensation Law § 11. The claims against DAL were also properly dismissed as it established, based on Shawmut's having taken on the responsibility for removing debris, its freedom from negligence and that it did not control the injury-producing work (see *Naughton v City of New York*, 94 AD3d 1, 10 [1st Dept 2012]). We reject defendants' contention that DAL should have removed the debris based on its alleged contractual obligation to do so as the record establishes that Shawmut undertook that work (see *Brown v New York City Economic Dev. Corp.*, 234 AD2d 33, 33 [1st Dept 1996]). Concur—Manzanet-Daniels, J.P., Mendez, Pitt-Burke, Higgitt, Hagler, JJ.

(April 7, 2026)

1 In the Matter of M.K.A., Also Known as M.M., a Child Alleged to be Permanently Neglected. T.M., Appellant; Children's Aid Society, Respondent. [251 NYS3d 667]—

Parent, Child and Family—Termination of Parental Rights—Permanent Neglect—Agency's Diligent Efforts

Parent, Child and Family—Termination of Parental Rights—Permanent Neglect—Compliance with Service Plan

Parent, Child and Family—Termination of Parental Rights—Permanent Neglect—Best Interests of Child

Order, Family Court, Bronx County (Sarah P. Cooper, J.), entered on or about March 26, 2024, which, to the extent appealed from, upon a finding of permanent neglect, terminated respondent mother's parental rights to the subject child and transferred custody and guardianship of the child to petitioner agency Children's Aid Society and the Commissioner of the Administration for Children's Services of the City of New York for purposes of adoption, unanimously affirmed, without costs.

Clear and convincing evidence supports the determination that the agency made diligent efforts to reunite the mother with the child by, among other things, scheduling weekly in-person and virtual visits and covering the cost of the mother's transportation, creating a service plan tailored to the mother's needs, including a referral to determine her eligibility for additional services, mental health and domestic violence counseling, as well as referrals for special needs parenting classes, dyadic therapy, visitation coaches, a parent advocate, and a housing specialist for assistance with finding housing. The agency also scheduled 120 case planning conferences to discuss the mother's progress toward completing her service plan, kept the mother aware of the child's medical appointments, and had an agency nurse available to explain the child's medical conditions (*see* Social Services Law § 384-b [7] [a], [c], [f]; *Matter of Hailey ZZ. [Ricky ZZ.]*, 19 NY3d 422, 429 [2012]; *Matter of Faith J. [Kimberly J.]*, 200 AD3d 611, 611 [1st Dept 2021]).

Although the mother may have attended some of the services to which she was referred, she failed to consistently comply with her service plan, gain insight into the issues that led to the child's placement in foster care, and failed to plan for the child's future, warranting a finding of permanent neglect (*see* Social Services Law § 384-b [7]; *Matter of Janell J. [Shanequa J.]*, 88 AD3d 512, 512 [1st Dept 2011]; *Matter of Racquel Olivia M.*, 37 AD3d 279, 280 [1st Dept 2007], *lv denied* 8 NY3d 812 [2007]). After 2019, the mother was not permitted to have unsupervised visitation with the child because she had to be

repeatedly reminded to make sure the child's mouth was empty before feeding the child to prevent the child from choking, she fell asleep during supervised visitation even after being assigned a visiting coach, and she continued communicating with the father of the child after being told that she was not complying with her service plan by having contact with him given his history of domestic violence (*see Matter of Nathaniel T.*, 67 NY2d 838, 841-842 [1986]). Although the mother visited the child, the quality of the visits was poor, and, in any event, consistent visitation does not preclude a finding of permanent neglect where, as here, there has been a failure to plan for the child's future (*see Matter of Raymond C. [Maria V.]*, 150 AD3d 476, 477 [1st Dept 2017], *lv denied* 29 NY3d 913 [2017]).

A preponderance of the evidence supports Family Court's determination that it was in the child's best interests to terminate the mother's parental rights and free the child for adoption (*see Matter of Serenity H. [Shantell F.]*, 200 AD3d 452, 452-453 [1st Dept 2021]). As of the date of the dispositional hearing, the then five-year-old child spent most of the child's life in foster care, not having resided with the mother since the child was approximately 15 days old, and was well-bonded with the foster mother who wished to adopt the child and could handle the child's special needs (*see Matter of Serenity K.T. [Shanisha S.]*, 190 AD3d 572, 573 [1st Dept 2021]). A suspended judgment is not warranted as the mother failed over an extended period of time to comply with her service plan, and to allow her still more time to demonstrate that she can be a fit parent would serve no other purpose than to prolong the child's lack of permanence (*see* Family Ct Act § 633; *see Matter of "No Given Name" O. [Adele O.]*, 209 AD3d 443, 444 [1st Dept 2022]).

We have considered the father's further arguments in support of the mother and find them unavailing. Concur—Webber, J.P., Kennedy, Kapnick, González, O'Neill Levy, JJ.

2 Hisham Abuhamdia, Appellant, v New York Presbyterian Hospital, Respondent. [251 NYS3d 669]—

Civil Rights—Election of Remedies

Order, Supreme Court, New York County (Judy H. Kim, J.), entered October 9, 2025, which granted defendant's motion to dismiss plaintiff's claims brought under the New York State Human Rights Law (HRL), unanimously affirmed, without costs.

Plaintiff's pending complaint with the New York State Division of Human Rights bars plaintiff's assertion of HRL claims in the instant complaint under the election of remedies provi-

sion (see Executive Law § 297 [9]). Both complaints arise out of the same facts and circumstances—defendant’s alleged refusal to grant plaintiff a disability accommodation and subsequent termination of plaintiff’s employment (see *Jones v Gilman Paper Co.*, 166 AD2d 294, 294 [1st Dept 1990]).

No whistleblower claim under Labor Law § 740 is apparent in the complaint, which, on its face, asserts only claims under the State HRL. In any event, the election of remedies doctrine bars a complaint that is “couched in terms of” another cause of action where, as here, “it is obvious that its essential thrust is the same as that contained in” the DHR complaint (*Low v Gibbs & Hill*, 92 AD2d 467, 468 [1st Dept 1983]). Even if the complaint could be read to invoke Labor Law § 740, it fails to state a cause of action under that provision because defendant had already commenced the termination process before plaintiff engaged in alleged protected activity (see *Melman v Montefiore Med. Ctr.*, 98 AD3d 107, 129 [1st Dept 2012]).

We have considered plaintiff’s additional arguments and find them unavailing. Concur—Webber, J.P., Kennedy, Kapnick, González, O’Neill Levy, JJ.

3 Jason Almodovar, Appellant, v City of New York et al., Respondents, et al., Defendants. [— NYS3d —]

Appeal—Matters Appealable—Order Deciding Letter Application

Order, Supreme Court, New York County (Hasa A. Kingo, J.), entered on or about August 9, 2024, which, in effect, granted the branches of plaintiff’s motion to reargue and, upon reargument, amended the order dated April 25, 2024 to reflect that the complaint is dismissed with prejudice, and otherwise adhered to the original determinations in the April 25 and May 15, 2024 orders, and denied the branches of plaintiff’s motion to vacate the April 25 and May 15, 2024 orders or, alternatively, for leave to amend the complaint, unanimously affirmed, without costs.

The fact that oral argument on defendants’ motion to dismiss was held before a different Justice than the Justice who ultimately decided the motion does not require vacatur of the April 25, 2024 order granting defendants’ motion. Although Judiciary Law § 21 provides that a Supreme Court Justice “shall not decide or take part in the decision of a question, which was argued orally in the court, when he was not present and sitting therein as a” Justice, reversal is not warranted on this ground because defendants’ motion to dismiss pursuant to CPLR 3211 (a) (7) presented purely legal questions (see *People v Hampton*, 21 NY3d 277, 285, 287 [2013]; *Marti v Rana*, 173 AD3d 576, 577 [1st Dept 2019], *lv denied* 34 NY3d 906 [2019]).

Litigation by letter is not contemplated by the CPLR and, thus, disfavored (*see e.g. Matter of Davin v Felberman*, 75 Misc 3d 1034, 1046 n 5 [Sup Ct, Rockland County 2022], *affd* 205 AD3d 855 [2d Dept 2022]; *Lederman v New York City Dept. of Parks & Recreation*, 61 Misc 3d 1202[A], 2018 NY Slip Op 51329[U], *6 [Sup Ct, NY County 2018]), because an order deciding a letter application ordinarily is not appealable as of right (*see* CPLR 5701 [a] [2]; *contra Perrotte v Bloomberg, L.P.*, 246 AD3d 480 [1st Dept 2026]). Rather, the proper procedure is for the aggrieved party to move to vacate the order, then appeal from the denial of that motion (*see e.g. Georgievski v Robins*, 235 AD3d 493, 493 [1st Dept 2025]). That, in sum and substance, is what plaintiff has done here, and defendants do not dispute that the court's August 9, 2024 order is appealable, or that this Court can permissibly review the May 15, 2024 order. Accordingly, the fact that the May 15, 2024 order was entered on a letter application, as opposed to a motion made on notice, does not require a different outcome in this case.

Upon considering defendants' letter application, Supreme Court correctly deemed plaintiff's amended complaint to be a nullity. The court's April 25, 2024 order granted defendants' motion to dismiss the complaint in its entirety on the merits and—as clarified by the order on appeal—with prejudice. Thus, plaintiff could not file an amended complaint as of right on April 29, 2024, because “there was no complaint left before the court” (*Tanner v Stack*, 176 AD3d 429, 429 [1st Dept 2019]; *see Panagouloupoulos v Carlos Ortiz Jr. MD, P.C.*, 194 AD3d 728, 729 [2d Dept 2021], *lv dismissed in part, denied in part* 37 NY3d 1022 [2021]).

Finally, plaintiff never noticed an appeal from the court's April 25, 2024 order granting defendants' motion to dismiss. Accordingly, our review is limited to whether the court providently granted plaintiff's motion for leave to reargue and, upon reargument, made the appropriate disposition (*see Tyagi v Gadella*, 202 AD3d 561, 562 [1st Dept 2022]). In his motion for leave to reargue, plaintiff did not seek to reargue the merits of defendants' motion, but rather the alleged procedural impropriety in the court first deciding the motion, then effectively granting defendants' letter application and deeming his amended complaint a nullity. We therefore do not reach the merits of plaintiff's arguments as to whether the court, in its April 25, 2024 order, properly granted defendants' motion to dismiss. Concur—Webber, J.P., Kennedy, Kapnick, González, O'Neill Levy, JJ. **[Prior Case History: 83 Misc 3d 1271(A), 2024 NY Slip Op 51074(U).]**

4 Mahbub Azizy et al., Appellants, v Hunts Point Terminal Produce Cooperative Association, Inc., et al., Respondents. [252 NYS3d 100]—

Negligence—Maintenance of Premises—Premises Security

Negligence—Maintenance of Premises—Proximate Cause—Intervening Act

Order, Supreme Court, Bronx County (Paul L. Alpert, J.), entered June 6, 2025, which granted defendants' motion for summary judgment dismissing the complaint, unanimously reversed, on the law, without costs, the motion denied, and the complaint reinstated.

Plaintiffs allege that while they were working at the Hunts Point Terminal Market in the Bronx, they were assaulted and seriously injured by four men wearing masks and wielding baseball bats. Plaintiffs commenced this action seeking damages for negligence, asserting that the incident was foreseeable given previous criminal activity at the Market, and that defendants breached their duty to provide the necessary security there.

Defendants failed to establish *prima facie* entitlement to summary judgment because they failed to eliminate issues of fact as to whether they negligently breached their duty to adequately secure the premises, and whether the resulting attack was a foreseeable consequence of the allegedly inadequate security (see *Scurry v New York City Hous. Auth.*, 39 NY3d 443, 454 [2023]; *Tamimu v River Park Assoc.*, 8 AD3d 93, 94 [1st Dept 2004]). The record discloses, for example, evidence that entrants into the Market are required to show identification, yet two of the assailants were able to sneak into the premises without being stopped or showing any identification.

Moreover, although the targeted nature of a crime may be relevant to a proximate cause analysis, the sophisticated and calculated nature of the attack in this case does not, as a matter of law, sever any proximate causal link between defendants' negligence and plaintiffs' injuries (*Scurry*, 39 NY3d at 450). Rather, whether an intervening act is foreseeable under the circumstances generally is for the factfinder to resolve (*id.*). Defendants' argument that they are entitled to summary judgment because the attack would have occurred even if stricter security measures had been implemented cannot be resolved as a matter of law. As the Court of Appeals has noted, hypotheticals about what would have occurred in the presence of different, stronger security measures are "quintessentially questions of fact to be resolved at trial" (*id.* at 456-457).

We have considered defendants' remaining contentions and

find them unavailing. Concur—Scarpulla, J.P., Friedman, Shulman, Rodriguez, Rosado, JJ.

5 David Burstein, Respondent, v Kandice Watson, Appellant. [251 NYS3d 670]—

Courts—Jurisdiction—Child Support—Interim Order

Order, Supreme Court, New York County (Ariel D. Chesler, J.), entered on or about December 22, 2022, which, to the extent appealed from as limited by the briefs, denied defendant's cross-motion to dismiss the child support petition filed by plaintiff or consolidate the actions, denied her application for sanctions and attorneys' fees, and granted plaintiff's request to claim both children as dependents on his 2021 tax returns, unanimously affirmed, without costs.

The court providently exercised its discretion by declining to dismiss plaintiff's child support petition or to consolidate the matters (*see* CPLR 3211 [a] [4]; *Whitney v Whitney*, 57 NY2d 731, 732 [1982]; *Geneva Temps, Inc. v New World Communities, Inc.*, 24 AD3d 332, 334 [1st Dept 2005]). Defendant's initial petition seeking child support was not properly brought in Supreme Court since Family Court has "exclusive original jurisdiction over proceedings for support" (Family Ct Act § 411), the parties were never married, and the court expressly declined to adjudicate any child support claims at that time. The court stated its willingness to issue an interim order, on the parties' consent, specifying "financial protocols" to protect the children. No action was ever commenced in Family Court by either party. Over a year later, upon the parties' consent, the court ultimately agreed to consider child support together with the child custody matters, and the court explicitly asked the parties to file a stipulation or motion to facilitate the court's consideration of those issues. Thus, despite defendant's contention that her child support request remained active, her claim was not properly pending before Supreme Court. Nor was there another action with which to consolidate the instant action.

The court did not abuse its discretion by denying defendant's cross-motion for sanctions under the 22 NYCRR 130-1.1 (*see Pickens v Castro*, 55 AD3d 443, 444 [1st Dept 2008]). Neither plaintiff nor his attorney made any misleading or materially factually inaccurate statements, and the filing of a child support petition in accordance with the court's directives and the parties' agreement did not amount to frivolous and sanctionable conduct (*see Gordon Group Invs., LLC v Kugler*, 127 AD3d 592, 594-595 [1st Dept 2015]).

The court did not modify the terms of the interim order,

which already required defendant to pay 50% of add-on expenses for the children, and the court providently exercised its discretion by determining that plaintiff was permitted to claim both children on his tax returns for one year, while each party claimed one child thereafter (*see O'Halloran v O'Halloran*, 58 AD3d 704, 706 [2d Dept 2009], *appeal dismissed* 12 NY3d 804 [2009]). Furthermore, the court was not required to engage in additional fact-finding, as “an aggrieved party’s remedy for perceived inequities in a pendente lite award is a speedy trial” (*Anonymous v Anonymous*, 63 AD3d 493, 496-497 [1st Dept 2009], *appeal dismissed* 14 NY3d 921 [2010]). Concur—Webber, J.P., Kennedy, Kapnick, González, O’Neill Levy, JJ.

6 Daniel Cronemeyer, Appellant, v City of New York et al., Respondents, et al., Defendants. [251 NYS3d 673]—

Civil Rights—Discrimination Based on Religion—Vaccine Mandate

Order, Supreme Court, New York County (Hasa A. Kingo, J.), entered on or about February 24, 2025, which granted defendants’ motion to dismiss the complaint and denied plaintiff’s cross-motion to compel discovery as moot, unanimously affirmed, without costs.

Initially, Supreme Court properly dismissed the complaint as against defendant New York City Police Department, which is a non-suable agency of the City (*see* NY City Charter § 396; *Troy v City of New York*, 160 AD3d 410, 411 [1st Dept 2018]).

Plaintiff failed to allege any nonconclusory facts linking his termination to his religion rather than his noncompliance with the vaccine mandate (*see Lively v Wafra Inv. Advisory Group, Inc.*, 211 AD3d 432, 433 [1st Dept 2022]; *Kola v City of New York*, 245 AD3d 513, 514 [1st Dept 2026]; *Brown v City of New York*, 188 AD3d 518, 518-519 [1st Dept 2020]). His asserted belief—that as a Christian, he is created in God’s image—has no nexus to a religious prohibition against vaccination (*see Kola*, 245 AD3d at 514; *Askin v Department of Educ. of the City of N.Y.*, 110 AD3d 621, 622 [1st Dept 2013]). He also failed to establish constructive discharge, as he advanced no nonconclusory facts that defendants “deliberately created working conditions so intolerable, difficult or unpleasant that a reasonable person would have felt compelled to resign” (*Crookendale v New York City Health & Hosps. Corp.*, 175 AD3d 1132, 1132 [1st Dept 2019]). Plaintiff’s cooperative dialogue claim was properly dismissed as well, as he availed himself of the approved appeals process and failed to establish how it fell short of the New York State or New York City Human Rights Law (*see Matter of Marsteller v City of New York*, 217 AD3d 543, 545

[1st Dept 2023], *appeal dismissed & lv denied* 41 NY3d 960 [2024]; *Dougherty v City of New York*, 245 AD3d 628, 629 [1st Dept 2026]). Additionally, plaintiff failed to sufficiently allege a claim for breach of his employment contract (see *Elite Tech. NY Inc. v Thomas*, 70 AD3d 506, 507 [1st Dept 2010]).

Plaintiff's Free Exercise claim fails, as there is no private right of action to recover damages for state constitutional violations where alternative remedies exist (see *Dougherty*, 245 AD3d at 630). His aiding and abetting claim necessarily fails absent an underlying discrimination violation of the City or State Human Rights Law (see *Weir v Montefiore Med. Ctr.*, 208 AD3d 1122, 1123 [1st Dept 2022], *lv denied* 39 NY3d 911 [2023]). The declaratory relief claim is moot, as there is no live controversy between the parties following rescission of the vaccine mandate in February 2023 (see CPLR 3001; *Matter of New York City Mun. Labor Comm. v Adams*, 222 AD3d 437, 438 [1st Dept 2023]).

Because the court correctly dismissed the complaint, it properly dismissed plaintiff's cross-motion for discovery as moot.

We have considered plaintiff's remaining arguments and find them unavailing. Concur—Scarpulla, J.P., Friedman, Shulman, Rodriguez, Rosado, JJ.

7 In the Matter of Alhassane D., a Person Alleged to be a Juvenile Delinquent, Appellant. [252 NYS3d 101]—

Infants—Juvenile Delinquents—Level Three Probation

Order of disposition, Family Court, Bronx County (Cynthia Lopez, J.), entered on or about October 16, 2024, which adjudicated appellant a juvenile delinquent upon his admission that he committed an act that, if committed by an adult, would constitute the crime of criminal possession of a weapon in the second degree, and placed him on level three probation for a period of 18 months, unanimously affirmed, without costs.

The court providently exercised its discretion when it adjudicated appellant a juvenile delinquent and placed him on level three probation, which was recommended by the Probation Department, and which was the least restrictive available alternative consistent with appellant's best interests and the community's need for protection (see Family Ct Act § 352.2 [2] [a]; *Matter of Katherine W.*, 62 NY2d 947, 948 [1984]).

Although appellant's post-offense rehabilitative and educational achievements were significant, the court providently found that an adjournment in contemplation of dismissal would

not have provided sufficient supervision, in view of the seriousness of the underlying offense (which involved appellant's possession of a firearm and participation in a violent gang assault near a school), ongoing daily use of marijuana, negative peer associations, and repeated failure to attend appointments for a court-ordered mental-health evaluation (*see e.g. Matter of Michael F.*, 230 AD3d 414, 416 [1st Dept 2024]; *Matter of Alioun T.*, 224 AD3d 433, 433-434 [1st Dept 2024]). Concur—Scarpulla, J.P., Friedman, Shulman, Rodriguez, Rosado, JJ.

8 Deutsche Bank National Trust Company, Respondent, v Archie Washington et al., Appellants, et al., Defendants. [—NYS3d —]

**Motions and Orders—Reargument or Renewal—Change in Law
Mortgages—Foreclosure—Compliance with RPAPL 1304**

Order, Supreme Court, Bronx County (Naita A. Semaj, J.), entered on or about February 28, 2025, which, to the extent appealed from as limited by the briefs, granted plaintiff's motion for summary judgment against defendant Archie Washington and its motion for a default judgment against defendant 3989 Paulding LLC (Paulding LLC), denied defendant Paulding LLC's cross-motion for leave to renew its prior motion to vacate an August 4, 2015 order, same court (Kenneth L. Thompson, J.), entered on default and granting plaintiff leave to amend the complaint to join Paulding LLC as a necessary party defendant, and referred the matter to a referee for calculation of damages, unanimously modified, on the law, to the extent of denying plaintiff's motion for summary judgment as against Washington, and otherwise affirmed, without costs. Appeal from that portion of the February 28, 2025 order, which denied Paulding LLC's cross-motion for leave to reargue its prior motion to vacate the August 4, 2015 order entered on default, unanimously dismissed, without costs, as taken from a nonappealable paper.

In this mortgage foreclosure action, Supreme Court properly denied the cross-motion of Paulding LLC, the current title holder, for, inter alia, leave to renew its prior motion to vacate the August 4, 2015 order entered on default, as it failed to identify a change in the law justifying renewal (CPLR 2221 [e]). The case relied upon effects no such change, but instead reaffirms identical holdings by this Court (*see MTGLQ Invs., L.P. v Shay*, 190 AD3d 527, 528 [1st Dept 2021], *lv denied* 37 NY3d 908 [2021], citing *JP Morgan Chase Bank, N.A. v White*, 182 AD3d 469, 470 [1st Dept 2020]; *see also Deutsche Bank Natl. Trust Co. v Tanibajeva*, 132 AD3d 430, 431 [1st Dept

2015]). While Paulding LLC claims plaintiff served its motion at the wrong address, “[s]ervice of the joinder motion on the party sought to be joined is not a condition precedent to the court’s consideration of such an application” (*Eastern States Elec. Contrs. v Crow Constr. Co.*, 153 AD2d 522, 524 [1st Dept 1989]; see also *Levykh v Laura*, 274 AD2d 418, 418 [2d Dept 2000]). Paulding LLC otherwise fails to demonstrate lack of personal jurisdiction (see Limited Liability Company Law § 303 [a]; CPLR 311-a).

Turning to the summary judgment motion, Supreme Court providently considered the successive motion based on “other sufficient justification,” namely, enhanced judicial efficiency (*Amill v Lawrence Ruben Co., Inc.*, 117 AD3d 433, 433 [1st Dept 2014] [internal quotation marks omitted]; see *Bullaro v Ledo, Inc.*, 234 AD3d 433, 433 [1st Dept 2025]; see also *Bank of Am., N.A. v Brannon*, 156 AD3d 1, 5-11 [1st Dept 2017]; *Landmark Capital Invs., Inc. v Li-Shan Wang*, 94 AD3d 418, 419 [1st Dept 2012]; *Detko v McDonald’s Rests. of N.Y.*, 198 AD2d 208, 209 [2d Dept 1993], *lv denied* 83 NY2d 752 [1994]). Plaintiff submitted the mortgage, unpaid note, and evidence of Washington’s default in payment and “established standing by showing that it had attached the indorsed note to the summons and complaint” in this action (*Bank of N.Y. Mellon v Knowles*, 151 AD3d 596, 596-597 [1st Dept 2017]; see *Brannon*, 156 AD3d at 6).

However, plaintiff failed to demonstrate “strict compliance” with the prelitigation notice provision of the Real Property Actions and Proceedings Law § 1304 (*HSBC Bank USA v Rice*, 155 AD3d 443, 443 [1st Dept 2017]; see RPAPL 1304 [1]-[2]). Though the certified mail receipt in the record reflects the asserted date of mailing to the address of the mortgaged property, the tracking information from the Post Office raises questions of fact as to this mailing. Additionally, plaintiff’s affiant failed to establish that the 90-day notice was sent by first-class mail as required, as there was no description “of a standard office mailing procedure designed to ensure that items are properly addressed and mailed, sworn to by someone with personal knowledge of the procedure” (*U.S. Bank N.A. v Hammer*, 192 AD3d 846, 848 [2d Dept 2021]; see also *CIT Bank N.A. v Schiffman*, 36 NY3d 550, 556 [2021]). Similarly, the electronic notice to the Department of Financial Services, though timely made, failed to include Washington’s address, one of the details required by the statute “at a minimum” (RPAPL 1306 [2]), and we decline to “disregard” this omission (CPLR 2001). Concur—Scarpulla, J.P., Friedman, Shulman, Rodriguez, Rosado, JJ.

9 Anna Ellis et al., Appellants, v City of New York et al., Respondents. [251 NYS3d 671]—

Municipal Corporations—Tort Liability—Special Relationship—Oversight of Private Daycare

Order, Supreme Court, New York County (Nicholas W. Moyne, J.), entered on or about March 22, 2024, which granted defendants' motion to dismiss the complaint, unanimously affirmed, without costs.

This wrongful death action arises from the tragic death of plaintiffs' 20-month-old child from injuries sustained at a nonparty private daycare. The parties agree that a heavy stroller fell on the child after he got out of his playpen while left unattended in the daycare's nap room, which did not have a functioning camera. Plaintiffs assert that defendants, all of which are municipal entities, owed them and their infant child a special duty relating to the operation, management, inspection, supervision, monitoring, control, and enforcement of rules concerning the daycare. Plaintiffs further allege that defendants failed to make certain the daycare had functioning cameras or sufficient staffing, and that prior City inspections had found deficiencies severe enough that defendants scheduled a hearing to determine whether the daycare should be shut down.

Supreme Court properly dismissed the complaint, as plaintiffs failed to adequately plead that defendants owed a special duty to them or to the infant plaintiff, as is necessary to hold a municipal entity liable for negligence (*see Ferreira v City of Binghamton*, 38 NY3d 298, 309-310 [2022]; *Applewhite v Accuhealth, Inc.*, 21 NY3d 420, 425 [2013]). First, plaintiffs did not adequately plead that defendants exercised positive direction and control over a known and dangerous condition, or that defendants otherwise took affirmative actions that placed the infant in harm's way (*see Ferreira*, 38 NY3d at 310). Rather, plaintiffs' theories of liability stem from defendants' inaction or omissions when performing their government oversight functions, rather than from any affirmative action by defendants. Plaintiffs have not clearly alleged that defendants told them that the facility was safe, but instead allege that defendants did not do more to shut down the daycare. Inaction or omissions, however, do not constitute a sufficient basis for a finding of a special duty (*see Smullen v City of New York*, 28 NY2d 66, 71-72 [1971]; *Sutton v City of New York*, 119 AD3d 851, 852-853 [2d Dept 2014]).

Plaintiffs further argue that defendants exercised positive action in several ways: first, by certifying the daycare as safe

despite the finding of violations, giving parents a false sense of security; second, by deciding to keep the facility open and agreeing to a seven-month adjournment in the hearing that would determine the revocation of the daycare's license; third, by deciding to suspend inspections of the daycare facility; and fourth, by removing the facility from its recommendation list. However, these allegations also concern inaction rather than the positive action that would be necessary to find a special duty. Similarly, plaintiffs do not clearly identify an instance in which defendants informed them that the daycare was safe, but instead suggest that any such representation was implied by defendants' inaction. To the extent plaintiffs argue that defendants failed to post or require the daycare to post violation letters, this failure would also constitute inaction rather than positive direction or control.

Plaintiffs also did not adequately plead a special duty on the basis that defendants voluntarily assumed an affirmative duty toward them or the infant plaintiff (*see Ferreira*, 38 NY3d at 312-313). Plaintiffs acknowledged in their 50-h hearing testimony that neither of them communicated with defendants before the incident. Thus, they could not prove either direct contact with defendants or justifiable reliance on an affirmative undertaking by defendants, each of which must be established under the rubric of voluntary assumption of duty (*see id.* at 312). Plaintiffs also failed to allege that defendants made any promises or took any actions on their behalf beyond their duty to any other parent or child in need of daycare (*see id.* at 313; *McLean v City of New York*, 12 NY3d 194, 201 [2009]).

We have considered plaintiffs' remaining contentions and find them unavailing. Concur—Moulton, J.P., Pitt-Burke, O'Neill Levy, Michael, Chan, JJ.

10 In the Matter of Eliezer G., a Person Alleged to be a Juvenile Delinquent, Appellant. [252 NYS3d 102]—

Crimes—Unlawful Search and Seizure—Pursuit and Stop—Reasonable Suspicion

Order, Family Court, Bronx County (Cynthia Lopez, J.), entered on or about December 10, 2024, which adjudicated appellant a juvenile delinquent upon his admission that he committed an act that, if committed by an adult, would constitute the crime of criminal possession of a firearm, and placed him on probation (level 2) for a period of 12 months, unanimously affirmed, without costs.

The court properly denied appellant's motion to suppress the

firearm recovered from beneath a dumpster, as his abandonment of the gun was not “coerced or precipitated by unlawful police activity” (*People v Ramirez-Portoreal*, 88 NY2d 99, 110 [1996]). There is no basis to disturb the court’s credibility determinations (see *People v Prochilo*, 41 NY2d 759, 761 [1977]; *People v Williams*, 287 AD2d 396, 396 [1st Dept 2001], *lv denied* 97 NY2d 734 [2002]).

The evidence presented at the suppression hearing supported the court’s finding that the police had reasonable suspicion to pursue and stop appellant (see *People v Martinez*, 80 NY2d 444, 446 [1992]). Two public safety officers who had been assigned to patrol an area because of a recent surge in firearms-related crimes noticed appellant’s “hyperaware” demeanor, which included nervously looking up and down the street and furtively adjusting his jacket pocket (see *People v Dumbuya*, 142 AD3d 922, 922-923 [1st Dept 2016], *lv denied* 28 NY3d 1072 [2016]; *People v Allen*, 42 AD3d 331, 332 [1st Dept 2007], *affd* 9 NY3d 1013 [2008]). As the officers’ vehicle passed appellant, they observed that he had a heavy, weighted bulge in his jacket pocket with a distinctive “rectangular” shape that they believed, based on their training, indicated the presence of a gun (see *People v Bowman*, 222 AD3d 538, 540 [1st Dept 2023], *lv denied* 41 NY3d 942 [2024]). When the officers turned the car around and approached appellant, he immediately fled with his hand on the jacket pocket and made hand motions that suggested he was discarding an object. Under these circumstances, the officers’ pursuit and stop of appellant was justified (see *People v Evans*, 65 NY2d 629, 630 [1985]). Concur—Scarpulla, J.P., Friedman, Shulman, Rodriguez, Rosado, JJ.

11 Luis Francisco Castro Gonzalez, Respondent, v 60-74 Gansevoort Street LLC et al., Appellants. MJM Associates Construction LLC, Third-Party Plaintiff-Appellant, v Alba Services, Inc., Third-Party Defendant-Respondent/Second Third-Party Defendant-Respondent. 60-74 Gansevoort Street LLC, Second Third-Party Plaintiff-Appellant. [— NYS3d —]

Labor—Safe Place to Work—Industrial Code Violation—Inspection of Hand Demolition Operations—Hazards Created by Progress of Work
Labor—Safe Place to Work—Statutory and Common-Law Negligence—Constructive Notice of Hazardous Condition

Order, Supreme Court, New York County (Shlomo S. Hagler, J.), entered April 23, 2024, which, to the extent appealed from as limited by the briefs, denied the motion of defendants 60-74 Gansevoort Street LLC and MJM Associates Construction LLC for summary judgment dismissing plaintiff’s claims for violations of Labor Law §§ 240 (1), 241 (6) and 200, and common-

law negligence, and for contractual indemnification against third-party defendant/second third-party defendant Alba Services, Inc., unanimously modified, on the law, to the extent of granting defendants' motion for summary judgment dismissing the Labor Law § 241 (6) claim premised on Industrial Code (12 NYCRR) § 23-3.3 (c), and otherwise affirmed, without costs.

Supreme Court should have granted defendants' motion for summary judgment dismissing plaintiff's Labor Law § 241 (6) claim premised on violations of Industrial Code § 23-3.3 (c), which requires only continuing inspections against hazards that are created by the progress of the work (*Wilinski v 334 E. 92nd Hous. Dev. Fund Corp.*, 18 NY3d 1, 12 [2011]). This provision has been construed as a specific safety rule "designed to protect a worker from the hazards created when a structure is *weakened* by the *progress of the demolition*," and therefore did not require defendants to inspect the roof's structural integrity before commencing any asbestos abatement work (*Garcia v 225 E. 57th St. Owners, Inc.*, 96 AD3d 88, 92 [1st Dept 2012] [internal quotation marks omitted]).

Supreme Court properly denied that portion of defendants' motion for summary judgment dismissing plaintiff's Labor Law § 200 and common-law negligence claims, as defendants failed to establish that they lacked constructive notice of the hazardous condition that allegedly caused plaintiff's injury (*see Spencer v Term Fulton Realty Corp.*, 183 AD3d 441, 442 [1st Dept 2020]). Defendants did not submit any evidence establishing that they inspected the structural integrity of the wood that broke on the roof, allegedly causing plaintiff's injury, nor have they established that it would have been impossible to inspect the wood before the incident (*see Pereira v New Sch.*, 148 AD3d 410, 412 [1st Dept 2017]).

Finally, Supreme Court properly denied that portion of defendants' motion for summary judgment for contractual indemnification against Alba Services, as the record presents issues of fact as to defendants' negligence (*see Byrnes v RP1185 LLC*, 238 AD3d 660, 662 [1st Dept 2025]). At most, defendants would be entitled to conditional indemnification, which they have not sought (*see Pardo v Bialystoker Ctr. & Bikur Cholim, Inc.*, 10 AD3d 298, 301 [1st Dept 2004]). Concur—Webber, J.P., Kennedy, Kapnick, González, O'Neill Levy, JJ.

12 Homelink International Inc., Respondent, v Law Offices of Sanjay Chaubey, Appellant. [251 NYS3d 688]—

Judgments—Default Judgment—Vacatur—Reasonable Excuse

Order, Supreme Court, New York County (Kathleen

Waterman-Marshall, J.), entered on or about August 1, 2025, which denied defendant's motion pursuant to CPLR 5015 (a) to vacate an order of the same court and Justice, dated May 30, 2025, which granted plaintiff a default judgment against defendant, unanimously affirmed, with costs.

Defendant failed to demonstrate a reasonable excuse for its failure to appear at the preliminary conference, which resulted in the default judgment (*see* Uniform Rules for Trial Cts [22 NYCRR] § 202.27 [b]; *Biton v Turco*, 88 AD3d 519, 519 [1st Dept 2011], *lv dismissed* 30 NY3d 1081 [2018]). Defendant's counsel, who is the principal of defendant law office, failed to sign up for appearance notifications under the New York State Court's e-track system, even after he admitted that he defaulted previously in this action for the same reason (*see New York Dangerous LLC v Librot*, 200 AD3d 467, 467 [1st Dept 2021]; *see also Imovegreen, LLC v Frantic, LLC*, 139 AD3d 539, 540 [1st Dept 2016]).

Where the moving party "fail[s] to provide an acceptable excuse for his default, we need not address whether he had a meritorious defense" (*Seitzer v McFadden*, 219 AD3d 1262, 1262 [1st Dept 2023]). In any event, defendant has not demonstrated that it has a meritorious defense, since the defenses set forth in its answer and papers in support of the motion to vacate are either vague and conclusory, or have already been rejected by this Court (*see id.*; *Homelink Intl. Inc. v Law Offs. of Sanjay Chaubey*, 242 AD3d 455 [1st Dept 2025]). Concur—Webber, J.P., Kennedy, Kapnick, González, O'Neill Levy, JJ.

13 Juan Carlos Perez Jadan, Plaintiff, v 414 Gerard Owner, LLC, et al., Respondents. 414 Gerard Owner, LLC, et al., Third-Party Plaintiffs-Respondents, v Citywide Container Service Corp., Third-Party Defendant-Appellant. [— NYS3d —]—

Indemnity—Contractual Indemnification—Construction Accident

Order, Supreme Court, Bronx County (Shawn T. Kelly, J.), entered February 26, 2025, which, to the extent appealed from as limited by the briefs, denied the motion of third-party defendant Citywide Container Service Corp. for summary judgment dismissing defendants/third-party plaintiffs' contribution, common-law and contractual indemnification claims as against it, unanimously affirmed, without costs.

As a threshold matter, this appeal is properly before the Court and is not affected by the subsequent order granting reargument and adhering to the prior order (CPLR 5517 [a] [1]).

In this Labor Law construction accident action, defendants/third-party plaintiffs 414 Gerard Owner LLC, the property

owner, and Monadnock Construction, Inc., the general contractor for the construction project, seek contribution and common-law and contractual indemnification from Citywide. Monadnock contracted with Citywide to provide the construction site with mini containers to be used for the collection of construction debris. Citywide's representative testified that, as a matter of practice, Citywide inspected all the mini containers and made any necessary repairs before delivering them to a construction site, at which point the customer took possession and was responsible for moving them into the site.

On the day of his accident, plaintiff was moving a loaded mini container to another floor when he heard the wheel screech, felt a "snag," and then the mini container tipped over and fell on his foot. Plaintiff noticed a bent wheel on the mini container immediately after his accident.

Citywide did not establish prima facie entitlement to summary dismissal of the contribution and common-law and contractual indemnification claims. As to the contractual indemnity claim, Citywide failed to establish that the indemnity provision, which provides that Citywide shall indemnify 414 Gerard and Monadnock to the fullest extent permitted by law for claims "arising from, in connection with or relating to the performance (or nonperformance)" of Citywide's work, did not cover the accident (*see Worth Constr. Co., Inc. v Admiral Ins. Co.*, 10 NY3d 411, 415 [2008]). Citywide's work was to supply and deliver mini containers that were free from defects and fit for their ordinary purpose. There is an issue of fact as to whether a defective wheel contributed to plaintiff's accident. Citywide's generalized inspection testimony failed to establish that the mini container at issue was defect-free when supplied. Notably, plaintiff testified that the wheel screeched before the mini container tipped over and that he noticed a bent wheel immediately thereafter (*see e.g. Ryan v City of New York*, 68 AD3d 613, 613 [1st Dept 2009]).

As to common-law indemnification and contribution, because there are issues of fact as to what caused the accident, summary dismissal of those claims is also precluded (*see Douglas v Roseland Dev. Assoc., LLC*, 225 AD3d 467, 468 [1st Dept 2024]; *Cackett v Gladden Props., LLC*, 183 AD3d 419, 420-422 [1st Dept 2020]). Concur—Scarpulla, J.P., Friedman, Shulman, Rodriguez, Rosado, JJ.

14 KSFB Management, LLC, Appellant, v Goldman Sachs & Co., LLC, et al., Respondents. [251 NYS3d 678]—

Contracts—Breach or Performance of Contract—Nondisclosure Agreement

Covenants—Covenant of Good Faith and Fair Dealing—Nondisclosure Agreement**Fraud—Reliance—Engagement Letter—Contradictory Oral Representations**

Order, Supreme Court, New York County (Margaret A. Chan, J.), entered on or about January 24, 2025, which, insofar as appealed from as limited by the briefs, granted the motion of defendants Goldman Sachs & Co. LLC (Goldman) and Patrick Fels to dismiss the first, fourth, and sixth causes of action pursuant to CPLR 3211 (a) (7), unanimously affirmed, with costs.*

Plaintiff alleges that defendants Focus and Goldman engaged in a months-long scheme to deceive plaintiff, a business management firm providing services for high net individuals, into continuing to manage Focus' non-party subsidiary, NKSFB, LLC (NKSFB), while Goldman assisted Focus to pursue a combined sale of NKSFB and KSFB. Unbeknownst to plaintiff, however, Goldman and Fels were simultaneously advising Focus in a competing transaction to sell Focus and NKSFB to Clayton Dubilier & Rice LLC (CD&R), which excluded plaintiff. According to the complaint, defendants used the expectation of a joint sale of NKSFB and KSFB to convince plaintiff to provide defendants with confidential information under the parties' nondisclosure agreement (NDA). Defendants then allegedly used the confidential information in their negotiations with CD&R. To minimize Goldman's legal exposure for this alleged scheme, defendants convinced plaintiff to sign an engagement letter, which included several disclaimers of liability.

The motion court properly dismissed the first cause of action alleging that defendants breached (i) paragraph 2 of the NDA and (ii) a section of paragraph 8 which provides that "any Confidential Information of another party [e.g., plaintiff] received or accessed by a party [e.g., Goldman] . . . shall be used by such party only for the purposes of a mutually agreeable strategic transaction." Plaintiff made only vague and conclusory statements that defendants disclosed confidential information, as defined in the NDA, and failed to identify what confidential information was allegedly misused (*see Art Capital Group, LLC v Carlyle Inv. Mgt. LLC*, 151 AD3d 604, 605 [1st Dept 2017]; *see also Parker Waichman LLP v Squier, Knapp & Dunn Communications, Inc.*, 138 AD3d 570, 570-571 [1st Dept 2016]). Plaintiff alleges that Goldman shared confidential information with nonparty CD&R to assist them in negotiations to acquire defendant Focus and NKSFB. Plaintiff was not involved in those negotiations, and its confidential information

* Defendants Focus Financial Partners, LLC (Focus) and Leonard Chang filed a stipulation of discontinuance after plaintiff filed this appeal.

would not have been material to those discussions. In that regard, plaintiff's complaint suffers from the absence of any allegations about whether the confidential information that was allegedly disclosed belonged to plaintiff or Focus. We need not accept as true plaintiff's conclusory allegations, made upon information and belief, that Goldman disclosed plaintiff's confidential information to CD&R (*see Skillgames, LLC v Brody*, 1 AD3d 247, 250 [1st Dept 2003]).

The court also correctly dismissed the contract claim based on allegations that Goldman breached that portion of paragraph 8 which provides, "Each Disclosing Party [i.e., Focus and plaintiff] will be granted access to any electronic dataroom or other file sharing platform used to share Confidential Information with" Goldman. The purpose of the NDA was to allow Goldman to receive confidential information from Focus and plaintiff. Thus, paragraph 8 should be read to refer to the dataroom or platform used to share Focus' and plaintiff's confidential information with Goldman, not a separate dataroom or platform set up to share Focus' confidential information with CD&R (*see Beal Sav. Bank v Sommer*, 8 NY3d 318, 324 [2007] ["a contract should be read as a whole, and every part will be interpreted with reference to the whole" (internal quotation marks omitted)]).

The motion court providently dismissed the breach of the implied covenant of good faith and fair dealing claim. Plaintiff did not meet its "heavy burden" to show that defendants agreed in the NDA to forgo, explicitly or implicitly, any action that would create a conflict with the proposed sale of plaintiff and NKSFB (*Cordero v Transamerica Annuity Serv. Corp.*, 39 NY3d 399, 410 [2023] [internal quotation marks omitted]; *see also Singh v City of New York*, 40 NY3d 138, 146 [2023]). The NDA provides that the parties thereto (Focus, plaintiff, and Goldman) "have an interest in entering into discussions wherein [ea]ch Disclosing Party may share information with Recipient [Goldman] . . . for the purpose of pursuing a possible relationship between Recipient and the Disclosing Parties in which Recipient may advise and assist with respect to a possible strategic transaction involving" NKSFB. The NDA itself was not an agreement in which Goldman committed itself to helping Focus and plaintiff sell KSFB and NKSFB.

The motion court also properly dismissed the sixth cause of action alleging fraud because plaintiff failed to satisfy the element of justifiable reliance. Plaintiff alleges that on a September 16, 2022 phone call, Fels "repeatedly assured [plaintiff] that there was no, and would be no conflict" in Goldman acting

as an investment banker for both Focus and plaintiff. Any alleged reliance on these oral statements is irreconcilable with the engagement letter which the parties signed four months later (*see HSH Nordbank AG v UBS AG*, 95 AD3d 185, 204-206 [1st Dept 2012] [dismissing fraud claim based on “extracontractual representations” concerning “alignment of interests” where contract “expressly disclosed the potential for conflicts of interests . . . and provided that HSH would have no claim against UBS arising from such conduct”]; *Societe Nationale d’Exploitation Industrielle des Tabacs et Allumettes v Salomon Bros. Intl.*, 249 AD2d 232, 233 [1st Dept 1998] [dismissing fraud claim because alleged oral representations were contradicted by letter confirmation agreements], *lv denied* 95 NY2d 762 [2000]). In the engagement letter, the parties unambiguously agreed that “potential conflicts of interest, or a perception thereof, may arise as a result of [Goldman] rendering services to both [Focus and KSFB] simultaneously,” that KSFB’s and Focus’ “interests may not always be aligned,” and that the arrangement “will not give rise to any claim of conflict of interest against Goldman.” On the September call, Fels also stated that Focus and Goldman were “committed to the same goal” as KSFB. This allegation fails to state a claim for fraud for the same reasons. The engagement letter explicitly stated that the parties only contemplated a “possible sale of all or a portion of [NKSFB] . . . and/or [KSFB].” It further disclosed that Goldman “may currently be providing and may in the future provide” other “services that could impact the transaction contemplated.” In light of these written disclaimers, it was unreasonable as a matter of law for plaintiff, a sophisticated party, to rely on Goldman’s oral representations made months earlier during the September call.

Plaintiff’s argument that the motion court failed to apply the peculiar knowledge exception to the fraud claims lacks merit. Plaintiff fails to articulate any undisclosed information that was *uniquely* in defendants’ possession (*see Skyview Capital, LLC v Conduent Bus. Servs., LLC*, 239 AD3d 426, 428 [1st Dept 2025] [finding that “plans were not peculiarly within (defendants’) knowledge” because plaintiff “could have inquired” about them]; *MBIA Ins. Corp. v Merrill Lynch*, 81 AD3d 419, 419 [1st Dept 2011] [declining to apply the peculiar knowledge exception because the plaintiff was a sophisticated business entity that could have obtained the truth about defendants’ allegedly fraudulent representations through investigation]). As discussed above, the engagement letter notified plaintiff concerning potential “conflicts of interest” that may exist between Focus and plaintiff that could “impact the [NSKFB/

KSFB] transaction.” Concur—Webber, J.P., Kennedy, Kapnick, González, O’Neill Levy, JJ.

Motion to amend the caption, granted.

15 In the Matter of Yuchen Lin, Appellant-Respondent, for the Judicial Dissolution of XS Franchise, L.L.C., a New York Limited Liability Company, v Xu Sun, Respondent-Appellant. [251 NYS3d 676]—

**Limited Liability Companies—Dissolution—Standing—Membership Interest
Contracts—Breach or Performance of Contract—Transfer of Franchise**

Order, Supreme Court, New York County (Anar Rathod Patel, J.), entered on or about February 28, 2025, which granted the motion of respondent Xu Sun (respondent) to dismiss the petition and denied his application for attorneys’ fees and costs, unanimously modified, on the law, to deny the motion insofar as the motion sought dismissal of the causes of action for breach of contract (fourth cause of action), unjust enrichment (fifth cause of action), and promissory estoppel (eighth cause of action), and otherwise affirmed, without costs.

On November 18, 2022, respondent entered into a franchise agreement with StretchLab Franchise, LLC to operate a fitness studio franchise. Under article 14.3 of the franchise agreement, respondent formed XS Franchise, L.L.C. and assigned his franchise rights to that entity. Petitioner, who managed the XS Franchise’s StretchLab franchise location in Union Square, alleges that she acquired a 40% membership interest in the XS Franchise under an agreement with respondent, who purportedly owned the remaining 60% interest.

Supreme Court properly dismissed the causes of action for declaratory relief (the first cause of action), dissolution, liquidation, and appointment of a receiver in accordance with Limited Liability Company Law §§ 702 and 703 (the second cause of action), accounting (the third cause of action), and waste, mismanagement, and self-dealing (the eleventh cause of action), as the documentary evidence established that petitioner never acquired a membership interest in XS Franchise and therefore does not have standing to seek dissolution of it (*see* CPLR 3211 [a] [1]). Articles 14.1 and 14.2 of the franchise agreement between respondent and StretchLab set forth requirements for the admission of new members and the transfer of an ownership interest in the franchisee entity, and petitioner did not allege that she complied with any of those requirements. Similarly, article III (e) (2) of the XS Franchise’s

operating agreement requires that a transferee execute an instrument stating that it agrees to be bound by the agreement's terms and conditions, and petitioner did not allege that she executed any such instrument. In addition, Limited Liability Company Law § 702, by its terms, applies only to members of a limited liability company, and because petitioner has not demonstrated that she obtained membership in XS Franchise, she cannot maintain a claim under the statute.

Moreover, Supreme Court properly dismissed the cause of action for breach of fiduciary duty (the sixth cause of action), as the petition did not allege a fiduciary relationship between petitioner and respondent. Rather, petitioner alleged only a business relationship (*see Roni LLC v Arfa*, 74 AD3d 442, 444 [1st Dept 2010], *aff'd* 18 NY3d 846 [2011]).

Petitioner's cause of action for breach of the implied covenant of good faith and fair dealing (the seventh cause of action) was also properly dismissed. The conduct underlying the breach of contract claim and the breach of the covenant of good faith and fair dealing claim is essentially identical, and both claims seek the same damages. Therefore, the latter claim is duplicative (*see Salomon v Citigroup Inc.*, 123 AD3d 517, 518 [1st Dept 2014]).

The cause of action for conversion (the ninth cause of action) was also properly dismissed for failure to state a cause of action, as an interest in the XS Franchise and its profits do not constitute personal property (*see Colavito v New York Organ Donor Network, Inc.*, 8 NY3d 43, 49-50 [2006]). Furthermore, Supreme Court properly dismissed the fraud claim as duplicative of the breach of contract claim, as the petition did not allege a legal duty owed to petitioner separate and apart from that arising under the alleged contract (*see GoSmile, Inc. v Levine*, 81 AD3d 77, 81 [1st Dept 2010], *lv dismissed* 17 NY3d 782 [2011]; *MBW Adv. Network v Century Bus. Credit Corp.*, 173 AD2d 306, 306-307 [1st Dept 1991]).

However, Supreme Court should not have dismissed the remaining causes of action. In the cause of action for breach of contract (the fourth cause of action), petitioner alleged the existence of a valid contract to transfer an interest in XS Franchise to her in exchange for her services and the payment of capital, her performance of those services and payment of capital, respondent's failure to transfer the interest, and resulting damages. These allegations are sufficient to state a cause of action for breach of contract (*see Morris v 702 E. Fifth St. HDFS*, 46 AD3d 478, 479 [1st Dept 2007]).

Petitioner also sufficiently stated a cause of action for unjust

enrichment (the fifth cause of action) by alleging that respondent was enriched by petitioner's services and by the money she contributed to build up the XS Franchise, and that it is inequitable to permit him to retain the benefits without fairly compensating her (*see Kiehl v Cavicchio*, 238 AD3d 672, 674 [1st Dept 2025]).

Finally, petitioner sufficiently stated a cause of action for promissory estoppel, alleging that respondent promised to transfer to petitioner a 40% interest in XS Franchise, that she relied on that promise in rendering services and providing capital for the business, and that she suffered damages (*see Braddock v Braddock*, 60 AD3d 84, 95 [1st Dept 2009]).

The court providently exercised its discretion in declining to award respondent attorneys' fees and costs in accordance with 22 NYCRR 130-1.1, as the petition was not frivolous.

We have considered the remaining arguments and find them unavailing. Concur—Scarpulla, J.P., Friedman, Shulman, Rodriguez, Rosado, JJ.

16 Link Motion Inc., Appellant, v DLA Piper LLP (US) et al., Respondents. Felicello Law P.C. et al., Nonparty-Appellants. [— NYS3d —]

**Limitation of Actions—Legal Malpractice—Continuous Representation Toll—
Notice of End of Representation
Attorney and Client—Frivolous Conduct—Sanctions**

Judgment, Supreme Court, New York County (Andrew Borrok, J.), entered June 16, 2025, awarding defendant DLA Piper LLP (US) sanctions and attorneys' fees in the amount of \$482,390.56, plus interest, against plaintiff Link Motion Inc. and nonparty-appellants Felicello Law P.C., Rosanne Felicello, and Michael Maloney, unanimously affirmed, with costs. Appeals from order, same court and Justice, entered on or about February 19, 2025, dismissing the amended complaint and awarding defendants sanctions, including their reasonable attorneys' fees incurred in defending the action, and from supplemental order, same court and Justice, entered on or about March 11, 2025, clarifying the February 19, 2025 order and referring the matter for a hearing to determine the amount of attorneys' fees to be awarded, unanimously dismissed, without costs, as subsumed in the judgment.

The court correctly found that the record of the communications between DLA and plaintiff concerning DLA's limited representation of plaintiff in the first stage of a federal derivative action clearly established that plaintiff was on notice that DLA's representation in that action ended as of January 21,

2019. That was the day that plaintiff told DLA it could not pay DLA, in response to DLA’s message from a day earlier requesting consent to withdraw from representation if plaintiff could not pay it to go forward. These communications to and from plaintiff refute any allegations to the contrary, as well as the allegations that the legal representation continued after that date until at least February 4, 2019 (*see Shumsky v Eisenstein*, 96 NY2d 164, 170-171 [2001] [“even when further representation concerning the specific matter in which the attorney allegedly committed the complained of malpractice is needed and contemplated by the client, the continuous representation toll would nonetheless end once the client is informed or otherwise put on notice of the attorney’s withdrawal from representation”]; *Walsh v Wallace Law Off.*, 203 AD3d 684, 685 [1st Dept 2022]). In the absence of a “continuous representation toll,” the claim was untimely filed, even if the COVID toll were to apply.

The action was, in any event, properly dismissed for failure to state a cause of action. The record of the communications described above between DLA and plaintiff concerning the former’s representation in the federal case forecloses the possibility that plaintiff could show, or that Felicello Law could in good faith have believed, that DLA’s conduct in that matter breached a duty to provide competent legal services.

The court correctly awarded sanctions pursuant to the 22 NYCRR 130-1.1 against plaintiff and Felicello Law for the assertion of the same frivolous legal malpractice claim that resulted in Federal Rules of Civil Procedure rule 11 sanctions in the mirror image federal malpractice action. The record establishes that certain allegations in the complaint were false and that plaintiff and its counsel had no possibility of proving, nor any good faith basis for believing, that DLA acted negligently in its representation (*see Kyowa Seni, Co., Ltd. v ANA Aircraft Technics, Co., Ltd.*, 239 AD3d 413, 414 [1st Dept 2025]). Furthermore, the court providently exercised its discretion in determining, based on the evidence submitted at the fee hearing, the reasonable amount of attorneys’ fees and disbursements incurred by DLA in defending the litigation (*see e.g. Sprecase v Tenreiro*, 216 AD3d 499 [1st Dept 2023], *lv dismissed* 40 NY3d 1090 [2024]). Concur—Scarpulla, J.P., Friedman, Shulman, Rodriguez, Rosado, JJ.

17 Americo Lorenzo et al., Appellants, v Alexander Sankin, M.D., et al., Respondents, et al., Defendant. [251 NYS3d 672]—

Physicians and Surgeons—Malpractice—Summary Judgment—New Theory

Order, Supreme Court, Bronx County (Michael Frishman,

J.), entered on or about June 4, 2025, which, to the extent appealed from, granted defendants' motion for summary judgment dismissing the complaint, except to the extent the causes of action related to defendant Sankin's alleged failure to perform a lymphadenectomy, including plaintiff Lourdes Lorenzo's claim for loss of consortium, unanimously affirmed, without costs.

The motion court correctly found that plaintiffs' opposition to the summary judgment motion improperly raised a new theory of malpractice not asserted in the pleadings, namely that Dr. Sankin departed from good and accepted medical practice by monitoring plaintiff Americo Lorenzo under an active surveillance (AS) protocol rather than performing surgery (see *Khurdayan v Kassir*, 223 AD3d 590, 591 [1st Dept 2024]; *Valette v Correa*, 216 AD3d 500, 500 [1st Dept 2023]). Plaintiffs' bills of particulars alleged just the opposite; i.e., that defendants were negligent in performing the surgery, rather than continuing with AS or performing radiation therapy. Similarly, plaintiffs claimed in their bills of particulars that genetic testing was functionally useless and that defendants should not have relied upon it in deciding to proceed with surgery, and that a further biopsy should have been conducted in 2019 prior to recommending an invasive surgical procedure. However, plaintiffs reversed this position in opposing the motion, arguing that defendants were negligent in not performing genetic testing in 2016, testing which they claim would have shown that plaintiff's surgery should have been performed without delay.

Further, plaintiffs' complaint states that defendants' negligence occurred beginning on March 25, 2019, the date of plaintiff's surgery, and the dates of malpractice are listed in the bills of particulars as September 20, 2018, to October 19, 2020. Their opposition to the summary judgment motion, however, dates the malpractice from July of 2016, when Americo Lorenzo's biopsy was suspicious for prostate cancer.

Plaintiffs' claim that the motion court unfairly cited to their bill of particulars for Montefiore in ascertaining their pleaded theory of malpractice is unavailing. Montefiore's alleged negligence is vicarious with respect to Dr. Sankin's actions, so the allegations in Montefiore's bill of particulars regarding the decision to first employ an AS protocol and later recommend surgery can only refer to the acts and omissions of Dr. Sankin (see generally *Suits v Wyckoff Hgts. Med. Ctr.*, 84 AD3d 487 [1st Dept 2011]).

Finally, to the extent plaintiffs argue that defendants should

have been on notice of the theory advanced in their opposition to the motion for summary judgment, we note that there is no specific line of questioning in Dr. Sankin's deposition that should have alerted defendants to the fact that plaintiffs had radically changed their theory of malpractice.

We have considered plaintiffs remaining contentions and find them unavailing. Concur—Scarpulla, J.P., Friedman, Shulman, Rodriguez, Rosado, JJ.

18 Robert L. Meyer et al., Appellants, v New York Lessee LLC et al., Respondents. [252 NYS3d 98]—

Negligence—Maintenance of Premises—Slip and Fall on Water while Entering Revolving Door—Ongoing Rainstorm

Judgment, Supreme Court, New York County (Shlomo S. Hagler, J.), entered February 21, 2025, in favor of defendants, and bringing up for review an order, same court and Justice, entered January 24, 2025, which granted defendants' motion for summary judgment dismissing the complaint, unanimously affirmed, without costs. Appeal from aforesaid order, unanimously dismissed, without costs, as subsumed in the appeal from the judgment.

Summary judgment was properly granted to defendants where plaintiff was injured when he slipped and fell on water during an ongoing rainstorm while entering the revolving door of a hotel owned and maintained by defendants. Given that it was raining, defendants were “not required to provide a constant ongoing remedy for an alleged slippery condition caused by moisture tracked indoors during the storm” (*Polanco v Newmark & Co. Real Estate, Inc.*, 172 AD3d 602, 602 [1st Dept 2019]; see *Garcia v Delgado Travel Agency*, 4 AD3d 204, 204 [1st Dept 2004]).

There is no evidence that defendants had constructive notice of a hazard that could have been prevented by the exercise of reasonable care (see *Garcia*, 4 AD3d at 204). Although defendants had no obligation to continuously mop up all tracked-in water while it was raining, the hotel's security guard, who witnessed plaintiff's accident, nevertheless testified that he saw housekeeping mopping the floor inside the revolving door twice within a half an hour before plaintiff's accident, which was corroborated by an affidavit of a housekeeping staff member who was on duty that day. The video evidence further showed that several people carrying wet umbrellas walked through the revolving door without issue before plaintiff's accident. Thus, based on the record, no inference can be drawn that defendants had constructive notice of a dangerously wet

floor (*see Garcia*, 4 AD3d at 204). Under these circumstances, defendants were not required to produce written maintenance logs to establish lack of constructive notice (*see Hartley v Burnside Hous. Dev. Fund Corp.*, 209 AD3d 608, 609 [1st Dept 2022]).

We have considered plaintiffs' remaining arguments, including the contention that defendants' witnesses were not credible, and find them unavailing. Concur—Scarpulla, J.P., Friedman, Shulman, Rodriguez, Rosado, JJ.

19 Wilson Narvaez, Appellant, v 12 West 31st Street Corp. et al., Respondents. (And a Third-Party Action.) [251 NYS3d 681]—

Labor—Safe Place to Work—Elevation-Related Risk—Slip and Fall Down Freshly Painted Steps

Order, Supreme Court, New York County (Mary V. Rosado, J.), entered June 6, 2025, which denied plaintiff's motion pursuant to CPLR 5015 (a) (1) to vacate an order of the same court and Justice, entered November 1, 2024, dismissing the complaint, unanimously modified, on the law, to the extent of vacating so much of the November 1, 2024 order as dismissed plaintiff's claim pursuant to Labor Law § 240 (1), and otherwise affirmed without costs. Order, same court and Justice, entered on or about November 6, 2024, which denied plaintiff's motion for partial summary judgment on his Labor Law § 240 (1) claim, unanimously reversed, on the law, without costs, and the motion granted. Appeal from November 1, 2024 order, unanimously dismissed, without costs, as academic.

Plaintiff, in moving to vacate the order dismissing the complaint, did not address his claims pursuant to Labor Law §§ 241 (6) and 200 and common-law negligence, so they are deemed abandoned, and we decline plaintiff's request to search the record and reverse the dismissal of those claims.

With respect to plaintiff's Labor Law § 240 (1) claim, the one-time incident of law office failure constituted a reasonable excuse for failing to timely oppose defendants' summary judgment motion, and plaintiff did not unreasonably delay in moving to vacate the order dismissing the complaint, demonstrating his lack of intention to abandon the action (*see US Bank N.A. v Richards*, 155 AD3d 522, 522-523 [1st Dept 2017]; *see also Winters v Atlantic Dev. Corp.*, 205 AD3d 447, 447 [1st Dept 2022]).

Further, plaintiff established the merit of the claim not only for purposes of vacating the order, but also for purposes of summary judgment in his favor on the claim. He testified that

he was welding a handrail between the 10th and 11th floor on a fire escape when he slipped and fell down several freshly painted and wet steps. To be sure, not every fall down a staircase on a construction site establishes a Labor Law § 240 (1) violation (see *O'Brien v Port Auth. of N.Y. & N.J.*, 29 NY3d 27, 33 [2017]). Here, however, plaintiff established that the fire escape “was an elevated surface on which [he] was required to work,” which “required provision of an adequate safety device” (*Conlon v Carnegie Hall Socy., Inc.*, 159 AD3d 655, 655 [1st Dept 2018]; see also *Gomez v City of New York*, 63 AD3d 511 [1st Dept 2009]). The record also demonstrates that defendants failed to provide plaintiff with such a device that would protect him from an elevation-related risk (see *O'Shea v Procida Constr. Corp.*, 220 AD3d 622, 623 [1st Dept 2023]). Defendants' arguments that the fire escape was not defective and was not used as a safety device are belied by the record (see *Batista-Rosa v 1230 Franklin, LLC*, 245 AD3d 461, 462 [1st Dept 2026]).

We have considered the remaining contentions and find them unavailing. Concur—Webber, J.P., Kennedy, Kapnick, González, O'Neill Levy, JJ.

20 The People of the State of New York, Respondent, v Charles Cherry, Appellant. [251 NYS3d 685]—

Crimes—Evidence—Present Sense Impression

Judgment, Supreme Court, Bronx County (Steven Hornstein, J.), rendered January 24, 2023, convicting defendant, after a jury trial, of criminal possession of a weapon in the second degree, and sentencing him to a term of five years, unanimously affirmed.

The evidence of defendant's guilt, which included DNA evidence linking defendant to the recovered gun and an eyewitness identification by an officer who knew defendant by name from prior interactions, was legally sufficient and the verdict was not against the weight of the evidence (see *People v Danielson*, 9 NY3d 342, 348-349 [2007]; see also *People v Baque*, 43 NY3d 26 [2024]).

Defendant's various claims of trial error are unavailing. The court submitted two counts for the jury's consideration—criminal possession of a weapon in the second degree (Penal Law § 265.03 [3]) and criminal possession of a firearm (Penal Law § 265.01-b [1]). Contrary to defendant's contention, the court providently submitted the non-inclusory concurrent count of criminal possession of a firearm (see CPL 300.40 [3] [a]; *People v Leon*, 7 NY3d 109, 113 [2006]).

The court also providently denied defendant's application for

a missing witness charge for an officer who was fired by the NYPD and prosecuted by the Bronx County District Attorney's Office (*see People v Hernandez*, 137 AD3d 603, 604 [1st Dept 2016], *lv denied* 27 NY3d 1133 [2016]).

The court properly admitted a 911 call, and the statement of a non-testifying officer captured in the body-worn camera footage of other officers, under the present sense impression exception to the hearsay rule because both described “substantially contemporaneous observations of the incident” (*People v Rodriguez*, 166 AD3d 459, 460 [1st Dept 2018], *lv denied* 32 NY3d 1209 [2019]). Admission of these statements, which were not “‘procured with a primary purpose of creating an out-of-court substitute for trial testimony’” (*People v Pealer*, 20 NY3d 447, 453 [2013], *cert denied* 571 US 846 [2013], quoting *Michigan v Bryant*, 562 US 344, 358 [2011]) did not violate defendant's rights under the Confrontation Clause (*see Crawford v Washington*, 541 US 36, 53-54 [2004]).

The court also did not err in ruling that defendant voluntarily waived his right to trial by a jury of 12 and granting his request to proceed with a jury of 11, where defendant signed a written waiver in open court (*see People v Gajadhar*, 9 NY3d 438 [2007]).

Finally, to the extent that the existing record permits review, defendant was not deprived of the effective assistance of counsel under either the state or federal standard (*see People v Benevento*, 91 NY2d 708, 713-714 [1998]; *Strickland v Washington*, 466 US 668 [1984]). Concur—Webber, J.P., Kennedy, Kapnick, González, O'Neill Levy, JJ.

21 The People of the State of New York, Respondent, v Craig Ruggeri, Appellant. [251 NYS3d 684]—

Crimes—Sex Offenders—Sex Offender Registration Act—Presumptive Override for Prior Felony Sex Crime Convictions—Downward Departure Declined

Order, Supreme Court, New York County (Marisol Martinez Alonso, J.), entered on or about August 21, 2024, which adjudicated defendant a level three sexually violent predicate offender pursuant to the Sex Offender Registration Act (Correction Law art 6-C), unanimously affirmed, without costs.

Even if the SORA court erroneously applied a clear and convincing evidentiary standard in declining defendant's request for a downward departure to level two, in applying the correct standard, there is no basis to disturb the presumptive override to level three for defendant's prior felony sex crime convictions, notwithstanding their remoteness in time (*see People v Acosta*, 225 AD3d 553, 554 [1st Dept 2024], *lv denied*

41 NY3d 910 [2024]). Notably, defendant failed to argue that the mitigating factors he cites were not accounted for by the risk assessment instrument, even though “the three-step *Gillotti* analysis properly implements the Guidelines and [is] applie[d] in full regardless of the applicability of an override” (see *People v Lafrem*, 242 AD3d 644, 644 [1st Dept 2025]).

In any event, defendant failed to show that his age of 52 would make him less likely to reoffend (see *People v Rodriguez*, 145 AD3d 489, 490 [1st Dept 2016], *lv denied* 28 NY3d 916 [2017]). Furthermore, defendant, who was convicted of persistent sexual abuse, has a more than 20-year criminal history of targeting underage victims, and his argument that the type of misconduct in which he has been more recently engaged is not serious enough to warrant a level three designation is both unsupported and unavailing (see *People v Bevel*, 224 AD3d 430, 431 [1st Dept 2024], *lv denied* 42 NY3d 902 [2024]; *People v Doctor*, 108 AD3d 413 [1st Dept 2013], *lv denied* 21 NY3d 866 [2013]). Concur—Scarpulla, J.P., Friedman, Shulman, Rodriguez, Rosado, JJ.

22 The People of the State of New York, Respondent, v Jabal Gordon, Appellant. [251 NYS3d 675]—An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, Bronx County (Dineen Riviezzo, J.), rendered May 1, 2024, said appeal having been argued by counsel for the respective parties, due deliberation having been had thereon, and finding the sentence not excessive, it is unanimously ordered that the judgment so appealed from be and the same is hereby affirmed. Concur—Scarpulla, J.P., Friedman, Shulman, Rodriguez, Rosado, JJ.

23 The People of the State of New York, Respondent, v Joshua Soto, Appellant. [251 NYS3d 675]—

Crimes—Right to Counsel—Right to Choose Objective of Defense

Judgment, Supreme Court, New York County (Kathryn Paek, J.), rendered December 5, 2022, convicting defendant, after a jury trial, of robbery in the third degree, and sentencing him, as a second felony offender, to a term of 3 to 6 years, unanimously affirmed.

Defendant’s claim that he was deprived of his Sixth Amendment and New York state constitutional right to choose the “objective of his defense” in violation of *McCoy v Louisiana* (584 US 414, 423 [2018]) is unpreserved and we decline to review it in the interest of justice. As an alternative holding, we find that the record contains no indication that defendant,

whose testimony made out the elements of third-degree robbery, opposed counsel's strategy of admitting defendant's guilt of that crime in summation as part of an argument that defendant could not properly be convicted of first-degree robbery (see *People v Alvarez*, 205 AD3d 577 [1st Dept 2022], *lv denied* 38 NY3d 1131 [2022], *cert denied* 598 US —, 143 S Ct 813 [2023]).

The court properly denied defendant's request for an instruction on petit larceny as a lesser included offense of first-degree robbery because there was no reasonable view of the evidence under which defendant committed the lesser crime but not the greater (see CPL 300.50; *People v Van Norstrand*, 85 NY2d 131, 135 [1995]).

Defendant's right to be present and meaningfully participate in the selection of jurors was not violated by "[t]he court's COVID-19 safety protocols, which included requiring jurors to wear masks that covered the nose and mouth at all times during the jury selection process" (*People v Rodriguez*, 235 AD3d 541, 541-542 [1st Dept 2025], *lv denied* 43 NY3d 1011 [2025]). Concur—Moulton, J.P., Mendez, Rodriguez, Rosado, Hagler, JJ.

24 The People of the State of New York, Respondent, v Josue Deleon, Appellant. [251 NYS3d 680]—Judgment, Supreme Court, New York County (April Newbauer, J.), rendered January 23, 2025, convicting defendant, upon his plea of guilty, of attempted assault in the first degree, and sentencing him to 3½ years followed by 2½ years of postrelease supervision, unanimously modified, as a matter of discretion in the interest of justice, to the extent of vacating the surcharge and fees imposed on defendant at sentencing, and otherwise affirmed.

Said appeal having been argued by counsel for the respective parties, due deliberation having been had thereon, and finding the sentence not excessive, however, based on our own interest of justice powers, we vacate the mandatory surcharge and fees imposed on defendant at sentencing (*People v Chirinos*, 190 AD3d 434 [1st Dept 2021]). We note that the People do not oppose this relief. Concur—Webber, J.P., Kennedy, Kapnick, González, O'Neill Levy, JJ.

25 The People of the State of New York, Respondent, v Omar Key, Appellant. [251 NYS3d 682]—

Crimes—Evidence—Hearsay—Unknown Identity of Declarant

Crimes—Evidence—Rush to Judgment Defense—Testimony Outlining Course of Investigation

Judgment, Supreme Court, Bronx County (Jeffrey M. Zimmerman, J.), rendered December 7, 2023, convicting defendant,

after a jury trial, of manslaughter in the first degree, and sentencing him to a term of fifteen years, unanimously affirmed.

The verdict was based on legally sufficient evidence and was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]; *see also People v Baque*, 43 NY3d 26 [2024]). Although there was no surveillance footage capturing the actual stabbing, footage from before and after the event amply established defendant's guilt.

Defendant has not preserved his claim that the court's preclusion of evidence that would have supported a third-party culpability defense deprived him of his constitutional right to present a defense (*see People v Lane*, 7 NY3d 888, 889 [2006]). We decline to review his claims in the interest of justice. As an alternative holding, we reject his claims on the merits.

In an interview with the victim's sister after the stabbing, she informed the police that on the night of the stabbing, an unknown knocked on her door and said that "Bronx Deuce" killed her brother. It was later learned that the nickname belonged to the victim's best friend, who was seen on footage pulling the bleeding victim away from the fight. Defendant offered the victim's sister's testimony to support his claim that there had been a "rush to judgment" by the police. The court properly instructed the jury that the testimony was to be considered only to understand what the police did with the information and not for its truth. Given the lack of knowledge of the identity of the declarant or the source of the declarant's information, the statement lacked any indicia of reliability.

The court providently exercised its discretion in precluding footage of the victim's best friend appearing distraught after the victim's death and of the best friend's interview with the police in which he claimed he was intoxicated and did not remember what had happened that night. The videos were not relevant, and if admitted, would have confused and misled the jury (*see People v Primo*, 96 NY2d 351, 356-357 [2001]).

The court providently exercised its discretion in permitting a detective to testify, while viewing the surveillance video, that he saw a knife in defendant's hand but not in anyone else's hand, to explain why he focused on defendant as the perpetrator. Where defendant, in extensive pretrial discussions, sought to introduce evidence of a "rush to judgment" by the police in arresting defendant and not investigating the victim's friend or others as suspects, it was reasonable to allow the detective to outline the course of the investigation (*see generally People v Ludwig*, 24 NY3d 221, 231 [2014]). Further, the court instructed

the jury as to the limited purpose for which the testimony was admitted and stressed that the jury was to make the “ultimate factual determination” of what defendant did and what he was holding. Thus, any error in admitting that testimony was harmless (*see People v Crimmins*, 36 NY2d 230 [1975]; *People v Coleman*, 78 AD3d 457, 458-459 [1st Dept 2010], *lv denied* 16 NY3d 829 [2011]).

We perceive no basis for reducing the sentence. Concur—Webber, J.P., Kennedy, Kapnick, González, O’Neill Levy, JJ.

26 The People of the State of New York, Respondent, v Rene Garcia, Appellant. [252 NYS3d 101]—

Crimes—Possession of Weapon—Challenge to Firearm Licensing Scheme

Judgment, Supreme Court, Bronx County (Steven J. Hornstein, J.), rendered June 3, 2024, convicting defendant, upon his plea of guilty, of criminal possession of a weapon in the fourth degree, and sentencing him to a jail term of eight months, to run concurrently with his sentence under indictment No. 72417/24, unanimously affirmed.

Defendant’s waiver of his right to appeal does not preclude review of his Second Amendment claim (*see People v Johnson*, — NY3d —, —, 2025 NY Slip Op 06528, *2 [2025]). Defendant also has standing to raise his challenge to the constitutionality of New York’s firearm licensing scheme, notwithstanding that he never applied for a firearm license (*Johnson*, — NY3d at —, 2025 NY Slip Op 06528, *3; *see also People v Jacobs*, 246 AD3d 440 [1st Dept 2026]). However, defendant’s challenge to the “good moral character” provision in Penal Law § 400.00 (1) (b) is unpreserved because he failed to raise it below (*see People v Cabrera*, 41 NY3d 35, 42-51 [2023]), and we decline to review it in the interest of justice. As an alternative holding, we reject it on the merits (*see People v Mazyck*, 246 AD3d 520 [1st Dept 2026]; *People v Guzman*, 237 AD3d 570, 571 [1st Dept 2025], *lv denied* 44 NY3d 993 [2025]).

Defendant’s contention that his counsel rendered ineffective assistance in failing to raise a challenge to the “good moral character” provision of New York’s gun licensing scheme is “unreviewable on direct appeal, as it involves matters not reflected in the record, and must be raised in a CPL 440.10 motion” (*People v Gray*, 230 AD3d 1039, 1039 [1st Dept 2024], *lv denied* 42 NY3d 1035 [2024]; *see also Jacobs*, 246 AD3d 440). As an alternative holding, to the extent that the record allows review, we find that counsel did not render ineffective assistance (*see People v Caban*, 5 NY3d 143, 152 [2005]). Concur—Webber, J.P., Kennedy, Kapnick, González, O’Neill Levy, JJ.

27 The People of the State of New York, Respondent, v Tyee Fisher, Appellant. [251 NYS3d 683]—

Crimes—Appeal—Preservation of Issue for Review—Challenge to Firearm Licensing Scheme

Judgment, Supreme Court, Bronx County (Steven J. Hornstein, J.), rendered March 6, 2024, convicting defendant, upon his plea of guilty, of attempted criminal possession of a weapon in the third degree, and sentencing him, as a second violent felony offender, to a term of three years, unanimously affirmed.

Defendant's Second Amendment challenges to New York's revised gun licensing scheme are unpreserved because he failed to argue in his motion to dismiss the indictment that the "good moral character" provision is "vague and discretionary," or that there is "no historical analogue" to New York's lifetime firearms ban for any person previously convicted of a crime (*see People v Cabrera*, 41 NY3d 35, 42-51 [2023]), and we decline to review them in the interest of justice. As an alternative holding, we find them unavailing. Concur—Scarpulla, J.P., Friedman, Shulman, Rodriguez, Rosado, JJ.

28 The People of the State of New York, Respondent, v Neil Rodney, Appellant. [253 NYS3d 136]—

Crimes—Right to Counsel—Effective Representation—Desirability of Juror

Judgment, Supreme Court, Bronx County (Jeannette Rodriguez-Morick, J.), rendered April 1, 2019, convicting defendant, after a jury trial, of assault in the third degree and criminal possession of a weapon in the fourth degree, and sentencing him to concurrent jail terms of four months, unanimously affirmed.

Without a CPL 440.10 motion, defendant's ineffective assistance of counsel claim is unreviewable on direct appeal because it involves matters of strategy outside the record (*see People v Maffei*, 35 NY3d 264, 269-270 [2020]). "The record does not reveal on what basis counsel might have concluded that [this was a] desirable juror[] for the defense, and that further inquiry was unnecessary. In particular, counsel may have been influenced by [the] juror[s] demeanor, which is not reflected in the record" (*People v Vilfort*, 33 AD3d 368, 369 [1st Dept 2006], *lv denied* 7 NY3d 929 [2006]). To the extent that the existing record permits review, we find that defendant received effective assistance under the state and federal standards (*see People v Benevento*, 91 NY2d 708, 713-714 [1998]; *see also Strickland v Washington*, 466 US 668 [1984]).

The verdict was not against the weight of the evidence (*see*

People v Danielson, 9 NY3d 342, 348 [2007]; *see also People v Baque*, 43 NY3d 26 [2024]). The credibility assessments of witnesses requires us to “give great deference to the jury’s verdict precisely because the memory, motive, mental capacity, accuracy of observation and statement, truthfulness and other tests of the reliability of witnesses can be passed upon with greater safety by those who see and hear than by those who simply read the printed narrative” (*People v Romero*, 7 NY3d 633, 645 [2006] [internal quotation marks, citations, and brackets omitted]). There is no basis to disturb the jury’s credibility determinations, which were amply supported by the record. Concur—Scarpulla, J.P., Friedman, Shulman, Rodriguez, Rosado, JJ.

29 Shoo-In, LLC, Appellant, v Randy C. Rivera, Respondent. [251 NYS3d 687]—

Dismissal and Nonsuit—Failure to Enter Default Judgment within One Year—Reasonable Excuse—Law Office Failure

Order, Supreme Court, New York County (Paul A. Goetz, J.), entered December 23, 2024, which denied plaintiff’s motion to vacate an order, same court and Justice, entered on or about July 22, 2024, dismissing the complaint as abandoned pursuant to CPLR 3215 (c), unanimously affirmed, without costs.

Supreme Court providently exercised its discretion in denying plaintiff’s motion to vacate the order dismissing the complaint as abandoned, as plaintiff failed to demonstrate a justifiable excuse for its five-year delay in moving for entry of a default judgment against defendant (*see* CPLR 5015 [a] [1]; *938 St. Nicholas Ave. Lender LLC v 936-938 Cliffcrest Hous. Dev. Fund Corp.*, 241 AD3d 1134, 1135 [1st Dept 2025]). Plaintiff’s explanation for its inaction—that the associate responsible for litigating this action left the law firm plaintiff retained—is insufficient. Although law office failure may constitute a reasonable excuse for failure to enter a judgment (*see Mejia v Ramos*, 113 AD3d 429, 430 [1st Dept 2014]), plaintiff failed to explain why it did not pursue entry of the default judgment in the several-month period between the date the court directed entry of a default judgment (July 11, 2019) and the date that the associate left the law firm (Oct. 22, 2019). Moreover, although the firm temporarily closed in March 2020 because of the COVID-19 pandemic, it resumed normal operations roughly a week before the one-year deadline set forth in

CPLR 3215 (c) elapsed on July 11, 2020.* Plaintiff's general assertion that the law firm experienced ongoing disruptions in the wake of the COVID-19 pandemic and that plaintiff's director was stranded in China for five years is not disputed, but lacks sufficient detail to constitute a reasonable excuse. Similarly, plaintiff's argument that it did not move for entry of a default judgment because the parties were engaging in settlement discussions and discovery is unavailing. Plaintiff could have advised the motion court about the reason for its delay.

Because plaintiff failed to demonstrate a justifiable excuse for its delay, we need not address whether it has shown a potentially meritorious cause of action (*see McNaughton v 5 W. 14 Owners Corp.*, 235 AD3d 471, 474 [1st Dept 2025]).

We have considered plaintiff's remaining contentions and find them unavailing. Concur—Webber, J.P., Kennedy, Kapnick, González, O'Neill Levy, JJ.

30 Wyatt Troia, Appellant, v LoanStreet, Inc., et al., Respondents. [252 NYS3d 99]—

Civil Rights—Strategic Lawsuits against Public Participation—Substantial Basis in Fact and Law—Federal Court Finding of Liability for Defamation Appeal—Frivolous Appeal

Order, Supreme Court, New York County (Mary V. Rosado, J.), entered May 27, 2025, which granted defendants' motion to dismiss the complaint, unanimously affirmed, with costs, and the matter remanded to Supreme Court for a determination of costs and reasonable attorneys' fees incurred by defendants in responding to this appeal.

Supreme Court properly dismissed plaintiff's complaint for failure to state a cause of action, as the underlying lawsuit filed in federal court had a substantial basis in fact and law (*see* Civil Rights Law § 70-a; *Smartmatic USA Corp. v Fox Corp.*, 213 AD3d 512, 512 [1st Dept 2023]). The federal court in the underlying lawsuit already found, based on plaintiff's own pleadings and submissions, that plaintiff was liable to defendants for defamation, and a trial has been scheduled on the issue of damages. Further, the federal court already dismissed substantially the same anti-SLAPP cause of action in the federal case on the merits.

Under the circumstances, this appeal is frivolous within the meaning of 22 NYCRR 130-1.1, and defendants should be

* While Executive Order (A. Cuomo) No. 202.8 (9 NYCRR 8.202.8) tolled the statutes of limitations in New York from March 2020 through November 3, 2020, because of the COVID-19 pandemic, plaintiff still waited almost four more years, until July 1, 2024, to resume litigating its case.

reimbursed for their reasonable attorneys' fees and costs incurred on this appeal (*see Boye v Rubin & Bailin, LLP*, 152 AD3d 1, 11 [1st Dept 2017]; *Matter of Levine*, 82 AD3d 524, 527 [1st Dept 2011]). Therefore, this matter is remanded to Supreme Court for a determination of the amount of expenses and fees incurred by defendants in responding to this appeal, and for entry of the appropriate judgment against plaintiff. Concur—Scarpulla, J.P., Friedman, Shulman, Rodriguez, Rosado, JJ.

Motion for leave to file an amicus curiae brief, denied.

31 In the Matter of K.W., a Child Alleged to be Neglected. M.W., Appellant; Administration for Children's Services, Respondent, et al., Respondent. [251 NYS3d 684]—

Parent, Child and Family—Abused or Neglected Child

Order, Family Court, New York County (Keith E. Brown, J.), entered on or about September 25, 2024, which, after a fact-finding hearing, determined that appellant father neglected the subject child, unanimously affirmed, without costs.

Family Court's determinations that the father's testimony was not credible, but that the testimony of the Administration for Children Services (ACS) worker, the maternal grandmother, and the mother of the child's two older half-siblings was credible and consistent are entitled to deference, and we see no reason for disturbing them (*see Matter of Yumara T. [Raymond K.]*, 185 AD3d 429, 431 [1st Dept 2020]).

Family Court properly found that the father neglected the child by unexpectedly leaving the child with the maternal grandmother in March 2021, without shoes, extra clothing, or sufficient diapers, and did not return to pick up the child. Also, the father was repeatedly intoxicated to the point of losing self-control (*see* Family Ct Act § 1046 [a] [iii]; Family Ct Act § 1012 [f] [i] [B]; [ii]; *Matter of Nassair S. [Chareshma T.]*, 144 AD3d 604, 604-605 [1st Dept 2016]; *Matter of Chastity O.C. [Angie O.C.]*, 136 AD3d 407, 408 [1st Dept 2016]).

Family Court's finding of neglect is further supported by the father's actions following a court ordered visitation in August 2022 where he behaved erratically and admitted he was intoxicated while caring for the child, exposing the then three-year-old child to instability and potential harm (*see Matter of Genesis Q. [Viviana L.]*, 206 AD3d 473, 473 [1st Dept 2022]; *Matter of Caleah C.M.S. [Calvin S.]*, 174 AD3d 457, 458 [1st Dept 2019]). It is of no moment that the child did not suffer

actual harm during that particular incident (*see Matter of Pedro C. [Josephine B.]*, 1 AD3d 267, 268 [1st Dept 2003]). Concur—Webber, J.P., Kennedy, Kapnick, González, O'Neill Levy, JJ.

32 Wesco Insurance Company et al., Respondents, v Nunez Dental Services, P.C., et al., Appellants, et al., Defendants. Merrimack Mutual Fire Insurance Company, Third-Party Plaintiff-Respondent, v Nunez Dental Services, P.C., et al., Third-Party Defendants-Appellants. [— NYS3d —]

Trial—Note of Issue and Statement of Readiness—Extension of Filing Deadline

Order, Supreme Court, New York County (Kathleen Waterman-Marshall, J.), entered on or about September 16, 2025, which, to the extent appealed from as limited by the briefs, granted plaintiffs' motion to compel defendants to produce discovery and to extend the time to file the note of issue, unanimously affirmed, with costs.

In a prior appeal, this Court determined that neither plaintiffs nor defendants Nunez Dental Services, P.C., and Maritza Nunez (together, Nunez), and Camila Davalos met their summary judgment burden, noting that the record did not establish whether a prior publication exclusion in plaintiffs' policy was applicable. Specifically, we found that because a 2009 publication in question was not in the record it could not be determined whether such publication "consisted of substantially the same offending material" as publications attached to the underlying complaint (*Wesco Ins. Co. v Nunez Dental Servs., P.C.*, 225 AD3d 410, 411 [1st Dept 2024]). The day after this Court issued its decision, plaintiffs served discovery demands seeking, among other things, all publications and information concerning any advertisements for Nunez services using Davalos' image, including when such advertisements were first published. Plaintiffs also sought an extension of time to file the note of issue because the original deadline of January 31, 2023, had lapsed while plaintiffs awaited Supreme Court's decision on their motion for summary judgment.

Supreme Court properly concluded that the discovery materials sought by plaintiffs are material and necessary to the prosecution of this action, particularly in light of this Court's prior determination (*see Those Certain Underwriters at Lloyds, London v Occidental Gems, Inc.*, 11 NY3d 843, 845 [2008]).

The court also providently exercised its discretion in extending the note of issue deadline (CPLR 2004; *Grant v City of New York*, 17 AD3d 215, 217 [1st Dept 2005]). Although the compli-

ance conference order required plaintiffs to file the note of issue by January 31, 2023, and plaintiffs failed to do so, the amount of time that elapsed between the note of issue deadline and plaintiffs' subsequent document demands was relatively short in the context of the particular procedural history of this case (see *Manrique v Warshaw Woolen Assoc.*, 282 AD2d 407, 408 [1st Dept 2001]). Additionally, plaintiffs provided a plausible reason for not making their demands earlier; namely, that they thought they were entitled to relief based on the record that was available when they originally moved for summary judgment. Furthermore, there is minimal prejudice to defendants, and the likelihood that the additional discovery will lead to successive summary judgment motions is speculative (see generally *Jones v 636 Holding Corp.*, 73 AD3d 409, 409 [1st Dept 2010]). Concur—Webber, J.P., Kennedy, Kapnick, González, O'Neill Levy, JJ.

33 S.A.W., Respondent, v Archdiocese of New York, Appellant, et al., Defendants. [251 NYS3d 686]—

Schools—Students—Injury to Student—Catholic School—Operation and Control by Archdiocese

Order, Supreme Court, New York County (Sabrina Kraus, J.), entered on or about May 19, 2025, which, to the extent appealed from as limited by the briefs, denied defendant Archdiocese of New York's motion for summary judgment dismissing plaintiff's claims for negligence and negligent hiring, retention, supervision, or direction as against it, unanimously affirmed, without costs.

In this action brought pursuant to the Child Victims Act, CPLR 214-g, plaintiff alleges that she was sexually abused by defendant Edmond Parrakow, a priest who taught at defendant Aquinas High School, while she was a student there. Defendant Archdiocese's motion for summary judgment dismissing the complaint was properly denied because the Archdiocese failed to demonstrate, prima facie, that it did not owe plaintiff a duty of care. The Archdiocese's own documents and deposition testimony show that there is an issue of fact as to whether the Archdiocese operated and controlled, at least in part, Aquinas High School (see *C.R. v Episcopal Diocese of N.Y.*, — AD3d —, —, 2025 NY Slip Op 05144, *1 [1st Dept 2025]; *Schlesinger v Sisters of the Order of St. Dominic*, 236 AD3d 1074, 1076 [2d Dept 2025]). The record shows that defendant Dominican Convent of Our Lady of the Rosary handled Aquinas High School's day-to-day operations, but also that the Archdiocese retained at least some degree of control over the school.

For example, the Archdiocese submitted testimony showing that it set Fr. Parrakow's salary and benefits, approved the assignment of Fr. Parrakow to teach at Aquinas High School, and retained the authority to remove him.

As to the Archdiocese's argument that it lacked notice of Fr. Parrakow's propensity to abuse children, it relied on the same body of evidence as defendants Dominican Convent of Our Lady of the Rosary and Aquinas High School, which evidence we previously determined raises issues of fact as to notice (*see S.A.W. v Archdiocese of N.Y.*, 246 AD3d 451, 451 [1st Dept 2026]). Here, the Archdiocese similarly failed to eliminate all issues of fact as to whether it had notice of Fr. Parrakow's propensity to abuse children before he abused plaintiff.

We have considered the Archdiocese's remaining contentions and find them unavailing. Concur—Scarpulla, J.P., Friedman, Shulman, Rodriguez, Rosado, JJ.

(April 9, 2026)

1 In the Matter of Ola A., Respondent, v Bafode D., Appellant. [252 NYS3d 107]—

Parent, Child and Family—Custody—Primary Physical Custody

Order, Family Court, New York County (Jessica M. Forman, Ref.), entered on or about November 25, 2024, which granted petitioner mother primary physical custody of the children with parenting time to respondent father on alternate weekends, summer breaks, and holidays, and one midweek dinner visit, unanimously affirmed, without costs.

Family Court's determination that an award of primary physical custody to the mother was in the best interests of the children has a sound and substantial basis in the record and the father failed to identify any grounds to disturb the determination (*see Matter of Emmanuel A. v Evelyn R.M.G.*, 242 AD3d 481, 482 [1st Dept 2025]). The undisputed testimony established that, since the parents' separation in 2023, the children lived primarily with the mother, that she provided a stable and loving home for the children, and that she managed the children's medical appointments, school drop offs and pickups, and social activities (*see Matter of Kimberly J. v Benjamin G.*, 227 AD3d 471, 472 [1st Dept 2024]; *see Matter of Celina S. v Donald S.*, 133 AD3d 471, 471 [1st Dept 2015]). Moreover, the mother testified that she communicated with the father and facilitated his visitation, sometimes rearranging her

own schedule to accommodate his parenting time (*see Matter of Dave D. v Cara C.*, 179 AD3d 560, 561 [1st Dept 2020]).

While the father loves his children and plays an active role in their lives, the testimony shows that he did not provide them with the same degree of stability that the mother provided (*see Matter of Celina S. v Donald S.*, 133 AD3d 471, 471 [1st Dept 2015]; *see e.g. Matter of Mary N. v Scott M.*, 218 AD3d 890, 892 [3d Dept 2023]). In any event, Family Court considered his loving relationship with the children in granting him parenting time during the week, on alternate weekends, and during school breaks and holidays (*see e.g. Matter of Chirag C. v Jaimie D.*, 226 AD3d 470, 471 [1st Dept 2024], *lv denied* 42 NY3d 907 [2024]; *see also Matter of Ian C. v Desery C.*, 161 AD3d 621, 622 [1st Dept 2018]). Concur—Kennedy, J.P., Kapnick, Higgitt, Michael, Chan, JJ.

2 Air Products and Chemicals, Inc., Respondent, v World Energy, LLC, Appellant. [— NYS3d —]

Judgments—Summary Judgment—Motion for Summary Judgment in Lieu of Complaint—Guaranty

Judgment, Supreme Court, New York County (Jennifer G. Schecter, J.), entered October 20, 2025, awarding plaintiff damages in the amount of \$343,014,718.45, and bringing up for review an order, same court and Justice, entered on September 19, 2025, which granted plaintiff's CPLR 3213 motion for summary judgment in lieu of complaint, unanimously affirmed.

Plaintiff established *prima facie* entitlement to summary judgment in lieu of complaint by furnishing copies of the guaranty, the underlying credit agreement, default notices, and an affidavit attesting to the absence of any payments from defendant as guarantor (*see Cooperatieve Centrale Raiffeisen-Boerenleenbank, B.A., "Rabobank Intl.," N.Y. Branch v Navarro*, 25 NY3d 485, 491-492 [2015]). The court correctly determined that defendant's undisputed breach of the guaranty could be summarily adjudicated pursuant to CPLR 3213, as this absolute, unconditional, and irrevocable guarantee of payment is an instrument for the payment of money only (*see BBM3, LLC v Vosotas*, 216 AD3d 403, 404 [1st Dept 2023]). Nor does the inclusion of the word "performance" remove this guaranty from the category of instruments for the payment of money only, particularly where the sentence includes the words that it "guarantees . . . the due and punctual payment in full when due" (*see Museum Bldg. Holdings, LLC v Schreiber*, 236 AD3d 526, 527 [1st Dept 2025], *lv denied* 44 NY3d 909 [2025]; 27 W. 72nd St. Note Buyer LLC v Terzi, 194 AD3d 630, 632 [1st Dept 2021], *lv denied* 37 NY3d 913 [2021]).

That the guaranty was part of a larger transaction does not, by itself, bar accelerated treatment, and to the extent there was a need for limited review of the underlying credit agreement to establish the obligation and amount of liability, this does not affect the availability of CPLR 3213 (*see Arbor-Myrtle Beach PE LLC v Frydman*, 202 AD3d 464, 465 [1st Dept 2022]). Plaintiff did not have to comply with the dispute resolution provisions in the parties' other agreements before bringing an action pursuant to CPLR 3213 to enforce the guaranty.

The court correctly found that defendant has not identified any performance obligations in the guaranty or any other required determinations concerning the amounts owed that would have necessitated a factual inquiry (*see AB Commercial Real Estate Debt - B2 S.A.R.L. v Holtzman*, 236 AD3d 506, 507 [1st Dept 2025]; *cf. PDL Biopharma, Inc. v Wohlstadter*, 147 AD3d 494, 495-496 [1st Dept 2017]).

Moreover, the court properly determined the interest rate applicable under the terms of the credit agreement and the guaranty.

We have considered defendant's remaining arguments and find them unavailing. Concur—Kennedy, J.P., Kapnick, Higgett, Michael, Chan, JJ.

3 Katie Altman, Formerly Known as Katie Brown, Appellant, v New York City Department of Education, Respondent. [— NYS3d —]

Arbitration—Collective Bargaining Agreement—Exhaustion of Administrative Remedies—Antiretaliation Claim

Order, Supreme Court, New York County (Paul A. Goetz, J.), entered on or about March 28, 2025, which granted defendant's motion to dismiss the complaint, unanimously affirmed, without costs.

Plaintiff, an assistant principal at all times relevant to this action, commenced this action alleging that defendant retaliated against her after she reported a violation of Social Services Law § 413 by her then-principal, and that she ultimately was constructively discharged. She asserts a claim pursuant to Civil Service Law § 75-b (2) (a), alleging that defendant dismissed or took other disciplinary or other adverse personnel action against her because of her report. However, a public employee may be required to arbitrate such a claim where she "is subject to dismissal or other disciplinary action under a final and binding arbitration provision" (*id.* subd [3] [a]) or where she "is subject to a collectively negotiated agreement which contains provisions preventing an employer from taking

adverse personnel actions and which contains a final and binding arbitration provision to resolve alleged violations of such provisions of the agreement” (*id.* subd [3] [b]).

Pursuant to the terms of the collective bargaining agreement (CBA) between plaintiff’s union and defendant, grievances which are not resolved after a two-step internal process must be submitted to arbitration. The CBA defines a “grievance,” as relevant here, as “[a] complaint by a supervisor covered by this Agreement that there has been as to him/her a violation, misinterpretation or inequitable application of any of the provisions of this Agreement.” A subsequent Memorandum of Agreement (MOA) between plaintiff’s union and defendant, which by its terms became part and parcel of the CBA, added an antiretaliation provision that provides, among other things, “The harassment, intimidation, retaliation and discrimination of any kind because an employee in good faith raises a concern or reports a violation or suspected violation of any Department policy, rule/law/regulation or contractual provision . . . is prohibited.”

Since the MOA is incorporated into the CBA, plaintiff’s claims of retaliation in violation of the MOA’s antiretaliation provision constitute a grievance under the CBA. Accordingly, plaintiff was required to grieve her complaint before commencing this action, and Supreme Court properly granted defendant’s motion to dismiss based on plaintiff’s failure to exhaust her administrative remedies. Indeed, plaintiff’s course of conduct in demanding arbitration, citing to the CBA’s grievance procedures and the MOA’s antiretaliation provision, confirms that the arbitration of the claim was required (*see generally e.g. Matter of Bank of N.Y. Mellon*, 202 AD3d 465, 466 [1st Dept 2022]).

We have considered plaintiff’s remaining arguments and find them unavailing. Concur—Renwick, P.J., Kennedy, Friedman, Mendez, Hagler, JJ.

4 In the Matter of Emily E.D., Appellant, v Meschach D.M., Respondent. [— NYS3d —]—

Parent, Child and Family—Family Offense Proceeding—Second-Degree Menacing

Order, Family Court, New York County (Jacob K. Maeroff, Ref.), entered on or about November 25, 2024, which, to the extent appealed, denied so much of petitioner mother’s petition for modification of an August 11, 2021 order of visitation as sought to prohibit the father from having the children visit him in Texas, and for visitation in New York to be supervised,

unanimously affirmed, without costs. Appeal from dismissal of the mother's family offense petition, unanimously dismissed, without costs, as not having been taken from a nonappealable paper.

The appeal from the dismissal of the family offense petition must be dismissed because no appeal lies from an unsigned transcript (*see Nova v Jerome Cluster 3, LLC*, 46 AD3d 292, 292 [1st Dept 2007]). Even were we to review the denial of the petition, we would find that the court properly concluded that the mother failed to establish any family offenses by a fair preponderance of the evidence.

There is no basis for disturbing the court's credibility determination crediting the father's version of events over the mother's version (*see Matter of D.K. v D.L.*, 242 AD3d 456, 457 [1st Dept 2025]). There was insufficient evidence to establish the family offense of menacing in the second degree, as there was no testimony or evidence that the father engaged in a "course of conduct" or "repeatedly commit[ted] acts over a period of time" which placed or attempted to place the mother "in reasonable fear of physical injury, serious physical injury or death" (*see Penal Law § 120.14 [2]; Matter of Kalyan v Trasybule*, 189 AD3d 1046, 1048 [2d Dept 2020]). Nor was there sufficient evidence that the father intentionally placed or attempted to place the mother in fear of death, imminent serious physical injury, or physical injury by displaying a deadly weapon or dangerous instrument (*see Penal Law § 120.14 [1]*). The petition and testimony similarly fail to support an offense based on menacing in the third degree (*see Penal Law § 120.15; see also Matter of Alexandra U. v Shalva S.*, 214 AD3d 468, 469 [1st Dept 2023]). To the extent that the mother challenges the Referee's jurisdiction, we note that she implicitly consented to the order of reference by actively participating in the proceeding (*see Matter of Edward C.Y. v Jessica E.H.*, 220 AD3d 503, 504 [1st Dept 2023]; *Matter of Vanessa R. v Christopher A.E.*, 173 AD3d 412, 413-414 [1st Dept 2019], *lv denied* 34 NY3d 948 [2019]).

Although the father exercised poor judgment during visitation with the children, the court's preservation of the current custody and visitation arrangement was supported by a sound and substantial basis in the record, since the record did not reflect that the children's health or safety was ever placed at risk (*see Matter of Barry H. v Veronica S.*, 175 AD3d 427, 428 [1st Dept 2019]). Concur—Kennedy, J.P., Kapnick, Higgitt, Michael, Chan, JJ.

5 Jeffrey Hunold, Appellant, v City of New York et al., Respondents. [— NYS3d —]

**Judgments—Res Judicata—Religious Exemption from COVID-19 Vaccination Requirement—Article 78 Proceeding and Human Rights Law Action
Civil Rights—Discrimination in Employment—Discrimination Based on Religion—COVID-19 Vaccination Requirement**

Judgment, Supreme Court, New York County entered January 23, 2025, dismissing the complaint with prejudice, and bringing up for review an order of the same court (Hasa A. Kingo, J.), entered September 10, 2024, which granted the motion by defendants the City of New York, the New York City Police Department (NYPD), Michael Melocowsky, Eric Eichenholtz, and Tanya Meisenholder to dismiss the complaint, unanimously affirmed, without costs.

Plaintiff was a police officer with the NYPD who, due to his “devout Christian faith,” applied for a religious accommodation exempting him from the NYC Department of Health and Mental Hygiene Commissioner’s October 20, 2021 COVID-19 vaccination requirement and requested to be allowed to wear a mask and submit to weekly testing. In a form denial sent by email dated February 15, 2022, the NYPD denied his religious accommodation request by checking two boxes; one stated “Insufficient or missing religious documentation” and the other “No demonstrated history of vaccine/medicine refusal.” Plaintiff appealed the NYPD’s denial to the City of New York Reasonable Accommodation Appeals Panel, which on June 17, 2022, notified him that it denied his administrative appeal because he “does not meet [the] criteria,” and that he would be placed on leave without pay on June 24, 2022, and terminated on June 27, 2022, if he refused to be vaccinated. Instead, plaintiff applied for vested retirement that same day.

Plaintiff commenced a CPLR article 78 proceeding challenging the denial of his reasonable accommodation request. He asserted five claims for relief alleging that the decision was arbitrary and capricious because: (i) no reasoning was provided, (ii) the denial violated the City Human Right Law’s (City HRL) antidiscrimination statute and the requirement that the NYPD engage in a cooperative dialogue with plaintiff, (iii) the City and NYPD failed to follow their own equal employment opportunity rules, (iv) the denial violated Title VII, the State Human Rights Law (State HRL), the City HRL, and EEOC guidance requiring employers to assume that the religious accommodation requests were based on sincerely held religious beliefs, and (v) the denial violated his right to free exercise of his sincerely held religious beliefs under the New York State Constitution.

Supreme Court denied the petition and dismissed the

proceeding, concluding that the NYPD identified sound reasons for denying plaintiff's reasonable accommodation requests, including his failure to provide a cogent explanation for why his religious beliefs conflict with vaccination. Citing to *Matter of Marsteller v City of New York* (217 AD3d 543, 545 [1st Dept 2023], *appeal dismissed & lv denied* 41 NY3d 960 [2024]). The City also concluded that the denial of his application for religious exemption was not a violation of the City's HRL, nor was the use of a form checklist stating the reason for the denial arbitrary and capricious.

While the article 78 proceeding was still pending, plaintiff commenced this action by verified complaint, which he amended after the article 78 proceeding had been dismissed. In his amended complaint, plaintiff alleged causes of action for (1) religious discrimination in violation of the State and City HRLs, (2) refusal to engage in cooperative dialogue in violation of the City HRL, (3) a declaratory judgment that defendants' policy and practice in denying plaintiff's religious accommodation requests was unlawful, (4) violation of the Free Exercise Clause of the New York State Constitution, (5) intentional infliction of emotional distress (IIED), (6) aiding and abetting discriminatory acts by the individual defendants, (7) breach of contract due to constructive termination, (8) attorneys' fees, (9) violation of the Equal Protection Clause of the State Constitution, and (10) disparate treatment and disparate impact under the City HRL.

Defendants moved to dismiss the amended complaint based on *res judicata*, and because it otherwise failed to state a cause of action upon which relief may be granted. Defendants argued that plaintiff failed to plead facts to support his claim that he held a bona fide religious belief that conflicted with the vaccine mandate or that he suffered an adverse employment action or disparate impact because of that belief. They further argued that they engaged plaintiff in a sufficient cooperative dialogue; that plaintiff's claim for declaratory relief was moot; that the NYPD was not amenable to suit; and that because the vaccine mandate was lawful, plaintiff did not meet the standard for IIED.

In opposition, plaintiff argued, as he does on appeal, that the issues brought in this action differed from those brought in the article 78 proceeding because here the claims include discrimination under the State and City HRL, violations of the State Constitution, IIED and constructive termination, among others; that the article 78 court limited its review to whether the City's decision was rational and not arbitrary; and that he

stated a cause of action because the complaint alleged that defendants subjected him to discrimination and unlawful termination due to his religious beliefs when he was denied a religious accommodation.

The court properly dismissed the complaint as against the NYPD, which is “a non-suable agency of the City” (*see* NY City Charter § 396; *Troy v City of New York*, 160 AD3d 410, 411 [1st Dept 2018]). With respect to the remaining defendants, because the essence of the factual allegations in both the article 78 proceeding and this action is discrimination under the State and City HRLs, the court properly held that the claims against them for alleged violations of the State and City HRL are barred by collateral estoppel and res judicata based on the decision issued in the article 78 proceeding. That proceeding, in which plaintiff alleged that NYPD’s denial of his request for a religious accommodation exempting him from the COVID-19 vaccine mandate was arbitrary and capricious, was dismissed upon the article 78 court’s determination that defendants’ actions were rationally motivated by nondiscriminatory reasons. Therefore, plaintiff is collaterally estopped from raising those claims again in a plenary action (*see Parker v Blauvelt Volunteer Fire Co.*, 93 NY2d 343, 349 [1999]; *Rosenthal v Roosevelt Is. Operating Corp.*, 221 AD3d 551, 551-552 [1st Dept 2023]).

Res judicata, which “prevents relitigation between the same parties, or those in privity with them, of a cause of action arising out of the same transaction or series of transactions that either were raised or could have been raised in the prior proceeding,” also applies (*Rojas v Romanoff*, 186 AD3d 103, 108 [1st Dept 2020]). Plaintiff’s complaint raises no instance of discrimination that was not previously raised in the article 78 proceeding, “despite the fact that the claims are based on a different theory or seek a different remedy” (*Thomas v City of New York*, 239 AD2d 180, 180 [1st Dept 1997]).

In any event, the complaint fails to state a cause of action because the discrimination claims fail to allege what plaintiff’s religious beliefs are beyond that he was created in God’s image or that his beliefs conflict with the vaccine mandate (*see Kola v City of New York*, 245 AD3d 513, 514 [1st Dept 2026]). Plaintiff’s claim that he suffered an adverse employment action in being notified that he would be placed on leave without pay and then terminated, fails because these events never manifested. Plaintiff chose instead to apply for vested retirement, making any harm speculative (*see Crookendale v New York City Health & Hosps. Corp.*, 175 AD3d 1132, 1132 [1st Dept 2019]).

Furthermore, plaintiff's breach of contract claim fails for lack of standing. A union employee "may not independently enforce the collective bargaining agreement unless (1) the union has breached its duty of fair representation or (2) the contract permits it" (*Matter of Dourdounas v City of New York*, 44 NY3d 34, 39 [2025]). Plaintiff's IIED claim must be dismissed because such claims "against government bodies are barred as a matter of public policy" (*Dillon v City of New York*, 261 AD2d 34, 41 [1st Dept 1999]) and the complaint does not allege conduct "so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency" (*Howell v New York Post Co.*, 81 NY2d 115, 122 [1993]; see *Chanko v American Broadcasting Cos. Inc.*, 27 NY3d 46, 57 [2016]).

Plaintiff's aiding and abetting claim fails because there is no underlying violation of the State or City HRL (see *Weir v Montefiore Med. Ctr.*, 208 AD3d 1122, 1123 [1st Dept 2022], *lv denied* 39 NY3d 911 [2023]). Finally, his claim for declaratory relief is moot as the city rescinded the COVID-19 vaccine mandate in February 2023 (see *Matter of New York City Mun. Labor Comm. v Adams*, 222 AD3d 437, 438 [1st Dept 2023]).

We have considered plaintiff's remaining arguments and find them unavailing. Concur—Kennedy, J.P., Gesmer, Mendez, Pitt-Burke, Rosado, JJ.

6 Isaac Kassirer et al., Respondents, v Joshua Gotlib et al., Appellants. [— NYS3d —]

Contracts—Formation of Contract—Oral Agreement
Declaratory Judgments—When Remedy Available—Duplicative Breach of Contract Claim
Equity—Unjust Enrichment—Sufficiency of Pleading

Order, Supreme Court, New York County (Nancy M. Bannon, J.), entered on or about March 31, 2025, which denied defendants' motion to dismiss the complaint, unanimously modified, on the law, to the extent of granting the motion to dismiss plaintiffs' first and second causes of action for a declaratory judgment and breach of contract, and otherwise affirmed, without costs.

The court should have granted defendants' motion to dismiss the breach of contract claim. "To establish the existence of an enforceable agreement, a plaintiff must establish an offer, acceptance of the offer, consideration, mutual assent, and an intent to be bound" (*Kowalchuk v Stroup*, 61 AD3d 118, 121 [1st Dept 2009]). "That meeting of the minds must include agreement on all essential terms" (*id.*). When "there are sufficient material terms absent" from the alleged contract, no en-

forceable agreement exists (*Argent Acquisitions, LLC v First Church of Religious Science*, 118 AD3d 441, 445 [1st Dept 2014]). Here, plaintiffs allege an oral agreement to split membership interests in a nonexistent entity that would be formed at an unspecified time and was to manage another nonexistent entity. That second nonexistent entity would, in turn, own an unspecified set of properties to be purchased at an unspecified time. Given the plethora of vague and missing material terms, the parties' purported oral agreement is plainly nothing more than an unenforceable "agreement to agree" (*Srivatsa v Rosetta Holdings LLC*, 213 AD3d 514, 514-515 [1st Dept 2023]). Dismissal of plaintiffs' breach of contract claim was therefore warranted on this ground, thereby rendering academic the parties' arguments regarding the applicability of the statute of frauds.

The court also improperly denied defendants' motion to dismiss the claim seeking a declaratory judgment. The desired relief—a declaratory judgment stating that plaintiff Kassirer owns one-third of the interests in defendant 685 Manager LLC and is entitled to distributions—"merely seek[s] a declaration of the same rights and obligations" arising out of the parties' unenforceable agreement (see *Colfin SNP-1 Funding, LLC v Security Natl. Props. Servicing Co., LLC*, 199 AD3d 406, 407 [1st Dept 2021], quoting *Apple Records v Capitol Records*, 137 AD2d 50, 54 [1st Dept 1988]). Thus, this claim should also have been dismissed as duplicative of the now-dismissed breach of contract claim.

The court, however, properly denied defendants' motion to dismiss plaintiffs' unjust enrichment claim. To plead an unjust enrichment claim, "[t]he plaintiff must show that the other party was enriched, at plaintiff's expense, and that it is against equity and good conscience to permit [the other party] to retain what is sought to be recovered" (*Georgia Malone & Co., Inc. v Rieder*, 86 AD3d 406, 408 [1st Dept 2011] [internal quotation marks omitted], *affd* 19 NY3d 511 [2012]). Assuming, without deciding, that the statute of frauds applies to the alleged oral agreement in this case, it does not preclude the claim for unjust enrichment because this claim "is not an attempt to enforce the oral contract" (see *Castellotti v Free*, 138 AD3d 198, 208 [1st Dept 2016]; *cf. Komolov v Segal*, 117 AD3d 557, 557 [1st Dept 2014]). Further, each of the elements of unjust enrichment are sufficiently pleaded. Plaintiffs allege that they enriched defendants by \$1.66 million under the auspice of purchasing an interest in real estate. They then further aver that defendants have refused to either return the money to

plaintiffs or recognize their ownership of the real estate. Accordingly, as pleaded, plaintiffs have stated a claim for unjust enrichment. Concur—Kennedy, J.P., Kapnick, Higgitt, Michael, Chan, JJ.

7 Thomas D. Kraemer, Appellant, v Florence Edelstein et al., Respondents. [252 NYS3d 103]—

Judgments—Res Judicata—Prior Federal Action

Limitation of Actions—Six-Year Statute of Limitations—Fraud—Subornation of Perjury

Courts—Jurisdiction—Long-Arm Jurisdiction

Order, Supreme Court, New York County (Ariel Chesler, J.), entered on or about February 25, 2025, which, to the extent appealable, granted defendants' respective motions under CPLR 3211 to dismiss the complaint in its entirety and to enjoin plaintiff from filing any new actions against defendants or their counsel absent leave of court, denied plaintiff's cross-motion under CPLR 3212 for summary judgment on his claims against defendant Christopher Duval, denied plaintiff's motion under CPLR 3215 for default judgments against defendants Lisa Spitale, the City of New York, Florence Edelstein, Michael Edelstein, and Majestic Realty Corporation, and denied plaintiff's motion to compel discovery against the City, unanimously affirmed, without costs.

Supreme Court properly dismissed the complaint in its entirety based on plaintiff's commencement of numerous prior actions against these defendants and others. The allegations here are identical to those raised in a 2019 action commenced by plaintiff in the U.S. District Court for the Southern District of New York, which was dismissed by order entered April 24, 2020, as time-barred, barred by res judicata, and factually frivolous (*Kraemer v City of New York*, 2020 WL 1974204, 2020 US Dist LEXIS 73041 [SD NY, Apr. 24, 2020, 19-CV-6671 (VEC)]). The same result was proper here (see e.g. *O'Brien v City of Syracuse*, 54 NY2d 353, 357 [1981]).

The court properly determined that even if the complaint was not barred by res judicata, all the claims were untimely under the relevant statutes of limitations. The claim for fraud on the court against defendants Florence Edelstein and Michael Edelstein as principals of defendant Majestic Realty Corporation, plaintiff's former landlord, and Majestic's counsel, defendant Christopher Duval, arising from these defendants' alleged conduct in the 2014 nonpayment proceeding resulting in plaintiff's 2015 eviction, falls outside the six-year limitations period for fraud under CPLR 213 (8). Although plaintiff asserts that the claim for subornation of perjury against Duval

has no statute of limitations, in civil actions, if a statute of limitations is not set forth under CPLR 213 (1), then the six-year statute of limitations applies, rendering all the claims arising from plaintiff's 2015 eviction time-barred.

Additionally, even if the action were not untimely or barred by res judicata, the allegations failed to state a claim against these defendants because no private right of action arises from the alleged violation of the criminal statutes and ethical rules on which plaintiff relies (*see e.g. Sheehy v Big Flats Community Day*, 73 NY2d 629, 636 [1989]; *see also Weintraub v Phillips, Nizer, Benjamin, Krim, & Ballon*, 172 AD2d 254, 254 [1st Dept 1991]).

Turning to the claims for subornation of perjury and kidnapping against defendant Lisa Spitale, the court properly determined that even if the claims were not barred by res judicata or untimely, the court lacked personal jurisdiction over Spitale, a Pennsylvania lawyer appointed in 2011 by a Pennsylvania court as the limited permanent guardian of plaintiff's adult daughter, a Pennsylvania resident. On appeal, plaintiff relies solely on CPLR 302 (a) (3) as a basis for jurisdiction, baselessly asserting that Spitale used interstate commerce to extort him. Plaintiff's reliance on CPLR 302 (a) (3) is particularly inapt because the situs of the alleged injury is Pennsylvania, and plaintiff failed to meet his burden to submit any evidence that Spitale "regularly . . . solicits business" in the state or "derives substantial revenue from interstate or international commerce" for jurisdiction to be proper under this provision (CPLR 302 [a] [3] [i], [ii]).

The court properly determined that plaintiff's failure to file a notice of claim in advance of commencing this action was fatal to his claims against the City of New York (General Municipal Law § 50-e [1] [a]). Although plaintiff asserts that no notice of claim was required because the causes of action do not sound in tort, civil claims for forgery, theft, destruction of records, and assault are tort claims for which a notice of claim is required (*see e.g. Davidson v Bronx Mun. Hosp.*, 64 NY2d 59, 62 [1984]). Additionally, even if a notice of claim had been filed, these claims relate to conduct going back to 2013, rendering the claims untimely under General Municipal Law § 50-i's one year and ninety day statute of limitations.

Furthermore, the court providently granted those branches of defendants' motion seeking to enjoin plaintiff from filing further actions against defendants or their counsel without leave of court. While a pro se plaintiff is afforded some leeway, he "acquires no greater right than any other litigant" (*Bloom v*

Hilpert, 222 AD3d 574, 575 [1st Dept 2023]). Plaintiff's allegations have been rejected as frivolous on at least two previous occasions, at needless expense to these parties, wasting judicial resources (see *Kraemer v City of New York*, 2020 WL 1974204, *1, 2020 US Dist LEXIS 73041, *2, quoting *Kraemer v Edelstein*, 2017 US Dist LEXIS 153504 [SD NY, Sept. 19, 2017, 17-CV-2910 (CM)]). Since this action was properly dismissed in its entirety, plaintiff's additional requests for relief were rendered moot, and plaintiff was providently precluded from filing further actions absent leave of court.

We have considered plaintiff's remaining contentions and find them unavailing. Concur—Kennedy, J.P., Kapnick, Higitt, Michael, Chan, JJ. [**Prior Case History: 85 Misc 3d 1224(A), 2025 NY Slip Op 50268(U).**]

8 Cheryl Lifshitz, Respondent, v Eric Brody, Appellant. [252 NYS3d 113]—

**Bills, Notes and Checks—Promissory Note—Unconditional Obligation to Pay
Bills, Notes and Checks—Counsel Fees—Liquidated Damages**

Judgment, Supreme Court, New York County (James d'Auguste, J.), entered January 13, 2025, awarding plaintiff a money judgment against defendant, and bringing up for review an order, same court and Justice, entered September 10, 2024, which granted plaintiff's motion for summary judgment in lieu of complaint on a note and guaranty and denied defendant's cross-motion to dismiss pursuant to CPLR 3211 (a) (4) and (5), unanimously affirmed, without costs.

Plaintiff established, through admissible evidence, the existence of an instrument for the payment of money only, defendant's unconditional promise to pay, and defendant's failure to make payments as required (see *German Am. Capital Corp. v Oxley Dev. Co., LLC*, 102 AD3d 408, 408 [1st Dept 2013], *lv denied* 21 NY3d 862 [2013]). In opposition, defendant failed to raise an issue of fact or defense to plaintiff's claim. Defendant's argument that the motion court could not grant plaintiff's motion pursuant to CPLR 3213 because the promissory note referenced the existence of a forbearance agreement was properly rejected. The promissory note itself provides defendant's unconditional obligation to make payment without reference to or reliance upon any other document (see *German Am. Capital Corp.*, 102 AD3d at 409; *Embraer Fin. Ltd. v Servicios Aereos Profesionales, S.A.*, 42 AD3d 380, 381 [1st Dept 2007]).

Additionally, the court properly awarded plaintiff attorneys' fees. The promissory note contained an enforceable liquidated damages provision requiring payment of reasonable attorneys'

fees equal to 10% of the note upon defendant's failure to pay, and did not require proof of legal services rendered (*see General Lbr. Corp. v Landa*, 13 AD2d 804, 805 [2d Dept 1961]). That the court awarded a lower amount for legal fees does not bar plaintiff's motion pursuant to CPLR 3213. Defendant sets forth no basis to challenge the interest awarded, which was consistent with the terms of the promissory note.

There was no merit to defendant's cross-motion to dismiss the action based on a prior action pending or on collateral estoppel or res judicata. The prior action was marked disposed in 2023 with entry of judgment against a different defendant—an entity which was the only defendant served in that action (*see Ember v Denizard*, 160 AD3d 537, 538-539 [1st Dept 2018]). Collateral estoppel and res judicata are thus inapplicable to bar this action, as jurisdiction was never obtained over defendant in the prior action. Defendant was never served nor did he appear in that action, and the claim asserted against him was never litigated on the merits (*see Landau, P.C. v LaRossa, Mitchell & Ross*, 11 NY3d 8, 13 [2008]).

We have considered defendant's remaining arguments and find them unavailing. Concur—Kennedy, J.P., Kapnick, Higgitt, Michael, Chan, JJ.

9 William McIntyre, Appellant, v FNY GP LLC et al., Respondents, et al., Defendants. [— NYS3d —]

Limited Liability Companies—Members and Managers—Operating Agreement—Non-Participation Provision

Order, Supreme Court, New York County (Verna L. Saunders, J.), entered on or about August 21, 2025, which denied plaintiff's motion for summary judgment on his claim for breach of contract and for dismissal of defendants' counterclaims, and granted defendants' cross-motion for summary judgment dismissing the complaint and on their counterclaim for breach of contract, and severed the counterclaim, unanimously affirmed, without costs.

The motion court properly found that section 9.04 (a) of the operating agreements, which were governed by Delaware law, anticipated a forfeiture of plaintiff's liquidating share (which largely consisted of his capital account) in the event he breached the "non-participation" provision contained in section 12.02 (d). Plaintiff claims that because section 12.02 (a) of the agreements expressly requires forfeiture of his "Membership Interest" if he fails to "devote substantially all of his . . . business time to the business of [defendants]" and adhere to relevant provisions of law and company policies, his violation of

the non-participation provision, which does not contain a forfeiture clause, cannot serve as a predicate to deprive him of his liquidating share. However, a contractual remedy will not be considered an exclusive remedy without express language to that effect in the agreements (*see Oliver B. Cannon & Son, Inc. v Dorr-Oliver, Inc.*, 336 A2d 211, 214 [Del 1975]).

Contrary to plaintiff's contention, section 12.02 (d) is a "forfeiture-for-competition" clause under Delaware law, not a restraint on trade against public policy (*see Cantor Fitzgerald, L.P. v Ainslie*, 312 A3d 674, 691 [Del 2024]). Indeed, especially where a plaintiff voluntarily resigned, as is the case here, there is no public policy concern related to the parties' freedom to contract (*see LKQ Corp. v Rutledge*, 337 A3d 1215, 1222 [Del 2024]). As such, the clause was enforceable without regard to the reasonableness of the non-participation restrictions.

Similarly unavailing is plaintiff's contention that the agreements violated the Delaware Limited Liability Company Act (Del Code Ann title 6, § 18-604). To the contrary, that section of the Act expressly allows parties to a limited liability company agreement to contract, as the parties did here, for situations that would result in a member not receiving a distribution. Nor is there any ambiguity in the agreements to be resolved here. Critically, plaintiff has identified no alternative, reasonable reading of the relevant provisions (*see AM Gen. Holdings LLC v Renco Group, Inc.*, 2020 WL 3484069, *4, 2020 Del Ch LEXIS 223, *8 [June 26, 2020, C.A. Nos. 7639-VCS, 7668-VCS]).

Turning to defendants' counterclaim for breach of the non-participation provision, the motion court properly denied plaintiff's motion for summary judgment dismissing that claim. Although the clause lacked a geographic limitation, it only prevented plaintiff from working at a competing firm that had hired an employee from defendants in the year prior. Given this restrictive covenant's limited scope, plaintiff failed to demonstrate that the lack of an express geographic limitation rendered the provision overall unreasonable and unenforceable (*see Delaware Express Shuttle, Inc. v Older*, 2002 WL 31458243, *13, 2002 Del Ch LEXIS 124, *51 [Oct. 23, 2002, No. Civ.A. 19596]; *Research & Trading Corp. v Pfuhl*, 1992 WL 345465, *12, 1992 Del Ch LEXIS 234, *32 [Nov. 18, 1992, Civ. A. No. 12527]; *see also Lyons Ins. Agency, Inc. v Wilson*, 2018 WL 4677606, *5-6, 2018 Del Ch LEXIS 317, *14-15 [Sept. 28, 2018, C.A. No. 2017-0092-SG]). Further, because defendants put forth sworn testimony as to their damages arising from plaintiff's purported breach, the motion court correctly determined that

issues of fact precluded a ruling that they could not seek damages. Finally, because the court dismissed plaintiff's complaint, the counterclaim was properly severed.

We have considered plaintiff's remaining arguments and find them unavailing. Concur—Kennedy, J.P., Kapnick, Higgitt, Michael, Chan, JJ.

10 Jairo Moreno-Santos et al., Appellants-Respondents, v Real Builders Inc. et al., Respondents-Appellants, and MLK Plaza LLC et al., Respondents, et al., Defendant. Real Builders Inc. et al., Third-Party Plaintiffs-Respondents-Appellants, v North South Masonry Inc., Third-Party Defendant-Respondent. [252 NYS3d 108]—

Labor—Safe Place to Work—Fall from Unsecured Ladder

Order, Supreme Court, Bronx County (Myna Socorro, J.), entered March 3, 2025, which, to the extent appealed from as limited by the briefs, denied plaintiffs' motion for summary judgment on liability on their Labor Law § 240 (1) claim, and denied the motion of defendants/third-party plaintiffs Real Builders Inc. and HP MLK Plaza Housing Development Fund Company Inc. (collectively, the owner defendants) for summary judgment dismissing plaintiffs' Labor Law §§ 240 (1); 241 (6) and 200 claims and for summary judgment on their contractual indemnification claim against third-party defendant North South Masonry Inc., unanimously modified, on the law, to grant plaintiffs' motion insofar as it sought summary judgment on liability on their Labor Law § 240 (1) claim and conditionally grant the owner defendants' motion for summary judgment on their contractual indemnification claim as against North South Masonry, and otherwise affirmed, without costs.

Plaintiffs established prima facie entitlement to summary judgment through the deposition testimony of the injured plaintiff, a mason employed by North South Masonry, that an unsecured ladder suddenly slipped out from under him while he was standing on it to finish work on a block wall (*see Tuzzolino v Consolidated Edison Co. of N.Y.*, 160 AD3d 568, 568 [1st Dept 2018]). The evidence also established that the ladder was only the upper part of an extension ladder that had been separated from its bottom part when plaintiff found it at the work site, and the owner defendants acknowledged that it was an inadequate safety device.

In opposition, the owner defendants failed to raise a triable issue of fact, as they offered no evidence to rebut plaintiff's testimony. We reject the owner defendants' sole proximate cause argument, as the evidence demonstrates that plaintiff's

injury resulted from a violation of Labor Law § 240 (1), and therefore, plaintiff cannot, as matter of law, be solely to blame for it (*see Saula v Harlem Urban Dev. Corp.*, 235 AD3d 478, 478 [1st Dept 2025]). To the extent the owner defendants raise a sole proximate cause defense, they offer no evidence to show that plaintiff deliberately disobeyed an instruction not to use the inadequate ladder, or an instruction to use an appropriate ladder available to him (*see Siguencia v City of New York*, 237 AD3d 554, 554-555 [1st Dept 2025]; *Vacca v Landau Indus.*, 5 AD3d 119, 120 [1st Dept 2004]). On the contrary, plaintiff testified that he requested a ladder from his foreman, but was told that he would have to find one himself, and since he did not have a key to the shanty that allegedly contained North South Masonry's ladders, he reluctantly used the partly dismantled extension ladder because there were no other ladders to be found on the job site.

Because plaintiffs are entitled to partial summary judgment on their Labor Law § 240 (1) claim, the owner defendants' arguments regarding plaintiffs' Labor Law § 241 (6) claim are academic (*see Saula*, 235 AD3d at 479).

The owner defendants did not establish prima facie entitlement to dismissal of the Labor Law § 200 and common-law negligence claims, as the defective ladder constituted a dangerous or defective condition existing on the job site and they did not offer evidence to show that they did not have actual or constructive notice of that condition (*see Jaycox v VNO Bruckner Plaza, LLC*, 146 AD3d 411, 412 [1st Dept 2017]). In addition, evidence that other trades used the unsafe ladder for weeks before plaintiff was injured raises triable issues as to whether the owner defendants had notice of the dangerous condition.

However, the owner defendants did establish their entitlement to conditional summary judgment on their contractual indemnification claim, as they submitted evidence showing that the indemnification provisions in their subcontract with North South Masonry were triggered. The provisions were broadly worded to provide for indemnification for any loss or liability arising in connection with the subcontractor's work. To the extent one of the provisions additionally required evidence that a loss or liability be caused by the subcontractor's negligent acts or omissions, the un rebutted facts here satisfy that condition (*see Cackett v Gladden Props., LLC*, 183 AD3d 419, 421-422 [1st Dept 2020]). However, because there are triable issues as to whether the owner defendants had actual or constructive notice of the hazardous condition that allegedly

existed on the premises for weeks before plaintiff's injury, they are entitled only to conditional indemnification.

North South Masonry argues, for the first time on appeal, that the alternative dispute resolution provisions in its subcontract with the owner require dismissal of the third-party complaint against it. However, North South Masonry has waived this defense, which it never asserted in its answer, by failing to raise it until now, more than six years after the commencement of the third-party action. Further, North South Masonry's participation in discovery, including by filing dispositive motions in this action, is inconsistent with an assertion of the right to arbitrate (*see Stark v Molod Spitz DeSantis & Stark, P.C.*, 9 NY3d 59, 66-67 [2007], citing *De Sapio v Kohlmeyer*, 35 NY2d 402, 405 [1974]). Concur—Kennedy, J.P., Kapnick, Higgitt, Michael, Chan, JJ.

11 The People of the State of New York, Respondent, v Charles Washington, Appellant. [252 NYS3d 106]—

Crimes—Sex Offenders—Sex Offender Registration Act—Downward Departure

Order, Supreme Court, Bronx County (Raymond L. Bruce, J.), entered on or about August 30, 2019, which adjudicated defendant a level two sexually violent offender pursuant to the Sex Offender Registration Act (Correction Law art 6-C), unanimously affirmed, without costs.

The court providently exercised its discretion in declining to grant a downward departure (*see People v Gillotti*, 23 NY3d 841, 861 [2014]). Although defendant presented evidence that he was legally blind, which was not accounted for by the risk assessment instrument, he presented no evidence that such impairment was linked to a reduced risk of recidivism (*cf. People v Sanchez*, 186 AD3d 880, 882-883 [2d Dept 2020]; *People v Davis*, 179 AD3d 183, 189 [2d Dept 2019]). Defendant's educational and vocational efforts in prison, and his contributions to the church, are commendable, but they do not present mitigating circumstances not already taken into account by the risk assessment instrument (*see People v Cabrera-Fernandez*, 242 AD3d 553 [1st Dept 2025]; *see People v Perez*, 226 AD3d 487, 487 [1st Dept 2024], *lv denied* 42 NY3d 905 [2024]). In any event, even if we were to consider the mitigating factors set forth by defendant, the totality of circumstances does not warrant a departure to level one. Defendant's criminal history includes a sex offense against a minor, whom he raped while threatening her with a weapon. "Even if defendant is less likely to reoffend, a downward departure is unwarranted due to the

magnitude of harm that would result if he did reoffend” (*People v Martinez*, 244 AD3d 423, 423 [1st Dept 2025] [internal quotation marks omitted]). Concur—Kennedy, J.P., Kapnick, Higgitt, Michael, Chan, JJ.

12 The People of the State of New York, Respondent, v Dasheim Greene, Appellant. [252 NYS3d 105]—

Crimes—Sex Offenders—Sex Offender Registration Act—Downward Departure

Order, Supreme Court, New York County (Curtis J. Farber, J.), entered on or about July 19, 2023, which adjudicated defendant a level two sex offender pursuant to the Sex Offender Registration Act (Correction Law art 6-C), unanimously affirmed, without costs.

The court’s assessment of 30 points under risk factor 3 was supported by clear and convincing evidence that the defendant victimized three young girls by sexually exploiting them for his own personal gain (*see* Sex Offender Registration Act: Risk Assessment Guidelines and Commentary at 10 [2006]; *see also* *People v Torres*, 220 AD3d 514 [1st Dept 2023], *lv denied* 41 NY3d 908 [2024]).

Defendant was also properly assessed points under risk factor 7 for his relationship with the victims “because the evidence clearly established that defendant at least promoted the relationship for the purpose of such victimization,” regardless of the circumstances under which they met (*People v Brunson*, 154 AD3d 499, 499 [1st Dept 2017], *lv denied* 30 NY3d 908 [2018]; *see also* *People v Cook*, 29 NY3d 121, 126 [2017]).

The SORA court providently exercised its discretion in declining to grant a downward departure, and defendant has set forth no basis for this Court to exercise its discretion to grant the departure (*see* *People v Gillotti*, 23 NY3d 841, 861 [2014]). The mitigating factors cited by defendant either were adequately taken into account by the risk assessment instrument or were outweighed by aggravating factors including the seriousness of his offenses. Concur—Kennedy, J.P., Kapnick, Higgitt, Michael, Chan, JJ.

13 The People of the State of New York, Respondent, v Rasheed Davis, Appellant. [252 NYS3d 115]—

Crimes—Unlawful Search and Seizure—Standing—Overnight Guest
Crimes—Unlawful Search and Seizure—Protective Sweep

Judgment, Supreme Court, New York County (Felicia Menin, J., at suppression hearing; Neil E. Ross, J., at plea and sentencing), rendered September 14, 2022, convicting defend-

ant, of attempted criminal possession of a weapon in the second degree, and sentencing him, as a second violent felony offender, to a term of five years, unanimously affirmed.

Defendant's suppression motion should not have been summarily denied based on lack of standing. Defendant claimed that he had standing based on his status as an "overnight guest" (see *Minnesota v Olson*, 495 US 91, 95-97 [1990]; *People v Ortiz*, 83 NY2d 840, 842-843 [1994]), and supported this claim with factual allegations that, if true, would establish standing. The court's view that these allegations were not credible and that the most reasonable inference was that defendant was a "casual visitor" (see *Ortiz*, 83 NY2d at 843) had no bearing on whether defendant established a material factual dispute regarding standing because defendant's "sworn allegations of fact . . . support[ed] the ground alleged," i.e., that he was an overnight guest (see CPL 710.60 [3] [b]).

However, the court properly denied the motion on the merits because the record established that a "protective sweep" of the apartment was justified after officers had arrested defendant, and soon after arrested codefendant, at the door to the apartment (see *Maryland v Buie*, 494 US 325, 334 [1990]; *People v Bryant*, 91 AD3d 558, 558 [1st Dept 2012], *lv denied* 20 NY3d 1009 [2013]). Thus, the police properly conducted a limited protective sweep of the apartment to determine if there was anyone present who might destroy evidence or pose a threat to the officers (see *Bryant*, 91 AD3d at 558, citing *Maryland v Buie*, 494 US at 334). Concur—Kennedy, J.P., Kapnick, Higgitt, Michael, Chan, JJ.

14 The People of the State of New York, Respondent, v Michelle Merritt, Appellant. [252 NYS3d 107]—An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Ann Scherzer, J.), rendered December 19, 2023, said appeal having been argued by counsel for the respective parties, due deliberation having been had thereon, and finding the sentence not excessive, it is unanimously ordered that the judgment so appealed from be and the same is hereby affirmed. Concur—Kennedy, J.P., Kapnick, Higgitt, Michael, Chan, JJ.

15 State of New York ex rel. Phone Administrative Services, Inc., Appellant, v Verizon New York, Inc., et al., Respondents. [252 NYS3d 118]—

State—False Claims Act—Undercollection and Underremission of E911 Surcharges—Scienter
 State—False Claims Act—False Record or Statement

Order, Supreme Court, New York County (Melissa A. Crane, J.), entered on or about January 22, 2025, which granted defendants Citizens Telecommunications Company of New York, Inc., Frontier Communications of Ausable Valley, Inc., Frontier Communications of New York, Inc., Frontier Communications of Rochester, Inc., Frontier Communications of Seneca Gorham, Inc., Frontier Communications of Sylvan Lake, Inc., Frontier Telephone of Rochester, Inc., and Ogden Telephone Company's motion for summary judgment (mot seq 34) dismissing the sixth amended complaint as against these defendants, unanimously affirmed, without costs. Order, same court and Justice, entered on or about January 22, 2025, which granted the motion of defendants Verizon of New York, Inc., Verizon Communications Inc., XO New York, Inc. doing business as XO Communications (New York), XO Communications Services, LLC, MCImetro Access Transmission Services LLC, and MCI Communications Services LLC (collectively Verizon) for summary judgment dismissing the sixth amended complaint as against these defendants (mot seq 35); denied plaintiff's motion for summary judgment on its claim that certain defendants (the access line defendants) violated State Finance Law § 189 (1) (h) (mot seq 44); and denied plaintiff's motion for summary judgment on its claim that certain defendants violated State Finance Law § 189 (1) (g) (mot seq 45), unanimously affirmed, without costs. Order, same court and Justice, entered on or about January 22, 2025, which granted defendants CenturyLink Communications, LLC and Level 3 Communications, LLC's motion for summary judgment dismissing the sixth amended complaint as against them (mot seq 36), unanimously affirmed, without costs. Order, same court and Justice, entered on or about January 22, 2025, which granted defendant YMax Communications Corp.'s motion for summary judgment dismissing the sixth amended complaint as against it (mot seq 37), unanimously affirmed, without costs. Order, same court and Justice, entered on or about January 22, 2025, which granted defendants' AT&T Communications of New York, Inc., AT&T Corp., and TC Systems's motion for summary judgment dismissing the sixth amended complaint as against them (mot seq 38), unanimously affirmed, without costs. Order, same court and Justice, entered on or about January 21, 2025, which granted defendant KPMG, LLP's motion for summary judgment dismissing the sixth amended complaint as against it (mot seq 39), unanimously affirmed, without costs. Order, same court and Justice, entered on or about January 22, 2025, which granted defendant Metropolitan Telecommunications Holding Company LLC's motion for summary judgment dismissing the

sixth amended complaint as against it (mot seq 40), unanimously affirmed, without costs. Order, same court and Justice, entered on or about January 22, 2025, which granted defendants Altice USA, Inc., CSC Holdings, LLC, Cablevision Lightpath, LLC and NY OV, LLC's motion for summary judgment dismissing the sixth amended complaint as against them (mot seq 42), unanimously affirmed, without costs. Order, same court and Justice, entered on or about January 22, 2025, which granted defendant Bandwidth Inc.'s motion for summary judgment dismissing the sixth amended complaint as against it (mot seq 43), unanimously affirmed, without costs.

Plaintiff brings this *qui tam* action under the New York False Claims Act (the NYFCA), codified at State Finance Law §§ 187-194. In the pleadings, plaintiff alleges that the defendant telecommunications carriers systematically undercollected and underremitted surcharges (the E911 surcharges) intended to fund the enhanced 911 emergency system under New York's Enhanced Emergency Telephone System Surcharge Law (codified at County Law §§ 300-308) (the E911 Law), in violation of State Finance Law § 189 (1) (h) (the shortfall claims). Plaintiff further alleges that defendants, along with their accounting firm KPMG, inaccurately reported the E911 surcharges in remittance forms periodically submitted to local governments, in violation of State Finance Law § 189 (1) (g) (the remittance form claims).

Supreme Court correctly dismissed the shortfall claims, as plaintiff did not establish the elements necessary to sustain a claim under the NYFCA. In the shortfall claims, plaintiff contends that the access line defendants applied an incorrect definition of "access lines," incorporating a concurrent call limitation—that is, limiting the definition of "access lines" to the number of distinct telephone numbers that were able to place calls simultaneously rather than defining it to include all unique phone numbers, regardless of how many are capable of making simultaneous calls. Plaintiffs maintain that this incorrect definition resulted in undercounting the number of E911 Surcharges charged to their customers (*see* County Law §§ 303 [1]; 304 [1]). However, the E911 Law is ambiguous with respect to the meaning of "access lines," and the evidence the parties offered on the issue does not fully resolve the ambiguity. In addition, the access line defendants' interpretation of the term, whether or not correct, was not unreasonable. As a result, even if the access line defendants misinterpreted and misapplied the E911 Law, they did not possess the requisite *scienter* required to find a violation of the NYFCA (*see* State Finance

Law §§ 188 [3]; 189 [1] [h]; *People v Sprint Nextel Corp.*, 26 NY3d 98, 113 [2015], *cert denied* 578 US 1012 [2016]).

Plaintiff's assertions that defendants Verizon, YMax, and Metropolitan Telecommunications Holding Company also undercharged E911 surcharges to their customers in other ways apart from the definition of "access lines" are not supported by the record.

Moreover, Supreme Court correctly dismissed the remittance form claims. The failure to report the names of nonpaying customers, which were not specifically called for by any form (although generally required by County Law § 306 [2]) does not constitute a "false record or statement" (*see* State Finance Law § 189 [1] [g]). Even if falsity and scienter are established with respect to the remaining statements, defendants established as a matter of law that those statements were not "material to an obligation to pay or transmit money or property to the state or a local government" (*see* State Finance Law §§ 189 [1] [g]; 188 [5]; *Universal Health Services, Inc. v United States ex rel. Escobar*, 579 US 176, 193-194 [2016]; *People ex rel. Hunter v Starbucks Corp.*, 60 Misc 3d 204, 212 [Sup Ct, NY County 2018]). Plaintiff does not dispute that the effect of rounding certain numbers on remittance forms was de minimis, or that the reporting of zero uncollectible surcharges and exempt access lines did not deprive the counties of any money. Rather, plaintiff contends that the false statements were material insofar as they disguised defendants' undercounting of access lines and thereby prevented the counties from taking corrective action. But even if defendants had clearly and accurately reported the number of access lines they counted, as well as the number of exempt access lines and any uncollectible surcharges, their doing so would not have revealed the underlying methodology they employed to count access lines and therefore would not reveal the undercounting.

In view of our disposition of these issues, we need not reach the parties' arguments with respect to State Finance Law § 189 (4) (a) and whether certain defendants are "service suppliers" within the meaning of the E911 Law.

We have considered plaintiff's remaining contentions and find them unavailing. Concur—Kennedy, J.P., Kapnick, Higgitt, Michael, Chan, JJ.

16 Silvio Scaglia, Appellant, v Julia Haart, Also Known as Julia Hendler, Respondent. [252 NYS3d 112]—

Husband and Wife and Other Domestic Relationships—Divorce—Striking of Pleadings—Repeated Violations of Court Orders

Appeal—Matters Appealable—Default Judgment

Order, Supreme Court, New York County (Jeffrey H. Pearlman, J.), entered January 17, 2025, which struck plaintiff husband's verified complaint for divorce, awarded defendant wife a default judgment of divorce on her verified answer and counterclaims pursuant to 22 NYCRR 202.27 and CPLR 3126, and awarded the wife \$7.4 million in unpaid management fees of the parties' holding company, Freedom Holding, Inc. (FHI), from 2019 through 2021; a 50% interest in FHI and any of its subsidiaries as of the date of commencement of the action, and of Elite World Group and SW Vestry, LLC; 50% of the proceeds of the sale of a Van Dongen painting owned by FHI; power of attorney to oversee implementation of all orders of the court, including necessary transactions to effectuate her 50% ownership interest in the entities; power of attorney to appear and intervene in the action against SW Vestry to foreclose on a mortgage on the marital residence; and half of the withdrawals made by the husband from the company since the inception of the action which constitute dissipation of the marital property and 90% of legal fees, amounts to be determined after inquest, unanimously modified, on the law, to remand the matter for a determination of the factors considered and reasons for the court's decision with respect to the award to the wife of management fees, ownership of 50% of FHI, and 50% of the proceeds of the sale of the Van Dongen painting, and to the extent the wife has received management fees and proceeds from the sale of the painting, direct the wife to place the amounts in escrow pending issuance of the order of fact-finding in connection with the final judgment of divorce, and otherwise affirmed, without costs.

The court providently exercised its discretion in striking the husband's pleadings, finding him in default, and awarding the wife a judgment of divorce on her counterclaims (*see Berk v Berk*, 5 AD3d 165, 166 [1st Dept 2004]; *Hwang v Tam*, 72 AD3d 741, 742 [2d Dept 2010]). The record establishes the husband's repeated violations of the court's orders, including his failure or refusal to provide ordered discovery, court-ordered counsel fees, forensic expert and special masters fees, and his failure to attend conferences.

While no appeal generally lies from orders entered on default (CPLR 5511), "that provision does not apply where . . . a party appears and contests a motion for leave to enter a default judgment" (*Cole-Hatchard v Eggers*, 132 AD3d 718, 719 [2d Dept 2015]; *see Ganz v Florman*, 213 AD3d 434, 435 [1st Dept 2023]). Here, the husband filed an affidavit in opposition to the motion

and his counsel filed an affirmation in opposition (albeit one day late). Counsel also appeared and argued in opposition to the motion on December 16, 2024, and on the related motion on January 17, 2025. Accordingly, CPLR 5511 is inapplicable (see *Levine v Singal*, 172 AD3d 402, 403 [1st Dept 2019]).

Domestic Relations Law § 236 (B) (5) (g) provides that disposition of property in a matrimonial action requires a court to set forth the factors it considered and the reasons for its decision and may not be waived by the parties or counsel (see e.g. *Capasso v Capasso*, 119 AD2d 268, 275 [1st Dept 1986]). Written findings of fact are required for the entry of a divorce judgment on default (CPLR 3215 [b]), to assure a proper evidentiary basis for awards of equitable distribution (see *Otto v Otto*, 150 AD2d 57, 61 [2d Dept 1989]).

Here, the court awarded the wife a 50% ownership interest in FHI, as well as 50% of the proceeds of the sale of the Van Dongen painting, and \$7.4 million in management fees earned from 2019 through 2021, but failed to provide the factual underpinnings for its determination or the reasons for its decision in the order. Accordingly, determination of the underlying findings of fact with respect to ownership of FHI and the proceeds of the Van Dongen painting is required. While a search of the record provides at least some basis for those awards, it lacks the calculation or basis for the award to the wife of \$7.4 million in management fees, which should be addressed at inquest. In the interim, any amounts paid to the wife for the painting and the management fees should be placed in escrow pending the court's written determination and reasons for its disposition (see *Roberson-Fisch v Fisch*, 236 AD3d 554, 555-556 [1st Dept 2025], *lv dismissed* 44 NY3d 1075 [2026]).

Pending the court's determination, the powers of attorney will remain in place. Concur—Kennedy, J.P., Kapnick, Higgitt, Michael, Chan, JJ.

17 Randolph W. Slifka et al., Appellants, v Paul, Weiss, Rifkind, Wharton & Garrison, LLP, et al., Respondents, et al., Defendants. [252 NYS3d 110]—

Attorney and Client—Conflicts of Interest—Division of Proceeds from Sale of Property

Order, Supreme Court, New York (Melissa A. Crane, J.), entered August 13, 2024, which granted the motion of defendants Paul, Weiss, Rifkind, Wharton & Garrison LLP and Peter E. Fisch to dismiss the complaint, unanimously affirmed, without costs.

This derivative action is brought by plaintiffs Randolph W. Slifka and David Dove (as trustees of and on behalf of a trust created under the will of Alan B. Slifka), on behalf of nominal defendants 477 Madave Associates and 477 Madave Holdings LLC. Plaintiffs assert that defendants Paul Weiss and Paul Weiss partner Peter E. Fisch engaged in misconduct in connection with a division of the proceeds from the sale of a Manhattan office building, located at 477 Madison Avenue, between the owners of its separate fee and leasehold interests. The two interests, the fee and leasehold together, ultimately sold for \$258.25 million. According to plaintiffs, defendants simultaneously represented entities on both sides of the transaction without any attempt to obtain a conflict waiver, thus engaging in professional malpractice. Plaintiffs further allege that instead of using a fair and unbiased allocation procedure, defendants deliberately favored the leasehold interest and blocked the fee interest from participating in the process. Plaintiffs assert causes of action for professional malpractice, breach of fiduciary duty, aiding and abetting breach of fiduciary duty, unjust enrichment, and common-law fraud.

Initially, we note that the releases given by the nominal defendants in favor of defendants are invalid. Plaintiffs sufficiently alleged that defendants violated the New York Rules of Professional Conduct by failing to obtain a release of claims from the nominal defendants, failing to give notice about their conflict of interest, and failing to counsel nonparty Barbara Slifka, who had exclusive control over entities on both sides of the transaction, to seek independent counsel (*see* Rules of Prof Conduct [22 NYCRR 1200.0] rules 1.4 [b]; 1.8 [h] [2]; *Swift v Ki Young Choe*, 242 AD2d 188, 192-193 [1st Dept 1998]). Additionally, plaintiffs pleaded sufficient allegations to support their contention that the releases were invalid because Barbara was not competent to enter into those releases (*see Gormley v Marist Bros. of the Schs., Province of the United States of Am.*, 236 AD3d 868, 869-872 [2d Dept 2025]). According to the allegations in the complaint, Barbara Slifka was 91 years old when she signed the relevant agreements and conceded more than once that she did not understand aspects of the transaction or the allocation of the sale proceeds. Under the relevant standard, this evidence is sufficient at the motion to dismiss stage to constitute evidence of Barbara's incompetence (*see Fleming v Ponziani*, 24 NY2d 105, 111 [1969]).

Nevertheless, Supreme Court properly dismissed the complaint. The settlement agreements, including the indemnification provisions in those agreements, among certain of the

parties with interests in the property are valid as to nonparties David Slifka and Michael Slifka (both of whom also held interests in nominal defendants through their trusts) and the entities they control. Both David and Michael were represented by independent counsel in connection with those settlement agreements. Accordingly, there is no conflict or self-dealing by defendants with respect to that representation.

Moreover, the indemnification provisions of the settlement agreements are triggered by this action and cover plaintiffs' claims. The indemnification provisions apply to any action on a "Released Claim," and, according to the agreement, Released Claims expressly include "derivative actions." It is therefore "clearly implied" from the agreement that this action is covered in the indemnification provisions (*see Shah v 20 E. 64th St. LLC*, 230 AD3d 405, 410 [1st Dept 2024]). In addition, contrary to plaintiffs' contentions, the indemnity clauses are triggered because this action is maintained on behalf of the beneficial owners as well as the nominal defendants.

As a result, as Supreme Court properly found, plaintiffs cannot "fairly and adequately" represent the nominal defendants and their other owners, given the totality of the relationship (*see Gilbert v Kalikow*, 272 AD2d 63, 63 [1st Dept 2000], *lv denied* 95 NY2d 761 [2000]; *see also James v Bernhard*, 106 AD3d 435, 435 [1st Dept 2013]; *Steinberg v Steinberg*, 106 Misc 2d 720, 721-722 [Sup Ct, NY County 1980]). The interests of the plaintiffs conflict with those of the nominal defendants and their other owners, as the action would undo the settlements reached by those owners and would trigger financial risk through the indemnification clauses (*see James*, 106 AD3d at 435). Moreover, because plaintiffs have already been made whole in a prior arbitration, it is unclear whether their financial motives now align with the other owners (*see Jakob v Gershwin Partners, Inc.*, 2011 NY Slip Op 33873[U], *4 [Sup Ct, NY County 2011]).

In light of our determination, we need not consider plaintiffs' further contentions. Concur—Webber, J.P., Gesmer, Higgitt, Michael, Chan, JJ.

18 Jose Elmer Tineo, Respondent, v Timothy R. Bogart et al., Appellants, et al., Defendant. [252 NYS3d 115]—

Trial—Place of Trial—Action Involving Public Authority

Order, Supreme Court, Bronx County (Patsy Gouldborne, J.), entered on December 23, 2024, which, to the extent appealed from, denied defendants' motion pursuant to CPLR 505 (a) to change venue from Bronx to New York County, unanimously reversed, on the law, without costs, and the motion granted.

In an action against a public authority, venue “shall be in the county in which the authority has its principal office or where it has facilities involved in the action” (CPLR 505 [a]; *see Gumbs v MTA Bus Co.*, 193 AD3d 617, 617 [1st Dept 2021]; *Emerick v Metropolitan Transp. Auth.*, 272 AD2d 150, 150 [1st Dept 2000]). Defendant MTA Bus Company’s principal office is located in New York County. Plaintiff failed to preserve his argument that MTA Bus Company’s Bronx facilities were involved in the action. Even were we to consider the argument, we would find that it is unavailing, since the accident arose out of alleged operational negligence, not improper maintenance in a facility (*see Gumbs*, 193 AD3d at 617-618).

To the extent the Supreme Court relied on CPLR 505 (b), that subsection applies only to the New York City Transit Authority, which, although a subsidiary of the MTA, is legally distinct from defendant MTA Bus Company (*see Public Authorities Law* § 1266 [5]; *Schulz v State of New York*, 84 NY2d 231, 237 n 1 [1994]; *Emerick*, 272 AD2d at 150; *Noonan v Long Is. R.R.*, 158 AD2d 392, 393 [1st Dept 1990]). Concur—Kennedy, J.P., Kapnick, Higgitt, Michael, Chan, JJ.

19 Armindo Veloso et al., Appellants, v City of New York et al., Respondents. [252 NYS3d 116]—

Labor—Safe Place to Work—Elevation-Related Hazard—Injury from Falling Rock during Excavation

Labor—Safe Place to Work—Industrial Code Violation—Trench and Area Type Excavations—Shoring

Order, Supreme Court, New York County (Paul A. Goetz, J.), entered November 6, 2024, which granted defendants’ motion for summary judgment dismissing plaintiffs’ claims for negligence and violations of Labor Law §§ 200, 240 (1) and 241 (6), and denied plaintiffs’ cross-motion for partial summary judgment on the Labor Law §§ 240 (1) and 241 (6) claims, unanimously affirmed, without costs.

Plaintiff was injured when he was hit by a rock while working in a trench. At the time of the injury, he was working on the excavation of the trench, in which utility lines were to be placed, and on shoring the sides of the trench.

Supreme Court properly granted summary judgment to defendants on the negligence and Labor Law § 200 claims. Plaintiff failed to submit any argument before Supreme Court in opposition to this branch of defendants’ motion, and, in any event, his arguments on appeal fail to identify a triable issue (*see e.g. FPG Maiden Lane, LLC v Bank Leumi USA*, 237 AD3d 425, 426 [1st Dept 2025]). The record demonstrates that none

of the defendants exercised direction or control of the injury producing work performed by plaintiff and his employer in connection with the excavation and shoring of the trench (*see Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 505 [1993]; *Lombardi v Stout*, 80 NY2d 290, 295 [1992]). “General supervisory authority at a work site, the right to stop a contractor’s work if a safety violation is observed, or the authority to ensure compliance with safety regulations or the terms of a contract is insufficient to impose liability” (*Messina v City of New York*, 147 AD3d 748, 749 [2d Dept 2017]; *see Palumbo v Citigroup Tech., Inc.*, 240 AD3d 455, 457 [1st Dept 2025]). Additionally, the record demonstrates that defendants did not create or have actual or constructive notice of the dangerous condition (*see Blake v Brookfield Props. One WFC Co., LLC*, 180 AD3d 422, 423 [1st Dept 2020], *lv dismissed & denied* 35 NY3d 1059 [2020]).

Supreme Court properly granted defendants summary judgment on the Labor Law § 240 (1) claim. Notwithstanding the fact that the collapse or cave-in of the side of a trench may evince a failure to provide adequate protection against “the risk arising from the physically significant elevation differential” (*Rivas v Seward Park Hous. Corp.*, 219 AD3d 59, 64 [1st Dept 2023]), the injury in this case was not caused by such a risk. Unlike in *Rivas*, where the shoring on the side of a trench caved in, here the rock that rolled over plaintiff’s ankle came from “the particular wall of the trench” that was actively being excavated (*Rivas*, 219 AD3d at 65). Because plaintiff testified that he was instructed at the beginning of his shift to “move the trench forward,” securing the front wall of the trench in the very direction that work was progressing “would have been contrary to the objectives of the work plan” (*see Salazar v Novalox Contr. Corp.*, 18 NY3d 134, 140 [2011]).

Supreme Court also properly dismissed plaintiff’s Labor Law § 241 (6) claim. “[L]iability under the statute requires proof that a particular, nongeneral rule promulgated” by the Industrial Code has been violated (*Griffin v Clinton Green S., LLC*, 98 AD3d 41, 49 [1st Dept 2012]). Industrial Code (12 NYCRR) §§ 23-4.1 (b) and 23-4.2 (k) are not sufficiently specific for liability to attach (*see Reyes v Astoria 31st St. Devs., LLC*, 190 AD3d 872, 875 [2d Dept 2021] [12 NYCRR 23-4.1 (b)]; *Willis v Plaza Constr. Corp.*, 151 AD3d 568, 568 [1st Dept 2017] [12 NYCRR 23-4.2 (k)]).

Industrial Code § 23-4.2 (b) does not apply, as there were no sides or banks sloped back from the trench. To the extent plaintiff testified that the front side of the trench was sloped, this was the side that plaintiff’s employer was extending.

The record demonstrates that Industrial Code §§ 23-4.2 (a) and 23-4.4 (a) were not violated. Plaintiff's employer had installed shoring along the sides of the trench, his employer's witness testified to having personally inspected the shoring at the start of plaintiff's shift, plaintiff himself was actively engaged in the installation of shoring at the time, the shoring was in contact with the sides or banks of the trench and did not give way or collapse, and, as noted above, the front of the trench was actively being expanded.

We have considered plaintiffs' remaining contentions and find them unavailing. Concur—Kennedy, J.P., Kapnick, Higgett, Michael, Chan, JJ.

(April 14, 2026)

1 Luis Amancha, Respondent-Appellant, v 720-730 Fort Washington Avenue Owners Corp. et al., Appellants-Respondents, et al., Defendants-Respondents. 720-730 Fort Washington Avenue Owners Corp., Third-Party Plaintiff-Appellant-Respondent, v TRB No. 1 Corp. et al., Third-Party Defendants-Respondents. [252 NYS3d 142]—

**Labor—Safe Place to Work—Fall from Ladder—Securing of Ladder
Labor—Safe Place to Work—Examination of Equipment at Issue
Indemnity—Contractual Indemnification—Party to Agreement**

Order, Supreme Court, New York County (James G. Clynes, J.), entered on or about March 6, 2025, which, to the extent appealed from as limited by the briefs, denied plaintiff's motion for summary judgment on liability on his Labor Law § 240 (1) claim and denied the motion of 720-730 Fort Washington Avenue Owners Corp. (720-730 Fort Washington) and Gumley-Haft LLC (together, 720/Gumley) for summary judgment on their cross-claims for contractual indemnification and breach of contract as against third-party defendants TRB No. 1 Corp. and for dismissal of TRB's cross-claim for contractual and common-law indemnification, unanimously modified, on the law, to the extent of granting plaintiff's motion for summary judgment on liability on his Labor Law § 240 (1) claim and granting 720/Gumley's motion for summary judgment insofar as it sought dismissal of TRB's cross-claim for contractual and common-law indemnification, and otherwise affirmed, without costs.

Supreme Court should have granted plaintiff's motion for summary judgment on the issue of liability on his Labor Law § 240 (1) claim. Plaintiff, a laborer working on a renovation

project, established prima facie entitlement to summary judgment through his testimony that as he was working atop an unsecured A-frame ladder, it suddenly moved and caused him to fall. The evidence that the ladder was unsecured, and that it shifted and moved for no apparent reason, raises the presumption that it was insufficient to give proper protection under the statute (see *Wasilewski v Museum of Modern Art*, 260 AD2d 271, 271 [1st Dept 1999]). Plaintiff's testimony that he heard the ladder's brackets click into place, indicating that the ladder was "secured," does not change this determination, as the relevant issue is whether the ladder was secured to something stable or held in place so that it remained steady and upright while being used (*id.* ["that the ladder may have had a brace in the middle to keep it open is immaterial"])).

In opposition, defendants failed to raise a triable issue of fact. Although defendants' expert, a professional engineer, stated that she examined the ladder, she did not perform that examination until two years after the accident, and in any event, the evidence does not establish that the ladder that the expert inspected was actually the same ladder from which plaintiff fell. Furthermore, the expert's affidavit, in which she averred that if the ladder tipped over it did so because plaintiff applied a lateral force to it, was conclusory and speculative, as it cites no evidence in the record to support her theory (see *Suazo v 501 Madison-Sutton LLC*, 235 AD3d 513, 513 [1st Dept 2025]; see *Merino v Continental Towers Condominium*, 159 AD3d 471, 473 [1st Dept 2018]).

Supreme Court correctly denied so much of 720/Gumley's motion as sought summary judgment on their cross-claim for contractual indemnification against TRB. The relevant alteration agreement, which governs the renovation work in the building and contains an indemnification clause, was entered into between "TRB" and "Fort Washington Avenue Owners Corporation." However, the record does not make clear whether "Fort Washington Avenue Owners Corporation" refers to defendant 720-730 Fort Washington. The text of the alteration agreement therefore raises issues of fact as to whether 720-730 Fort Washington is actually a party to the agreement (see *Matter of 195 B Owner LLC v Anthropologie, Inc.*, 228 AD3d 418, 419 [1st Dept 2024]).

Similarly, the court correctly denied so much of 720/Gumley's motion as sought summary judgment on liability on their cross-claim for breach of contract as against TRB No. 1. As noted, it is unclear whether 720-730 Fort Washington was a party to the alteration agreement, and as a result, it cannot be

determined as a matter of law that TRB No. 1 breached any obligations toward 720-730 Fort Washington.

However, Supreme Court should have granted 720/Gumley's motion for summary judgment dismissing TRB No. 1's cross-claim against it for contractual and common-law indemnification, as plaintiff no longer asserts any Labor Law § 200 or common-law negligence claims, including against 720-730 Fort Washington. Moreover, TRB No. 1 has failed to point to any contractual provision that would require 720-730 Fort Washington to indemnify it.

We have considered the parties' remaining contentions and find them unpreserved or unavailing. Concur—Moulton, J.P., Friedman, González, Shulman, Rosado, JJ.

2 In the Matter of T.B.G., a Child Alleged to be Neglected. T.M., Appellant; Administration for Children's Services, Respondent. [252 NYS3d 128]—

Parent, Child and Family—Abused or Neglected Child—Corroboration of Child's Out-of-Court Statement—Excessive Corporal Punishment

Evidence—Hospital Records—Relevance to Diagnosis, Treatment, and Discharge Plan

Parent, Child and Family—Abused or Neglected Child—Physical Attack on Child

Order of fact-finding, Family Court, New York County (Yael T. Wilkofsky, J.), entered on or about November 26, 2024, which, after a hearing, determined that respondent mother neglected the subject child, unanimously affirmed, without costs.

A preponderance of the evidence supports Family Court's determination that the mother neglected the child by inflicting excessive corporal punishment on her, even though the subject punishment occurred during a single event (*see* Family Ct Act §§ 1012 [f] [i] [B]; 1046 [b] [i]; *Matter of Empress B. [Henrietta L.]*, 204 AD3d 562, 563 [1st Dept 2022]; *Matter of Cevon W. [Talisha W.]*, 110 AD3d 542, 542 [1st Dept 2013]). Family Court properly credited the child's out-of-court statements about an incident that occurred when the mother came to pick her up at school. The child refused to go with her mother because she was supposed to be residing with her father. The mother became aggressive with the child and school staff, screaming at the child, grabbing and yanking her, bending her fingers backwards, and throwing water, school chairs, and other objects, at the child. Although the child's repetition of the foregoing is not by itself sufficient corroboration, her consistent statements to more than one person sufficiently "enhance[d] the credibility of these statements" (*Matter of Emily S. [Jorge S.]*, 146 AD3d 599, 600 [1st Dept 2017]).

Family Court properly admitted the child's hospital records into evidence without striking the statements of the child's school counselor and assistant principal, as those statements were relevant to the child's diagnosis, treatment, and discharge plan (see CPLR 4518 [a]; *People v Ortega*, 15 NY3d 610, 617 [2010]; *Matter of S.A. [S.F.]*, 235 AD3d 523, 524 [1st Dept 2025]). There is no basis to disturb the court's conclusion that the child's account was sufficiently corroborated by those statements and the testimony of a child protective specialist (see *Matter of A.P. [M.P.]*, 183 AD3d 535, 536 [1st Dept 2020]). The court properly drew a negative inference from the mother's failure to appear and testify (see *Matter of B.C. [Bernadette C.]*, 215 AD3d 584, 585 [1st Dept 2023]).

There is no evidence that the mother's physical attack on the child was in any way a justified or reasonable form of discipline (see *Matter of Isaiah D.S. [Jamal K.S.]*, 237 AD3d 627 [1st Dept 2025]). Further, the fact that the child was not physically injured does not preclude a finding of neglect (see *Matter of Joseph C. [Anthony C.]*, 88 AD3d 478, 479 [1st Dept 2011]). In any event, it was sufficient that her emotional well-being was at imminent risk of impairment due to the mother's actions (see *Matter of Kaylee S. [Kyle L.S.]*, 214 AD3d 423, 423 [1st Dept 2023]). The record reflects that the child became distressed and cried during the incident, and she repeatedly stated that she did not wish to reside with the mother because she did not feel safe (see *Matter of Robann H. [Autumn P.]*, 221 AD3d 502, 503 [1st Dept 2023]; *Matter of Nia J. [Janet Jordan P.]*, 107 AD3d 566, 567 [1st Dept 2013]). Concur—Moulton, J.P., Friedman, González, Shulman, Rosado, JJ.

3 In the Matter of N.G., and Another, Children Alleged to be Neglected, Nonparty Appellants. Angelica T., Respondent; Administration for Children's Services, Appellant. [252 NYS3d 135]—

Parent, Child and Family—Abused or Neglected Child—Suspended Judgment—Finding of Neglect

Parent, Child and Family—Abused or Neglected Child—Testimony of Parent—Acknowledgment or Demonstration of Remorse

Parent, Child and Family—Abused or Neglected Child—Best Interests of Child

Amended order of disposition, Family Court, Bronx County (Angel Cruz, J.), entered on or about September 23, 2025, which granted respondent mother a six-month suspended judgment, with automatic vacatur contingent upon her full compliance, unanimously reversed, on the law, without costs, the suspended judgment vacated, new dispositional orders entered continuing the subject child N.G.'s release to his father, releas-

ing the subject child D.J. to respondent mother, and placing the mother under the Administration for Children's Services' supervision under both dispositional orders pursuant to Family Court Act § 1057, with the same conditions set forth in the amended order of disposition. Order of dismissal of the adjudication of neglect against the mother, same court and Judge, entered on or about March 4, 2026, unanimously vacated, without costs, the adjudication of neglect restored, and the appeal from the March 4, 2026, order dismissed as moot. The matter is remitted to the Family Court for further proceedings in accordance with this order.

In February 2025, ACS filed petitions alleging that the mother neglected the subject child N.G. and derivatively neglected the subject child D.J. The petitions were based, *inter alia*, on incidents in which the mother allegedly punched and slapped N.G. in the face, pushed him against a table, struck him in the back with an iPhone cable, and hit him with a folded belt, with the metal buckle exposed, causing bruising beneath his right eye. Her actions caused the child to feel unsafe around his mother and to be unwilling to return to her home. N.G. has resided with the non-respondent father since mid-February 2025.

On July 24, 2025, the mother consented to the entry of a finding of neglect and admitted to all of the allegations in the petition pursuant to Family Court Act § 1051 (a). As of June 4, 2025, the mother was permitted agency- or approved resource-supervised visits at ACS's discretion. Despite this, no visits had taken place as of July 24. Two weeks later, on the motion of ACS, Family Court issued an order further restricting visits to agency-supervised only based on allegations that the mother had discussed the case with the child and that the approved supervisor was not present, in violation of the court's earlier orders.

On September 4, 2025, Family Court held a dispositional hearing and issued a decision on September 23, 2025. Over the objections of ACS and the children's attorney, Family Court granted the mother a suspended judgment, and provided that the petitions would be dismissed on March 3, 2026, contingent on the mother's compliance with ACS supervision until that date.

On or about March 4, 2026, before the appeal of the suspended judgment order had been heard by this Court, Family Court *sua sponte* vacated the neglect petition against the mother pursuant to the terms of the suspended judgment order. ACS filed a notice of appeal from this order.

On March 12, 2026, the mother moved to dismiss both appeals as moot, in view of Family Court's vacatur of the neglect finding, and ACS moved to consolidate the appeals and decide both appeals on the existing briefing. For reasons discussed below, we grant the mother's motion to the extent of dismissing the appeal from the March 4, 2026, order and otherwise deny her motion; and we grant ACS's motion to consolidate the appeals and now decide them both.

The court abused its discretion in granting the mother a suspended judgment. A court should not vacate a neglect finding except upon a determination that doing so serves the child's best interests, including "consideration of a parent's ability to supervise a child and eliminate any threat of future abuse or neglect" (*Matter of Tsoede L. [Kinisha B.]*, 198 AD3d 509, 510 [1st Dept 2021]). "[A]t its core, a suspended judgment affords a respondent the opportunity to correct his or her neglectful actions" (*Matter of Leenasia C. [Lamarriea C.]*, 154 AD3d 1, 10 [1st Dept 2017]). Courts considering whether to grant a suspended judgment should examine four factors: "(1) [the] respondent's prior child protective history; (2) the seriousness of [respondent's] offense; (3) respondent's remorse and acknowledgment of the abusive [or] neglectful nature of his or her act; and (4) respondent's amenability to correction, including compliance with court[] order[s]" (*id.* at 12 [internal quotation marks omitted]).

Here, Family Court failed to consider the second, third and fourth factors adequately. The trial court addressed the first factor by noting that the mother had no prior involvement with the child welfare system. As to the second factor, although the mother admitted inflicting excessive corporal punishment on N.G. on more than one occasion and causing him injury, Family court's decision does not acknowledge the seriousness of the mother's conduct.

Family Court found portions of the mother's testimony to be "evasive and inconsistent." Nevertheless, the court found that she expressed sufficient remorse and acknowledgment of her neglectful actions against N.G. by stating that she felt "bad for . . . the way that he feels" and remorseful for "what my family has gone through." However, the mother's own testimony reveals that she failed to accept full responsibility for her actions or show true remorse or insight. Indeed, she continued to claim that she only hit N.G. with a cloth belt without a buckle on two occasions, that she had not caused the bruise on his face, and that, prior to that, she had only "spanked" him, despite having consented to a finding of neglect against her based

on the truth of the allegations in the petition which directly contradict her claims. Moreover, as the court acknowledged, shortly before the dispositional hearing, it had ordered that the mother be limited to agency-supervised visits with N.G. because she had violated court orders by pressuring N.G. to discuss the case during visits. When asked how her own conduct had contributed to the child's request that visits be supervised, she testified that she was "not entirely sure." Accordingly, the record does not support a finding that the mother acknowledged or demonstrated remorse for her neglectful acts (*see Tsoede L.*, 198 AD3d at 510), and Family Court's decision does not give adequate weight to her lack of remorse.

Finally, the court noted that the mother complied with court-ordered services by completing 15 sessions of combined parent education, anger management, and individual therapy. However, respondent's completion of court-ordered services without an acknowledgment of how her behavior affected the child and insight into her behavior is insufficient to merit a suspended judgment (*see id.*).

Moreover, in its dispositional order, Family Court failed to meaningfully address the child's best interests at all. At the time that the court issued its dispositional order, the mother and child had had no visits between February 17, 2025, and July 2025 and only "a few" supervised visits in July and August 2025. Accordingly, Family Court had insufficient information on which to determine that a suspended judgment was in the child's best interests, which would have required it to consider whether the mother was able to care for him in a manner that would "eliminate any threat of future abuse or neglect" (*Tsoede L.*, 198 AD3d at 510). Rather than addressing whether a suspended judgment was in the best interests of the child, the court improperly cited to its own research into online and print media reports about the criminal charges brought against the mother for her treatment of N.G. (*Matter of State of New York v Richard V.*, 228 AD3d 109, 124 [1st Dept 2024]), and focused on the perceived impact of the neglect finding on the mother's career advancement and reputation, "broader public policy," and "the best interests of society" (*see Matter of Aaliyah B. [Althea R.]*, 170 AD3d 712, 713 [2d Dept 2019]).

Accordingly, we vacate the suspended judgment, which, at the very least, is premature (*see Matter of Daniella A. [Jessica A.]*, 153 AD3d 426 [1st Dept 2017]).

In view of our vacatur of the suspended judgment, Family Court's March 4, 2026, order vacating the neglect adjudication in accordance with the terms of the suspended judgment order

is vacated, and the appeal from the March 4, 2026, order is dismissed as moot.

We have considered the remaining arguments and find them unavailing. Concur—Webber, J.P., Gesmer, Mendez, Pitt-Burke, Hagler, JJ.

Motion to dismiss appeals, granted to the extent that the appeal from Family Court’s March 4, 2026, order is dismissed, and otherwise denied.

Motion to consolidate appeals and decide them on the existing briefing, granted.

4 Vickie Hamilton, Individually and as Administratrix of the Estate of Mattie H. Metcalfe, Respondent, v Premier Home Health Care Services, Inc., Appellant, et al., Defendant. [252 NYS3d 123]—

**Negligence—Duty—Questions of Fact Regarding Accident
Evidence—Hearsay Evidence—Personal Knowledge of Accident**

Order, Supreme Court, Bronx County (Bianka Perez, J.), entered on or about January 28, 2025, which denied the motion of defendant Premier Home Health Care Services, Inc. for summary judgment dismissing the complaint as against it, unanimously affirmed, without costs.

Defendant Premier Home Health Care Services, Inc., a provider of home health care services, failed to meet its initial burden of establishing entitlement to summary judgment as a matter of law (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; see also *Esposito v Personal Touch Home Care*, 288 AD2d 337, 338 [2d Dept 2001]). Supreme Court properly concluded that defendant’s own submissions created questions of fact, including when and how decedent’s alleged fall took place, whether defendant abandoned decedent or otherwise breached its duty of care, and whether any such breach was the proximate cause of decedent’s injuries (see *Esposito*, 288 AD2d at 338). Even defendant’s expert did not conclude that the decedent did not fall; rather, she conceded that “whether the decedent actually fell” was “in question.”

Defendant argued, based on our decision in *Soto v Assisted Care Home Attendants Program* (66 AD3d 530, 530 [1st Dept 2009]), that it established its prima facie case by citing plaintiff’s deposition testimony that she did not witness plaintiff’s fall and that she lacked personal knowledge as to how the fall occurred. We disagree. In *Soto*, plaintiff alleged that decedent was injured when she fell out of bed due to her

home health aide's alleged negligence (*id.*). This Court affirmed the motion court's dismissal of the complaint on the grounds that plaintiff had not witnessed the incident and provided no admissible evidence raising questions of fact in opposition to the summary judgment motion (*see Soto v Assisted Care Home Attendants Program*, 2008 WL 9453487, *3 [Sup Ct, Bronx County 2008]). Here, while plaintiff concedes that she did not witness the fall herself, the decedent's aide described the fall to her in a phone conversation in the immediate aftermath of the incident. The certified medical records report similar statements by the aide and indicate that the aide witnessed the fall. These statements taken together were sufficient to create factual issues as to how the fall occurred, and whether the decedent's aide witnessed the incident. In addition, a CT scan performed two days after the alleged fall revealed a right extra-axial acute hematoma, creating a question of fact as to the effect of the fall on decedent.

In short, the record is replete with factual issues surrounding the circumstances of the alleged fall and decedent's injuries. Under these circumstances, defendant's summary judgment motion was properly denied. Concur—Manzanet-Daniels, J.P., Moulton, Gesmer, Mendez, Michael, JJ.

5 IGS Realty Co. L.P., Doing Business as IGS Realty Co., Respondent, v James H. Brady, Appellant. [252 NYS3d 129]—

Declaratory Judgments—When Remedy Appropriate—Justiciable Controversy

Attorney and Client—Frivolous Conduct—Sanctions—Repeated Advancement of Meritless Arguments

Order, Supreme Court, New York County (Arthur F. Engoron, J.), entered April 1, 2025, which, to the extent appealed from as limited by the briefs, denied defendant's motion for a declaratory judgment, unanimously affirmed, with costs. Pursuant to Rules of the Chief Administrator of the Courts (22 NYCRR) § 130-1.1, sanctions in the amount of \$7,500 are imposed sua sponte against defendant payable to the clerk of the court for transmittal to the State Commissioner of Taxation and Finance.

The parties have been engaged in litigation since 2009. On June 26, 2015, a jury rendered a verdict in favor of plaintiff on its breach of contract claim against defendant, who had leased commercial properties from plaintiff, and awarded plaintiff \$541,758.62 in damages.

On August 25, 2015, Supreme Court (Barry R. Ostrager, J.), denied defendant's motion to set aside the jury verdict and

award a new trial, and on April 13, 2017, this Court affirmed (see *IGS Realty Co., L.P. v Brady*, 149 AD3d 524 [1st Dept 2017], *lv dismissed* 31 NY3d 1036 [2018]). Specifically, this Court concluded that defendant failed to preserve “his challenges regarding the jury charges and the verdict sheet interrogatories,” and held that the jury’s verdict was neither against the weight of the evidence nor against public policy (*id.* at 524).

On May 31, 2017, Supreme Court entered a judgment for \$1,458,002.33 in plaintiff’s favor against defendant, representing damages, attorneys’ fees, and accrued interest. Defendant appealed the judgment, and this Court affirmed, finding “defendant’s arguments on [the] appeal, previously raised and rejected by this Court and supported by no new evidence or change of law, are barred by law of the case” (*IGS Realty Co., L.P. v Brady*, 162 AD3d 444, 445 [1st Dept 2018], *lv denied* 32 NY3d 901 [2018]).

In the motion at issue here, defendant asked the court to issue a judgment declaring that his personal guarantees of the leases underlying plaintiff’s breach of contract claim were voided as a matter of law and public policy, and granting defendant’s counterclaim for constructive eviction, arguing that neither issue was explicitly decided by the jury in its verdict. Defendant cites deposition testimony of plaintiff’s attorney in a separate 2021 action, which defendant contends supports his position.

The court correctly denied defendant’s motion for a declaratory judgment (see CPLR 3001). Defendant does not seek a declaratory judgment on a justiciable controversy, but rather, in sum and substance, seeks to vacate the jury verdict and resulting judgment, which this Court has already rejected.

Moreover, in May 2018, plaintiff obtained a judgment to enforce the May 31, 2017 judgment in a separate CPLR article 52 proceeding. Supreme Court denied defendant’s motion to vacate that judgment, and this Court affirmed that decision (see *Matter of IGS Realty Co. L.P. v Brady*, 244 AD3d 452, 453 [1st Dept 2025]). We also note that a federal court has effectively rejected the same arguments that defendant raised in his motion (see *Brady v Sheindlin*, 2021 WL 5312995, *2, 2021 US App LEXIS 33908, *3-4 [2d Cir, Nov. 16, 2021, No. 21-669-cv] [rejecting the defendant’s contentions that “because the interrogatories the state court gave the jury did not specifically mention his personal guarantees or his affirmative defenses, the state court therefore never determined the enforceability of those guarantees or ruled on those affirmative defenses”]).

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

A court may on its own initiative impose monetary sanctions on a party that has engaged in an intentional pattern of frivolous conduct to actively delay court proceedings and harass the opposing party (*see* 22 NYCRR 130-1.1, 130-1.2; *Levy v Carol Mgt. Corp.*, 260 AD2d 27, 34-35 [1st Dept 1999]). Defendant's behavior, including his repeated advancement of meritless arguments, amply justifies sanctions. By way of defendant's unrelenting series of motions, despite prior sanctions and injunctions issued by federal and state courts, he has "crossed the line from zealous advocacy to that which is sanctionable" (*Pentalpha Enters., Ltd. v Cooper & Dunham LLP*, 91 AD3d 451, 452 [1st Dept 2012]). Accordingly, we sua sponte impose sanctions on defendant in the amount of \$7,500 for his repeated pattern of frivolous conduct within the meaning of 22 NYCRR 130-1.1 (*see id.*; *Leventritt v Eckstein*, 206 AD2d 313, 314 [1st Dept 1994], *lv dismissed in part, denied in part* 84 NY2d 987 [1994]). Concur—Moulton, J.P., Friedman, González, Shulman, Rosado, JJ.

6 Interbar Fabricators LLC, Plaintiff, v C.B. Contracting Corp., Respondent/Third-Party Plaintiff-Respondent, et al., Defendants. E.E. Cruz & Company, Inc., Third-Party Defendant-Appellant, et al., Third-Party Defendants. [— NYS3d —]

Contracts—Breach or Performance of Contract—Summary Judgment—Entitlement to Payment

Evidence—Business Records—Regular Course of Business

Judgment, Supreme Court, New York County (Nancy M. Bannon, J.), entered February 24, 2025, to the extent appealed from as limited by the briefs, awarding defendant/third-party plaintiff C.B. Contracting Corp. (CBC) the total sum of \$1,489,769.35 against third-party defendant E.E. Cruz & Company, Inc. (Cruz), and bringing up for review an order, same court and Justice, entered on or about September 27, 2024, which, inter alia, granted CBC's motion for partial summary judgment on its first cause of action for breach of contract against Cruz, and dismissed Cruz's sole counterclaim, also for breach of contract, unanimously affirmed, with costs. Appeal from aforesaid order, unanimously dismissed, without costs, as subsumed in the appeal from the judgment. Appeal by defendants Liberty Mutual Insurance Company, Travelers Casualty and Surety Company of America, Fidelity and Deposit Company of Maryland/Zurich American Insurance Company, Federal Insurance Company, The Continental Insurance Company, Berkshire Hathaway Specialty Insurance Company, and Amer-

ican Home Assurance Company from aforesaid judgment, unanimously dismissed, without costs, as abandoned.

The court properly concluded that CBC demonstrated prima facie that it was entitled to be paid for 8,876,853 pounds of rebar based on the shipment report by invoice and the testimony of CBC's president, general foreman, plaintiff's former vice president of operations, and Cruz's senior project manager that CBC never installed rebar without authorization and always with approved shop drawings. Cruz failed to present evidence that raised a triable issue of fact as the summary of the takeoffs it submitted did not include the underlying records, and that chart reflected a discrepancy between Cruz's computations and those of Turner Construction Company Joint Venture (JV), the contractor hired to design and construct the new building. Moreover, the settlement amount agreed on by JV and Cruz in connection with their dispute does not bind CBC or necessarily reflect the actual amounts of rebar delivered and installed by CBC.

Nor did Cruz present evidence that raised an issue of fact concerning whether any rebar that was delivered was not installed. The testimony of their project manager about rebar waste was vague and insufficient to raise a triable issue of fact and Cruz admitted that it could not determine the amount of rebar waste.

The court also correctly concluded that the shipment records provided by CBC were admissible as CBC's president testified that they were made in the regular course of business, reflected a routine, regularly conducted business activity, and were relied on in the performance of the business (*see People v Cratsley*, 86 NY2d 81, 89 [1995]). Plaintiff's former vice president of operations also laid a foundation for the records, which plaintiff produced in discovery. Material produced by a party in response to a discovery demand that was created by the producing party is presumed authentic when offered into evidence by an adverse party (CPLR 4540-a). The fact that the reports were summaries or account balances did not affect their admissibility (*see generally Ed Guth Realty v Gingold*, 34 NY2d 440, 446 [1974]).

Cruz contends that CBC was required to provide both shop drawings and as-built drawings under §§ 2, 5.6, and 6.2.3 of its contract with CBC, and it failed to do so. However, none of these provisions mandate the preparation of as-built drawings. Cruz's senior project manager testified that approved shop drawings were utilized for installation of the rebar, and, according to the senior project manager, in the settlement discus-

sions with JV Cruz asserted that the shop drawings were equivalent to as-built drawings.

Moreover, Cruz was not entitled to withhold the retainage as section 4.3 of the subcontract was an unenforceable pay-if-paid provision (see *West-Fair Elec. Contrs. v Aetna Cas. & Sur. Co.*, 87 NY2d 148, 153 [1995]; *Bank of Am., N.A. v ASD Gem Realty LLC*, 205 AD3d 1, 6 n 3 [1st Dept 2022]). By its terms, section 4.3 stated that payment by JV was a “condition precedent” to Cruz’s payment of CBC. Moreover, even if the provision is viewed as an acceptable pay-when-paid clause, which is a timing mechanism, the significant delay in payment rendered it unenforceable (*Gem Realty*, 205 AD3d at 6 n 3).

We have considered Cruz’s remaining arguments and find them unavailing. Concur—Webber, J.P., Gesmer, Mendez, Pitt-Burke, Hagler, JJ.

7 Carlos Jover, Appellant, v 1540 Second Realty, LLC, Respondent/Third-Party Plaintiff-Respondent. Alba Services Inc., Third-Party Defendant-Respondent. [252 NYS3d 137]—

Labor—Safe Place to Work—Summary Judgment—Conflicting Testimony
Labor—Safe Place to Work—Adequate Safety Devices

Order, Supreme Court, Bronx County (Myrna Socorro, J.), entered July 28, 2025, which, to the extent appealed from, denied plaintiff’s motion for partial summary judgment on the Labor Law §§ 240 (1) and 241 (6) claims, unanimously reversed, on the law, without costs, and the motion granted as to liability on the Labor Law § 240 (1) claim.

Supreme Court denied plaintiff’s motion for summary judgment due to conflicting testimony concerning how plaintiff’s accident occurred. Plaintiff testified that as part of demolition activities at the construction site, his employer created holes in each floor of the building, which allowed his coworkers to dump construction debris from higher floors to the first floor. Plaintiff testified that his foreman ordered him to clean debris that had clogged the hole on the second floor, and while doing so, a coworker dumped debris that fell on him, causing injury. In contrast, plaintiff’s foreman testified that construction debris was dumped into a chute system that passed through holes in the floors from the higher floors to the first floor, where debris then fell into containers that had to be replaced after they were filled. Plaintiff’s foreman testified that plaintiff was on the first floor performing the container replacement job prior to his accident, but that debris dumping activities had completed, and plaintiff had been instructed to come upstairs from the first floor before the accident.

Plaintiff was entitled to summary judgment on the Labor Law § 240 (1) claim under either scenario. The existence of conflicting accounts of an accident does not preclude summary judgment on the issue of liability where either asserted version of events demonstrates that a violation of Labor Law § 240 (1) proximately caused an injury (*see Romanczuk v Metropolitan Ins. & Annuity Co.*, 72 AD3d 592, 592 [1st Dept 2010]). Under either version of the facts, defendant violated Labor Law § 240 (1) by failing to provide adequate safety devices (*see Henningham v Highbridge Community Hous. Dev. Fund Corp.*, 91 AD3d 521, 521-522 [1st Dept 2012]). Contrary to defendant's suggestion, falling object liability "is not limited to cases in which the falling object is in the process of being hoisted or secured" (*Quattrocchi v F.J. Sciamme Constr. Corp.*, 11 NY3d 757, 758-759 [2008]).

In light of the foregoing, consideration of the Labor Law § 241 (6) claim is academic. Concur—Moulton, J.P., Friedman, González, Shulman, Rosado, JJ.

8 Carol Kaufman, Respondent, v Starbucks Corporation, Appellant. [252 NYS3d 140]—

Negligence—Maintenance of Premises—Summary Judgment

Order, Supreme Court, New York County (Emily Morales-Minerva, J.), entered May 5, 2025, which denied defendant's motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

Plaintiff, who fell in defendant's coffee shop after she allegedly "collided" with one or more other persons, sues defendant for the injuries she allegedly sustained in the fall on the theory that the collision resulted from overcrowding in the store. The only evidence defendant submitted in support of its motion for summary judgment was the testimony of a barista who was not working at the time of plaintiff's accident and therefore could not attest to the conditions in the store at that time. Defendant failed to carry its burden as the movant to present evidence establishing its prima facie entitlement to judgment as a matter of law. Accordingly, the motion for summary judgment was properly denied, regardless of the sufficiency of the opposing papers (*see Alvarez v Prospect Hosp.*, 68 NY2d 320 [1986]; *Zuckerman v City of New York*, 49 NY2d 557 [1980]). Concur—Moulton, J.P., Friedman, González, Shulman, Rosado, JJ.

9 Rosario Lardiere, Appellant-Respondent, v Site 6 DSA Owner LLC et al., Respondents, et al., Defendants. Site 6 DSA Owner LLC et al., Third-Party Plaintiff-Respondents, v Gil-

Bar Industries, Third-Party Defendant-Respondent-Appellant, and Peepels Mechanical Corp., Third-Party Defendant-Respondent/Fourth Third-Party Plaintiff-Respondent, et al., Third-Party Defendant, et al., Fourth Third-Party Defendants. (And Second and Third Third-Party Actions.) [252 NYS3d 548]—

Labor—Safe Place to Work—Covered Class of Workers—Involvement in Construction, Demolition, or Excavation

Labor—Safe Place to Work—Summary Judgment—Questions of Fact

Indemnity—Contractual Indemnification—Arising out of Contractor's Work

Order, Supreme Court, New York County (Arlene P. Bluth, J.), entered August 21, 2024, which, to the extent appealed from as limited by the briefs, denied plaintiff's motion for summary judgment on liability on his Labor Law §§ 240 (1) and 200 claims and his common-law negligence claim, and dismissal of all affirmative defenses sounding in comparative negligence and culpable conduct; (mot seq 9) granted so much of the motion of defendants Site 6 DSA Owner LLC, Site 6 Commercial LLC, Taconic Investment Partners, LLC, s/h/a Taconic Investment Partners, L&M Development Partners, Inc., s/h/a L&M Development Partners, Delancey Street Associates LLC, and BFC Phase I DSA, LLC (collectively, the owners), NYU Langone Health System, and Hunter Roberts Construction Group, s/h/a Hunter Roberts Construction Group, LLC (mot seq 8) as sought dismissal of plaintiff's Labor Law § 240 (1) claim as against them, and granted so much of the motion as sought dismissal of the Labor Law § 200 claim as against the owners except for Hunter Roberts; granted so much of the motion of defendant Peepels Mechanical Corp. (mot seq 10) as sought dismissal of plaintiff's Labor Law § 240 (1) claim as against it and denied so much of the motion as sought dismissal of plaintiff's Labor Law § 200 claim as against it; and denied the motion of third-party defendant Gil-Bar Industries to dismiss the third-party complaint and all cross-claims against it (mot seq 12), unanimously modified, on the law, to grant plaintiff's motion to the extent it sought dismissal of all affirmative liability defenses against him sounding in comparative negligence and culpable conduct, and to grant Gil-Bar's motion dismissing the third-party complaint and all cross-claims against it, and otherwise affirmed, without costs. Order, Supreme Court, same court and Justice, entered on or about November 13, 2024, which, to the extent appealed from as limited by the briefs, granted so much of the motion of defendant The Pace Companies of New York, Inc. (mot seq 13) as sought reargument of its summary judgment motion, and upon reargument, dismissed plaintiff's Labor Law § 200 claim as against Hunter Roberts and Peepels, unanimously reversed, on

the law, without costs, to reinstate the Labor Law § 200 claim as against those defendants.

Supreme Court correctly dismissed plaintiff's Labor Law § 240 claim as against the Owners, NYU Langone, Hunter Roberts, and Peepels. The evidence established that plaintiff was not within the class of workers covered by Labor Law § 240 (1), which provides special protection to those engaged in the "erection, demolition, repairing, altering, painting, cleaning or pointing of a building or structure" (see *Prats v Port Auth. of N.Y. & N.J.*, 100 NY2d 878, 880, 882-883 [2003]). Plaintiff was a salesman visiting a construction site where he had brokered the sale of air handlers to Peepels, the HVAC subcontractor; he had no experience or knowledge in HVAC installation and played no construction-related role in the installation of the air handler units (see *DeJesus v 935 Bronx Riv. Ave., LLC*, 213 AD3d 552, 552-553 [1st Dept 2023]). Furthermore, plaintiff's employer, Gil-Bar, was not engaged by contract to carry out a specific part of the construction project; indeed, it was not a company that performed construction, demolition, or excavation and it had no laborers on staff (see *Gibson v Worthington Div. of McGraw-Edison Co.*, 78 NY2d 1108, 1109 [1991]; *Spadola v 260/261 Madison Equities Corp.*, 19 AD3d 321, 323 [1st Dept 2005]). Even assuming that plaintiff was conducting an inspection of the construction site, he did not perform that inspection as the employee of a contractor tasked with an enumerated activity within the meaning of section 240 (1); on the contrary, Gil-Bar's role concerning the HVAC system was solely as to the salesman of component equipment that Peepels would install (see e.g. *Astrakan v City of New York*, 184 AD3d 444, 445 [1st Dept 2020]; *Fabrizio v City of New York*, 306 AD2d 87, 87-88 [1st Dept 2003]).

For the same reasons, Supreme Court correctly denied plaintiff's motion for summary judgment on liability on his section 240 claim.

The Labor Law § 200 claims must be reinstated as against Hunter Roberts and Peepels, as Supreme Court erred in finding that plaintiff was not a covered employee under Labor Law § 200. Unlike Labor Law § 240 (1), the protection afforded by section 200 is not limited to those who are injured while performing construction work (see *Jock v Fien*, 80 NY2d 965, 967 [1992]; *Lynch v Abax, Inc.*, 268 AD2d 366, 367 [1st Dept 2000]; *Agli v Turner Constr. Co.*, 246 AD2d 16, 24 [1st Dept 1998]).

Nonetheless, plaintiff is not entitled to summary judgment on his section 200 claims against Hunter Roberts or Peepels,

as the record presents several questions of fact precluding summary judgment, including the identity of the contractor that cut the hanger rods supporting the pipe that fell on plaintiff, and the circumstances under which that occurred. In addition, the evidence is equivocal as to who cut the supports, why they did so, and whether Hunter Roberts was culpable because it removed the wall which partially supported the pipes and failed to coordinate the trades (*see Ponce v City of New York*, 217 AD3d 464, 465 [1st Dept 2023], *lv dismissed* 41 NY3d 963 [2024]; *cf. Langer v MTA Capital Constr. Co.*, 184 AD3d 401, 402 [1st Dept 2020]). Therefore, this case does not present the rare circumstance in which summary judgment on a negligence cause of action is appropriate (*see Langer*, 184 AD3d at 402).

Supreme Court should have dismissed all affirmative defenses concerning plaintiff's alleged culpable conduct in the happening of the accident. The record presents no evidence of any act or inaction by plaintiff that caused the accident (*see Ortega-Estrada v 215-219 W. 145th St. LLC*, 118 AD3d 614, 615 [1st Dept 2014]; *Tounkara v Fernicola*, 80 AD3d 470, 471 [1st Dept 2011]).

Finally, the third-party complaint against Gil-Bar, along with all cross-claims against it, must be dismissed. Gil-Bar was not a trade that was performing work on the project and played no role in any of the work leading to the accident. The contractual indemnity claims against it also fails, as there is no indemnity agreement that applies here. Although there was a contract between Hunter Roberts and Gil-Bar, that contract was for work entirely different from plaintiff's, and unrelated to the reason he was on site that day (*see Cohen v Rockefeller Ctr.*, 292 AD2d 151, 152 [1st Dept 2002]; *see also Harris v City of New York*, 202 AD3d 624, 625 [1st Dept 2022]). Concur—Webber, J.P., Gesmer, Mendez, Pitt-Burke, Hagler, JJ.

10 John Lyons, Appellant, v Sigma Management Holdings, LLC, et al., Respondents. [252 NYS3d 130]—

Bills, Notes and Checks—Promissory Note—Illusoriness—Ability to Decide Whether to Pay

Bills, Notes and Checks—Promissory Note—Terms of Agreement—Ambiguity Fraud—What Constitutes—Special Facts Doctrine

Order, Supreme Court, New York County (Andrew Borrok, J.), entered on or about September 24, 2024, which granted defendants' motion to dismiss the first amended complaint pursuant to CPLR 3211 (a) (1) and (7), unanimously affirmed, without costs.

We reject plaintiff's argument that the promissory note at is-

sue is illusory. A contract is illusory “[w]here a promisor retains an unlimited right to decide later the nature or extent of his performance” (*Chiapparelli v Baker, Kellogg & Co.*, 252 NY 192, 200 [1929]). Such was not the case here. Defendant Sigma Management’s ability to decide whether to pay plaintiff was not completely unlimited (*see Dorman v Cohen*, 66 AD2d 411, 418-419 [1st Dept 1979] [contract was illusory where one party had right to terminate at will and without notice]). Sections 2 and 3 of the note required Sigma Management to make principal and interest payments according to a defined schedule, and section 2 required the full principal amount to be paid in the event of a transfer of the assets of Sigma Management’s subsidiary. The scheduled principal and interest payment obligations were subject to suspension by section 5 (a) of the note if Sigma Management’s subsidiary was prohibited from transferring money to its parent under the provisions of a Senior Credit Agreement (SCA) between the subsidiary and its lenders, but nothing in the agreement completely relieved Sigma Management of its obligation to perform. Indeed, because these provisions were “clear, complete and unambiguous, [they] should be enforced according to [their] terms” (*Cole v Macklowe*, 99 AD3d 595, 595 [1st Dept 2012]; *see Duane Reade, Inc. v Cardtronics, LP*, 54 AD3d 137, 140 [1st Dept 2008]).

Enforcement of the note as written does not render certain sections meaningless. Sigma Management was not required to suspend payments under section 5 (a); it was simply not “obligated” to do so; indeed, its affiliates still made payments to plaintiff in January 2023 and March 2023. Similarly, the note’s use of conditional language such as “if” and “if any” is not problematic, since it was merely to allow for the possibility that at some point the SCA would not be in effect and Sigma Management’s obligation to make payments would be restored.

That plaintiff received payments under the note in January 2023 and March 2023 has no bearing on the enforceability of the provision that Sigma Management was not obligated to make payments while the SCA was in effect. First, in interpreting contracts, evidence of parties’ conduct is generally only relevant when the terms of the contract are ambiguous (*see Webster’s Red Seal Publs. v Gilberton World-Wide Publs.*, 67 AD2d 339, 341 [1st Dept 1979], *affd* 53 NY2d 643 [1981]). Again, the terms of the agreement at issue are not ambiguous. Further, the note contains an unambiguous non-waiver clause (*Rosenzweig v Givens*, 62 AD3d 1, 7 [1st Dept 2009], *affd* 13 NY3d 774 [2009]; *see also Whitecap [US] Fund I, LP v Siemens*

First Capital Commercial Fin. LLC, 121 AD3d 584, 592-593 [1st Dept 2014]). The fourth amendment to the SCA, adding an exception that allows plaintiff to be paid under certain circumstances, is immaterial, since it only reinforces the notion that Sigma Management's obligation to pay plaintiff was generally suspended while the SCA was in effect.

The motion court properly dismissed the fraud claim. Plaintiff admits that he asked for a copy of the SCA while the transactions at issue were being negotiated, but that his request was declined. In accepting the promissory note nonetheless, plaintiff relinquished any ability to plead justifiable reliance (see e.g. *Rodas v Manitaras*, 159 AD2d 341, 342-343 [1st Dept 1990]). Moreover, the special facts doctrine does not save the fraud claim. Under that doctrine, "a duty to disclose arises where one party's superior knowledge of essential facts renders a transaction without disclosure inherently unfair" (*P.T. Bank Cent. Asia, N.Y. Branch v ABN AMRO Bank N.V.*, 301 AD2d 373, 378 [1st Dept 2003] [internal quotation marks omitted]). However, the special facts doctrine applies to scenarios where one party concealed a material fact; here, the alleged fraud is premised on the misrepresentation of a material fact.

The court correctly dismissed plaintiff's claim for breach of the implied covenant of good faith and fair dealing. The covenant "cannot be construed so broadly as to effectively nullify other express terms of the contract, or to create independent contractual rights" (*National Union Fire Ins. Co. of Pittsburgh, Pa. v Xerox Corp.*, 25 AD3d 309, 310 [1st Dept 2006], *lv dismissed* 7 NY3d 886 [2006]). Such express terms exist here, where the note stated that Sigma Management's obligations to pay principal and interest were subject to section 5. In addition, "[a] claim for breach of the implied covenant . . . may not be used as a substitute for a nonviable claim of breach of contract" (*Smile Train, Inc. v Ferris Consulting Corp.*, 117 AD3d 629, 630 [1st Dept 2014] [internal quotation marks omitted]).

We have considered plaintiff's other arguments and find them unavailing. Concur—Moulton, J.P., Friedman, González, Shulman, Rosado, JJ. [**Prior Case History: 84 Misc 3d 1201(A), 2024 NY Slip Op 51334(U).**]

11 Theresa Maddicks et al., Appellants, v 106-108 Convent BCR, LLC, et al., Respondents. [252 NYS3d 126]—

Landlord and Tenant—Rent Regulation—Determination of Legal Regulated Rent—Underlying Documents

Landlord and Tenant—Rent Regulation—Fraudulent Scheme—Affidavit by Tenant

Landlord and Tenant—Rent Regulation—Fraudulent Scheme—Knowing Engagement

Order, Supreme Court, New York County (Sabrina Kraus, J.), entered on or about April 29, 2025, which, to the extent appealed from, denied plaintiffs' motion for an order finding that defendants engaged in a methodical attempt to illegally inflate plaintiffs' rents, and for the appointment of a special referee, unanimously affirmed, with costs, without prejudice to plaintiffs' ability to file a motion for summary judgment pursuant to CPLR 3212.

Plaintiffs moved under CPLR 906 (1) for a declaration, as a matter of law, that they were the victims of a rent overcharge scheme. However, CPLR 906 (1) is not a vehicle for issue determination. Rather than dismissing plaintiff's motion, the court elected to treat it as a motion for summary judgment. In order to prevail, plaintiffs were required to lay bare their proof (*see* CPLR 3212 [b]), which they failed to do.

Although plaintiffs properly submitted certain evidence, including the certified rent rolls from the New York State Division of Housing and Community Renewal which they submitted based on an attorney affirmation, they failed to present the relevant leases and other documents which would have allowed the court to perform a full documentary analysis of the available records relating to individual apartment improvements. Their failure to do so deprived the court of the ability to determine whether plaintiffs met their prima facie burden to eliminate questions of fact (*see Reichenbach v Jacin Invs. Corp.*, 237 AD3d 446, 447 [1st Dept 2025], *lv dismissed* 44 NY3d 1022 [2025]).

As a result, plaintiffs did not eliminate all possible bases for deregulation or establish the impropriety of the rent increases with respect to any individual apartment. Although plaintiffs' charts summarizing the evidence they had obtained in discovery to date may prove useful in the ultimate resolution of the case or in further proceedings, judgment as a matter of law would require the submission of the underlying documents from which the charts were created in order to determine the legal regulated rent on the base date and its reliability, together with the relevant legal rent increases for each apartment (*see Casey v Whitehouse Estates, Inc.*, 39 NY3d 1104, 1107 [2023]).

Nevertheless, this action had been pending for more than eight years when the instant motion was filed, and defendants had not produced many of the relevant records, particularly those supporting pre-base date deregulations. The motion

court's extension of the discovery deadline for defendants to produce the relevant documents or be precluded from offering them may permit plaintiffs to move for summary judgment on a complete record. That motion may be supported by counsel affirmation only, provided that the documents supporting the motion are in admissible form (*see generally Zuckerman v City of New York*, 49 NY2d 557, 563 [1980]). Facts that cannot be established through irrefutable documentary evidence, however, must be supported by an affidavit or affirmation by an affiant with personal knowledge of the facts.

The motion court relied on *Thomas v 560-566 Hudson LLC* (219 AD3d 1193 [1st Dept 2023]) and *Tribbs v 326-338 E 100th LLC* (215 AD3d 480 [1st Dept 2023]) to deny plaintiff's motion because it lacked affidavits by tenants or other persons with personal knowledge. However, those cases are inapposite for two reasons. First, those cases address the proof required for a court to find, on a summary judgment motion, that it should apply the default formula to determine rent overcharges because the landlord engaged in a fraudulent scheme. However, plaintiffs in this case do not seek application of the default formula for a majority of the plaintiffs.*

Second, to the extent that plaintiffs seek application of the default formula for some tenants, *Tribbs* and *Thomas* were decided before the Legislature enacted Section 4 of the Session Laws of 2024, which clarified that, upon a colorable claim that an owner has engaged in a fraudulent scheme, the court shall determine "whether the owner knowingly engaged in such fraudulent scheme after a consideration of the totality of the circumstances," without requiring the tenant to establish the elements of common-law fraud (L 2024, ch 95, § 4; *see also Burrows v 75-25 153rd St., LLC*, 44 NY3d 74, 83 [2025]). Since tenants do not have to prove reliance to establish a fraudulent scheme as courts previously required (*see Thomas*, 219 AD3d at 1194), an affidavit by a tenant is not necessarily required to establish summary judgment on a fraudulent scheme claim (*see also Grey v LIC Dev. Owner, L.P.*, 247 AD3d 531 [1st Dept 2026]).

Finally, plaintiffs urge that the motion court should not have found that plaintiffs were required to establish defendants' "intent" with respect to engaging in a fraudulent scheme. As plaintiffs' correctly assert, the 2024 amendments to the rent

* For most of the tenants, plaintiffs seek a rent freeze under Rent Stabilization Law § 26-517 (e), either because proper registrations were not filed or because the landlord's alleged misconduct occurred after the base date.

laws expressly require that the owner “knowingly engaged” in the fraudulent scheme (L 2024 ch 95, § 4). As we explained in *Alekna v 207-217 W. 110 Portfolio Owner LLC* (241 AD3d 414 [1st Dept 2025]), our holding that “fraud in the regulatory context generally means ‘consciously and knowingly charg[ing] . . . improper rent’ . . . is consonant with ‘the intent of the legislature to discourage and penalize fraud against the rent regulatory system itself, as well as against individual tenants’ ” (*id.* at 417, quoting *Matter of Regina Metro. Co., LLC v New York State Div. of Hous. & Community Renewal*, 35 NY3d 332, 356 n 7 [2020]). In further proceedings, plaintiffs’ burden is to establish that defendants “[knowingly] engaged in a fraudulent scheme to deregulate a unit” (L 2024, ch 95, § 4). Concur—Webber, J.P., Gesmer, Mendez, Pitt-Burke, Hagler, JJ.

12 Marie Massaro et al., Appellants, v Manfredi Auto Central, LLC, et al., Respondents. [252 NYS3d 141]—

Negligence—Maintenance of Premises—Out-of-Possession Landlord—Control over Premises

Order, Supreme Court, Bronx County (Elizabeth A. Taylor, J.), entered on or about March 6, 2025, which denied plaintiffs’ motion for partial summary judgment as to liability against defendants and granted defendants’ motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

Plaintiffs’ argument that defendants’ failure to submit the lease in their motion papers requires dismissal of their motion is improperly raised for the first time on appeal and therefore is unpreserved for our review (*see Greca v Choice Assoc. LLC*, 200 AD3d 415, 415-416 [1st Dept 2021]; *DiLeo v Blumberg*, 250 AD2d 364, 366 [1st Dept 1998]).

An out-of-possession landlord is generally not liable for negligence with respect to the condition of the demised premises unless it “(1) is contractually obligated to make repairs to maintain the premises or, (2) has a contractual right to reenter, inspect and make needed repairs and liability is based on a significant structural or design defect that is contrary to a specific statutory safety provision” (*see Vasquez v The Rector*, 40 AD3d 265, 266 [1st Dept 2007]).

Defendants established that they were legally out-of-possession landlords. Periodic visits by one of defendants’ agents to the premises to collect stored files, after contacting the tenant, does not establish a course of conduct sufficient to call into question whether defendants maintained control over the premises (*see Henry v Hamilton Equities, Inc.*, 34 NY3d

136, 142 [2019]; *Gronski v County of Monroe*, 18 NY3d 374, 380-381 [2011]). Furthermore, the record does not establish that defendants conducted any maintenance or repairs subsequent to the tenant assuming possession and control of the premises (see *Dimas v 160 Water St. Assoc.*, 191 AD2d 290, 290 [1st Dept 1993]).

Plaintiffs did not raise a triable issue of fact as to whether defendants were contractually obligated to repair the ceiling leak or whether the leak was a structural or design defect contrary to a specific statutory provision (see *Bawa v JJ. Operating Inc.*, 234 AD3d 517, 518 [1st Dept 2025]; *Espinoza v Minus5 HH NYC, Inc.*, 189 AD3d 499, 500 [1st Dept 2020]). Concur—Webber, J.P., Gesmer, Mendez, Pitt-Burke, Hagler, JJ.

13 Cyrus Massoumi, Appellant, v Nikhil Ganju et al., Respondents. [— NYS3d —]

Fraud—Factual Misrepresentation—Truthfulness as to Subsequent Injurious Actions
Corporations—Officers and Directors—Removal

Judgment, Supreme Court, New York County (Jennifer G. Schechter, J.), entered November 20, 2024, dismissing the complaint, and bringing up for review an order, same court and Justice, entered July 12, 2024, which granted defendants' motion for summary judgment dismissing the complaint and denied plaintiff's motion for partial summary judgment, unanimously affirmed, with costs.

Plaintiff Cyrus Massoumi alleged that defendants Oliver Kharraz, Nettana Samroengraja, and Nikhil Ganju committed fraud in advance of a board meeting that resulted in plaintiff's ouster as Chief Executive Officer of Zocdoc, Inc. Like plaintiff, defendants Kharraz and Samroengraja occupied roles both on the board of directors and in the company's senior management. Ganju was not a member of the board but worked with senior management in his capacity as a company employee with the title of "Founder." In advance of the board meeting, plaintiff conveyed to defendants the expectation that the meeting would focus on product and marketing. Plaintiff, defendants, and other employees prepared presentation materials and conducted dry-run meetings in accordance with plaintiff's vision. The actual meeting did not go as plaintiff planned. Instead, the board announced a leadership review, appointed new officers, amended the company's bylaws, and put plaintiff on administrative leave, ultimately resulting in his removal.

Plaintiff proffered three incidents to support his allegations of fraud: (1) Kharraz's email of "sounds good" in response to

plaintiff's proposed presentation topics circulated to senior management for the upcoming board meeting; (2) Samroengraja's forwarding of a PowerPoint presentation titled "final" and an agenda the day before the meeting; and (3) all defendants' attendance and participation in the dry-run rehearsals in preparation for the meeting.

Although half-truths and misleading partial disclosures can support a fraud claim (*see DIRECTV, LLC v Nexstar Broadcasting, Inc.*, 199 AD3d 561, 562 [1st Dept 2021]), plaintiff casts these three incidents as actionable misrepresentations rather than omissions. For this framing to adequately support his claim, however, the communicative content of these incidents must have been untrue as to the subsequent injurious actions of the board at the meeting. Notwithstanding plaintiff's protestations to the contrary, the record does not present a triable issue of fact, as the incidents carried no such content and there was no showing of a duty to disclose under the circumstances (*see Dembeck v 220 Cent. Park S., LLC*, 33 AD3d 491, 492 [1st Dept 2006]; *Oppenheimer & Co. v Oppenheim, Appel, Dixon & Co.*, 173 AD2d 203, 204 [1st Dept 1991]; *see also J.A.O. Acquisition Corp. v Stavitsky*, 8 NY3d 144, 148-149 [2007]).

On its face, a responsive email stating solely "sounds good" is merely an acknowledgement. Likewise, an internal document labeled "final" sent in an otherwise contentless email does not, on its own, amount to a promise or warranty. Finally, the record lacks support for actionable misrepresentations constituting fraud in defendants' participation in the preparatory meetings as employees of the company (*see Eurycleia Partners, LP v Seward & Kissel, LLP*, 12 NY3d 553, 559-562 [2009]).

As members of Zocdoc's board of directors, defendants' duty was to Zocdoc and its shareholders, and they were not required to forewarn plaintiff that his possible termination would occur at the board meeting (*see Klaassen v Allegro Dev. Corp.*, 106 A3d 1035, 1043-1044 [Del 2014]; *Benihana of Tokyo, Inc. v Benihana, Inc.*, 891 A2d 150, 191 [Del Ch 2005], *affd* 906 A2d 114 [Del 2006]). Accordingly, plaintiff cannot claim that he was justified in concluding that directors would not discharge these duties. Supreme Court thus properly granted defendants' motion for summary judgment dismissing the complaint.

Given these determinations, we need not reach the parties' arguments about the nature of plaintiff's alleged damages. Concur—Kennedy, J.P., Scarpulla, Kapnick, González, Rodriguez, JJ.

14 Velin Mezinev, Appellant, v Donald Smith & Co. et al., Respondents. [252 NYS3d 147]—

Civil Rights—Discrimination in Employment—National Origin—Concerning Employment Decision**Civil Rights—Discrimination in Employment—Familial or Caregiver Status—Process of Securing Legal Custody**

Order, Supreme Court, New York County (Verna L. Saunders, J.), entered March 7, 2025, which, to the extent appealed as limited by the briefs, granted defendants' motion for summary judgment dismissing plaintiff's claims for discrimination on the basis of familial status under the New York State Human Rights Laws (State HRL), caregiver status under the New York City Human Rights Law (City HRL), and national origin under both HRLs, unanimously modified, on the law, to deny the motion with respect to the causes of action for familial status discrimination under the State HRL (first cause of action) and caregiver status under the City HRL (third cause of action), and those causes of action reinstated, and otherwise affirmed, without costs.

Initially, the Dead Man's Statute (CPLR 4519) does not bar consideration of plaintiff's testimony about statements by Donald Smith, the late co-chief investment officer of plaintiff's former employer, defendant Donald Smith & Co. (DSC), as the testimony was not the only evidence presented to defeat summary judgment (*see Matter of Ingberman [Colon]*, 194 AD3d 410, 411 [1st Dept 2021]; *Phillips v Kantor & Co.*, 31 NY2d 307, 315 [1972]).

Nevertheless, even considering Smith's statements, plaintiff fails to demonstrate the existence of genuine issues of fact as to whether defendants' proffered reasons for terminating him—his poor analytical and communication skills and the relatively poor performance of his portfolio—were pretexts for national origin discrimination, or whether his national origin was a motivating factor for his termination (*see Hamburg v New York Univ. Sch. of Medicine*, 155 AD3d 66, 73 & n 7 [1st Dept 2017]). Smith's seven isolated and undated comments about plaintiff's Bulgarian national origin over the course of plaintiff's 12-year tenure are legally insufficient to suggest discrimination (*see Sicola v Cushman & Wakefield, Inc.*, 210 AD3d 449, 451 [1st Dept 2022], *lv denied* 39 NY3d 916 [2023]). The comments that plaintiff points to as discriminatory constitute a small number of stray remarks regarding plaintiff's national origin, and none of those remarks concerned an employment decision (*see Melman v Montefiore Med. Ctr.*, 98 AD3d 107, 126 [1st Dept 2012]; *see also Godbolt v Verizon N.Y. Inc.*, 115 AD3d 493, 494 [1st Dept 2014], *lv denied* 24 NY3d 901 [2014]). Plaintiff also fails to demonstrate that he and his purported comparator, Jonathan

Hartsel, were “similarly situated in all material respects” (*Eti- enne v MTA N.Y. City Tr. Auth.*, 223 AD3d 612, 612 [1st Dept 2024] [internal quotation marks omitted]). On the contrary, Hartsel managed a significantly larger portfolio, which earned more for the firm as an annual average, and had different job responsibilities from plaintiff.

However, the record presents issues of fact as to plaintiff’s familial and caregiver status causes of action under the State HRL, which prohibits discrimination based on “familial status,” including against “any person who . . . has a child or is in the process of securing legal custody” of a child (Executive Law §§ 292 [26] [a]; 296 [1] [a]), and the City HRL, which prohibits discrimination based on “caregiver status” (Administrative Code of City of NY § 8-107 [1] [a]). On July 11, 2016, the day before DSC’s decision to put plaintiff on probation, plaintiff attended a hearing in a custody proceeding regarding his daughter. According to plaintiff, Richard Greenberg, DSC’s co-chief investment officer, questioned whether plaintiff “was sure [he wanted] to do this” (that is, to participate in custody proceedings) and encouraged him to “[g]ive up on [his] daughter.” In addition, at plaintiff’s year-end review meeting, which plaintiff recorded, Greenberg gave him negative feedback about his job performance and stated, “I just want to know . . . is your heart still in it, you know? . . . I mean you’ve got all these things going on.”

Additionally, in January 2017, Jane Park, the firm’s director of business development and client relations, authored a memo for Smith and Greenberg that discussed whether to disclose to firm clients that a more junior investment analyst had received firm equity while plaintiff had not. The memo posited telling clients, as one option, that plaintiff “is going through some personal issues which make[] the current timing less than ideal for ownership disbursement.” Park testified at her deposition that she was referring to the fact that plaintiff was “distracted” because of his divorce and custody fight. The memo was edited by Hartsel, who by then had been promoted to portfolio manager/analyst and gave Greenberg input on the decision to terminate plaintiff. Evidence that plaintiff’s portfolio improved in the last several years of his tenure, and that his compensation correspondingly increased, arguably undermines defendants’ assertion that they terminated him because of the poor performance of his portfolio.

Taken together, the evidence could lead a reasonable factfinder to conclude that defendants’ proffered reasons for denying plaintiff equity and ultimately terminating him were “false,

misleading, or incomplete,” and that plaintiff was, in fact, terminated on the basis of his familial or caregiver status (*Bennett v Health Mgt. Sys., Inc.*, 92 AD3d 29, 35-36, 43 [1st Dept 2011], *lv denied* 18 NY3d 811 [2012]; *see also Friedman v Bloomberg, L.P.*, 230 AD3d 1060, 1061-1062 [1st Dept 2024]). Although the record presents some evidence that defendants terminated plaintiff for legitimate reasons, it is not definitive. A court may not determine credibility or resolve factual issues on a motion for summary judgment (*see Hammond v State of New York*, 157 AD2d 391, 393 [1st Dept 1990]). Concur—Moulton, J.P., Friedman, González, Shulman, Rosado, JJ.

15 Tommy Ng et al., Respondents, v Carlos H. Figueroa et al., Defendants, Vector Building Corp., Respondent, DBMG NY, LLC, et al., Respondents, and RC Russell, LLC, Appellant. [252 NYS3d 125]—An appeal having been taken to this Court by the above-named appellant from an order of the Supreme Court, New York County (James G. Clynes, J.), entered on or about July 11, 2024, and said appeal having been argued by counsel for the respective parties; and due deliberation having been had thereon, and upon the stipulation of the parties hereto dated March 20, 2026, it is unanimously ordered that said appeal be and the same is hereby withdrawn in accordance with the terms of the aforesaid stipulation. Concur—Webber, J.P., Gesmer, Mendez, Pitt-Burke, Hagler, JJ.

16 Noyack Medical Partners, LLC, Appellant, v OSK IX, LLC, Respondent. [252 NYS3d 144]—

Damages—Inadequate and Excessive Damages—Calculation—Value of Taxi Medallions on Date of Breach

Order, Supreme Court, New York County (Jennifer G. Schecter, J.), entered on or about January 17, 2025, which, to the extent appealed from, awarded plaintiff damages in the amount of \$390,000, plus pre-judgment interest running from June 7, 2021 to the date judgment is entered, unanimously affirmed, without costs.

Supreme Court’s damages award was “based on a fair interpretation of the evidence” and was “not contrary to the weight of the evidence” (*Lariviere v New York City Tr. Auth.*, 131 AD3d 1130, 1132-1133 [2d Dept 2015], *lv dismissed* 27 NY3d 1029 [2016]; *see also Tanya Knitwear [PVT], Ltd. v Young Stuff Apparel Group, Inc.*, 12 AD3d 258, 258 [1st Dept 2004]). The court properly calculated damages based on the value of the taxi medallions as of June 7, 2021, the date of the breach (UCC 2-713; *see Fertico Belgium v Phosphate Chems. Export Assn.*, 70 NY2d 76, 81-82 [1987]; *Cole v Macklowe*, 64 AD3d 480, 480

[1st Dept 2009]). In doing so, the court properly relied on a recent sale of the medallions to arrive at its valuation (*see Matter of Allied Corp. v Town of Camillus*, 80 NY2d 351, 356 [1992]).

Additionally, because plaintiff was not a covering buyer, it was not entitled to additional damages based on the expense of preparing the medallions for sale (UCC 1-305; *cf. Fertico*, 70 NY2d at 82, 84).

We have considered plaintiff's remaining arguments and find them unavailing. Concur—Moulton, J.P., Friedman, González, Shulman, Rosado, JJ.

17 The People of the State of New York, Respondent, v Dashawn Wright, Appellant. [252 NYS3d 145]—

Crimes—Verdict—Sufficiency of Evidence

Crimes—Evidence—Excited Utterances—911 Call

Crimes—Argument and Conduct of Counsel—Responsive Remarks

Judgment, Supreme Court, New York County (Thomas Farber, J.), rendered January 16, 2020, convicting defendant, after a jury trial, of burglary in the second degree and criminal trespass in the second degree, and sentencing him, as a second violent felony offender, to concurrent terms of 7½ years on the burglary count and one year on the criminal trespass count, unanimously affirmed.

The verdict was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]; *see also People v Baque*, 43 NY3d 26 [2024]). That the tenant, upon returning to her apartment, discovered defendant, a stranger, in her living room with two dresser drawers half-opened and their contents “shuffled around,” along with defendant's series of implausible excuses for his presence, provided compelling proof that defendant entered her apartment with larcenous intent.

Defendant has not preserved his claim that the victim's 911 call was not admissible as an excited utterance or as a present sense impression (*see People v Smith*, 173 AD3d 414 [1st Dept 2019], *lv denied* 34 NY3d 938 [2019]), and we decline to review his claim in the interest of justice. As an alternative holding, we reject it on the merits. The 911 call was properly admitted under both the excited utterance and present sense impression exceptions to the hearsay rule (*see People v Hernandez*, 28 NY3d 1056, 1057 [2016]; *People v Brown*, 80 NY2d 729, 734 [1993]). The record supports inferences that at the time of the call the victim was still under the influence of the stress of finding a stranger in her locked apartment, as well as that the substantial contemporaneity and corroboration requirements

for admission of a present sense impression were met. In any event, any error in the admission of the 911 call was harmless. The victim testified at trial, and her credibility was fully tested through cross-examination (*see People v Ludwig*, 24 NY3d 221, 230 [2014]).

Since defendant did not object to any of the remarks made by the prosecutor in his summation he has not preserved his claim that those remarks denied him a fair trial (*see People v Romero*, 7 NY3d 911, 912 [2006]). We decline to review his claim in the interest of justice. As an alternative holding, we find no basis for reversal (*see People v Overlee*, 236 AD2d 133 [1st Dept 1997], *lv denied* 91 NY2d 976 [1998]; *People v D'Alessandro*, 184 AD2d 114, 118-119 [1st Dept 1992], *lv denied* 81 NY2d 884 [1993]). The challenged remarks constituted evidence-based comments on the only issue in dispute—defendant's intent. The remarks were responsive to defendant's summation arguments, and did not constitute impermissible vouching, shift the burden of proof, or mischaracterize the evidence. In any event, defendant's failure to raise any objection to these remarks "is perhaps the best indication of the absence of any real prejudice" (*see Overlee*, 236 AD2d at 142).

Defendant's present challenges to the constitutionality of his prior Queens convictions are unpreserved (*see People v Lane*, 7 NY3d 888, 889 [2006]; *People v Stone*, 231 AD3d 585 [1st Dept 2024], *lv denied* 43 NY3d 947 [2025]), and we decline to review his claim in the interest of justice. As an alternative holding, we reject this claim on the merits. Defendant's two prior convictions in Queens County were not obtained in violation of any federal constitutional right, and in any event, the waivers of indictment in the Queens cases satisfied the requirements of CPL 195.20.

We perceive no basis for reducing the sentence. Concur—Webber, J.P., Gesmer, Mendez, Pitt-Burke, Hagler, JJ.

18 The People of the State of New York, Respondent, v Devante Gibson, Appellant. [252 NYS3d 144]—An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Kathryn S. Paek, J.), rendered September 22, 2022, said appeal having been argued by counsel for the respective parties, due deliberation having been had thereon, and finding the sentence not excessive, it is unanimously ordered that the judgment so appealed from be and the same is hereby affirmed. Concur—Webber, J.P., Gesmer, Mendez, Pitt-Burke, Hagler, JJ.

19 The People of the State of New York, Respondent, v George Jones, Appellant. [252 NYS3d 153]—

Crimes—Indictment—Jurisdictional Requirement—Allegations Regarding Violation of Subsection

Judgment, Supreme Court, New York County (Gregory Carro, J.), rendered June 28, 2018, as amended July 23, 2018, convicting defendant, after a jury trial, of criminal possession of a weapon in the third degree, and sentencing him, as a second felony offender, to a term of 2½ to 5 years, unanimously reversed, on the law, the judgment of conviction vacated and the indictment dismissed.

Defendant’s claim that the evidence was legally insufficient is unpreserved because defense counsel’s motion for a trial order of dismissal was general and did not direct the court’s attention to his current appellate claims (*see People v Hawkins*, 11 NY3d 484, 492-493 [2008]; *People v Gray*, 86 NY2d 10, 19 [1995]). As an alternative holding, we find that the conviction was supported by legally sufficient evidence and that the verdict was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348 [2007]; *see also People v Baque*, 43 NY3d 26 [2024]).

However, we agree with defendant that the count of the indictment under which he was convicted was jurisdictionally defective and that the court should not have amended the indictment at the People’s request. While the jurisdictional requirements of an indictment count are ordinarily met by an allegation that the defendant “violated the terms of a specific statute designated by name and section” (*People v Cohen*, 52 NY2d 584, 586 [1981]), that rule does not apply where, as here, the statute at issue allows for commission under discrete subdivisions and there is no specific allegations regarding the subsection that the defendant allegedly violated (*see People v Saenger*, 39 NY3d 433, 438-439 [2023]). The second count of the indictment charging defendant with criminal possession of a weapon in the third degree under Penal Law § 265.02 (1), could be satisfied by proof that defendant committed the “bump-up” crime of fourth-degree criminal possession of a weapon (Penal Law § 265.01) in one of four ways, without specifically alleging the provision that defendant violated. Further, the amendment had the effect of “curing . . . [a] failure . . . to charge or state an offense” or the “[l]egal insufficiency of the factual allegations,” both of which are prohibited by CPL 200.70 (2).

Accordingly, the judgment of conviction is vacated and the indictment dismissed. Concur—Webber, J.P., Gesmer, Mendez, Pitt-Burke, Hagler, JJ.

20 The People of the State of New York, Respondent, v Jefry Flores, Appellant. [252 NYS3d 150]—

Crimes—Appeal—Validity of Waiver of Right to Appeal

Judgment, Supreme Court, Bronx County (Albert Lorenzo, J.), rendered June 29, 2021, convicting defendant, upon his plea of guilty, of criminal possession of a controlled substance in the fourth degree and attempted criminal possession of a weapon in the second degree, and sentencing him to concurrent three-year terms, unanimously affirmed.

Defendant validly waived his right to appeal (*see People v Thomas*, 34 NY3d 545, 559 [2019], *cert denied* 589 US 1302 [2020]). The court explained to defendant that “[o]rdinarily you would retain the right to appeal even after pleading guilty. So a waiver of the right to appeal is separate and distinct from the waiver of the right of a trial and other rights of a plea of guilty,” and the court’s colloquy closely tracked the Model Colloquy (*see People v Maldonado*, 242 AD3d 419, 420 [1st Dept 2025], *lv denied* 44 NY3d 1053 [2025]). Further, the written waiver stated, “I understand that my right to appeal is separate and distinct from the rights automatically forfeited upon a guilty plea.” The fact that the colloquy about the waiver occurred after allocution does not render his waiver of his right to appeal invalid (*see People v Jessamy*, 237 AD3d 619, 619 [1st Dept 2025], *lv denied* 43 NY3d 1046 [2025]). The valid waiver of the right to appeal forecloses our review of defendant’s challenge to the search warrant (*see People v Wallace*, 240 AD3d 437, 438 [1st Dept 2025], *lv denied* 44 NY3d 1014 [2025]).

As an alternative holding, we find that there was a sufficient factual predicate upon which to issue the search warrant in this case (*see People v Griminger*, 71 NY2d 635, 639 [1988]; *see also People v Parris*, 83 NY2d 342, 350 [1994] [“An identified citizen informant is presumed to be personally reliable”]; *People v Goldman*, 189 AD3d 698, 700 [1st Dept 2020], *lv denied* 36 NY3d 1097 [2021]). Concur—Moulton, J.P., Friedman, González, Shulman, Rosado, JJ.

21 The People of the State of New York, Respondent, v Kenny Johnson, Appellant. [252 NYS3d 147]—An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, Bronx County (Tara A. Collins, J.), rendered July 27, 2021, said appeal having been argued by counsel for the respective parties, due deliberation having been had thereon, and finding the sentence not excessive, it is unanimously ordered that the judgment so appealed from be and the same is hereby affirmed. Concur—Moulton, J.P., Friedman, González, Shulman, Rosado, JJ.

22 The People of the State of New York, Respondent, v Luis Padro-Rosario, Appellant. [252 NYS3d 146]—An appeal having

been taken to this Court by the above-named appellant from a judgment of the Supreme Court, Bronx County (Ralph A. Fabrizio, J.), rendered September 12, 2022, said appeal having been argued by counsel for the respective parties, due deliberation having been had thereon, and finding the sentence not excessive, it is unanimously ordered that the judgment so appealed from be and the same is hereby affirmed. Concur—Moulton, J.P., Friedman, González, Shulman, Rosado, JJ.

23 The People of the State of New York, Respondent, v Maurice Kinsey, Appellant. [252 NYS3d 11]—

Crimes—Search Warrant

Judgment, Supreme Court, Bronx County (Shari R. Michels, J. on motion to controvert the search warrant; James McCarty, J. at plea and sentencing), rendered December 3, 2019, convicting defendant of attempted criminal possession of a weapon in the second degree, and sentencing him to five years of probation, unanimously affirmed.

Regardless of whether the appeal waiver was valid, we find, based on our in camera review of the sealed materials, that there was probable cause to issue the search warrant. We decline to revisit this Court's prior order, which denied defendant's motion to vacate the protective order and to provide him with copies of the unredacted search warrant materials (*see People v Meran*, 143 AD3d 423, 424 [1st Dept 2016], *lv denied* 28 NY3d 1074 [2016]). Concur—Moulton, J.P., Friedman, González, Shulman, Rosado, JJ.

24 The People of the State of New York, Respondent, v Tyresse Minter, Appellant. [252 NYS3d 151]—An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, Bronx County (Audrey E. Stone, J.), rendered February 26, 2025, said appeal having been argued by counsel for the respective parties, due deliberation having been had thereon, and finding the sentence not excessive, it is unanimously ordered that the judgment so appealed from be and the same is hereby affirmed. Concur—Webber, J.P., Gesmer, Mendez, Pitt-Burke, Hagler, JJ.

25 Prospect Capital Corporation, Appellant-Respondent, v Morgan Lewis & Bockius LLP et al., Respondents-Appellants. [252 NYS3d 152]—

Disclosure—Protective Order—Waiver of Privileges

Disclosure—Scope of Disclosure—Legal Malpractice—Relevance to Reliance on Advice

Order, Supreme Court, New York County (Margaret A. Chan,

J.), entered on or about July 25, 2025, which, to the extent appealed from, denied in part plaintiff's motion for a protective order insofar as categories 15, 19, and 20 of its privilege log were found to have been placed at issue, and which, to the extent cross-appealed from as limited by the briefs, granted plaintiff's motion for a protective order as to categories 6, 9, 10, and 12 of its privilege log, unanimously affirmed, without costs.

In this legal malpractice case, Supreme Court providently denied plaintiff's motion for a protective order as to categories 15, 19, and 20 of its privilege log, limiting disclosure of category 19 solely to advice related to Prospect's choice to bring the turnover claim, because plaintiff had waived the attorney-client privilege and work product privilege by reason of the at-issue doctrine (see CPLR 3103 [a]; *Those Certain Underwriters at Lloyds, London v Occidental Gems, Inc.*, 11 NY3d 843, 845 [2008]; *G.D. Searle & Co. v Pennie & Edmonds*, 308 AD2d 404, 404 [1st Dept 2003]). As this Court previously stated, the issues in this case "involve whether defendants' alleged malpractice leading to the loss of a cause of action under the turnover provision of the subordination agreement caused Prospect damages" (*Prospect Capital Corp. v Morgan Lewis & Bockius LLP*, 239 AD3d 526, 527 [1st Dept 2025]). As to categories 15, 19, and 20, plaintiff has placed at issue the communications from in-house counsel regarding the turnover provision, its interpretation, and the decisions of whether or when to litigate against nonparty Silicon Valley Bank, because plaintiff has alleged that it relied on defendants' advice in formulating its negotiation and litigation strategy (see *Deutsche Bank Trust Co. of Ams. v Tri-Links Inv. Trust*, 43 AD3d 56, 63-64 [1st Dept 2007]). The "communications sought . . . were made concurrently with the representation" by defendants and were "relevant to establishing . . . alleged reliance" on their advice (*Bolton v Weil, Gotshal & Manges LLP*, 4 Misc 3d 1029[A], 2004 NY Slip Op 51118[U], *6 [Sup Ct, NY County 2004]; see also *Charbern Mgt. Group LLC v Borah, Goldstein, Altschuler, Nahins & Goidel, P.C.*, 2023 WL 3945599, *4, 2023 US Dist LEXIS 101340, *9-10 [SD NY, June 12, 2023, No. 22-CV-8137 (VEC)]). The privilege based on work product may also be waived "by reason of the at-issue doctrine" (*G.D. Searle & Co.*, 308 AD2d at 404; see also *Goldberg v Hirschberg*, 10 Misc 3d 292, 298 [Sup Ct, NY County 2005]; *Bolton*, 2004 NY Slip Op 51118[U], *4).

On the other hand, Supreme Court providently granted plaintiff's motion for a protective order as to categories 6, 9,

10, and 12 of its privilege log. The communications at issue, involving other contracts and amendments in the same transaction, are not relevant to whether plaintiff relied on defendants' advice regarding the turnover provision (*see Prospect Capital Corp.*, 239 AD3d at 526-527).

We have considered the remaining contentions and find them unavailing. Concur—Moulton, J.P., Friedman, González, Shulman, Rosado, JJ.

26 Qiaoshang International LLC, Respondent, et al., Plaintiff, v Bryant Park Funding 100, LLC, Appellant, et al., Defendants. [— NYS3d —]

Vendor and Purchaser—Contract for Sale of Condominium—Interest in Subject Units—Constructive Notice
Specific Performance—Contract for Sale of Condominium—Control over Direct Owner

Judgment, Supreme Court, New York County (Jennifer G. Schecter, J.), entered January 24, 2025, to the extent appealed from as limited by the briefs, cancelling the mortgage of defendant Bryant Park Funding 100, LLC (BPF) against 16 West 40th Street, New York, NY, units 31A and 31B, recorded on June 28, 2022, and bringing up for review orders, same court and Justice, entered on or about July 12, 2024, which granted plaintiffs' motion for summary judgment, unanimously affirmed, with costs.

On April 17, 2017, plaintiff Qiaoshang International LLC (Qiaoshang) executed two substantially identical letter agreements, one with defendant HFZ Bryant Park Member I LLC (HFZ I) and the other with defendant HFZ Bryant Park Member II LLC (HFZ II). Together, HFZ I and II indirectly owned a controlling interest in defendant 20 West 40 Bryant Park Owner LLC, the owner of The Bryant, a condominium development located on 40th Street in Manhattan. HFZ I and II, together with their affiliates, defendants HFZ Capital Group LLC, HFZ Bryant Park Owner LLC and HFZ Bryant Park Manager LLC (collectively, HFZ), were in the process of developing The Bryant. Qiaoshang entered into these agreements with the express purpose of acquiring two adjacent units in the building that were being marketed as units 31A and B. However, until the New York Attorney General approved the condominium offering plan, the units could not be purchased outright. Thus, under the agreements, Qiaoshang paid a substantial sum in exchange for a membership interest in the two LLCs, with an agreement that, within 10 days following the offering plan's effective date, HFZ was to issue Qiaoshang an offering notice so that Qiaoshang could, if it chose, deliver a

“conversion notice” to HFZ, thereby starting the process of converting its membership interests into ownership of the units.

This arrangement had been structured by Qiaoshang’s principal, plaintiff Ying Ding, and Nicholas Mastroianni, the principal of defendant United States Immigration Fund, LLC (USIF), who was also principal of BPF. As part of this arrangement, USIF agreed to pay money which it owed to Ding’s entity.

The Attorney General approved the offering plan on May 4, 2017. HFZ, which has defaulted, has not disputed that it failed to send the offering notice within the time set by their agreement. As a result, Qiaoshang did not send HFZ a conversion notice. Despite this, the record establishes that over the next several years, both HFZ and Mastroianni treated Qiaoshang as the units’ owner, until at least late 2020.

The court properly granted plaintiffs’ motion for summary judgment against BPF. Plaintiffs established that they had an “interest” in the subject units, that BPF knew precisely which units Qiaoshang sought to acquire, and that BPF had actual or at least constructive notice of this interest by the time HFZ granted BPF a mortgage on May 27, 2022 (*see Warwick St Partners LLC v Harris*, 200 AD3d 586, 587 [1st Dept 2021], *lv dismissed* 38 NY3d 1168 [2022]). The record also establishes that HFZ, which defaulted, waived any requirement that Qiaoshang deliver a conversion notice (*see Condor Funding, LLC v 176 Broadway Owners Corp.*, 147 AD3d 409, 411 [1st Dept 2017]). BPF’s actual or constructive notice meant that BPF was not a bona fide encumbrancer when it was granted and subsequently recorded its mortgage (*see Warwick St Partners LLC*, 200 AD3d at 587).

The court also properly granted plaintiffs’ motion for summary judgment on their cause of action seeking specific performance against HFZ. Although HFZ I and II did not directly own the units, their control over the direct owner gave them the power to exercise specific performance (*see 75 Christopher St. Corp. v Furman*, 138 AD2d 323, 323-324 [1st Dept 1988]). The language BPF argues constitutes a condition precedent for closing merely sets the maximum time limit by which HFZ could set a closing date, a matter otherwise left to HFZ’s discretion. After HFZ had failed to exercise that discretion, and then defaulted the court ordered specific performance. In any event, the timeframes set in the agreement do not undermine the conclusion that the record establishes that Qiaoshang had an interest in the property sufficient to defeat BPF’s status as a bona fide encumbrancer (*see Warwick St Partners LLC*, 200

AD3d at 587; *2386 Creston Ave. Realty, LLC v M-P-M Mgt. Corp.*, 58 AD3d 158, 163 [1st Dept 2008], *lv denied* 11 NY3d 716 [2009]).

The court also providently exercised its discretion in granting summary judgment notwithstanding BPF's request for additional discovery (*see* CPLR 3212 [f]). BPF does not adequately explain how the additional discovery it sought would establish that it lacked actual or constructive notice, or how the additional discovery might otherwise change the motion's outcome.

We have considered the remaining arguments and find them unavailing. Concur—Webber, J.P., Gesmer, Mendez, Pitt-Burke, Hagler, JJ.

27 Zenun Ramaj et al., Respondents, v Franciosa Complex, LLC, Appellant, et al., Defendants. (And a Third-Party Action.) [252 NYS3d 154]—

Labor—Safe Place to Work—Fall into Trench—Adequate Safety Device

Order, Supreme Court, Bronx County (Mitchel J. Danziger, J.), entered September 6, 2024, which, to the extent appealed from as limited by the briefs, granted plaintiffs' motion for summary judgment on their claim pursuant to Labor Law § 240 (1), unanimously affirmed, without costs.

Plaintiffs made a prima facie showing that plaintiff Zenun Ramaj's accident was proximately caused by a violation of Labor Law § 240 (1). The evidence established that defendants failed to provide an adequate safety device protecting plaintiff from falling into a 7½-foot deep trench when the wood plank covering the trench broke (*see Devlin v AECOM*, 224 AD3d 437, 438 [1st Dept 2024]; *Rubio v New York Proton Mgt., LLC*, 192 AD3d 438, 439 [1st Dept 2021]; *see also Palumbo v Citigroup Tech., Inc.*, 240 AD3d 455, 456 [1st Dept 2025]).

In opposition, defendants failed to raise an issue of fact. That there was no other witness to the accident does not bar judgment in plaintiff's favor (*see Dyszkiewicz v City of New York*, 194 AD3d 444, 445 [1st Dept 2021]). Although plaintiff's testimony that the covering was not secured to the ground was contradicted by a coworker who testified that the covering was secured with nails, this inconsistency does not raise a material issue of fact as to whether the trench covering failed as a safety device (*see Ortiz v Burke Ave. Realty, Inc.*, 126 AD3d 577, 578 [1st Dept 2015]).

We have considered defendants' other contentions and find them unavailing. Concur—Moulton, J.P., Friedman, González, Shulman, Rosado, JJ.

28 Robin Fabricio Sanchez-Pesantez, Respondent, v City of New York, Defendant, and Dormitory Authority of the State of New York, Appellant. (And a Third-Party Action.) [252 NYS3d 149]—

Municipal Corporations—Notice of Claim—Late Notice—Actual Knowledge
Municipal Corporations—Notice of Claim—Late Notice—Reasonable Excuse

Order, Supreme Court, New York County (Hasa A. Kingo, J.), entered on or about October 3, 2024, which, to the extent appealed from as limited by the briefs, granted plaintiff's motion for leave to serve a late notice of claim, unanimously affirmed, without costs. Appeal from order, same court and Justice, entered on or about July 24, 2025, which granted defendant's motion to reargue so much of the aforementioned order as directed defendant to produce certain records in accordance with CPLR 409 (a), and upon reargument, modified the order to the extent of vacating that directive and referring further discovery matters to the Justice assigned to the motion, unanimously dismissed, without costs, as abandoned.

Supreme Court providently exercised its discretion in granting plaintiff leave to file a late notice of claim. Plaintiff demonstrated that defendant Dormitory Authority of the State of New York (DASNY) had actual knowledge of the essential facts underlying the claims on which liability was predicated (*see* General Municipal Law § 50-e [5]; *see e.g. Matter of Toro v New York City Hous. Auth.*, 182 AD2d 358, 358 [1st Dept 1992]; *Joseph v New York City Hous. Auth.*, 179 AD2d 441, 441 [1st Dept 1992]). In addition, DASNY had actual notice from the job incident report, completed within hours of the accident by DASNY's own project manager on a DASNY form, which states the time and place, the injured worker, and general nature of the accident (*see e.g. Matter of Toro*, 182 AD2d at 358; *Matter of Sokolowski v New York City Hous. Auth.*, 173 AD2d 239, 239 [1st Dept 1991]). Although the incident report contains limited details, DASNY cannot rely on its incompleteness to argue lack of sufficient notice, as it was generated through its own employee on its own form, and DASNY never sought to supplement it (*see Joseph*, 179 AD2d at 441; *Matter of Sokolowski*, 173 AD2d at 239). Furthermore, in light of the actual knowledge imparted by the job incident report, DASNY also did not suffer any substantial prejudice from the delay (*see Matter of Jaime v City of New York*, 41 NY3d 531, 539 [2024]).

Plaintiff's assertion that confusion over the proper entity to serve resulted in a 344-day delay in filing a notice of claim against DASNY does not constitute a reasonable excuse for the delay (*see Matter of Kayam v City of New York*, 237 AD3d 474,

475 [1st Dept 2025]; *Matter of Richardson v New York City Hous. Auth.*, 136 AD3d 484, 485 [1st Dept 2016], *lv denied* 28 NY3d 905 [2016]). However, lack of reasonable excuse standing alone is not fatal to the motion, and given the surrounding circumstances, Supreme Court providently granted the motion despite the lack of reasonable excuse (*see Matter of Mercedes v City of New York*, 169 AD3d 606, 607 [1st Dept 2019]). Concur—Webber, J.P., Gesmer, Mendez, Pitt-Burke, Hagler, JJ.

29 Shorehaven Homeowners Association, Inc., Appellant, v Sherese Campbell, Respondent, et al., Defendants. [252 NYS3d 155]—

Taxation—Tax Liens, Tax Sales and Tax Titles—Foreclosure—Redemption

Order, Supreme Court, Bronx County (Matthew Parker-Raso, J.), entered July 2, 2025, which, to the extent appealed from as limited by the briefs, granted defendant Sherese Campbell's motion to the extent of finding that defendant is not obligated to pay \$3,928.30 in publication and legal fees to plaintiff sought under plaintiff's common charge lien, unanimously affirmed, without costs.

On December 12, 2024, Supreme Court issued an order for final judgment of foreclosure and sale and a money judgment in the amount of \$40,484.59, together with interest, current common charges, special assessments and late charges. As of March 2025, Campbell made two payments to plaintiff, reducing these arrears to \$21,455.111. The parties then executed a March 6, 2025 payment agreement (agreement), wherein Campbell agreed to pay the arrears balance in 24 monthly installments of \$893.00 on the 15th of each month in addition to the current monthly assessment. The first installment was due on April 15, 2025, and the final installment would be due on January 15, 2027. Notably, plaintiff's by-laws were not incorporated by reference into the agreement, namely, Article 6.7 obligates a member (i.e., Campbell) to pay attorneys' fees and expenses to collect unpaid assessments or in any action to foreclose on a lien. Nor did the agreement contain a comparable "fees and costs" provision to be triggered if defendant defaulted thereunder.

Between April 1, 2025 and May 12, 2025, Campbell made eight installment payments totaling \$22,788.57. Although Campbell missed her first April 15, 2025 payment deadline, she effectively cured this initial default by paying off the entire sum owed under the agreement nearly two years ahead of schedule.

The Court of Appeals has made clear that "[t]he equity of

redemption, which long predates the RPAPL, allows property owners to redeem their property by tendering the full sum at any point before the property is actually sold at a foreclosure sale An unconditional tender of the full amount due is all that is required” (see *NYCTL 1999-1 Trust v 573 Jackson Ave. Realty Corp.*, 13 NY3d 573, 579 [2009], *cert denied* 561 US 1006 [2010] [citations omitted]), and that is exactly what Campbell did. Accordingly, plaintiff’s acceptance of the full amount of arrears without objection waived any right to continue the foreclosure sale.

Moreover, given the unambiguous terms of the agreement, it was well within the motion court’s discretion to partially grant Campbell’s motion and disallow the purported publication costs and attorneys’ fees incurred after May 12, 2025.

Plaintiff’s cancellation of the foreclosure sale did not render the motion via defendants’ order to show cause moot. Had Campbell withdrawn her motion, plaintiff could have scheduled a new foreclosure sale (see *City of New York v Ring*, 34 AD3d 218, 219 [1st Dept 2006]). Concur—Moulton, J.P., Friedman, González, Shulman, Rosado, JJ.

30 In the Matter of State of New York, Respondent, v D.M., Appellant. [— NYS3d —]—

Crimes—Sex Offenders—Civil Commitment or Supervision—Dangerous Sex Offender Requiring Confinement

Crimes—Sex Offenders—Civil Commitment or Supervision—Mental Abnormality

Crimes—Sex Offenders—Civil Commitment or Supervision—Compliance with Treatment

Order, Supreme Court, Bronx County (Tara A. Collins, J.), entered August 23, 2024, which granted the petition to revoke respondent D.M.’s prior release into the community under strict and intensive supervision and treatment (SIST) and ordered him to be civilly committed at a secure treatment facility, and bringing up for review an order, same court and Justice, entered August 7, 2024, which, after an evidentiary hearing, found respondent to be a dangerous sex offender requiring confinement under Mental Hygiene Law article 10, affirmed, without costs.

In 1977, when respondent was 23 years old and on parole supervision for a robbery conviction, he pleaded guilty to first-degree rape of a seven-month-old infant and was sentenced to a prison term of 8 to 16 years’ imprisonment. In 1986, while still on parole after serving eight years for the prior offense, respondent committed an article 10 qualifying sex offense. He was convicted of two counts of sexual abuse in the first degree

and one count of attempted sexual abuse in the first degree for his abuse of two boys, a nine year old and a 13 year old, and he was sentenced to two terms of 3½ to 7 years, to run consecutively. During his incarceration, respondent accumulated 26 disciplinary tickets for moderately severe (tier II) and highly severe (tier III) violations of prison rules. Two of the tier III violations involved sexual conduct by respondent—one for his making of unwanted sexual advances, kissing, and grabbing the buttocks of other inmates, and the other for consensual, though prohibited, sexual behavior with another inmate. Also noteworthy, although never charged, is respondent's admission of having a sexual relation with a 14-year-old female when he was 22 years old, which resulted in a child.

In November 2009, as respondent approached his release date, the Office of Mental Hygiene (OMH) conducted an article 10 evaluation, diagnosed him with pedophilic disorder and antisocial personality disorder (ASPD), and filed a petition for civil management. The court eventually committed respondent to a secure OMH facility, and an order of continued confinement was issued in April 2019.

On October 15, 2021, following an annual review hearing, Supreme Court found that respondent continued to suffer from a mental abnormality but was not then a dangerous sex offender requiring confinement. Thus, the court ordered respondent, who by then was 68 years old, to be released from the secure facility to the community under a SIST regimen. The SIST order incorporated numerous conditions of release, including the requirements that respondent complete sex offender treatment which required respondent to attend the program regularly, participate fully, and not miss scheduled appointments. In addition, the SIST order required respondent to comply with conditions prohibiting contact with children, possession of photographs of children and any unapproved cell phones, and access to social networking websites that allow minors to register, without the permission of his parole officer. Respondent was also required to wear a functioning GPS tracking monitor. Finally, the order memorialized respondent's acknowledgment that any violation of the SIST terms or conditions could result in the modification of SIST conditions or imposition of civil confinement.

Respondent repeatedly—and flagrantly—violated the SIST conditions. Respondent's parole officer filed seven incident reports for violation of SIST conditions while respondent was in his sex offender treatment program with New York Mental Health between December 2021 and December 2022.

Respondent had prohibited contact with minors on multiple occasions. A December 2021 SIST incident report, issued two months after respondent's release into SIST, states that respondent had prohibited contact with a minor female at the church he attended, gifting her a painting he had made. A June 2022 report states that respondent told his sex offender treatment provider that he had contact with a 16- or 17-year-old female—specifically, helping her find a lost wallet. When he discussed this incident with his parole officer, however, he admitted that the child was around 11 or 12 years of age. Respondent reported feeling happy about his incident “because he did something good,” demonstrating an acute lack of awareness as to how this incident violated his SIST prohibition against contact with minors and “minimized the extension of his deviant sexual history against minors.”

Respondent had further prohibited contact with minors using social media. A February 2022 incident report showed that he had obtained a Facebook account through another shelter resident, and that many of his Facebook friends appeared to be underage and residing in other countries. A review of respondent's private message chats revealed a conversation with and a photo of what appeared to be an underage boy. Respondent denied using social media applications when confronted by his parole officer and accused other shelter residents for the Facebook app's presence on his phone, despite his name and email addresses being attached to the Facebook account.

Respondent also possessed prohibited cell phones and images of minors. His April 2023 treatment Monthly Discussion Guide indicates that he possessed a cell phone that he allegedly “found” with a picture of a female child who appears to be between the ages of 9 and 10 years of age on the lock screen; he stated that he was holding the phone “to see if it gets a call so he can return it.” The next month, when confronted by his treatment provider about possessing another unauthorized cell phone, he denied having ever possessed it before ultimately surrendering it to his parole officer. Respondent's August 2023 Monthly Discussion Guide shows that he was found to be in possession of another unapproved cell phone, which contained pictures of children. Respondent claimed both to have been given the phone by another resident and to have “found” it. The following month, respondent's parole officer confiscated another unauthorized cell phone from respondent.

Respondent also repeatedly tampered with his GPS tracking device. An incident report shows that in December 2021, shortly following his release into SIST, defendant broke and

removed his device. A February 2022 report states that respondent tampered with and loosened the device and denied having done so to his parole officer, and a September 2022 report shows that, after the device was temporarily removed to allow respondent to treat a rash, respondent repeatedly failed to wear the tracking component of his GPS device, so that he was not being tracked. Respondent's June 2023 Monthly Discussion Guide shows that he "no longer had" his GPS charger, and the following month's Guide reported that his GPS battery had died on multiple occasions.

Respondent's July 2023 Monthly Discussion Guide also stated that he violated curfew on multiple occasions, leaving the SIST shelter for approximately 40 minutes at a time. Respondent failed to provide his parole officer with an explanation as to why he violated curfew or where he went during his absconding.

Respondent made numerous remarks of a quasi-sexual nature towards shelter staff and his treatment providers throughout his SIST supervision. His April 2023 Monthly Discussion Guide reports that he repeatedly told a treatment staff member that she was beautiful and asked for a picture of her so he could paint her. Respondent's July and September 2023 Monthly Discussion Guides indicate that he continued telling female staff that they were beautiful.

Respondent also engaged in plainly sexual behavior while under SIST supervision, as he sexually propositioned a much younger male treatment patient, whom he characterized as "young" and needing "help . . . out of his shell" and whom he would meet in the elevator so "others don't know [respondent] spends time with him."

Finally, respondent failed to complete his mandated sex offender treatment program. Respondent's incident reports and Monthly Discussion Guides are replete with voluminous instances of respondent skipping treatment sessions (sometimes for weeks at a time) and leaving sessions early, exhibiting combative behavior and failing to participate and engage in the treatment sessions he did attend, refusing to discuss his past sexual offenses, falsely reporting treatment attendance to his parole officer, refusing to assume responsibility for his SIST violations, engaging in "grievance thinking" (that his treatment providers were only there to send him back to jail), violating his behavior contracts, and failing to demonstrate any insight as to the problematic nature of his behavior in light of his past sexually deviant behavior.

Respondent's performance was so poor that he was expelled

from his first treatment program, New York Mental Health Group, in December 2022, and given a second chance with another program, RevCore, from which he was also expelled. Thus, in October 2023, the Department of Corrections and Community Supervision issued an incident report stating that respondent had been discharged from RevCore for missing 19 of his individual and group therapy sessions in a 10-month period.

An OMH psychologist, Dr. Jonathan Miljus, conducted an article 10 psychiatric evaluation of respondent, diagnosing him with pedophilic disorder and ASPD and opining that he required confinement at a secure OMH facility. Dr. Miljus's determination was based on, among other things, the reports and Monthly Discussion Guides from his treatment programs, parole records, and discussions with respondent's parole officer and sex offender treatment provider. Dr. Miljus also based his determination on a phone interview with respondent, during which respondent stated that "incarceration was enough treatment for him," and that "he has no current issues to work [on] in treatment," and denied both his noncompliance with SIST and his negative behaviors. Dr. Miljus administered the Static-99R sex offender assessment test, which ranked respondent in the "Above Average" risk group for recidivism. He also reviewed the results of the STABLE-2007 and ACUTE-2007 assessment tests administered to respondent while on SIST, both of which indicated that respondent was a high risk for recidivism. Despite respondent's advanced age, Dr. Miljus opined that respondent has continued to "exhibit these rule breaking manipulative, deceitful behaviors well into an age when you would believe that there is a decline." Dr. Miljus was particularly concerned with respondent's SIST violations that involved minors, which demonstrated that respondent is "not aware of how his behavior is indicative of his pedophilic disorder." Dr. Miljus believed respondent's behavior was becoming "more brazen and representative of risk, which is a concern, that makes him increasingly more dangerous and likely to re-offend."

Later that month, petitioner State of New York filed the underlying petition for revocation of respondent's SIST release and for his confinement in a secure facility. While Dr. Miljus testified in favor of confinement, a Mental Hygiene Legal Services expert, Dr. Leonard A. Bard, testified in favor of keeping respondent in the SIST program. While acknowledging respondent's host of SIST violations, as well as also scoring respondent as a high risk of recidivism on the Static-99R tool, Dr. Bard testified that respondent is a low risk to reoffend given

that he had not acted in a sexual manner “indicative of a loss of control of sexual urges” in the two years he had been released on SIST. Dr. Bard also argued that respondent’s failure to complete the sex offender treatment programs was due both to a brain injury suffered while on SIST and a language barrier (respondent speaks Spanish and English).

In granting the petition, Supreme Court credited the opinion of Dr. Miljus over that of Dr. Bard. The court found that respondent had engaged in a pattern of disregarding his mandatory sex offender treatment, despite being given two years’ worth of opportunities and accommodations to do so. The court did not credit Dr. Bard’s opinions that respondent’s purported cognitive impairments were reasons for his failure in the sex offender treatment program, as respondent was otherwise able to keep a schedule and attend and participate in his drug treatment program, see his parole officer, and go to church. The court applied the same reasoning to respondent’s alleged language barrier, as respondent was able to communicate in English, including during his evaluation with Dr. Bard.

The court found that respondent’s “brazen” violations of the prohibitions from him having contact with children, possessing unauthorized cell phones and photos of children, and having social media accounts, demonstrated that he was not avoiding or managing his risk, making him more likely to reoffend. The court expressed further concern with respondent’s expressed belief that a young woman (18 and up) and a 70-year old man could have a healthy romantic relationship, and his admission that he stares at women working out in the gym and believes that they are taunting him and dressing provocatively to entice him. The court also considered respondent’s failure to maintain his monitoring devices and his above-average-to high scores on the reoffending risk assessments.

The court concluded that respondent willingly failed to participate in sex offender treatment based on his misguided belief that he did not need it, and that there was nothing in the record that led the court to believe that he had gained any insight into his offending behavior or tried to manage his risk. Further, the court observed that while respondent may not have sexually reoffended, it disagreed with Dr. Bard’s opinion that none of respondent’s SIST violations implicated sexual misconduct. After his release from civil confinement, respondent, a diagnosed pedophile, had multiple unauthorized contacts with minors in person, online, and in photos, and propositioned an adult who looked like a teenager. The court noted, “[i]t is well settled that the State need not await sexual

offending before concluding that an offender is unable to control his sexual behavior (*see e.g. Matter of State of New York v George N.*, 160 AD3d 28, 31 [4th Dept 2018]), and here the State [had] amply ‘demonstrate[d] a persuasive link’ between the respondent’s nonsexual SIST violations ‘and the offender’s ability to control his sexual behavior’ (*Matter of State of New York v Anthony R.*, 228 AD3d 541, 545 [1st Dept 2024]).”

The court properly found that petitioner showed by clear and convincing evidence that respondent was a dangerous sex offender requiring confinement (*see* Mental Hygiene Law §§ 10.07 [f]; 10.11 [d] [4]; *Matter of State of New York v Michael M.*, 24 NY3d 649, 658-659 [2014]). The Mental Hygiene Law defines a “dangerous sex offender requiring confinement” as a “person who is a detained sex offender suffering from a mental abnormality involving such a strong predisposition to commit sex offenses,[*] and such an inability to control behavior, that the person is likely to be a danger to others and to commit sex offenses if not confined to a secure treatment facility” (Mental Hygiene Law § 10.03 [e]). “The trier of fact is in the best position to evaluate the weight and credibility of conflicting expert medical and psychiatric testimony” (*Matter of State of New York v Jason H.*, 82 AD3d 778, 780 [2d Dept 2011], citing *Matter of State of New York v Donald N.*, 63 AD3d 1391, 1394 [3d Dept 2009] and *Matter of George L.*, 85 NY2d 295, 305 [1995]). Under the circumstances presented here, we defer to Supreme Court’s determination in this regard (*see Jason H.*, 82 AD3d at 780).

We begin by noting that the court was “not limited to considering only the facts of the SIST violations that prompted this revocation proceeding,” but was entitled to “rely on all the relevant facts and circumstances tending to establish that respondent was a dangerous sex offender such as his underlying offenses and past SIST violations” (*Matter of State of New York v DeCapua*, 121 AD3d 1599, 1600 [4th Dept 2014] [internal quotation marks omitted], *lv denied* 24 NY3d 913 [2015]; *see also Matter of State of New York v David D.*, 206 AD3d 481, 485 [1st Dept 2022] [“it is the totality of respondent’s mental abnormalities, coupled with his history of substance abuse, impulsivity, lack of remorse or acceptance of his crimes, scores on the risk assessment instruments administered, and lack of sex offender treatment, that evinces respondent’s predisposition to commit sex offenses without the ability to control his sex offending conduct”]). Further, regardless of whether SIST

* It is undisputed that respondent suffers from a “mental abnormality” as relevant for this analysis.

violations were sexual in nature, “they remain highly relevant regarding the level of danger that [respondent] poses to the community with respect to his risk of recidivism” (*Jason H.*, 82 AD3d at 780, quoting *Donald N.*, 63 AD3d at 1394).

Dr. Miljus’s testimony establishes that both respondent’s pedophilic disorder and ASPD are chronic, lifelong conditions that manifest in respondent’s persistent rule breaking, manipulative, and deceitful behaviors despite his advanced age. Specifically, ASPD is characterized by deceitfulness, impulsivity, repeated criminal behavior, irresponsibility, aggression, and reckless disregard for the safety of others. Sex offender treatment, while not eliminating pedophilic disorder completely, helps individuals control their urges to sexually offend against children and learn to manage risks while in the community.

Respondent’s history of horrific pedophilic offenses, both of which were committed while he was on parole, and his violation of prison rules while incarcerated, together with his utter disregard for sex offender treatment throughout his two-year release into SIST, his myriad violations of SIST conditions regarding contact with and possession of photos of minors, and continued inappropriate interactions with treatment staff and clients demonstrate that he has no interest in controlling his pedophilic urges and remains a danger to reoffend.

Respondent’s continued pedophilic behavior is paired with his failure to discuss or accept responsibility for both his past sexual offenses and SIST violations, persistent unwillingness to attend treatment sessions, repeated attempts to evade GPS tracking and curfew, and blaming of his treatment staff for his noncompliance. Respondent’s expulsion from two separate treatment programs demonstrate that he is not willing to partake in, let alone benefit from, sex offender treatment, and his SIST violations have become only more “brazen.” We agree with the court’s conclusion that, despite his advanced age, respondent remains a dangerous individual who will sexually reoffend if not committed to a secure facility.

Finally, our previous holding in *Matter of State of New York v Anthony R.* (228 AD3d 541 [1st Dept 2024]) upon which respondent and the dissent rely, does not compel a different result, as it is wholly distinguishable from this case. Specifically, the respondent in *Anthony R.*, who was diagnosed with schizoaffective bipolar disorder and antisocial personality disorder, had previously lived in and complied with SIST for five years before his medication and mental health treatment plans were altered upon the onset of the COVID pandemic, after

which he lapsed into aggressive behavior (*id.* at 542). After a temporary confinement, the respondent was again released under SIST despite receiving ineffective psychiatric care prior to his release, as he was medication noncompliant and exhibiting psychotic behaviors at the time of his release (*id.* at 543). Within three days of his release, he was taken back into custody for missing curfew, appearing late for sex offender treatment, and testing positive for substance abuse (*id.*). After giving a detailed history as to how his mental health treatment providers had utterly failed him, we held that the respondent was not a dangerous sex offender requiring confinement because the petitioner did not causally link the respondent's substance abuse or aggressive behavior to any sexual behavior or compulsion during his three-day release in SIST (*id.* at 545-546).

The facts here are inapposite. First, respondent does not have a five-year history of SIST compliance like the respondent in *Anthony R.* As we have exhaustively detailed, respondent has not complied, or even showed any interest in complying, with sex offender treatment. Second, *Anthony R.*'s SIST violations were not of a sexual nature and did not bear any discernible relationship to his underlying crime, the rape of a 64-year-old woman (*id.* at 542). Here, respondent's SIST violations are indisputably reflective of his pedophilic disorder, as they involve his secretive, calculated, and prohibited interaction with minors, as well as photographs of them. Second, respondent's sex acts in prison, his proposition of the "young" client at his sex offender treatment center, and his repeated verbal advances towards treatment staff are all of a sexual nature.

We have considered the remaining arguments and find them unavailing. Concur—Manzanet-Daniels, J.P., Gesmer, González, Shulman, O'Neill Levy, JJ.

Gesmer, J., dissents in a memorandum as follows:

I respectfully dissent. While there is no doubt that the crimes respondent D.M. committed in 1977 and 1986 were heinous, that is not the question before this court. Instead, the question we must consider is whether there is clear and convincing evidence that respondent presently suffers "from a mental abnormality involving such a strong predisposition to commit sex offenses, and such an inability to control behavior, that he [is] likely to be a danger to others and to commit sex offenses if not confined to a secure treatment facility" (*Matter of State of New York v Michael M.*, 24 NY3d 649, 653 [2014]; Mental Hygiene Law § 10.07 [f]). I do not believe that petitioner State of New York met its burden to demonstrate that respondent

meets these criteria and thus requires confinement. Therefore, I would reverse and remand the case to Supreme Court for further proceedings.

Article 10 confinement is an extraordinary remedy that should not be taken lightly because it “threatens a liberty interest of the highest order” (*Matter of State of New York v Floyd Y.*, 22 NY3d 95, 105 [2013]; Mental Hygiene Law § 10.01 [b] [(i)n extreme cases, confinement of the most dangerous offenders will need to be extended by civil process]). Accordingly, the burden placed on the State is demanding. The State “has the burden to establish by clear and convincing evidence that the respondent meets the statutory definition of a dangerous sex offender requiring confinement” (*Floyd Y.*, 22 NY3d at 105; see Mental Hygiene Law § 10.07 [d]). I would find that the State has failed to make the requisite showing in this case.

As both the Court of Appeals and this Court have held, the Mental Hygiene Law draws a clear distinction between a sex offender requiring “strict and intensive supervision and treatment” (SIST) and a “dangerous sex offender requiring confinement” (see *Michael M.*, 24 NY3d at 652, 659; *Matter of State of New York v Anthony R.*, 228 AD3d 541, 544 [1st Dept 2024]). In order to impose SIST requirements, the State must show that defendant has a “mental abnormality,” defined as “a congenital or acquired condition, disease or disorder that affects the emotional, cognitive, or volitional capacity of a person in a manner that predisposes him or her to the commission of conduct constituting a sex offense and that results in that person having *serious difficulty in controlling such conduct*” (Mental Hygiene Law § 10.03 [i] [emphasis added]). By contrast, a “dangerous sex offender requiring confinement” is defined in the Mental Hygiene Law as “a person who is a detained sex offender suffering from a mental abnormality involving such a strong predisposition to commit sex offenses, and such an *inability to control behavior*, that the person is likely to be a danger to others and to commit sex offenses if not confined to a secure treatment facility” (Mental Hygiene Law § 10.03 [e] [emphasis added]). Therefore, “[a] mere tendency to engage in risky or socially undesirable conduct—even if that conduct provides an opportunity for, or increases the likelihood of, sexual offending” or “mere struggling with sexual urges” are “quintessentially insufficient to establish inability” to control sex offending behavior (*Anthony R.*, 228 AD3d at 545, quoting *Matter of State of New York v George N.*, 160 AD3d 28, 31 [4th Dept 2018]). Where, as here, there is no evidence of sexually inappropriate conduct while on SIST, it is “incumbent on the

State to demonstrate a persuasive link between a nonsexual SIST violation and the offender's ability to control his sexual behavior" (*Anthony R.*, 228 AD3d at 545, quoting *George N.*, 160 AD3d at 31).

In this case, I would find that petitioner's evidence, including the evidence demonstrating respondent's violation of the SIST conditions requiring his participation in a sex offender treatment program and requiring him to stay away from children, does not show that, as of 2023, respondent was "unable to control" his sexual conduct (see *Michael M.*, 24 NY3d at 659; *Anthony R.*, 228 AD3d at 545).

Respondent was born in about 1953 and is now approximately 73 years old.¹ He has been convicted of two sexual offenses. He committed the first in 1977, when he was approximately 24, and the second in 1986, when he was approximately 32. As a result of these convictions, and the consequent proceedings pursuant to article 10 of the Mental Hygiene Law, respondent spent almost all of his adult life, from mid-1977 to the present, in prison, jail, or a secure facility. During his incarceration, respondent successfully completed sex offender treatment. He resided in the community only from about July 2021 to October 2023.

The majority finds "noteworthy" that, at the time of respondent's first offense when he was approximately 24, he had been living for two years with a 16 year old with whom he had a child. While I share my colleagues' concern about this almost certainly unlawful situation, neither of the experts who examined respondent in connection with his 2020 discharge petition considered this factor to be relevant to whether he was a dangerous sex offender requiring confinement. The State's expert, Dr. Allison T. Prince, found that respondent remained a dangerous sex offender requiring confinement, but did not list respondent's cohabitation with the teenager as a factor supporting her finding. Similarly, Dr. Matthew Fabian, an independent examiner who also evaluated respondent at that time, was "not concerned" about this aspect of his life, "as [living with a young woman] would not be consistent with any psychiatric disorder or sexually deviant disorder."²

The majority also makes much of the disciplinary tickets is-

1. The record has some inconsistencies as to respondent's age. For simplicity, I will adopt the dates and ages used in the decision on appeal.

2. The diagnostic criteria for pedophilic disorder includes sexual urges or behaviors involving sexual activity with a prepubescent child "generally age 13 . . . or younger" (Diagnostic and Statistical Manual of Mental Disorders 697 [5th ed 2013]).

sued to respondent while he was incarcerated from 1986 to 2009. Only two of these were sexual in nature: a 2002 ticket for making sexual gestures toward three other inmates; and a 2006 ticket for engaging in consensual sexual activity with another inmate.

In anticipation of respondent's completion of his criminal sentence in 2009, respondent was evaluated and diagnosed with pedophilic disorder and antisocial personality disorder (ASPD). After further proceedings, the court directed that respondent be civilly confined in a secure facility. During the next 12 years, respondent did not receive any disciplinary tickets, sexual or otherwise.

On October 15, 2021, after a hearing, the court determined that respondent continued to suffer from a mental abnormality, but that he was no longer a dangerous sex offender requiring confinement. Among the evidence that the court considered was his lack of a disciplinary record during the preceding 12 years. Accordingly, the court terminated respondent's civil confinement and released him into the community with a SIST plan. Respondent remained on SIST for approximately two years before the State filed the civil confinement petition now before us.

In October 2023, respondent's parole officer issued an incident report alleging that respondent had violated the SIST condition requiring him to comply with and complete sex offender training. The report noted that he had been discharged from one treatment program in December 2022 because he had missed sessions earlier in the year. He was assigned to another treatment program that discharged him on October 4, 2023 for missing sessions. As a result, respondent was taken into custody for violating the conditions of his SIST release requiring his attendance and full participation in sex offender treatment.

On October 19, 2023, the State filed the petition now before us, seeking a determination that respondent is a dangerous sex offender requiring confinement. The State's petition is predicated on respondent's alleged failure to complete sex offender treatment as required by his SIST program.³

In their evaluations of respondent prepared in connection

3. As the majority notes, while respondent was living in the community, his parole officer filed seven incident reports alleging that he had violated SIST conditions. However, none of these incidents involved sexual activity, and none of them were alleged as the basis for his reincarceration or the State's confinement petition. According to the report of Dr. Jonathan Miljus, the State's expert, the incident reports alleged that respondent violated SIST

(n. cont'd)

with the instant petition, both the State's expert, Dr. Miljus, and respondent's expert, Dr. Leonard A. Bard, diagnosed respondent with pedophilic disorder. Dr. Miljus also diagnosed respondent with ASPD. Dr. Miljus concluded that respondent "is a dangerous sex offender requiring confinement based upon his diagnoses of [ASPD] and pedophilic disorder." His conclusion hinges in large part on his determination that respondent's SIST violations, and, in particular, his failure to complete sex offender treatment, were volitional. It appears that Dr. Miljus adopted the conclusion of parole officer Lisa Covington that respondent's failure to attend sex offender treatment was not the result of any cognitive difficulty, because he "was capable of keeping many of his scheduled activities like going to church." However, it is undisputed that respondent's church was located close to his residence, while his sex offender treatment program was in a different borough that required lengthy travel by public transportation.

Moreover, Dr. Miljus's conclusion that respondent's failure to attend sex offender treatment meetings was volitional disregards the evidence in the record that respondent's SIST team observed that respondent was exhibiting clear signs of cognitive decline following a brain bleed he suffered approximately four months after being released into SIST. Despite this, they failed to provide respondent with case management services or have him complete a cognitive evaluation, even though respondent had to travel by himself from the Bronx to Manhattan or Brooklyn to attend sex offender treatment sessions required by his SIST plan, and any lateness resulted in his being marked "absent." Strikingly, when respondent was late, he asked to attend a different group but was not permitted to do so. Dr. Miljus acknowledged each of the following facts.

conditions as follows: in December 2021, (1) respondent gave a painting he made to a 17-year-old girl at his church; and (2) had a broken GPS device that respondent told his parole officer had fallen off; in February 2022, (3) he disclosed to his parole officer that he had a Facebook account, which, when examined by the parole officer, showed that respondent had nonsexual communication with some people outside of the United States who appeared to be underage; and (4) he reported to his parole officer that his alcohol monitoring device was loose but denied having tampered with it; in June 2022, (5) respondent reported to his sex offender treatment provider that he had helped an underage girl locate her wallet and gave her \$10; in October 2022, (6) respondent was not in possession of part of his GPS device; and in December 2022, (7) respondent was discharged from his first sex offender treatment program at the New York Mental Health Group for missing treatment sessions. As stated above, respondent's discharge from a second sex offender treatment program at RevCore was the subject of the October 2023 incident report, which led to his reincarceration and the State's instant petition for confinement.

As early as October 2021, the staff in the shelter where respondent lived reported that respondent got lost daily and needed help getting to his appointments. In November 2021, respondent was referred for case management services by his SIST team. However, there is no evidence he ever received case management services. In January 2022, respondent experienced the brain bleed and hospitalization. Respondent's SIST team then recommended that he be evaluated for cognitive deficiencies and referred him for a cognitive evaluation. However, the appointment had to be rescheduled due to issues at the medical office unrelated to respondent. Although none of the members of the SIST team was qualified to determine whether respondent suffered from cognitive difficulties, the SIST team decided not to make a subsequent neurological evaluation appointment for respondent and he never received a cognitive evaluation or treatment recommendations.

The trial court adopted Dr. Miljus's view, and further found that respondent also "had no problem" attending meetings with his parole officer. However, Dr. Miljus admitted that, as of October 21, 2021, arrangements had been made for someone to bring respondent to his parole officer meetings because his residence staff reported that he got lost "daily." The trial court also found that respondent had "no problem" attending his drug treatment program. However, Dr. Miljus's report indicates that respondent's attendance at his substance abuse treatment program was "poor." Dr. Miljus also noted that respondent often had difficulty understanding his questions during his interview of him, which lasted less than 80 minutes. This is consistent with Dr. Bard's observation that respondent was much less able to respond to questions when he interviewed him in 2024 than he was during his prior interview of him in 2015.⁴

There is also no evidence in the record that respondent was unable to control his sex-offending behavior while he was living in the community. At most, the relevant evidence shows that respondent was struggling with his sexual urges at that time. In fact, none of the SIST incident reports relied upon by the State alleged inappropriate sexual behavior by respondent. Even Dr. Miljus noted in his report that "[t]here is insufficient evidence to conclude that [respondent] has been recently sexually preoccupied" or that he "holds attitudes that support sexual offending" and there is no indication that respondent "presents with significant behavioral impulsivity."

4. While the majority states that the trial court "credited the opinion of Dr. Miljus over that of Dr. Bard," the court in fact found that "both doctors testified credibly."

The record also demonstrates that respondent's SIST team was aware that he had difficulty understanding English, which is not his first language. Nevertheless, he was placed only in English-language treatment programs. Respondent's first language is Spanish. He moved to New York at age 18 but learned English only when he was incarcerated. Respondent told members of his SIST team that he sometimes did not understand what people were saying. Nevertheless, respondent was never enrolled in Spanish-language treatment. At the hearing on the subject petition, although respondent often responded in English, he used a Spanish interpreter. Dr. Bard testified that, while respondent may have spoken sufficient English to be interviewed in English for his evaluation, treatment requires a higher level of comfort with expressing oneself and listening, particularly in a group treatment setting, where participants need to feel comfortable sharing and bonding with group members in order to benefit.

In view of respondent's apparent cognitive and language difficulties and the State's failure to have him cognitively evaluated, provide case management services, or place him in a Spanish-language treatment program, I disagree with the majority that we can find on this record that he was given "two years' worth of opportunities and accommodations" to successfully complete sex offender treatment.

I also disagree with the majority that the State "demonstrate[d] a persuasive link" between respondent's nonsexual SIST incident reports and a present inability to control his sexual behavior (*Anthony R.*, 228 AD3d at 545). Indeed, in *Anthony R.*, this Court found that Mr. R's "disquieting" aggressive behaviors toward female staff, angry outbursts during his psychological evaluation, substance abuse, lack of transparency about violations of curfew, apparent nonchalance concerning his underlying offense, failure to exhibit a desire to make progress in sex offender treatment, and late appearance for sex offender treatment, all while on SIST, were insufficient to demonstrate a present inability to control sexual behavior (*id.*).

Here, the incidents that the majority focuses on as a basis for respondent's reincarceration, other than his failure to complete sex offender treatment, were almost all self-reported by respondent, and none involved sexual behavior with minors. The incident reports about several self-reported interactions respondent had with minors in person or online did not suffice to revoke the SIST release. Even if petitioner had demonstrated that these incidents were more than merely incidental interactions, they are not alleged to have involved any actual sexual

contact or content. Rather, the incidents suggest at most that respondent struggled with sexual urges or a tendency to engage in risky or socially undesirable conduct. This Court has previously found that such activity does not, on its own, show an inability to control behavior (*see Anthony R.*, 228 AD3d at 545). Strikingly, his earlier criminal incidents occurred while he was using drugs and alcohol, while there is no evidence that he used either while in the community on SIST.

While the majority attempts to distinguish *Anthony R.* from this case factually,⁵ the principles enunciated by our Court and by the Court of Appeals apply in every case: engaging in “risky or socially undesirable conduct,” including conduct that may provide an opportunity for, or increase the likelihood of, sexual offending, “is quintessentially insufficient to establish” a present inability to control behavior (*id.* [internal quotation marks omitted]; *see also Michael M.*, 24 NY3d at 658-659 [termination from sex offender program, hostility toward therapy and other nonsexual SIST violations insufficient to demonstrate present inability to control behavior and need for confinement]). Similarly, a respondent’s mere struggling with sexual urges is insufficient to show inability to control behavior (*Michael M.*, 24 NY3d at 659; *Anthony R.*, 228 AD3d at 545).

Accordingly, I would vote to reverse and remand to Supreme Court to modify the SIST order to address respondent’s cognitive needs, for example, by adding case management and transportation services and supervised housing, as was recommended by his expert (*see e.g. Matter of State of New York v A.A.*, 238 AD3d 651, 652 [1st Dept 2025], *lv denied* 44 NY3d 909 [2026]; *see also Matter of State of New York v Nelson D.*, 22 NY3d 233, 238-239 [2013]; *Matter of State of New York v*

5. I disagree with my colleagues in the majority that SIST violations by respondent in *Anthony R.* “did not bear any discernible relationship to his underlying crime.” Mr. R. had raped a 64-year-old woman in the process of robbing her. His SIST violations included “accessing and watching pornographic materials on his phone, taking photographs of women in the subway without their consent and aggressively approaching women for money” (*Anthony R.*, 228 AD3d at 542). As discussed above, I also view the evidence in this case of respondent’s unaddressed cognitive difficulties as not dissimilar to Mr. R.’s inadequately treated schizoaffective bipolar disorder (*id.* at 543), a factor that should have been considered as part of the totality of the circumstances here, as it was in *Anthony R.* My colleagues also point to Mr. R.’s years of release on SIST during which he was compliant. However, Mr. R., unlike respondent in this case, was properly evaluated and treated during those years, and it was only after treatment changed and lapsed during COVID that Mr. R. violated SIST conditions (*id.* at 542). Here, respondent was never evaluated or treated for cognitive decline, despite his SIST team’s recognition of his difficulties.

Mahwee S., 232 AD3d 1325, 1326 [4th Dept 2024], *lv denied* 43 NY3d 902 [2025]).

31 T-Mobile USA, Inc., Respondent, v Broadcom Inc., as Successor in Interest to VMware, Inc., et al., Appellants. [252 NYS3d 121]—

Injunctions—Preliminary Injunction—Likelihood of Success on Merits
Injunctions—Preliminary Injunction—Irreparable Injury—Proposals for Continued Services
Injunctions—Preliminary Injunction—Undertaking’s Relation to Potential Damages

Order, Supreme Court, New York County (Jennifer G. Schecter, J.), entered October 2, 2025, which, to the extent appealed from, granted plaintiff’s motion for a preliminary injunction and set the amount of the undertaking at \$500,000, unanimously modified, on the law and the facts, to remand for further proceedings regarding the undertaking, and otherwise affirmed, without costs.

Plaintiff commenced this action alleging, among other things, breach of contract related to its attempt to exercise its contractual right to a one-year extension of software support services from defendants. The court granted, in part, defendants’ motion to compel arbitration. The court also granted plaintiff’s motion for a preliminary injunction, which is the subject of this appeal.

Initially, the parties’ master software license and support agreement (Agreement) unambiguously gives either party the right to obtain a preliminary injunction from the court “to preserve the status quo pending arbitration.”

The court providently exercised its discretion by granting the injunction (*see Fisher v Hauman*, 204 AD3d 406 [1st Dept 2022]; *Doe v Dinkins*, 192 AD2d 270, 275 [1st Dept 1993]). Plaintiff sufficiently established a likelihood of success on the merits (*see Barbes Rest. Inc. v ASRR Suzer 218, LLC*, 140 AD3d 430, 431 [1st Dept 2016]). The parties’ Enterprise Order states, “In the event of a conflict or inconsistency [with the Agreement, which contains the End of Availability provision], the terms of [the] Enterprise Order will prevail with regards to such conflict or inconsistency.” It further states that plaintiff “may renew the Covered Offerings [which include Support Services for Perpetual Software] for one additional year by paying the Renewal Fees directly to [defendant VMware, Inc.] prior to the expiration of the entitlement to the Covered Offerings.”

Plaintiff established irreparable injury if defendants stopped providing support services altogether. It does not avail defend-

ants to argue that plaintiff could have accepted one of their proposals for continued services, and, if plaintiff prevailed in arbitration, recover as damages the extra amount it had to pay defendants. While “[d]amages compensable in money and capable of calculation are not irreparable” (*J.S.I.K. Intl. LLC v Schuster*, 225 AD3d 472, 473 [1st Dept 2024] [internal quotation marks and ellipsis omitted]), the verified complaint alleges that the “additional . . . products and services” that defendant Broadcom Inc. tried to force plaintiff to buy “are . . . , in some instances, incompatible with [its] existing infrastructure.” Hence, plaintiff should not be forced to accept one of Broadcom’s proposals.

Defendants contend that plaintiff will not be irreparably harmed absent an injunction because it can obtain the source code pursuant to section 5.2 of the Agreement’s Software License and Maintenance and Support Services Attachment. However, unlike the provision in *Matter of Part 60 Put-Back Litig.* (36 NY3d 342, 349-350, 352 [2020])—which case, in any event, involved neither a preliminary injunction nor irreparable injury—section 5.2 is not a sole or exclusive remedy. We also reject defendants’ argument that there was no irreparable harm because plaintiff delayed in bringing this action after defendants’ December 2023 announcement that they were ending the support services (*see Advent Software, Inc. v SEI Global Servs., Inc.*, 195 AD3d 498, 499 [1st Dept 2021]; *see also Barbes*, 140 AD3d at 432).

The balance of the equities favors plaintiff rather than defendants (*see Advent*, 195 AD3d at 500; *see also London Paint & Wallpaper Co., Inc. v Kesselman*, 138 AD3d 632, 633 [1st Dept 2016]).

Contrary to defendants’ contention, the court was not required to hold an evidentiary hearing, as they did not “raise an issue of fact as to any of [the] elements” required for a preliminary injunction (CPLR 6312 [c]).

However, the amount of the undertaking (\$500,000) was not “rationally related to defendants’ potential damages should the preliminary injunction later prove to have been unwarranted” (*Suttongate Holdings Ltd. v Laconm Mgt. N.V.*, 159 AD3d 514, 515 [1st Dept 2018] [internal quotation marks omitted]), such as the cost to defendants of providing special services to plaintiff. Therefore, we remand for further proceedings on this issue (*see East 54th Operating LLC v Brevard Owners, Inc.*, 223 AD3d 407, 408-409 [1st Dept 2024]; *116 St. Laundromat & Dry Cleaning Inc. v 240-42 W. 116 St. Hous. Dev. Fund Corp.*, 215 AD3d 513, 514-515 [1st Dept 2023]; *Spivak v Bertrand*,

147 AD3d 650, 652 [1st Dept 2017]). Concur—Webber, J.P., Gesmer, Mendez, Pitt-Burke, Hagler, JJ.

32 In the Matter of Z.T., a Person Alleged to be a Juvenile Delinquent, Appellant. [— NYS3d —]

Crimes—Verdict—Sufficiency of Evidence

Infants—Juvenile Delinquents—Least Restrictive Alternative—Conditional Discharge

Order of disposition, Family Court, New York County (Stephanie C. Schwartz, J.), entered on or about November 21, 2024, which adjudicated appellant a juvenile delinquent, upon a fact-finding determination that she committed acts that, if committed by an adult, would constitute the crimes of assault in the second degree, attempted assault in the second degree, assault in the third degree, and attempted assault in the third degree, and ordered a conditional discharge for a period of one year, unanimously modified, on the law, to the extent of dismissing the counts of attempted assault in the second degree, assault in the third degree, and attempted assault in the third degree, and otherwise affirmed, without costs.

As the Presentment Agency concedes, appellant is entitled to dismissal of those counts that are lesser included offenses of assault in the second degree (*see Matter of Esmeldyn P.*, 124 AD3d 542, 542 [1st Dept 2015]; *see also* CPL 1.20 [37]).

On the remaining charge of second-degree assault, the fact-finding determination was based on legally sufficient evidence and was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348 [2007]; *see also People v Baque*, 43 NY3d 26 [2024]). The evidence, including detailed testimony from the victim, medical records, and photographs, established that appellant slashed the victim in the face with a sharp metal object and kicked, punched, and stomped on the victim's body, causing injuries (*see* Penal Law § 120.05 [2]; *People v Hierro*, 122 AD3d 420, 421 [1st Dept 2014], *lv denied* 25 NY3d 1165 [2015]). There is no basis for disturbing the court's credibility determinations (*see Matter of Messiah G.*, 160 AD3d 577, 578 [1st Dept 2018], *lv denied* 31 NY3d 912 [2018]).

To the extent that appellant contends that certain evidentiary rulings made by the court at the fact-finding hearing warrant reversal, those claims are unavailing. Appellant also failed to preserve her constitutional challenges to the court's evidentiary rulings under the Fifth, Sixth, and Fourteenth Amendments of the United States Constitution (*see People v Cabrera*, 41 NY3d 35, 42-51 [2023]), and we decline to review them in the interest of justice. As an alternative holding, we find them to be unavailing.

As to the order of disposition, a conditional discharge was the least restrictive alternative consistent with appellant's needs and the community's need for protection (*see* Family Ct Act § 352.2 [2] [a]; *Matter of Katherine W.*, 62 NY2d 947, 948 [1984]). In determining the disposition, the court properly considered the seriousness of appellant's violent attack on another youth with a weapon (*see Matter of C.C.*, 245 AD3d 462, 462-463 [1st Dept 2026]), the evidence that appellant had attacked the victim a second time while the case was pending, and appellant's truancy issues. Appellant "has not substantiated [her] claim that this adjudication might have adverse consequences for [her]" in terms of her ability to participate in a job-training program (*see Matter of Dazaeth S.-M.*, 204 AD3d 552, 553 [1st Dept 2022]; *see also Matter of Giovanni G.*, 152 AD3d 419, 420 [1st Dept 2017]). Concur—Moulton, J.P., Friedman, González, Shulman, Rosado, JJ.

33 In the Matter of R.B., a Child Alleged to be Neglected. J.B., Also Known as J.B., Appellant; Administration for Children's Services, Respondent. [— NYS3d —]

Parent, Child and Family—Abused or Neglected Child—Imminent Risk to Life or Health—Death of Child in Parent's Care

Parent, Child and Family—Abused or Neglected Child—Mental Health Evaluation

Order, Family Court, New York County (Grace Oboma-Layat, J.), entered on or about March 11, 2025, which, after a hearing, denied respondent father's application for the return of the subject child to his care pending the fact-finding hearing, unanimously affirmed, without costs.

There is a sound and substantial basis in the record for Family Court's conclusion that returning the child to the father's care pending the outcome of the neglect proceeding would have posed an imminent risk to the child's life or health, and that the risk could not be mitigated by reasonable efforts to avoid removal (*see* Family Ct Act § 1028 [a]; *Matter of Kyng F. [Kareem F.]*, 203 AD3d 597, 598 [1st Dept 2022]; *Matter of Martha A. [Diana C.]*, 75 AD3d 476, 477 [1st Dept 2010]). At the Family Court Act § 1028 hearing, the evidence established that one of the father's other children died in infancy after suffering severe respiratory distress at home as a result of the father's failure to promptly seek medical attention after being alerted by the child's sibling, that the child was wheezing and struggling to breathe. The father's testimony and statements indicated that he did not believe that he should have acted differently to prevent the child's death and that he attributed blame to everyone but himself. The father appeared unwilling

or unable to acknowledge his role in the circumstances leading to the children's removal and even accused his seven-year-old child of lying about the circumstances surrounding the incident out of jealousy. Conspicuously absent from the father's testimony was any explanation of concrete steps he would take to prevent a similar incident from occurring with the subject child or any other child in his care.

Furthermore, at the time of the subject child's birth, the father had not complied with toxicology screening referrals, submitting to only 5 of 21 requested tests, nor had he engaged in substance abuse counseling or individual therapy. Each time the father did submit to a toxicology screening, the screening was positive for marijuana and alcohol. The father acknowledged that he had been a frequent user of marijuana since he was a teenager but did not view his use as problematic or concede that it affected his mental health.

The father also failed to complete a mental health evaluation, and he participated only inconsistently in the services in which he was enrolled. Although his engagement improved during the course of the hearing, his statements during the portion of the mental health evaluation that he completed showed a continued lack of insight into the reasons for the subject child's removal and continued placement in foster care. The father also continued to live with the subject child's mother, who did not engage in services. Under the totality of the circumstances, the evidence presented at the hearing supports the Family Court's conclusion that the child should not be returned to the father during the course of the proceeding (see *Matter of M.M. [Chelsea B.]*, 242 AD3d 605, 606 [1st Dept 2025]). That the subject child did not suffer injury during the two weeks the child remained in the father's care does not preclude a finding that the child's life or health would be at imminent risk if returned to him (see *Matter of Martha A.*, 75 AD3d at 477). Concur—Webber, J.P., Gesmer, Mendez, Pitt-Burke, Hagler, JJ.

34 Victor Unzain, Respondent, v NW 100 Broadway Property Owner, LLC, et al., Appellants, et al., Defendants. [252 NYS3d 120]—

Labor—Safe Place to Work—Fall from Ladder

Order, Supreme Court, New York County (Arlene P. Bluth, J.), entered March 20, 2025, which granted plaintiff's motion for summary judgment on liability as to the Labor Law §§ 240 (1) and 241 (6) claims against defendants NW 100 Broadway Property Owner, LLC and LSL Construction Services, Inc., unanimously affirmed, without costs.

Plaintiff made a prima facie showing of entitlement to summary judgment on the Labor Law § 240 (1) claim by submitting deposition testimony that the ladder he was using wobbled, causing him to fall (*see Rosario v Franklin Plaza Apts., Inc.*, 245 AD3d 490, 491 [1st Dept 2026]). Plaintiff's un rebutted testimony was that he fell from a "loose" ladder as he was putting sheetrock above a window in an area where there was no other safety device, that the ladder made a noise and wobbled, causing him to lose his balance, and causing both plaintiff and the ladder to fall. In opposition, defendants failed to raise an issue of fact.

In light of the above determination on the Labor Law § 240 (1) claim, review of the court's grant of summary judgment on plaintiff's Labor Law § 241 (6) claim is academic (*see Suazo v 501 Madison-Sutton LLC*, 235 AD3d 513 [1st Dept 2025]). Concur—Webber, J.P., Gesmer, Mendez, Pitt-Burke, Hagler, JJ.

35 Jeanette Valerio, Respondent, v Crescenciano Perez et al., Appellants. [252 NYS3d 132]—

Motor Vehicles—Collision—Rear-End Collision

Motions and Orders—Premature Motion—Summary Judgment—Information Solely in Opposing Party's Possession

Order, Supreme Court, Bronx County (Elizabeth A. Taylor, J.), entered July 7, 2025, which granted plaintiff's motion for summary judgment as to liability and striking the affirmative defenses of comparative negligence and failure to wear a seatbelt, unanimously affirmed, without costs.

Plaintiff established prima facie entitlement to summary judgment by submitting her affidavit stating that defendants' vehicle struck her vehicle in the rear (*see Downey v Mazzioli*, 137 AD3d 498, 499 [1st Dept 2016]). Defendants failed to raise an issue of fact in opposition. The affidavit submitted by defendant Perez, the driver of defendants' vehicle, states that it was translated from Spanish but was not accompanied by an affidavit from a translator attesting to the translator's qualifications and the accuracy of the affidavit, rendering it inadmissible (CPLR 2101 [b]; *see Richards v Walls*, 238 AD3d 524, 524 [1st Dept 2025]). Even were we to consider the affidavit, Perez's assertion that plaintiff stopped short in front of his vehicle is insufficient by itself to raise an issue of fact as to plaintiff's negligence, since the affidavit failed to explain why Perez did not maintain a safe distance between his vehicle and plaintiff's, in what he described as stop-and-go traffic (*see Alvarez v Bracchitta*, 210 AD3d 458, 459 [1st Dept 2022]; Vehicle and Traffic Law § 1129 [a]).

Defendants did not argue in opposition to plaintiff's summary judgment motion that plaintiff was not wearing a seatbelt and so we decline to consider their arguments regarding that affirmative defense (*see Mehmet v Add2Net, Inc.*, 66 AD3d 437, 438 [1st Dept 2009]). Further, the comparative negligence defense was properly dismissed as plaintiff's affidavit established her own lack of fault, and defendants failed to provide any proof to the contrary (*see Vasquez v Strickland*, 211 AD3d 414, 414-415 [1st Dept 2022]).

Finally, the motion for summary judgment was not premature, since defendants did not identify any information exclusively in plaintiff's possession that would have raised an issue of fact as to their negligence (*see Mirza v Tribeca Auto. Inc.*, 189 AD3d 448, 448 [1st Dept 2020]; *see also Ahmad v Behal*, 221 AD3d 558, 559 [1st Dept 2023]). "The mere hope that evidence sufficient to defeat a motion for summary judgment may be uncovered during the discovery process is insufficient to deny such a motion" (*Flores v City of New York*, 66 AD3d 599, 600 [1st Dept 2009]). Concur—Webber, J.P., Gesmer, Mendez, Pitt-Burke, Hagler, JJ.

36 Rodney Vargas, Respondent, v ESRT Empire State Building, LLC, et al., Appellants, and LinkedIn Corporation, Respondent. (And Third-Party Actions.) [252 NYS3d 124]—

**Negligence—Maintenance of Premises—Liability for Dangerous Condition—Occupancy, Ownership, Control, or Special Use
Indemnity—When Claim for Indemnification Available—Common-Law Indemnification**

Order, Supreme Court, New York County (Richard G. Latin, J.), entered November 20, 2024, which, to the extent appealed from as limited by the briefs, granted defendant LinkedIn Corporation's motion for summary judgment dismissing the complaint and all cross-claims against it and plaintiff's motion for summary judgment on the issue of liability against defendants ESRT Empire State Building, LLC and Empire State Realty Trust Inc. (together, Empire), unanimously affirmed, without costs.

In this slip and fall case, plaintiff demonstrated prima facie entitlement to summary judgment on the issue of liability as against Empire, the property owner, based on his testimony that the vestibule near the freight elevator was dark, that the light had not been working for a month, and that there was an oily or greasy substance on the floor. Plaintiff also submitted photographs of the slippery condition and inadequate lighting in the area, and Empire's records show that it had notice of the inadequate lighting. In opposition, Empire failed to raise a triable issue of fact.

LinkedIn demonstrated *prima facie* that it was not responsible for maintaining the area by the freight elevator where plaintiff fell, which was not within its leased space, thus warranting summary dismissal of the complaint as against it as well as Empire's cross-claims. "Liability for a dangerous condition on [a] property is predicated upon occupancy, ownership, control or a special use of such premises" (*Balsam v Delma Eng'g Corp.*, 139 AD2d 292, 296 [1st Dept 1988], *lv dismissed in part*, 73 NY2d 783 [1988]). Where none of these elements are present, as here, a party cannot be held liable for injury caused by the dangerous condition on the property (*see id.* at 297). In opposition, Empire failed to present sufficient evidence to raise a triable issue of fact concerning LinkedIn's responsibility for maintaining the area by the freight elevator where plaintiff fell. Nor did Empire present evidence sufficient to raise a triable issue of fact concerning the source of the oily or greasy substance on the floor. Empire's mere speculation that the source of the substance was a vendor hired by LinkedIn is inadequate to sustain their cross-claims (*see Raghu v New York City Hous. Auth.*, 72 AD3d 480, 482 [1st Dept 2010]). Moreover, there may be more than one proximate cause of an injury (*see Turturro v City of New York*, 28 NY3d 469, 483 [2016]).

In light of granting plaintiff's motion for summary judgment on the issue of liability as against Empire, Empire's contractual indemnification cross-claim was properly dismissed because the lease specifically exempted from indemnification injuries that were caused by the negligence or willful misconduct of Empire (*see Correia v Professional Data Mgt.*, 259 AD2d 60, 65 [1st Dept 1999]). Empire also failed to present sufficient evidence to raise a triable issue of fact concerning its entitlement to common-law indemnification because it did not show that it was free of negligence and that plaintiff's injuries were the result of LinkedIn's negligence (*see Naughton v City of New York*, 94 AD3d 1, 10 [1st Dept 2012]). Further, a party who participated to some degree in the wrongdoing cannot receive the benefit of common-law indemnification (*see McCarthy v Turner Constr., Inc.*, 17 NY3d 369, 377-378 [2011]). Contribution was also inapplicable because Empire did not present evidence that LinkedIn had a duty to plaintiff (*see Raquet v Braun*, 90 NY2d 177, 183 [1997]). Concur—Moulton, J.P., Friedman, González, Shulman, Rosado, JJ.

37 Ruben Lopez Vera, Respondent, v Xolle Demo LLC, Appellant, et al., Defendant. (And a Third-Party Action.) [252 NYS3d 138]—

Disclosure—Penalty for Failure to Disclose—Striking of Pleading—Violation of Discovery Orders

Order, Supreme Court, Bronx County (Myrna Socorro, J.), entered on or about July 15, 2024, which granted plaintiff's motion pursuant to CPLR 3126 to strike defendant Xolle Demo LLC's answer for failure to respond to plaintiff's demand for discovery and inspection and for excess insurance information, unanimously reversed, on the law, without costs, the motion denied, the answer reinstated, and the matter remanded for consideration of a lesser penalty.

In this personal injury matter, plaintiff served defendant Xolle Demo LLC with discovery demands on February 21, 2023. The demands were separated into two documents: a "Notice of Discovery and Inspection and Combined Demands" (D&I Notice) and a "Demand for Notice of Discovery and Inspection" (D&I Demand). The D&I Notice requested information relating to, among other things, witnesses, insurance coverage, accident reports, and expert testimony, and demanded a bill of particulars. The D&I Demand requested myriad documents, including construction contracts, work orders, insurance policies, plaintiff's employment file, and training materials.

After a month passed with no response, plaintiff served Xolle with a good-faith letter on March 27, 2023, requesting a response to its discovery demands. The following day, the court issued a preliminary conference order (PC order) directing defendants to respond to plaintiff's discovery demands "in 30 days." The PC order warned the parties that "in the event of non-compliance, costs or other sanctions may be imposed."

Despite the warning, Xolle failed to meet the court's 30-day deadline, prompting plaintiff to file a motion to compel on May 1, 2023. In the affirmation in support, plaintiff's counsel stated that "[i]n the two months since Plaintiff served his Combined Demands, [Xolle] has not responded." Xolle eventually responded to the D&I Notice on August 18, 2023, though it is unclear if Xolle responded to the D&I Demand. In its response to the D&I Notice, Xolle provided plaintiff with the name, policy number, and monetary limits of its insurance policies and explained that it did not have information relating to witnesses; had not yet retained an expert; and did not currently possess accident reports, photographs of the scene of the incident, surveillance, and plaintiff's statements. Xolle also responded to plaintiff's demand for a bill of particulars, by, among other things, providing a description of plaintiff's alleged negligence in the personal injury incident, and the name of an entity it believed should have been joined as a necessary party.

By order dated August 24, 2023, the court granted plaintiff's motion to compel solely "to the extent that the parties are directed to appear September 28, 2023" for a court conference. The parties appeared for a conference on September 28, 2023, and on that day, the court issued a compliance conference order which directed Xolle to respond to plaintiff's discovery demands by November 13, 2023 and warned Xolle that failure to comply could result in penalties including costs and sanctions.

On December 1, 2023, two weeks after the November 13, 2023 deadline passed without Xolle's compliance, plaintiff filed a motion to strike Xolle's answer. Plaintiff asserted that Xolle provided only partial responses to his discovery demands, but he did not detail what information or documentation remained outstanding. In response, Xolle argued that striking its answer would be too drastic a penalty, but it did not address the merits of plaintiff's claim that it had not substantially complied with discovery. By February 8, 2024 so-ordered stipulation, Xolle agreed to respond to plaintiff's discovery demands by February 23, 2024, and if it failed to do so, plaintiff was permitted to file a reply to its motion to strike and to notify the court that Xolle had not properly responded. Xolle did not comply, and upon plaintiff's notification to the court, the court granted plaintiff's motion to strike. The order did not specify what information remained outstanding as the basis for the sanction.

Striking a pleading pursuant to CPLR 3126 is a "drastic remedy" justified by a "long-standing pattern of willful or contumacious failure to comply with discovery demands or orders" (*Farrell Limousine Serv. LLC v Macro Consultants LLC*, 231 AD3d 667, 668 [1st Dept 2024]). The burden is on the moving party to establish that the failure to comply with discovery demands was willful (*see Pimental v City of New York*, 246 AD2d 467, 468 [1st Dept 1998]). Here, Xolle's piecemeal response to plaintiff's discovery demands lacked diligence but was not willful or contumacious.

It appears that Xolle violated three discovery orders—namely, the March 28, 2023 PC order, the September 28, 2023 compliance conference order, and the February 8, 2024 so-ordered stipulation, all of which warned Xolle that failure to comply could result in sanctions against it. However, there is no dispute that Xolle partially responded to plaintiff's discovery demands, which included information regarding its insurance policies, contrary to plaintiff's assertion that Xolle failed to provide such information. Moreover, it is not clear what information and documentation remains outstanding. Neither party

has identified in sufficient detail the status of discovery and we cannot rely on information outside the record (*see e.g. CIS Air Corp. v Express One Intl.*, 298 AD2d 317, 317 [1st Dept 2002]). We further note that plaintiff has not identified any prejudice stemming from Xolle's behavior (*see Stier v One Bryant Park LLC*, 122 AD3d 505, 505 [1st Dept 2014]). Accordingly, the drastic remedy of striking Xolle's answer and precluding it from introducing any defense at trial was not warranted (*see Lane v City of New York*, 210 AD3d 502, 503 [1st Dept 2022]; *De Socio v 136 E. 56th St. Owners, Inc.*, 74 AD3d 606, 608 [1st Dept 2010]). We therefore remand the matter for Supreme Court to determine an appropriate sanction, whether monetary or otherwise (*see De Socio*, 74 AD3d at 608). Concur—Moulton, J.P., Pitt-Burke, O'Neill Levy, Michael, Chan, JJ.

38 Leslie Wagner, Respondent, v 55 Tiemann Owners Corp. et al., Respondents-Appellants, and Zia Construction Company, Appellant-Respondent. (And a Third-Party Action.) [252 NYS3d 11]—An appeal and cross-appeal having been taken to this Court by the above-named appellants from an order of the Supreme Court, New York County (Suzanne J. Adams, J.), entered on or about October 21, 2024, and said appeal and cross-appeal having been withdrawn before argument by counsel for the respective parties; and upon the stipulation of the parties hereto dated March 17, 2026, it is unanimously ordered that said appeals be and the same are hereby withdrawn in accordance with the terms of the aforesaid stipulation. Concur—Moulton, J.P., Friedman, González, Shulman, Rosado, JJ.

39 Zurich American Insurance Company, as Subrogee of 432 Park Condominium, Plaintiff, v 56th and Park (NY) Owner, LLC, Respondent/Third-Party Plaintiff, and GCI Northeast Inc., Appellant, et al., Defendants. Mueser Rutledge Consulting Engineers, Third-Party Defendant-Respondent. (And a Second Third-Party Action.) [252 NYS3d 133]—

Indemnity—Contractual Indemnification—Workplace Accident—Indemnitees' Involvement in Construction Work

Indemnity—Contractual Indemnification—Authority over Means and Control of Work

Order, Supreme Court, New York County (Melissa A. Crane, J.), entered on or about February 27, 2025, which, to the extent appealed from as limited by the briefs, granted the motion of defendant/third-party plaintiff 56th and Park (NY) Owner, LLC for summary judgment on its contractual indemnification claim against defendant CGI Northeast Inc., and declared that

56th and Park (NY) Owner, LLC is entitled to contractual indemnification from CGI under the terms of their agreement, unanimously affirmed, with costs.

56th and Park (NY) Owner, LLC, whose agreement with CGI required the latter to indemnify “Owner (56th and Park (NY) Owner, LLC), its related or affiliated companies, subsidiaries, partnerships, joint ventures, shareholders, members, donors, lenders, investors, officers, directors, trustees, [and] employees at every tier . . . (‘Indemnitees’) from and against all losses . . . except to the extent caused by the Indemnitees’ active negligence or willful misconduct,” met its prima facie burden by showing that neither it nor any of the other potential indemnitees identified in the agreement actively caused the underlying accident. 56th and Park (NY) Owner, LLC was not actively involved in the construction work. Moreover, it did not supervise or direct the work of defendant McGraw Hudson Construction Company (McGraw) which was hired as development manager to supervise the design and construction of a building. McGraw’s work in that capacity cannot reasonably be included in any of the categories of indemnitees defined in the contract, so the alleged negligence on its part cannot be imputed to 56th and Park (NY) Owner, LLC for purposes of the indemnification provision.

CGI failed to raise a triable issue of fact as to whether the underlying accident was caused by the active or willful misconduct of any of the potential indemnitees identified in the contract, or whether McGraw could be considered one of those indemnitees. We note that “agent” is not one of the categories of potential indemnitees set forth in the agreement, and that the building’s general manager’s testimony that 56th and Park (NY) Owner, LLC and McGraw were “related,” without elaboration, is insufficient to create an issue of fact as to whether they were related for purposes of the agreement.

56th and Park (NY) Owner, LLC satisfied its initial burden of showing that General Obligations Law § 5-322.1 is not a bar to recovery under the indemnification clause by establishing “that it did not exercise any authority over the means and methods of [the] work” (*Sosa v 46th St. Dev. LLC*, 101 AD3d 490, 493 [1st Dept 2012]). It did this by showing that it did not have control over McGraw’s project manager. CGI again failed to raise a triable issue of fact. While it submitted testimony from its project manager and two other witnesses that he performed work “on behalf of” 56th and Park (NY) Owner, LLC, this testimony does not suggest that 56th and Park (NY) Owner, LLC had control over the means and methods of the

work (*id.*). Concur—Webber, J.P., Gesmer, Mendez, Pitt-Burke, Hagler, JJ.

(April 16, 2026)

1 ABJ 105 LLC, Respondent, v Gladys Martinez, Appellant.
[252 NYS3d 551]—

Fraud—Fraud in Inducement—Purchase of Real Property

Order, Supreme Court, New York County (Nicholas W. Moyne, J.), entered on or about August 16, 2024, which denied defendant’s motion to dismiss the complaint, unanimously reversed, on the law, without costs, and defendant’s motion granted. The Clerk is directed to enter judgment accordingly.

Plaintiff seeks to hold defendant liable for allegedly fraudulently inducing it to purchase real property in Manhattan. At the closing, defendant executed a certification concerning six apartments in the property, swearing that “no rent has ever been paid by the occupants” of the apartments, and alleging that the occupants of the apartments “are not tenants.” However, schedule 8.1 (k) in the closing binder set forth the “actual rents billed by [defendant] to the tenants of the premises.”

Supreme Court should have dismissed the complaint, as the documentary evidence conclusively refutes the cause of action for fraudulent inducement (*see* CPLR 3211 [a] [1]). The parties’ purchase and sale agreement contained a merger clause, which incorporated the terms of schedule 8.1 (k) into the agreement. Further, plaintiff agreed to purchase the property “as is” and “where is.” These terms in the parties’ agreement bar plaintiff’s claim arising out of reliance on the purported misrepresentations (*see Suber v Churchill Owners Corp.*, 228 AD3d 414, 415 [1st Dept 2024]; *Dille v Zoelle LLC*, 220 AD3d 409, 410 [1st Dept 2023]).

Even if the complaint were not barred by the documentary evidence, it should still have been dismissed, as it fails to sufficiently plead all the elements of a cause of action for fraudulent inducement (*see* CPLR 3211 [a] [7]; *Eurycleia Partners, LP v Seward & Kissel, LLP*, 12 NY3d 553, 559 [2009]; *Facebook, Inc. v DLA Piper LLP [US]*, 134 AD3d 610, 615 [1st Dept 2015], *lv denied* 28 NY3d 903 [2016]). Concur—Moulton, J.P., Scarpulla, Shulman, Rodriguez, Michael, JJ.

2 In the Matter of Century Indemnity Company, Appellant, v Office of the New York Attorney General, Respondent. [— NYS3d —]—

**Records—Freedom of Information Law—Materials Exempt from Disclosure—
Records Compiled for Law Enforcement Purposes—Interference with Law
Enforcement Investigations**

Judgment (denominated an order), Supreme Court, New York County (Arthur F. Engoron, J.), entered on or about February 21, 2025, which denied the petition challenging the denial by respondent Office of the New York Attorney General (OAG) of its Freedom of Information Law (FOIL) request dated August 2, 2024, and dismissed the proceeding brought pursuant to CPLR article 78, unanimously affirmed, without costs.

This proceeding arises from petitioner Century Indemnity Company's attempt to obtain records related to OAG's investigation of the Diocese of Brooklyn, one of the eight Roman Catholic Church dioceses incorporated under Religious Corporations Law § 15 in New York State. In September 2018, OAG launched an investigation into the Roman Catholic Church in New York State, issuing subpoenas to each of the eight dioceses for records related to their institutional response to allegations of sexual abuse against clergy members and other dioceses employees. The OAG subsequently reached settlements with the Dioceses of Brooklyn and Buffalo. Petitioner then submitted a FOIL request to OAG generally seeking records related to OAG's investigation of the Brooklyn Diocese, which request the OAG denied.

The court below correctly found that OAG was permitted to withhold the requested materials under the exemption for documents that “are compiled for law enforcement purposes only to the extent that disclosure would . . . interfere with law enforcement investigations” (Public Officers Law § 87 [2] [e] [i]). While the OAG reached a settlement with the Brooklyn Diocese and therefore was no longer investigating that diocese, its investigations into six of the other eight dioceses in New York State remained open. Although the law enforcement exemption “ceases to apply after enforcement investigations and any ensuing judicial proceedings have run their course,” the exemption may be claimed in an “unusual circumstance such as the prospect that disclosure might compromise a related case” (*Matter of Leshner v Hynes*, 19 NY3d 57, 68 [2012]). The OAG's continued investigation of other Roman Catholic dioceses presents such a circumstance.

Contrary to petitioner's contentions, OAG was not required to make a “specific evidentiary showing” of the likelihood that disclosure would “pose any unique or unusual danger of interference in the individual case that is the subject of the request” (*Matter of Abdur-Rashid v New York City Police Dept.*,

31 NY3d 217, 226 [2018]). Rather, OAG was required only to identify “the generic kinds of documents for which the exemption is claimed, and the generic risks posed by disclosure of these categories of documents” (*Lesher*, 19 NY3d at 67). In its final determination letter, issued in response to petitioner’s administrative appeal, and in the affirmations of two attorneys within its office that were familiar with the investigation, OAG attested that the investigations of the six New York dioceses remained open and that the individual investigations were interrelated. OAG further attested that the dioceses had, in the past, coordinated their response to sexual abuse allegations; that diocese personnel have worked across different dioceses in the state; and that the investigations have overlapping and interconnected facts. These statements provide an adequate articulation of the basis for claiming the exemption (see *Matter of Loevy & Loevy v New York City Police Dept.*, 139 AD3d 598, 599 [1st Dept 2016]).

We have considered plaintiff’s remaining contentions and find them unavailing. Concur—Moulton, J.P., Scarpulla, Shulman, Rodriguez, Michael, JJ.

3 Certain Underwriters at Lloyd’s, London, Respondent, v Southwest Marine and General Insurance Company, Appellant. [252 NYS3d 558]—

Insurance—Duty to Defend and Indemnify—Additional Insured

Order, Supreme Court, New York County (Arlene P. Bluth, J.), entered March 6, 2025, which granted plaintiff’s motion for partial summary judgment declaring that defendant must defend plaintiff’s insured, nonparty Arsenal Scaffold Inc., on a primary and noncontributory basis in an underlying action and reimburse plaintiff for all costs incurred in defending Arsenal in the underlying action, and denied defendant’s cross-motion for summary judgment, unanimously affirmed, without costs.

Plaintiff commenced this action for, among other things, a declaration that defendant had a duty to defend plaintiff’s named insured, Arsenal, in an underlying action. In the underlying action, the plaintiffs each allege that they were “caused to be seriously injured when” they fell “from an elevated height at” the construction site, and subsequently claimed to have been injured while working on a scaffold. Defendant’s named insured, JGR Services Inc., contracted with Arsenal to perform work at the site, and is the only party identified that performed work there on behalf of Arsenal. In a third-party complaint, JGR is also alleged to have caused the underlying plaintiffs’ injuries as a result of its negligence.

The court properly granted plaintiff's motion for partial summary judgment declaring that defendant had a duty to defend Arsenal in the underlying action as an additional insured. The record amply supports the court's conclusion that defendant "has actual knowledge of facts establishing a reasonable possibility of coverage," thereby requiring it to provide a defense (*Frontier Insulation Contrs. v Merchants Mut. Ins. Co.*, 91 NY2d 169, 175 [1997] [internal quotation marks omitted]; see *Live Nation Mktg., Inc. v Greenwich Ins. Co.*, 188 AD3d 422, 423 [1st Dept 2020]). While defendant's named insured is not a defendant in the underlying action, defendant cannot simply ignore the facts known to it that create a reasonable possibility of coverage (see *Sumner Bldrs. Corp. v Rutgers Cas. Ins. Co.*, 101 AD3d 417, 418-419 [1st Dept 2012]).

We have considered defendant's remaining arguments and find them unavailing. Concur—Manzanet-Daniels, J.P., Higitt, Rosado, O'Neill Levy, Chan, JJ.

4 The Glenmede Trust Company, N.A., et al., Appellants, v Infinity Q Capital Management LLC et al., Respondents, et al., Defendants. [— NYS3d —]

Secured Transactions—Security Agreements—Civil Liabilities on Account of False Registration Statement—Liability of Controlling Persons

Order, Supreme Court, New York County (Melissa A. Crane, J.), entered on or about February 26, 2024, which, to the extent appealed from as limited by the briefs, granted the motion by defendant Infinity Q Capital Management LLC (IQCM) to dismiss the claims against it under sections 11 and 15 of the Securities Act of 1933, unanimously modified, on the law, to deny the motion as to the claim under section 11, and otherwise affirmed, without costs. Order, same court and Justice, entered on or about March 21, 2024, which granted the motion of defendants Leonard Potter and Bonderman Family Limited Partnership, LP (Bonderman LP) to dismiss the complaints against them, unanimously modified, on the law, to deny the motion as to the Securities Act of 1933 section 11 claim and as to the section 15 claim to the extent it alleges that Potter and Bonderman LP were control persons of IQCM, and otherwise affirmed, without costs.

As alleged in the relevant complaints,* in 2014 the late David Bonderman, a billionaire investor and founder of the invest-

* Plaintiffs in this appeal are comprised of three groups that opted out of two class actions brought in New York County against some or all of the defendants named herein. Each group subsequently brought its own action alleging nearly identical facts and causes of action. The three groups

(n. cont'd)

ment fund TPG, launched defendant IQCM to manage two investment funds: a hedge fund, not at issue in this case, and a mutual fund open to the public named Infinity Q Diversified Alpha Fund (the Mutual Fund). The Mutual Fund was designed to make available to retail investors esoteric investment products and strategies that Bonderman had successfully used and that were typically available only to very wealthy investors. These investments included derivatives and swaps, many tied to market volatility.

To administer the Mutual Fund, Bonderman turned to U.S. Bank. U.S. Bank offered a service known as “multiple series trusts,” or “MSTs.” The MSTs were a series of unrelated mutual funds that were all owned and legally controlled by a single trust. Bonderman chose the Trust for Advised Portfolios (the Trust), a Delaware statutory trust created by US Bank, as the legal vehicle for the Mutual Fund.

The Mutual Fund was managed by IQCM pursuant to a written agreement with the Trust. Defendant Bonderman LP owned 25% or more of IQCM. Bonderman caused Potter to become the CEO of IQCM and defendant James Velissaris to become its chief investment officer, or CIO. Bonderman had a prior relationship with both men: Potter and Velissaris were employees of Wild Cat Partners, the investment advisor to Bonderman LP.

The swaps that were the main assets held by the Mutual Fund did not have an established market price. To provide a means for valuing the swaps, IQCM used a valuation service purchased from Bloomberg called BVAL. IQCM provided U.S. Bank’s affiliate with the valuations it generated using BVAL, including the net asset value (NAV) of the Mutual Fund.

The complaints allege that Velissaris manipulated BVAL to massively inflate the value of the assets and therefore the reported NAV. These improper valuations were eventually uncovered by the SEC. As a result, the Mutual Fund collapsed in February 2021, with assets about \$500 million less than reported.

The SEC commenced a series of civil actions and referred the matter to prosecutors. Bonderman LP and IQCM were perma-

stipulated to be bound by Supreme Court’s decision in one of the actions, and their appeals from that decision have been consolidated by order of this Court. Because this is an appeal from a dismissal pursuant to CPLR 3211 (defendants did not specify the subsection under which they moved), the facts herein are taken from the allegations of the amended complaints and the face of the documents incorporated by reference therein (*see Edwards v Nicolai*, 153 AD3d 440, 440-441 [1st Dept 2017]).

nently barred from the securities industry, and Bonderman LP was subject to a disgorgement order. Velissaris was criminally prosecuted. He ultimately pleaded guilty and was sentenced to 15 years in prison and ordered to make restitution of \$22 million.

This action concerns allegedly false statements in the Registration Statement SEC Form N-1A for the Mutual Fund, which was effective December 31, 2019, with its accompanying prospectus and other documents (the Registration Statement). The Registration Statement is signed by the trustees of the Trust, as well as by the Trust's chief financial officer. Potter also signed the Registration Statement. However, the following disclaimer appears above Potter's signature: "This Registration Statement, with respect only to information that specifically relates to Infinity Q Commodity Fund, Ltd., has been signed below by the following persons in the capacities and on the dates indicated." Potter is identified as a "Director." The disclaimer thus attempts to limit Potter's certification to statements concerning the Infinity Q Commodity Fund, Ltd., which was a subsidiary of the Mutual Fund. The effect, if any, of this disclaimer is hotly disputed by the parties.

Plaintiffs here were all investors in the Mutual Fund. The gravamen of the complaints is that the Registration Statement falsely states that the NAV for the Mutual Fund was estimated in good faith using a third-party tool (BVAL) that the Mutual Fund does not control. In fact, as noted above, Velissaris used false inputs to manipulate the BVAL, and thus knowingly falsified the NAV. The other defendants are alleged to be liable on various theories.

As relevant to this appeal, plaintiffs asserted claims under section 11 of the Securities Act of 1933 (15 USC § 77k) against Potter and IQCM, and under section 15 of the Securities Act (15 USC § 77o) against Potter, Bonderman LP, and IQCM.

Defendants moved to dismiss, arguing that Potter was not liable under section 11 because of the disclaimer over his signature. Because he was not liable, defendants reasoned, IQCM could not be vicariously liable. In any event, defendants asserted that Potter was not acting as the agent of IQCM when he signed the Registration Statement as a director of the Infinity Commodity Fund. With respect to section 15, defendants argued that Bonderman LP had only a 25% ownership of IQCM and that Potter did not have any ownership. As such, they were not control persons of IQCM. Finally, defendants argued that Potter could not be a control person of the Mutual Fund under section 15 because it was not a separate entity, but part

of the Trust. The Trust, they argued, was controlled by its Trustees.

Supreme Court granted defendants' motions to dismiss. The court agreed with defendants that the disclaimer over Potter's signature foreclosed his liability under section 11. Therefore IQCM could not be vicariously liable for this signing of the Registration Statement. The court further held that because there was no predicate section 11 claim, there could be no control person liability under section 15 for Bonderman LP, IQCM or Potter. The court held that neither Potter nor IQCM could be a control person of the Mutual Fund because plaintiffs had not asserted any claims against it. Finally, it held that neither Potter nor IQCM could be a control person of the Trust because it was controlled by its trustees.

We now modify Supreme Court's decision.

Potter's direct liability under section 11 rests on the fact that he signed the Registration Statement. There is no mechanism under the 1933 Act for a signatory to limit their responsibility for statements in a registration statement via a disclaimer. Thus, Potter is strictly liable for any misstatement in the operative Registration Statement.

The 1933 Act requires that certain classes of securities offered to the public be registered with the SEC (15 USC § 77e). The process requires an issuer to file a formal "registration statement" with the SEC that contains certain information (15 USC §§ 77f, 77g). The registration statement must be signed by "each issuer, its principal executive officer or officers, its principal financial officer, its comptroller or principal accounting officer, and the majority of its board of directors or persons performing similar functions" (15 USC § 77f [a]).

In the event that "any part of the registration statement . . . contained an untrue statement of a material fact or omitted to state a material fact required to be stated therein or necessary to make the statements therein not misleading," a purchaser of the securities offered pursuant to the registration statement has a cause of action against five enumerated categories of defendant:

"(1) every person who signed the registration statement;

"(2) every person who was a director of (or person performing similar functions) or partner in the issuer at the time of the filing of the part of the registration statement with respect to which his liability is asserted;

"(3) every person who, with his consent, is named in the registration statement as being or about to become a director, person performing similar functions, or partner;

“(4) every accountant, engineer, or appraiser, or any person whose profession gives authority to a statement made by him, who has with his consent been named as having prepared or certified any part of the registration statement, or as having prepared or certified any report or valuation which is used in connection with the registration statement, with respect to the statement in such registration statement, report, or valuation, which purports to have been prepared or certified by him;

“(5) every underwriter with respect to such security.” (15 USC § 77k [a]).

The only category of persons under which Potter falls is signatory under paragraph 1. Section 11 imposes strict liability on “every person who signed the registration statement.” We must give effect to the plain meaning of the statute (*see Matter of Walsh v New York State Comptroller*, 34 NY3d 520, 524 [2019] [“a court ‘should construe unambiguous language to give effect to its plain meaning’ ”], quoting *Matter of Lemma v Nassau County Police Officer Indem. Bd.*, 31 NY3d 523, 528 [2018]). Paragraph 4 above, which applies to experts’ certifications of discrete portions of a registration statement, illustrates that Congress knew how to allow for a limited scope certification where it chose to do so.

Defendants note that the signature page that precedes Potter’s in the Registration Statement states that the signatories on that page are signing “pursuant to the requirements of the Securities Act,” presumably a reference to section 6 of the Securities Act (15 USC § 77f [a]). There is no similar statement prior to Potter’s signature. However, liability depends on whether a person signed the Registration Statement, not on whether they were required to do so under another section of the Act. And Potter’s attempted disclaimer does not change this analysis.

Perhaps because section 11’s language is clear, there is not a great deal of apposite authority on this point. However, the most persuasive federal authority supports plaintiffs’ argument. In *Obasi Inv. LTD v Tibet Pharms., Inc.* (931 F3d 179 [3d Cir 2019]), the court considered the liability of the defendants whom the plaintiffs claimed were “named as a director” of the issuer under section 77k (a) (3). In analyzing the text, the court noted that unlike section 77k (a) (4)—the expert provision—section 77k (a) (3) did not contain the language limiting liability to just the statements or reports prepared by the director. “That’s because liability under § 77k(a) (3) is not limited to particular statements within the registration statement,” and that is the reason the language appears in 77k (a) (4) and not

in 77k (a) (3) (*id.* at 187). The same reasoning applies here: a signatory has no power via an exordium to unilaterally limit his or her liability under the Act.

Wang v Cloopen Group Holding Ltd. (661 F Supp 3d 208, 238 [SD NY 2023]) also provides closely analogous authority. In *Wang*, the defendants argued that one of them, DeVries, had signed the registration statement not in her personal capacity, but as an employee of the issuer. She argued that this limitation prevented her from being personally liable under section 11. The court disagreed, holding that “[t]he Cogency Defendants do not cite any authority for the proposition that a signatory to a registration statement is exempt from Securities Act liability because the signatory purported to sign the document on an employer’s behalf. Thus, the claims against DeVries under Sections 11 and 15 may proceed” (*id.* at 238).

The complaints also adequately allege that Potter was IQCM’s agent, giving rise to a respondeat superior claim under section 11 against IQCM. Agency is a fact-intensive issue and the complaints’ allegations, including that IQCM was the investment advisor to the Mutual Fund and that Potter was the CEO of IQCM, give rise to at least the inference of agency (*see Riviello v Waldron*, 47 NY2d 297, 302-303 [1979]).

In addition to primary violator liability under section 11, a person who “controls” the primary violator is also liable under section 15 of the Securities Act. Section 15 imposes “control person liability” upon “[e]very person who, by or through stock ownership, agency, or otherwise, or who, pursuant to or in connection with an agreement or understanding with one or more other persons by or through stock ownership, agency, or otherwise, controls any person liable under sections 77k or 77l of this title [15 USC §§ 77k or 77l], shall also be liable jointly and severally with and to the same extent as such controlled person” (15 USC § 77o [a]).

To establish this liability, “a plaintiff must plead: (1) a primary violation; and (2) control over the primary violator” (*In re Flag Telecom Holdings, Ltd. Sec. Litig.*, 352 F Supp 2d 429, 457 [SD NY 2005]). Control for section 15 purposes “is not the mere ability to persuade, but almost ‘always means the practical ability to direct the actions of people who issue or sell securities’ ” (*id.* at 458). This Court has established a relatively lenient standard for asserting control at the pleading stage. A plaintiff “need not allege facts that would prove that the control person actually exercised the power to influence or control. Rather [it] only need[s] to allege ‘the power or potential [power] to influence and control’ Consequently, ‘the determina-

tion of who is a controlling person . . . is an intensely factual question' ” (*Acacia Natl. Life Ins. Co. v Kay Jewelers*, 203 AD2d 40, 46 [1st Dept 1994], quoting *Caruso v Metex Corp.*, 1993 WL 305945, *3 [ED NY, July 1, 1993, No. CV 89-0571]).

Plaintiffs have met this standard with respect to certain of their section 15 claims. The complaints allege that Bonderman LP had a substantial ownership stake in the Mutual Fund and IQCM. Additionally, its founder had a role in creating those entities (see *In re Complete Mgt. Inc. Sec. Litig.*, 153 F Supp 2d 314, 332 [SD NY 2001]), and he appointed long-time trusted and loyal employees to run them (see *In re Spiegel, Inc. Sec. Litig.*, 382 F Supp 2d 989, 1022 [ND Ill 2004]). Therefore plaintiffs sufficiently alleged that Bonderman LP was a control person of IQCM. Plaintiffs also sufficiently alleged that Potter was a control person of IQCM as he was both its CEO and the person who signed the registration statement (cf. *In re Smith Barney Transfer Agent Litig.*, 884 F Supp 2d 152, 167 [SD NY 2012]).

However, plaintiffs fail to sufficiently allege that Potter was a control person of the Mutual Fund or the Trust. The Mutual Fund is not a separate legal entity, but part of the Trust, which is controlled by its trustees. For these same reasons, plaintiffs failed to sufficiently allege that IQCM was a control person of either the Mutual Fund or the Trust. Concur—Moulton, J.P., Gesmer, Rodriguez, Higgitt, Michael, JJ.

5 Alzerina Gomes, Respondent, v Frederic Des Estangs Roux, Appellant. [— NYS3d —]

Husband and Wife and Other Domestic Relationships—Divorce—Prenuptial Agreement—Sufficiency of Pleading

Husband and Wife and Other Domestic Relationships—Counsel Fees

Judgment of divorce, Supreme Court, New York County (Tandra Dawson, J.), entered March 22, 2023, and bringing up for review a decision and order, same court and Justice, issued November 3, 2022, confirming the report of Special Referee (Sue Ann Hoahng, Ref.) issued August 26, 2019, which, after trial, and to the extent appealed from as limited by the briefs, awarded plaintiff wife counsel fees in the amount of \$73,186.88, ordered that plaintiff was to retain certain real property in Cape Verde, provided for equal division of the parties' marital estate of \$439,992.35, for debts to be paid by the party incurring them, and child support from plaintiff to defendant of \$25 per month until emancipation, unanimously affirmed, without costs.

The parties in this protracted matrimonial action were mar-

ried in France in 1997. Plaintiff wife brought this action for divorce in August 2015. The parties had one child together who began residing with defendant husband in 2016. Supreme Court held several conferences in the case, at which it determined certain discovery issues and pendente lite maintenance and child support. The court then referred several issues to a Special Referee to hear and report, including equitable distribution, allocation of marital debt, spousal maintenance, child support arrears, and counsel fees.*

Throughout the contentious six-day hearing, the Special Referee repeatedly reprimanded defendant and his counsel for their disrespectful and disruptive behavior. During the hearing, defendant argued that the prenuptial agreement signed by the parties in France in 1997 was valid and enforceable and precluded equitable distribution. The Special Referee, noting that there was no allegation of a prenuptial agreement in defendant's answer or in the preliminary conference order, declined to consider the document.

With respect to equitable distribution, the Special Referee concluded that the marital estate was worth \$439,992.32, plus real property located in Cape Verde, plaintiff's nation of origin, valued at \$59,000. The Special Referee recommended that the Cape Verde property be awarded outright to plaintiff, as an equitable measure to compensate plaintiff for domestic violence she suffered by defendant, as well as for defendant's admittedly wrongful removal of funds from a retirement account. The Special Referee awarded each party fifty percent of the remainder of the marital estate and did not consider the prenuptial agreement in her recommendation.

Plaintiff moved to confirm the Special Referee's report. Defendant appeared pro se on the motion and submitted lengthy papers that did not conform to court rules. Supreme Court declined to consider defendant's opposition and initially confirmed the Special Referee's report in an order dated June 22, 2020. The court later vacated its order in consideration of defendant's pro se status and gave him an opportunity to be heard regarding the Special Referee's report. After receiving defendant's opposition, the court granted plaintiff's motion to confirm. Judgment was entered March 22, 2023. Defendant appealed and we now affirm.

Supreme Court properly declined to consider and enforce the prenuptial agreement. Defendant did not reference the prenup-

* The parties settled the issues of spousal maintenance and child support arrears.

tial agreement in his answer or his counterclaims (*see* CPLR 3013). The portion of the court's preliminary conference order seeking information about "Premarital, Marital or Separation Agreements" was left blank. Defendant's December 2015 Statement of Net Worth, which was not amended until the time of trial, alleged that his foreign assets were premarital but made no reference to the prenuptial agreement. Further, defendant never moved to amend his answer or to conform the pleadings to the proof (CPLR 3025 [b], [c]; *cf. Ross v Ross*, 35 AD3d 430, 431 [2d Dept 2006]).

Defendant's arguments regarding the proper distribution and calculation of the parties' assets for equitable distribution are largely raised for the first time on appeal, and we decline to address them in the interest of justice (*see generally Rosenblum v Treitler*, 242 AD3d 472, 473 [1st Dept 2025]). The trial court has broad discretion in determining a distribution of the assets (*see Mahoney-Buntzman v Buntzman*, 12 NY3d 415, 420 [2009]) and has "substantial flexibility in fashioning an appropriate decree based on what it views to be fair and equitable under the circumstances" (*id.* at 420).

The Special Referee's determination, as confirmed by Supreme Court, and based on the information before them, was not erroneous. Moreover, there is no reason to disturb the Special Referee's credibility determinations and factual findings, which are entitled to great deference on appeal (*see e.g. Matter of Anthony L. v Bernadette R.*, 193 AD3d 510, 511 [1st Dept 2021]).

The court properly allocated marital debt, particularly as the amounts appear to be undisputed, and debts need not be apportioned equally (*see generally Van Boxtel v Van Boxtel*, 233 AD3d 463, 463-464 [1st Dept 2024]; *Culman v Boesky*, 207 AD3d 18, 25 [1st Dept 2022], *lv denied* 39 NY3d 907 [2023]).

An award of counsel fees in a matrimonial action is a matter within the sound discretion of the trial court (*see Prichep v Prichep*, 52 AD3d 61, 64 [2d Dept 2008]). It is controlled by the equities and circumstances of each case, including, among other factors, the relative merits of the parties' positions and their respective financial circumstances (*see DeCabrera v Cabrera-Rosete*, 70 NY2d 879, 881 [1987]; *see also Johnson v Chapin*, 12 NY3d 461, 467 [2009]; *Morrissey v Morrissey*, 259 AD2d 472, 473 [2d Dept 1999]). The court may consider whether a party has engaged in unreasonable positions or dilatory behavior that prolonged the litigation (*see Gallen v Gallen*, 183 AD3d 425 [1st Dept 2020]). Contrary to defendant's argument, counsel fees were before the hearing court, as the bulk of

plaintiff's invoices were entered into evidence, and she testified to their reasonableness. Moreover, a review of the transcript confirms defendant's obstructive and inappropriate behavior during the trial, which prolonged the proceedings. Considering the parties' financial disparity, the legal fees incurred, and the actions of defendant and his counsel, the court's determination to award plaintiff fifty percent of the counsel fees she requested was a provident exercise of its discretion.

As defendant did not raise the issue of a Qualified Domestic Relations Order either during the trial or in written summation, the issue was not before the Special Referee when she made her determination. It was thus not error for the court to disregard this belated request.

Under the circumstances of this case, we find that the court's determination of \$25 per month child support until the child's emancipation based on plaintiff's income was proper. Concur—Moulton, J.P., Scarpulla, Shulman, Rodriguez, Michael, JJ.

6 Feifei Gu, Appellant, v Javon Henry et al., Respondents. [252 NYS3d 555]—

Municipal Corporations—Notice of Claim—Service

Order, Supreme Court, New York County (Dakota D. Ramseur, J.), entered on or about April 24, 2024, which denied plaintiff's motions to vacate a prior order, same court (Mary V. Rosado, J.), entered on or about July 28, 2023, dismissing the complaint for failure to file a timely notice of claim, and for sanctions, and which, in effect, granted plaintiff's motion for leave to reargue her opposition to defendants' motion to dismiss the complaint, and upon reargument, adhered to its prior determination, unanimously affirmed, without costs.

Supreme Court effectively granted plaintiff's motion for leave to reargue when it considered the merits of the motion, and thus, it is reviewable on appeal (*see High Definition MRI, P.C. v Mapfre Ins. Co. of N.Y.*, 148 AD3d 470, 471 [1st Dept 2017]). Upon reargument, the court properly adhered to its prior order granting defendants' motion to dismiss the complaint. Plaintiff's contention that defendants failed to serve their motion to dismiss is contradicted by the record, which includes counsel's affirmation of service by certified mail, plaintiff's submission of opposition to the motion, and her participation in oral argument on the motion.

Supreme Court also properly denied plaintiff's motion to vacate the July 28, 2023 order dismissing the complaint for failure to file a timely notice of claim. The record shows that plaintiff did not comply with the notice-of-claim requirements

applicable to tort claims under General Municipal Law §§ 50-e and 50-i prior to commencing this action against the District Attorney's Office and two of its prosecutors (*see Slemish Corp. S.A. v Morgenthau*, 192 AD3d 465, 468 [1st Dept 2021], *lv denied* 37 NY3d 909 [2021]). There is no evidence that defendants were ever served with a notice of claim, nor did plaintiff plead any such in the complaint. Because failure to satisfy these statutory prerequisites is a jurisdictional defect, dismissal was required (*see Davidson v Bronx Mun. Hosp.*, 64 NY2d 59, 62 [1984]).

Furthermore, the court providently denied plaintiff's motion for sanctions as her allegations of fraud and misconduct are conclusory and unsupported by the record.

We have considered plaintiff's remaining arguments and find them unavailing. Concur—Manzanet-Daniels, J.P., Higitt, Rosado, O'Neill Levy, Chan, JJ.

7 Steven R. Halperin et al., Appellants, v Stephan Van Dam et al., Defendants, and John-Luc Briguet R.A. et al., Respondents. [— NYS3d —]—

Attorney and Client—Malpractice—Damages

Order, Supreme Court, New York County (Andrea Masley, J.), entered on or about April 15, 2024, which granted the summary judgment motion of defendants Held & Hines, LLP and Marc J. Held, Esq. (the HH defendants), the summary judgment motion of Douglas Elliman Realty, LLC and Maggie Leigh Marshall (the broker defendants), and the summary judgment motion of Jean-Luc Briguet, R.A., all to dismiss the claims and cross-claims against them, unanimously affirmed, without costs.

This case arises from plaintiffs' purchase of an apartment located on the eighth floor of 32 West 20th Street, New York, New York (the Building). The HH defendants represented plaintiffs in connection with the transaction, and the broker defendants were plaintiffs' broker.

After plaintiffs' purchase, they retained Briguet to design a gut renovation of the apartment. The renovation included, among other things, creating a bedroom which utilized one of the apartment's easterly lot-line windows and moving the kitchen to utilize two of the easterly lot-line windows. The renovation was completed by February 2018.

The premises adjacent to the Building are owned by Panasia Estate Inc. (Panasia). On March 11, 2019, plaintiffs were notified that Panasia intended to construct a two-story addition

that would necessitate the elimination of the lot-line windows on the east side of the 7th and 8th floors of the Building. Thus, plaintiffs' apartment may be affected by Panasia's construction.

The HH defendants made a prima facie showing of their entitlement to summary judgment by submitting proof that plaintiffs have sustained no actual damages (*see IGEN, Inc. v White*, 250 AD2d 463, 465 [1st Dept 1998], *lv denied* 92 NY2d 818 [1998]). The HH defendants submitted evidence that plaintiffs' lot-line windows remain unobstructed, and plaintiffs failed to raise an issue of fact in opposition. Plaintiffs conceded that they have not lost the lot-line windows. Possible future damages plaintiffs may sustain, if the lot-line windows are lost, are speculative and thus, cannot support a legal malpractice claim as a matter of law (*Pellegrino v File*, 291 AD2d 60, 63 [1st Dept 2002], *lv denied* 98 NY2d 606 [2002]; *see Gallet, Dreyer & Berkey, LLP v Basile*, 141 AD3d 405, 405-406 [1st Dept 2016]).

Plaintiffs contend that, had they known the apartment they purchased might lose its lot-line windows because of the approved plan by Panasia for a future vertical expansion, they would have neither bought nor renovated it. However, plaintiffs' speculation failed to raise a triable issue of fact as to whether they overpaid for the apartment considering the possibility of the expansion of the neighboring building (*see Mah v 40-44 W. 120th St. Assoc., LLC*, 193 AD3d 549, 550 [1st Dept 2021]). Plaintiffs paid \$2,530,000 for the apartment in the spring of 2017, and their bank's appraiser—a nonparty who has no stake in this case—appraised it at the time for \$2,530,000, as if it had no eastern windows. In opposition, plaintiffs' expert appraiser opined that losing the lot-line windows would decrease the value of the apartment by 25% as of the original closing date, May 24, 2017. However, plaintiff's appraiser valued the apartment as of June 1, 2021, so it is unclear to what amount the 25% diminution would apply. Indeed, at his deposition, plaintiff's expert appraiser admitted that 2017 and 2021 are "vastly different dates" for appraisal purposes. Additionally, plaintiffs admitted that they could not have expected their apartment to increase in value dollar-for-dollar by the amount of the renovation.

For the same reasons, Supreme Court properly granted Briguet and the broker defendants summary judgment on the basis that plaintiffs suffered no non-speculative damages (*Besen v Farhadian*, 195 AD3d 548, 549-550 [1st Dept 2021] [breach of fiduciary duty claim]; *Gomez-Jimenez v New York Law Sch.*,

103 AD3d 13, 17-18 [1st Dept 2012] [fraudulent misrepresentation and fraudulent concealment claims], *lv denied* 20 NY3d 1093 [2013]; *Brazos v Brumidge*, 6 AD2d 494, 496-497 [1st Dept 1958] [negligence-based claims]).

We have considered plaintiffs' remaining contentions and find them unavailing. Concur—Moulton, J.P., Scarpulla, Shulman, Rodriguez, Michael, JJ.

8 Maurice Hyde, Respondent, v Cyril Okolie et al., Defendants, and Phyllis Weitzman, Also Known as Phyllis Okolie, et al., Appellants. [— NYS3d —]

Fraud—Actual Fraud—Constructive Fraud—Undue Influence—Misappropriation of Money of Person Suffering from Dementia

Order, Supreme Court, New York County (Shlomo S. Hagler, J.), entered February 4, 2025, which denied the motion of defendants Phyllis Weitzman, also known as Phyllis Okolie, and Bow Faith Co., LLC (together defendants) for summary judgment dismissing the fourth (aiding and abetting constructive fraud), fifth (aiding and abetting actual fraud), sixth (actual fraud), eighth (undue influence), ninth (promissory estoppel), thirteenth (joint and several liability), fifteenth (unjust enrichment), and sixteenth (constructive trust) causes of action in the second amended complaint as against them, unanimously affirmed, with costs.

Plaintiff Maurice Hyde is the administrator of the Estate of William Boise, who died on June 25, 2015. Hyde alleges that between 2011 and 2014, Weitzman, together with defendant Cyril Okolie, worked together to misappropriate more than a million dollars from Boise, who was suffering from dementia. Weitzman submitted an affidavit in support of her motion in which she states that she and Okolie were married in 1983 and have two children together. Weitzman avers that they separated in 2009 but maintain an amicable relationship. Okolie is a former student of Boise, who was a professor for many years at New York University.*

The complaint alleges that Weitzman used Boise's funds, transferred to her through Okolie, to purchase property in Maspeth, New York, which she then transferred to defendant Bow Faith, as its sole asset. Okolie also used his authority over Boise's financial accounts to make further transactions that allegedly benefitted Weitzman.

The court properly determined that defendants failed to establish their entitlement to summary judgment dismissing

* Okolie is not a party to this appeal.

plaintiff's claims for aiding and abetting constructive and actual fraud committed by Okolie and for actual fraud (see *Eurycleia Partners, LP v Seward & Kissel, LLP*, 12 NY3d 553, 559 [2009]; *Oster v Kirschner*, 77 AD3d 51, 55-56 [1st Dept 2010]). The evidence demonstrates that, Weitzman, at Okolie's behest, acted as witness to the execution of Boise's health care proxy and durable power of attorney naming Okolie. Subsequently, Okolie was added as a joint accountholder on Boise's accounts and moved Boise and himself into a costly two-bedroom apartment, paid for by Boise. Using this authority, Okolie then transferred large sums of money to Weitzman.

With respect to the Maspeth property, Okolie facilitated and was present at conversations in which Weitzman and Boise allegedly discussed buying a joint investment property together, with Boise having the option to live at the property. To that end, Boise and Weitzman executed a "partnership agreement" on January 1, 2012. Plaintiff offered medical records and expert testimony that indicates that Boise was suffering from total mental and physical incapacitation in December 2011, before he purportedly signed the partnership agreement. Weitzman then received more than \$300,000 of Boise's funds, through Okolie, to apply toward the purchase of the Maspeth property.

Weitzman contends that she and Boise intended to purchase an investment property where Boise could live, and that she returned Boise's money once Okolie indicated that Boise decided to back out of the deal. Weitzman then purchased the Maspeth property in her individual name. While she asserts that she returned \$250,000 to Okolie to give to Boise, there is no conclusive evidence that the \$250,000 was ever returned to Boise.

Defendants also failed to establish entitlement to summary judgment dismissing the undue influence claim (see *Matter of Kotick v Shvachko*, 130 AD3d 472, 473 [1st Dept 2015]). By virtue of a joint venture, a confidential relationship existed between Weitzman and Boise (see *Rocchio v Biondi*, 40 AD3d 615, 616 [2d Dept 2007]). Weitzman, as the transaction's beneficiary, failed to show that the purported partnership was free of undue influence (see *Sepulveda v Aviles*, 308 AD2d 1, 7 [1st Dept 2003]). There is evidence indicating that Weitzman exerted influence over Boise through multiple conversations with Boise about their purported joint venture, with Okolie, Boise's presumptive caretaker, acting as intermediary. Supreme Court properly found that the Maspeth transaction is entangled with the other allegedly fraudulent transactions recounted in the complaint that center on Okolie's actions.

Further, defendants were not entitled to summary judgment dismissing plaintiff's cause of action for promissory estoppel (see *Condor Funding, LLC v 176 Broadway Owners Corp.*, 147 AD3d 409, 411 [1st Dept 2017]). Based on Weitzman's own statements, there are issues of fact as to whether Weitzman made clear and unambiguous promises to Boise and whether he reasonably relied upon the alleged promises (see *Agress v Clarkstown Cent. School Dist.*, 69 AD3d 769, 771 [2d Dept 2010]).

Defendants did not establish entitlement to summary judgment on the unjust enrichment claim (see *Mandarin Trading Ltd. v Wildenstein*, 16 NY3d 173, 182 [2011]). The evidence shows that since the purchase of the Maspeth property, which plaintiff contends was purchased with Boise's funds, Weitzman acquired sole title to and occupancy of the property. It is undisputed that Boise never moved into the Maspeth property and never benefitted from the investment. Additionally, there is a dispute as to whether Weitzman reimbursed Boise \$250,000 of the more than \$300,000 that Boise gave to the purported partnership.

Co-conspirators found liable for aiding-and-abetting fraud may be held jointly and severally liable for damages (see *Visual Arts Found., Inc. v Egnasko*, 91 AD3d 578, 579 [1st Dept 2012]), thus, this cause of action was properly sustained. Moreover, under the circumstances here, a constructive trust is available as a remedy because Boise and Weitzman were in a confidential relationship by virtue of their joint venture (see *Bankers Sec. Life Ins. Socy. v Shakerdge*, 49 NY2d 939, 940 [1980]; *Sharp v Kosmalski*, 40 NY2d 119, 121 [1976]).

To the extent plaintiff shows at trial that Weitzman used Bow Faith to perpetrate a fraud on Boise, plaintiff may be entitled to reach the assets of that entity (see *Matter of Morris v New York State Dept. of Taxation & Fin.*, 82 NY2d 135, 140-141 [1993]).

We have considered defendants' remaining arguments and find them unavailing. Concur—Moulton, J.P., Scarpulla, Shulman, Rodriguez, Michael, JJ.

9 In the Matter of dLocal Securities Litigation. Joseph Zappia et al., Appellants, v dLocal Limited et al., Respondents, et al., Defendants. [— NYS3d —]

Secured Transactions—Security Agreements—False Registration Statement—Duty to Disclose

Order, Supreme Court, New York County (Andrea Masley, J.), entered March 21, 2025, which, to the extent appealed

from as limited by the briefs, granted the motion of defendants dLocal Limited, Colleen A. DeVries, Cogency Global Inc., J.P. Morgan Securities LLC, Goldman Sachs & Co. LLC, Citi Global Markets, Inc., Morgan Stanley & Co. LLC, BofA Securities, Inc., HSBC Securities (USA) Inc., and UBS Securities LLC to dismiss the complaint as against them, unanimously affirmed, with costs.

Supreme Court properly dismissed the claim brought under section 11 of the Securities Act of 1933 (15 USC § 77k), which was based on alleged violations of Items 105 and 303 of Regulation S-K (17 CFR 229.105 [a]; 229.303 [b] [2] [ii]), as well as the claim brought under Securities Act § 15 (15 USC § 77o; see CPLR 3211 [a] [1], [7]). Although claims for violations of Securities Act §§ 11 and 15 are not subject to the heightened pleading standards of CPLR 3016 (b), a plaintiff must plead facts from which one could reasonably infer that defendants had actual knowledge of the trend or risk (see *Schwartz v Genfit, S.A.*, 212 AD3d 96, 99 [1st Dept 2022]; *Kohl v Loma Negra Cia. Indus. Argentina S.A.*, 195 AD3d 414, 417 [1st Dept 2021]; *In re HEXO Corp. Sec. Litig.*, 524 F Supp 3d 283, 302 [SD NY 2021]).

As to the alleged violations of Item 105, plaintiffs fail to show that defendants had actual knowledge of a risk arising from a decline in “take rates” (that is, margins). The disclosed numbers in the prospectus of dLocal, the registrant, show continued increases in the total payment volume (TPV) monies collected, revenue, and gross profits. Moreover, the consolidated amended complaint, alleging additional numbers that dLocal allegedly disclosed to the SEC, shows the same growth in TPV, revenue, and profits, both before and after dLocal’s June 2021 initial public offering. Plaintiffs do not challenge the accuracy of any released figures. Thus, the record does not support plaintiffs’ allegation that defendants actually knew of a take rate decline that would make plaintiffs’ investment “speculative or risky” (17 CFR 229.105 [a]; see *Matter of Sundial Growers Inc. Sec. Litig.*, 67 Misc 3d 1217[A], 2020 NY Slip Op 50579[U] [Sup Ct, NY County 2020], *affd* 191 AD3d 543, 544 [1st Dept 2021]; *In re HEXO Corp. Sec. Litig.*, 524 F Supp 3d at 302).

Plaintiffs’ reliance on Item 303 fares no better. The duty to disclose arises when a trend or uncertainty is presently known and reasonably likely to have material effects on the registrant’s financial condition (*Panther Partners Inc. v Ikanos Communications, Inc.*, 681 F3d 114, 120 [2d Cir 2012]; see also *Stadnick v Vivint Solar, Inc.*, 861 F3d 31, 39 [2d Cir 2017]).

The prospectus informed investors that dLocal had been transitioning its largest customers from cross-border to more local-to-local payments, that cross-border payments brought more revenue per transaction, and that the vast majority of its growth potential (86% of the market) was in local-to-local payments. Thus, the prospectus emphasized the goal of increasing the overall volume of payment services—that is, TPV. The prospectus also disclosed the amount of money collected from payments rather than simply stating the number of transactions.

Although the prospectus did not include quarterly TPV numbers for the second, third, and fourth quarters of 2020, plaintiffs nonetheless alleged that those numbers increased, as shown in a table set forth in the complaint, and that the take rates for the second and third quarters of 2020 were higher than the first quarter 2020, with lower rates in the next two quarters. This limited amount of data, showing only a few months, does not constitute a known material trend that existed at the time of the offering (*City of Warwick Mun. Empls. Pension Fund v Restaurant Brands Intl. Inc.*, 210 AD3d 461, 462-463 [1st Dept 2022], *lv denied* 39 NY3d 909 [2023]).

We also reject plaintiffs' contention that dLocal management considered take rates to be a material performance metric, as discussed at quarterly sales calls after the IPO occurred. The actual statements made on the earnings calls do not support this allegation (*Matter of NIO Inc. Sec. Litig.*, 211 AD3d 464, 465 [1st Dept 2022]).

In any event, under the alleged facts, even if a decline in the take rate were a known trend, the consistent increase in TPV collections, revenue, and gross profits shows that the take rate decline, attributable to the disclosed transition to more local-to-local business, is “so obviously unimportant to a reasonable investor that reasonable minds could not differ on the question of their importance” (*Litwin v Blackstone Group, L.P.*, 634 F3d 706, 717-718 [2d Cir 2011], quoting *Ganino v Citizens Util. Co.*, 228 F3d 154, 162 [2d Cir 2000]). In other words, the release of TPV rates for additional quarters would not significantly alter the “total mix of information made available” showing steadily increasing profits (*Litwin*, 634 F3d at 717 [internal quotation marks omitted]).

Because plaintiffs do not state a claim for section 11 liability, the Securities Act § 15 claim for controlling person liability cannot be sustained (*Matter of NIO Inc. Sec. Litig.*, 211 AD3d at 466). Concur—Manzanet-Daniels, J.P., Higgitt, Rosado, O'Neill Levy, Chan, JJ.

10 F.K., Appellant, v K.F., Respondent. [252 NYS3d 551]—Appeal from order, Supreme Court, Bronx County (Jessica I.

Flores, J.), entered on or about August 19, 2024, which temporarily awarded physical custody of the subject children to respondent mother and provided petitioner father with visitation, unanimously dismissed, without costs, as moot.

Application by the father's assigned attorney to withdraw as appellate counsel is granted (*see Anders v California*, 386 US 738 [1967]). A review of the record demonstrates that there are no nonfrivolous issues which could be raised on this appeal. The temporary order of visitation is not an order of disposition within the meaning of Family Court Act § 1112 (a) and thus is not appealable as of right (*see Matter of Jodeci S. v Sheila M.*, 240 AD3d 420, 420-421 [1st Dept 2025]; *Matter of Rosa M. v Francisco P.*, 151 AD3d 451, 451 [1st Dept 2017]). Furthermore, the appeal is moot as the temporary order has already expired and been superseded by subsequent orders of custody and visitation, none of which were appealed (*see Matter of T.R. [Jaquasia G.]*, 227 AD3d 530, 530 [1st Dept 2024]; *Matter of Rolando A.G. v Marisol R.M.*, 172 AD3d 631 [1st Dept 2019]; *Matter of Crystal G. v Marquis E.*, 170 AD3d 557, 557-558 [1st Dept 2019]). Concur—Moulton, J.P., Scarpulla, Shulman, Rodriguez, Michael, JJ.

11 Dennis Lee, Also Known as Lee Man For Dennis, Respondent, v Chun Ka Luk, as Administrator of the Estate of Nancy Luk, Deceased, Appellant. [— NYS3d —]

Corporations—Officers and Directors—Action for Misconduct—Standing Evidence—Dead Man's Statute

Corporations—Officers and Directors—Action for Misconduct—Unlawful Conveyances

Order, Supreme Court, New York County (James E. d'Auguste, J.), entered July 15, 2025, which, to the extent appealed from as limited by the briefs, granted the motion of plaintiff Dennis Lee for summary judgment as to liability on the first through fifth causes of action in the amended complaint, for summary judgment as to the sixth cause of action for injunctive relief to set aside unlawful conveyances, declared that Nancy Luk was not the sole shareholder, officer and director of Lee-Tai Enterprises (USA) Ltd., 238-240 7th Avenue Corp., and Broadway Chinatown Realty Inc. (collectively, the Companies), and denied the cross-motion of defendant Chun Ka Luk, as Administrator of the Estate of Nancy Luk for summary judgment dismissing the amended complaint for a lack of standing and as barred by the statute of limitations, unanimously affirmed, with costs. Order, same court and Justice, entered September 9, 2025, which issued a permanent injunction against defendant prohibiting him from, among

other things, operating, managing, exercising control over or otherwise interfering with the Companies and the properties owned by the Companies, to compel defendant to transfer the Companies' books and records to plaintiff, to transfer the Companies' properties to plaintiff, directing anyone acting on defendants' behalf to take the steps necessary to transfer the properties owned by the Companies to plaintiff, and to give plaintiff access to the properties and corporate financial accounts, unanimously affirmed, with costs.

This case has its origins in a dispute between siblings Dennis Lee and Nancy Luk over the operation, management, and control of Lee-Tai Enterprises (USA) Ltd. and 238-240 7th Avenue Corp., both formed in 1973 by their parents, as well as Broadway Chinatown Realty, Inc., which was acquired by 238-240 in 1986. Plaintiff Dennis Lee contends that during her lifetime Nancy diverted monies and assets from the Companies for her own personal use and benefit. Defendant contends that Nancy was simply managing the Companies and that she was the only one in the family who did so from 1980 until her death in 2011.

Plaintiff commenced this action against Nancy in 2005, asserting claims for (1) breach of fiduciary duty, (2) breach of the duty of loyalty, (3) corporate waste, seeking to set aside any unlawful conveyances, (4) fraud, (5) conversion, (6) an injunction prohibiting defendant from interfering with the Companies, using Company monies, or disposing of any Company assets, and to set aside any unlawful conveyances, and (7) an accounting and constructive trust. The parties engaged in extensive motion practice and in 2024, 19 years after this action was commenced, plaintiff moved for summary judgment on his amended complaint and defendant cross-moved for summary dismissal of the amended complaint.

Supreme Court properly granted plaintiff's motion for summary judgment and denied defendant's cross-motion for summary dismissal. Plaintiff established his standing to bring claims under Business Corporation Law § 720 as an officer and director of the family companies, Lee-Tai Enterprises (USA) Ltd. and 238-240 7th Avenue Corp., against his now-deceased sister, Nancy. Defendant failed to present any evidence to contradict the 1996 corporate resolutions signed by Nancy reflecting that plaintiff, Nancy, and their father, Chung Li, were appointed as corporate officers and directors of Lee Tai and 238-240 until the next meeting, which the parties agree was never held.

As plaintiff observes, there would have been no reason for

Nancy to seek plaintiff and their father's approval of the companies' tax returns or the 1996 IRS settlement had Nancy been the companies' sole shareholder and director, nor would it make sense for her to sign the returns as "vice president" if she were the sole owner. Defendant also failed to present evidence supporting his contention that plaintiff's officer and director positions were abandoned as a factual matter or could be deemed abandoned under the corporate bylaws (*see* Business Corporation Law §§ 703 [b]; 715 [d]). Based on this un rebutted evidence, we need not reach the question of whether the court properly looked to the "realities" of the family-run businesses involved to reject defendant's objection to plaintiff's standing based on certain irregularities in the 1973 Business Corporation Law § 404 (b) statements (*see Leslie, Semple & Garrison v Gavit & Co.*, 81 AD2d 950, 951 [3d Dept 1981]).

We reject defendant's argument, raised for the first time on appeal, that the amended complaint should have been dismissed in its entirety under CPLR 1001 based on the failure to join Nancy's personal entity, Seventh Avenue Development LLC (SAD), as a party to the action. SAD was originally named as a defendant and was dismissed from the action in the February 9, 2007 order because the entity was wholly owned by Nancy and not one of the family businesses of which plaintiff was an officer or director. Thereafter, neither Nancy nor defendant ever sought intervention on SAD's behalf.

There is also no factual dispute that Nancy, and upon her death, defendant, used and operated SAD as their own personal entity to which they transferred the three apartment buildings owned by 238-240 for no consideration in 2002. After which they demolished those buildings to create the condominium building in which SAD remains the owner of the three units that are subject to the injunctive relief granted by the court in its September 9, 2025 order. Accordingly, because SAD's interests are entirely aligned with defendant's, dismissal on this basis is not warranted (*see e.g. Matter of Cartwright v Kennedy*, 230 AD3d 969, 970 [3d Dept 2024], *lv denied* 42 NY3d 943 [2024], *cert denied* 604 US —, 145 S Ct 1174 [2025]; *see also Matter of Long Is. Contractors' Assn. v Town of Riverhead*, 17 AD3d 590, 594 [2d Dept 2005]).

The court also properly denied dismissal of the amended complaint based on the statute of limitations as barred by the law of the case. In a previous appeal in this action we affirmed Supreme Court's application of the law of the case doctrine to preclude defendant from seeking leave to amend his answer to reassert the defense of the statute of limitations as "Supreme

Court had previously denied defendant's pre-answer motion to dismiss the complaint on statute of limitations grounds, holding that the causes of action were timely" (*Lee v Chun Ka Luk*, 127 AD3d 612, 613 [1st Dept 2015]). Defendant fails to identify any basis for disturbing this determination.

We also reject defendant's assertion that the amended complaint should have been struck under CPLR 3126 based on plaintiff's failure to respond to certain interrogatories. The court's June 14, 2014 compliance conference order only required plaintiff to supplement his interrogatory responses "to the extent he is able," and plaintiff asserted that demands for expert disclosures from his expert forensic accountant had not yet been served. Thus, there was no court order to which plaintiff failed to adhere to.

We reject defendant's challenges to the admission of certain documents on hearsay grounds or under the dead man's statute (CPLR 4519). As an initial matter, the documents recorded in the New York City Register's Office reflecting the illegal mortgages and transfers in the record are not hearsay (*see e.g. Board of Mgrs. of the Club at Turtle Bay v McGown*, 226 AD3d 468, 469 [1st Dept 2024], citing *Global Montello Group Corp. v Bronx Auto Tire, Inc.*, 184 AD3d 494, 495 [1st Dept 2020]). Nancy's out-of-court statements, including her affidavits and correspondence, are admissible under the exceptions to hearsay for party admissions and statements against interest (*see e.g. Matter of C.B. [Tiffany S.]*, 225 AD3d 415, 416 [1st Dept 2024]; *see also Caminiti v Extell W. 57th St. LLC*, 166 AD3d 440, 440 [1st Dept 2018]). Further, the documents such as the 1973 Business Corporation Law § 404 statements that are more than 30 years old are self-authenticating under the ancient document rule (*see Estate of Essig v 5670 58 St. Holding Corp.*, 50 AD3d 948, 949 [2d Dept 2008]). Finally, the dead man's statute does not apply here because the claims are not asserted against plaintiff's father or his estate (*see e.g. Matter of Zalk*, 10 NY3d 669, 679 [2008]).

Plaintiff's lack of specific evidence of damages did not require denial of summary judgment as to liability. Where, as here, a party moves for summary judgment solely as to liability, damages are not part of the analysis (*see e.g. MacArthur v Doeblin*, 224 AD3d 482, 483 [1st Dept 2024]).

The court properly granted summary judgment on the claims in the amended complaint seeking injunctive relief to set aside Nancy's unlawful conveyances, which Business Corporation Law § 720 (a) (2) specifically permits where, as here, "the transferee knew of its unlawfulness." The record establishes

that Nancy knew that the 2002 transfer of 238-240's real property to SAD without consideration was unlawful and there is no evidence that her personal entities, SAD and ABN Realty LLC, are innocent bona fide purchasers for value. In any event, the injunction order merely directs defendant and anyone acting on his behalf to take the requisite steps to transfer ownership of the three condominium units owned by SAD to 238-240. Consistent with Nancy's admission in her answer that SAD was solely owned by Nancy, and defendant's production of SAD and ABN documents in this action, the record shows that defendant has the requisite control over SAD to fulfill his obligations under the injunction order. Tellingly, defendant does not identify any impediment to his execution of documents to effect the transfer of properties from his shell entity to 238-240. Given that Nancy and defendant's position has always been that the transfers reflected in the record were undertaken in good faith in furtherance of the family Companies' interests, it is unclear how defendant would be prejudiced by the transfer.

We reject defendant's further contention that plaintiff was not entitled to an injunction because it would upset the status quo, as a mandatory permanent injunction, unlike a preliminary injunction, need not maintain the status quo (*see e.g. R.C. v City of New York*, 229 AD3d 173, 176 [1st Dept 2024]). Concur—Manzanet-Daniels, J.P., Higgitt, Rosado, O'Neill Levy, Chan, JJ.

12 Kelly MacNeal, Appellant, v Broadway Storage, LLC, et al., Respondents. [252 NYS3d 552]—

Negligence—Maintenance of Premises—Slip and Fall Down Staircase—Constructive Notice of Wet Condition

Order, Supreme Court, New York County (Eric Schumacher, J.), entered June 28, 2024, which denied the motion of defendants Broadway Storage, LLC and 500 Lincoln LLC for summary judgment dismissing the complaint, unanimously affirmed, without costs.

Defendants failed to satisfy their prima facie burden of demonstrating their entitlement to judgment as a matter of law based on a lack of constructive notice of the wet condition which allegedly caused plaintiff to slip and fall down the staircase (*see Ross v Betty G. Reader Revocable Trust*, 86 AD3d 419, 421 [1st Dept 2011]). Defendants' proffered evidence, which consisted of general deposition testimony about monitoring and ongoing maintenance, was insufficient to show that such procedures were followed on the day the accident occurred (*see Barreto v Grote St. Apts., L.P.*, 201 AD3d 401, 402 [1st Dept

2022]; *White v MP 40 Realty Mgt. LLC*, 187 AD3d 561, 562 [1st Dept 2020]).

Even assuming that defendants' proffered evidence was sufficient to meet defendants' prima facie burden, under the circumstances plaintiff's competing deposition testimony that there was water on the stairway at the time of her accident raised an issue of fact as to whether defendants had constructive notice of the alleged wet condition on the floor.

We have considered defendants' remaining arguments and find them unavailing. Concur—Moulton, J.P., Scarpulla, Shulman, Rodriguez, Michael, JJ.

13 In the Matter of A.C.W., Appellant, for the Appointment of a Guardian of the Person and Property of E.Y.W., an Incapacitated Person. Allied Community Support Services, Inc., Respondent. [252 NYS3d 559]—Order, Supreme Court, New York County (Phaedra Perry-Bond, J.), entered on or about August 15, 2024, which denied petitioner's motion to remove Allied Community Support Services as successor guardian of the person and property of the Incapacitated Person (IP), to reappoint her as successor guardian, and to transfer the IP back to the community, unanimously deemed withdrawn, without costs, upon the stipulation of the parties hereto dated January 14, 2026, in which petitioner agreed to withdraw the instant appeal by January 16, 2026.

The so-ordered stipulation in which petitioner agreed to withdraw the appeal was definite and complete upon its face and constituted a valid and binding contract that should be enforced as written. Thus, there is no good cause to set aside the agreement to withdraw (*see Barclay v Citibank, N.A.*, 136 AD3d 551, 551 [1st Dept 2016], *lv dismissed* 27 NY3d 1077 [2016]). Concur—Moulton, J.P., Scarpulla, Shulman, Rodriguez, Michael, JJ.

Motion to deem petitioner's appeal withdrawn, granted.

14 Metropolitan Partners Group Administration, LLC, et al., Respondents, v Brian Nerney et al., Appellants, et al., Defendant. [— NYS3d —]—

Contracts—Breach or Performance of Contract—Full Recourse and Indemnity Guaranties—Sufficiency of Pleading
Corporations—Disregarding Corporate Entity—Forum Selection Agreement—Alter Egos of Agreement Signatories
Fraud—Factual Misrepresentation—Alternative to Breach of Contract Claim

Order, Supreme Court, New York County (Melissa Crane, J.),

entered on or about August 27, 2025, which, to the extent appealed from as limited by the briefs, denied defendants' motions to dismiss the causes of action for breach of contract as against defendant RSG Schweitzer Investors, LLC (first cause of action); fraud as against RSG Schweizer Investors (second cause of action); breach of contract as against defendants Brian Nerney and David Horton (fourth cause of action); fraud as against Nerney and Horton (fifth cause of action); and fraud and breach of contract as against Rotorcraft Services Group, Inc., RSG Aviation, Inc., RSG Aerodesign, Inc., and RSG Products, Inc. (collectively, the RSG defendants) (sixth cause of action), unanimously affirmed, without costs.

Plaintiffs sufficiently stated a cause of action for breach of contract against Nerney and Horton by alleging that those defendants breached valid guaranties that they gave to plaintiffs. According to the allegations in the complaint, Nerney and Horton breached their guaranties' full recourse provisions, which guaranteed against "any act of [the guarantor] . . . taken in bad faith, that hinders, delays or interferes with the exercise of any rights or remedies of [plaintiffs]," by, among other things, deliberately obfuscating the books and records of defendant Schweizer RSG, LLC, giving plaintiffs' receiver false passwords related to Schweizer RSG's finances, and preparing an Excel spreadsheet that contained materially inaccurate information intended for plaintiffs' review. Plaintiffs also alleged that Nerney and Horton breached their indemnity guarantees, under which they each agreed to indemnify plaintiffs against any "actual losses" based on Nerney's or Horton's misappropriation or unauthorized transfer of collateral, or willful removal or disposal of any portion of the collateral. These allegations are sufficient to support the breach of contract claims, and plaintiff "may not be penalized for failure to make an evidentiary showing in support of a complaint that states a claim on its face" (*Miglino v Bally Total Fitness of Greater N.Y., Inc.*, 20 NY3d 342, 351 [2013]).

Supreme Court properly declined to dismiss the complaint on the basis of documentary evidence (*see* CPLR 3211 [a] [1]). Although defendants sought to use Schweizer RSG's ledgers to explain the transfers of collateral, those ledgers, like many of the other documents that defendants submitted concerning transactions among the various defendants, were not "essentially unassailable" as a defense against the allegations of the complaint (*Old Republic Natl. Title Ins. Co. v 1152 53 Mgt., LLC*, 227 AD3d 824, 827 [2d Dept 2024]). Thus, the documentary evidence did not conclusively establish a defense as a mat-

ter of law (see *Rosario v Hallen Constr. Co., Inc.*, 214 AD3d 544, 545 [1st Dept 2023]).

Supreme Court also properly allowed jurisdictional discovery to determine whether the RSG defendants are alter egos of Schweizer RSG and therefore are bound by the New York forum selection clause in Schweizer RSG's credit agreement even though they are not signatories to the agreement. The detailed allegations in the complaint, read together, suggest common directors, corporate records, employees, office space, and the comingling of funds and other assets. Plaintiffs also alleged that Schweizer RSG could not meet its payroll obligations, suggesting that Schweizer RSG was inadequately capitalized. These allegations may be sufficient for a finding of jurisdiction over the RSG defendants under a veil piercing theory (see *Shisgal v Brown*, 21 AD3d 845, 848 [1st Dept 2005]). As a result, plaintiffs have made a "sufficient start" in demonstrating prima facie the existence of personal jurisdiction over the RSG defendants (*Matter of James v iFinex Inc.*, 185 AD3d 22, 30 [1st Dept 2020]).

The fraud claims against Nerney, Horton, and the RSG defendants were also sufficiently particular to satisfy CPLR 3016 (b). The bulk of plaintiffs' fraud claims rely on specific allegations that defendants misrepresented the value of Schweizer's inventory in February 2022 to induce plaintiffs to make the loan. The fraud claims also were not duplicative to the breach of contract claims.

"[A] misrepresentation of present fact, unlike a misrepresentation of future intent to perform under the contract, is collateral to the contract, even though it may have induced the plaintiff to sign it, and therefore involves a separate breach of duty" (*GoSmile, Inc. v Levine*, 81 AD3d 77, 81 [1st Dept 2010], *lv dismissed* 17 NY3d 782 [2011]). Thus, a plaintiff may maintain a fraud cause of action in the alternative to a breach of contract claim where the "fraud cause of action was collateral to the . . . contract . . . regardless of whether the causes of action sought the same damages" (*Scarola Zubatov Schaffzin PLLC v Dynamic Credit Partners, LLC*, 210 AD3d 605, 607 [1st Dept 2022]; see also *Shear Enters., LLC v Cohen*, 189 AD3d 423, 424 [1st Dept 2020]). Accordingly, plaintiffs will be permitted to pursue their fraud claims in addition to their breach of contract claims at this early stage of the litigation.

We have considered the remaining contentions and find them unavailing. Concur—Manzanet-Daniels, J.P., Higgitt, Rosado, O'Neill Levy, Chan, JJ.

15 In the Matter of S.P., Respondent, v J.B., Appellant. [— NYS3d —]

Parent, Child and Family—Custody—Domestic Abuse
Parent, Child and Family—Custody—Sole Legal and Physical Custody

Order, Supreme Court, New York County (Tandra L. Dawson, J.), entered on or about August 7, 2024, which, to the extent appealed from as limited by the briefs, after a fact-finding hearing, awarded petitioner mother sole legal and physical custody of the subject child, denied respondent father's petition for joint custody, and granted him unsupervised daytime visitation, unanimously affirmed, without costs.

The court's decision to credit the mother's testimony and to not fully credit the father's testimony is supported by a sound and substantial basis in the record and entitled to great deference (*see Matter of Everett C. v Oneida P.*, 61 AD3d 489, 489 [1st Dept 2009]; *see also Matter of Judith L.C. v Lawrence Y.*, 179 AD3d 616, 616 [1st Dept 2020], *lv denied* 35 NY3d 911 [2020]). The mother testified in detail about several incidents of domestic abuse, including one where the father engaged in a "tug of war" over the child and another where he beat her and choked her, and her account was corroborated by the testimony of other witnesses. The father's general, flat denials of engaging in any physical abuse were incredible, as he was arrested and prosecuted for one of the incidents, and he acknowledged that afterwards the mother wanted him to attend therapy to address his anger issues. Under these circumstances, the court properly discredited aspects of the father's testimony and reasonably resolved any conflicting testimony in favor of the mother (*see Matter of Alexei S. v Michael M.*, 132 AD3d 466, 467 [1st Dept 2015]).

The court also properly determined that joint custody was not appropriate due to the lack of communication and hostility between the parties (*see Lubit v Lubit*, 65 AD3d 954, 955 [1st Dept 2009], *lv denied* 13 NY3d 716 [2010], *cert denied* 560 US 940 [2010]). The mother repeatedly testified that she was afraid of the father and sought orders of protection against him, and although the father opined that they could cooperate for the child's sake, he also acknowledged that the mother had blocked him and refused contact, and he made hostile social media posts about the mother. "The finding of the parties' acrimonious relationship, evinced by domestic violence . . . , and the finding that the parties do not communicate about the child further supports the [court's] decision" (*Matter of Deserie D.G. v Jonathan C.*, 184 AD3d 538, 539 [1st Dept 2020]; *see Zappin v Comfort*, 155 AD3d 497, 498 [1st Dept 2017], *appeal dismissed* 31 NY3d 1077 [2018]).

The court's determination that the child's best interests

would be served by awarding sole legal and physical custody to the mother was based on a thorough assessment of the witnesses' demeanor and credibility and is supported by a sound and substantial basis in the record (*see Matter of Darryl M. v Shaniqua D.*, 242 AD3d 512, 513 [1st Dept 2025]; *see also Eschbach v Eschbach*, 56 NY2d 167 [1982]; *Matter of Carl T. v Yajaira A.C.*, 95 AD3d 640, 641 [1st Dept 2012]). The mother has been the child's sole caretaker since birth and provided her with a safe and stable home life (*see Matter of Darryl M.*, 242 AD3d at 513). The father has lacked stable housing and employment, while the mother has maintained the same apartment and job for years. The mother has also always taken care of the child's educational and medical needs (*see Matter of Stephanie C. v Ricardo E.*, 231 AD3d 663, 664 [1st Dept 2024]). The mother scheduled all the child's medical appointments and enrolled her in daycare, while the father did not remember her pediatrician's name, was unaware of what vaccinations she had received, and did not know where she attended school (*see Matter of Daniel B. v Deshauna S.*, 226 AD3d 552, 553 [1st Dept 2024]). In addition, "[d]espite the parents' contentious relationship, the mother had been flexible and open to facilitating contact between the father and the child and indicated a willingness to promote their relationship" (*Matter of Kimberly J. v Benjamin G.*, 227 AD3d 471, 472 [1st Dept 2024]). The court properly considered the father's history of domestic violence against the mother, some of which occurred in the child's presence (*see Matter of Stacey-Ann H.J. v Ian J.*, 190 AD3d 456 [1st Dept 2021]).

The court's determination that overnight visitation with the father would not be in the child's best interest also has a sound and substantial basis in the record (*see Matter of Myles M. v Pei-Fong K.*, 139 AD3d 466, 467 [1st Dept 2016] [noting the father's "history of domestic violence with (the) mother, and . . . his failure to fully accept responsibility for his prior actions"]). The mother and the attorney for the child agreed to daytime unsupervised visits, after successful weekly supervised visits where the child appeared comfortable, interacted well with the father, and appeared to enjoy the visits. Accordingly, the court providently awarded the father daytime unsupervised visitation and unsupervised FaceTime calls several times a week (*see Matter of Frank M. v Donna W.*, 44 AD3d 495, 496 [1st Dept 2007]). Concur—Manzanet-Daniels, J.P., Higgitt, Rosado, O'Neill Levy, Chan, JJ.

16 The People of the State of New York, Respondent, v Carlos Medina, Appellant. [253 NYS3d 1]—

Crimes—Sex Offenders—Sex Offender Registration Act—Downward Departure

Order, Supreme Court, Bronx County (Raymond L. Bruce, J.), entered on or about June 14, 2024, which adjudicated defendant a level two sex offender pursuant to the Sex Offender Registration Act, (Correctional Law art 6-C), unanimously affirmed, without costs.

The court providently exercised its discretion in declining to grant a downward departure (*see generally People v Gillotti*, 23 NY3d 841, 861 [2014]). Defendant's lack of a disciplinary record, completion of sex offender and substance abuse treatment programs, participation in vocational training, and family support have been adequately taken into account by the risk assessment instrument (*see People v Bevel*, 224 AD3d 430, 431 [1st Dept 2024], *lv denied* 42 NY3d 902 [2024]; *People v Wright*, 208 AD3d 1112, 1112 [1st Dept 2022], *lv denied* 39 NY3d 907 [2023]; *People v Gomez*, 201 AD3d 601, 601 [1st Dept 2022]). Defendant has failed to establish that his response to sex offender treatment was so exceptional as to warrant a downward departure (*see People v Alcantara*, 154 AD3d 532, 532 [1st Dept 2017], *lv denied* 30 NY3d 908 [2018]), or how his vocational training or family support reduced his likelihood of reoffense or danger to the community (*Bevel*, 224 AD3d at 431; *Wright*, 208 AD3d at 1112).

In any event, we find that any mitigating factors were far outweighed by the nature of defendant's offense, as the egregiousness of the underlying crime indicated a danger that a reoffense by defendant would cause a high degree of harm (*see People v Roldan*, 140 AD3d 411, 412 [1st Dept 2016], *lv denied* 28 NY3d 904 [2016]). Concur—Manzanet-Daniels, J.P., Higgitt, Rosado, O'Neill Levy, Chan, JJ.

17 The People of the State of New York, Appellant, v David Sheard, Respondent. [— NYS3d —]—

Crimes—Promoting Prostitution—Attempted Second-Degree Promoting Prostitution—Attempted Sex Trafficking of Child—Sufficiency and Weight of Evidence

Oral decision and order, Supreme Court, Bronx County (Jeanette Rodriguez-Morick, J.), dated July 31, 2024, which granted the People's motion to reargue but adhered to the court's order, dated June 17, 2024, vacating the guilty verdicts on the counts of attempted sex trafficking of a child, and attempted promoting prostitution in the second degree, unanimously reversed, on the law, defendant's motion denied in its entirety, the verdict convicting defendant on the counts of at-

tempted sex trafficking of a child and attempted promoting prostitution in the second degree reinstated, and the matter remitted for resentencing.

This case stems from the 34-year-old defendant's operation of a sex worker business using 16-year-old A.J., known as "Candy," as a sex worker. After an undercover police operation's "rescue" of A.J. from the business, defendant engaged in conduct which the jury found intended to reinitiate his exploitation of A.J. as a child sex worker. Evidence presented during the jury trial reflected extensive electronic communications between A.J. and defendant. Defendant's post-rescue communications to A.J. included screenshots of text exchanges with sex buyers requesting "Candy," as well as repeated requests that A.J. come back to him.

The jury convicted defendant of promoting prostitution in the second degree, endangering the welfare of a child, attempted sex trafficking of a child, attempted promoting prostitution in the second degree, and attempted endangering the welfare of a child. Subsequently, the Supreme Court orally granted defendant's motion for a trial order of dismissal as to the counts of attempted sex trafficking of a child and attempted promoting prostitution in the second degree on the record. The People then moved to reargue that decision. Supreme Court granted the reargument motion but adhered to its original trial order of dismissal.

The Supreme Court improperly vacated the guilty verdicts on the counts of attempted sex trafficking of a child and attempted promoting prostitution in the second degree.* Evidence is legally sufficient if, "after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found essential elements of the crime beyond a reasonable doubt" (*People v Schulz*, 4 NY3d 521, 529 [2005] [internal quotation marks omitted]).

Here, the evidence was legally sufficient to demonstrate that defendant's pre-rescue association with A.J. was for the purpose of making money from her participation in sex work and his post-rescue communications were aimed at restoring the same relationship that previously existed. Thus, the jury's

* A person commits sex trafficking of a child when he or she is twenty-one years old or older and "intentionally advances or profits from prostitution of another person and such person is a child less than eighteen years old" (Penal Law § 230.34-a [1]). As relevant here, a person commits second-degree promoting prostitution when "he or she knowingly . . . [a]dvances or profits from prostitution of a person less than eighteen years old" (Penal Law § 230.30 [2]).

verdict was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]).

Defendant's argument that the evidence did not show that he came dangerously close to committing either attempted sex trafficking of a child or attempted promoting prostitution in the second degree misapprehends the elements of these crimes. To be guilty of an attempt to commit a crime, a "person's conduct" must come "dangerously close to committing the intended crime" (*People v Lendof-Gonzalez*, 36 NY3d 87, 89 [2020] [internal quotation marks omitted]; *see also People v Headley*, 204 AD3d 417, 418 [1st Dept 2022], *lv denied* 38 NY3d 1071 [2022]). In this case, the requirement was satisfied because the evidence shows that defendant "carr[ied] the project forward within dangerous proximity to the criminal end to be attained" (*People v Lendof-Gonzalez*, 36 NY3d at 93 [internal quotation marks and citation omitted]).

We have considered defendant's remaining contentions and find them unavailing. Concur—Moulton, J.P., Scarpulla, Shulman, Rodriguez, Michael, JJ.

18 The People of the State of New York, Respondent, v Kaliq Robinson, Appellant. [— NYS3d —]—

Crimes—Appeal—Waiver of Right to Appeal
Crimes—Sentence—Probation—Conditions

Judgment, Supreme Court, Bronx County (Lester B. Adler, J.), rendered January 18, 2023, convicting defendant, upon his plea of guilty, of criminal possession of a weapon in the fourth degree, and sentencing him to three years of probation, unanimously modified, on the law, to the extent of striking the condition of probation requiring him to pay the surcharge and fees imposed at sentencing, and otherwise affirmed.

Defendant validly waived his right of appeal, which tracked the model colloquy the Court of Appeals endorsed in *People v Thomas* (34 NY3d 545, 567 [2019], *cert denied* 589 US 1302 [2020]). "While the court did not enumerate the claims that survived the waiver of appeal during its colloquy, the written waiver listed them, and the court confirmed that defendant reviewed the waiver with counsel and understood it" (*People v Holmes*, 235 AD3d 435, 435 [1st Dept 2025], *lv denied* 43 NY3d 1009 [2025]). Thus, the oral colloquy, "along with the detailed written waiver that defendant reviewed with counsel, established that defendant understood the rights being waived" (*People v Galindo*, 216 AD3d 550, 550 [1st Dept 2023], *lv denied* 40 NY3d 996 [2023]). Defendant's valid waiver forecloses his excessive sentence claim and his as-applied constitutional challenges to the conditions of probation.

Defendant's valid appeal waiver does not foreclose from review his Second Amendment claim pursuant to *New York State Rifle & Pistol Assn., Inc. v Bruen* (597 US 1 [2022]) because *Bruen* claims are "facial constitutional challenges" and thus "non-waivable" (*People v Johnson*, — NY3d —, —, 2025 NY Slip Op 06528, *2-3 [2025]). Additionally, defendant has "standing to challenge the constitutionality of the state's firearm licensing scheme, notwithstanding his failure to apply for a license" (— NY3d at —, 2025 NY Slip Op 06528, *2). However, on the merits, defendant has failed to establish that the indictment is unconstitutional.

To the extent that defendant challenges the "good moral character" provision in Penal Law § 400.00 (1) (b), his argument is unpreserved because he failed to raise it in his motion to dismiss the indictment, and we decline to review it in the interest of justice (*see People v Cabrera*, 41 NY3d 35, 41-52 [2023]). As an alternative holding, we reject it on the merits (*People v Guzman*, 237 AD3d 570, 571 [1st Dept 2025], *lv denied* 44 NY3d 993 [2025]).

Defendant's valid waiver also forecloses review of his vagueness and First Amendment challenges to probation condition 7 insofar as they are as-applied challenges; to the extent that they are facial constitutional challenges, they survive his waiver (*see People v Lombard*, 241 AD3d 1126, 1126 [1st Dept 2025]). However, defendant's constitutional challenges are unpreserved because he did not raise them before the trial court (*see Cabrera*, 41 NY3d at 42), and we decline to reach them in the interest of justice.

Defendant's non-constitutional challenges to probation condition 7 survive his waiver of the right to appeal and do not require preservation because the "issue implicates the legality of the sentence imposed" (*People v Alvarez*, 233 AD3d 619, 620 [1st Dept 2024], *lv denied* 43 NY3d 961 [2025]). At the time of his arrest, defendant possessed a loaded firearm. Accordingly, the sentencing court providently deemed it "reasonably necessary" to order defendant to "[a]void injurious or vicious habits; refrain from frequenting unlawful or disreputable places; and . . . not consort with disreputable people" "to [e]nsure that the defendant will lead a law-abiding life or to assist him to do so" (Penal Law § 65.10 [1], [2]; *see People v Lowndes*, 239 AD3d 574, 575 [1st Dept 2025], *lv denied* 44 NY3d 1012 [2025]).

Defendant's challenge to probation condition 10, the requirement that he pay the mandatory surcharge and court fees imposed at sentencing, also survives his waiver of the right to appeal (*see People v Percy*, 234 AD3d 619, 620 [1st Dept 2025]).

We strike the condition as it is not reasonably related to defendant's rehabilitation or necessary to ensure that he will lead a law-abiding life (*see id.*).

Regardless of whether defendant validly waived his right to appeal, we perceive no basis for reducing his sentence. Concur—Manzanet-Daniels, J.P., Higgitt, Rosado, O'Neill Levy, Chan, JJ.

19 The People of the State of New York, Respondent, v Antoine Parker, Appellant. [— NYS3d —]—

Crimes—Sentence—Probation—Conditions

Judgment, Supreme Court, Bronx County (Jeffrey M. Zimmerman, J.), rendered September 19, 2024, convicting defendant, upon his plea of guilty, of attempted criminal possession of a weapon in the second degree, and sentencing him to a term of five years of probation, unanimously modified, on the law, to the extent of striking the condition of probation requiring him to pay \$375 in surcharge and fees as a condition of his probation, and otherwise affirmed.

Defendant validly waived of his right to appeal, which forecloses review of his claim that his sentence is excessive (*see People v Thomas*, 34 NY3d 545, 559 [2019], *cert denied* 589 US 1302 [2020]). In any event, there is no basis for reducing the sentence.

However, defendant's challenge to the condition of probation requiring that he pay the mandatory surcharge and court fees survives his waiver of the right to appeal because it implicates the legality of the sentence imposed (*see People v Arias*, 210 AD3d 593, 594 [1st Dept 2022], *lv denied* 39 NY3d 1109 [2023]), and does not require preservation for appellate review (*see People v Alvarez*, 233 AD3d 619, 620 [1st Dept 2024], *lv denied* 43 NY3d 961 [2025]; *see People v Hakes*, 32 NY3d 624, 628 n 3 [2018]). Defendant is indigent and thus the imposition of the \$375 sum, comprised of the mandatory surcharge, crime victim's assistance fees, and DNA fees, as a condition of defendant's probation will not assist in ensuring that he leads a law-abiding life and is not reasonably related to his rehabilitation (*see People v Percy*, 234 AD3d 619, 620 [1st Dept 2025]). Accordingly, that condition is stricken. We note that the People do not oppose this relief.

Defendant's challenge to the condition of his probation requiring him to "[a]void injurious or vicious habits; refrain from frequenting unlawful or disreputable places; and . . . not consort with disreputable people" as unrelated to his rehabilitation also "implicates the legality of the sentence imposed"

(*People v Alvarez*, 233 AD3d at 620). Nevertheless, the court providently deemed this condition “reasonably necessary to insure that the defendant will lead a law-abiding life or to assist him to do so” (Penal Law § 65.10 [1]), given his possession of a loaded gun and ammunition (see *People v Letterlough*, 86 NY2d 259, 263 [1995]; *People v Andujar*, 245 AD3d 529 [1st Dept 2026]; *People v Lowndes*, 239 AD3d 574, 575 [1st Dept 2025], *lv denied* 44 NY3d 1012 [2025]).

Regardless of whether or not defendant’s constitutional challenge to the same probation condition through his facial challenge to the constitutionality of Penal Law § 65.10 (2) (a) and (b) under the First, Fifth, and Fourteenth Amendments is waived by the valid appeal waiver (see *People v Johnson*, — NY3d —, —, 2025 NY Slip Op 06528 *2-4 [2025]), the claim is unpreserved (*People v Cabrera*, 41 NY3d 35, 42-51 [2023]), and we decline to review it in the interest of justice. As an alternative holding, the claim is unavailing (see *Andujar*, 245 AD3d at 530; *People v Carrasquillo*, 242 AD3d 424 [1st Dept 2025]). The probation condition “provides fair notice to a person of ordinary intelligence (*People v Stuart*, 100 NY2d 412, 420 [2003] [internal quotation marks omitted]) that associating with perpetrators of crimes, engaging in criminal behavior or behavior that could cause injury, or frequenting locations where criminal activity occurs is prohibited” (*Andujar*, 245 AD3d at 530 [internal quotation marks omitted]).

Defendant’s Second Amendment challenge to the “good moral character” provision in Penal Law § 400.00 (1) (b) is unpreserved because he failed to raise it in his motion to dismiss the indictment (see *People v Martinez*, 238 AD3d 423, 424 [1st Dept 2025], *lv denied* 44 NY3d 1067 [2026]), and we decline to review it in the interest of justice. As an alternative holding, we find his claim to be unavailing (see *id.*). Concur—Moulton, J.P., Scarpulla, Shulman, Rodriguez, Michael, JJ.

20 The People of the State of New York, Respondent, v Christian Rojas, Appellant. [252 NYS3d 553]—An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Ellen N. Biben, J.), rendered July 02, 2024, said appeal having been argued by counsel for the respective parties, due deliberation having been had thereon, and finding the sentence not excessive, it is unanimously ordered that the judgment so appealed from be and the same is hereby affirmed. Concur—Manzanet-Daniels, J.P., Higgitt, Rosado, O’Neill Levy, Chan, JJ.

21 The People of the State of New York, Respondent, v Darrell Rhett, Appellant. [252 NYS3d 553]—An appeal having been

taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Curtis J. Farber, J.), rendered September 05, 2023, said appeal having been argued by counsel for the respective parties, due deliberation having been had thereon, and finding the sentence not excessive, it is unanimously ordered that the judgment so appealed from be and the same is hereby affirmed. Concur—Moulton, J.P., Scarpulla, Shulman, Rodriguez, Michael, JJ.

22 Richard Pina, Respondent, v City of New York et al., Appellants. City of New York et al., Third-Party Plaintiffs-Appellants, v Procida Construction Corp. et al., Third-Party Defendants-Appellants. (And a Second Third-Party Action.) [—NYS3d —]—

Labor—Safe Place to Work—Elevation-Related Hazard—Injury from Mini Dumpster Tipping Over

Labor—Safe Place to Work—Industrial Code Violation—Hand-Propelled Vehicles

Labor—Safe Place to Work—Statutory and Common-Law Negligence—Means and Methods Liability

Order, Supreme Court, Bronx County (Myrna Socorro, J.), entered on or about March 25, 2025, which, to the extent appealed from as limited by the briefs, denied the motion of defendants/third-party plaintiffs/second third-party plaintiffs New York City Housing Authority and Mill Brook Housing Development Fund Company Inc. for summary judgment dismissing plaintiff's Labor Law § 200 and common-law negligence claims, and denied the motion of third-party defendants Procida Construction Corp., Procida Construction Co., LLC, and Alvin H. Butz, Inc. (together, Procida), for summary judgment dismissing plaintiff's Labor Law §§ 200, 240 (1) and 241 (6) claims and common-law negligence claim against defendants, unanimously modified, on the law, without costs, to grant defendants' and Procida's summary judgment motions insofar as they sought dismissal of plaintiff's Labor Law § 200 and common-law negligence claims against defendants NYCHA and Mill Brook, and otherwise affirmed, without costs.

The motion court properly denied the branch of Procida's summary judgment dismissing plaintiff's Labor Law § 240 (1) claim. Plaintiff testified that the mini dumpster which allegedly tipped over and fell on him was filled with concrete debris and was too heavy for plaintiff to straighten after it tilted. Thus, despite the facts that the mini dumpster was on the same level as plaintiff and stood only at chest height, it could still have posed a significant elevation-related hazard, depending on its weight and the force it could generate (*see Wilinski v*

334 E. 92nd Hous. Dev. Fund Corp., 18 NY3d 1, 7 [2011]; *Vil-lanueva v 114 Fifth Ave. Assoc. LLC*, 162 AD3d 404, 405 [1st Dept 2018]). Further, defendants failed to establish that the mini dumpster was an adequate safety device as a matter of law as the record contains evidence that the mini dumpsters sometimes had to be moved with a pallet jack due to their weight.

The motion court also properly denied the branch of Procida's summary judgment motion seeking dismissal of plaintiff's Labor Law § 241 (6) claim predicated on Industrial Code (12 NYCRR) § 23-1.28 (a) and (b). The second sentence of subdivision (a) and the first sentence of subdivision (b) are sufficiently specific to serve as predicates for liability under Labor Law § 241 (6) (see *Garcia v 95 Wall Assoc., LLC*, 116 AD3d 413, 413 [1st Dept 2014]; *Picchione v Sweet Constr. Corp.*, 60 AD3d 510, 512 [1st Dept 2009]).

Under those subdivisions, there is an issue of fact as to whether the wheels of the mini dumpster were defective. Procida's foreman stated in an affidavit that, immediately after the accident, "the mini dumpster was in a fully upright position with all of its wheels attached and in working order," and that "[t]he mini[-]dumpster remained in use for the rest of the work day and was in full working condition." In contrast, although plaintiff initially testified at his deposition that he did not know what caused the mini dumpster to tip over, he later testified the accident occurred because there was a bad wheel on the mini dumpster. The trier of fact must resolve the competing evidence as to the cause of the accident.

The court, however, should have dismissed plaintiff's Labor Law § 200 and common-law negligence claims against defendants NYCHA and Mill Brook. The means and methods test applies to these causes of action, as the allegedly defective mini dumpster involved the manner of plaintiff's work and did not constitute a dangerous condition existing on the premises (see *Cappabianca v Skanska USA Bldg. Inc.*, 99 AD3d 139, 144-145 [1st Dept 2012]; see also *Freitas v New York City Tr. Auth.*, 249 AD2d 184, 186 [1st Dept 1998]). Whether these defendants had constructive notice of the allegedly defective mini dumpster is irrelevant because they may only be held liable under section 200 if they exercised supervisory control over plaintiff's work (see *Cappabianca*, 99 AD3d at 144-145). There is no evidence that plaintiff's Labor Law § 200 claim arises from an alleged dangerous condition existing on the premises, and defendants submitted un rebutted evidence to show these defendants did not supervise plaintiff's work. Thus, the Labor Law § 200 and

common-law negligence claims should have been dismissed as against them (*see Villanueva*, 162 AD3d at 406-407; *Capabianca*, 99 AD3d at 144-145). Moreover, plaintiff did not oppose the motion of defendants NYCHA and Mill Brook to dismiss these causes of action against them. Concur—Moulton, J.P., Scarpulla, Shulman, Rodriguez, Michael, JJ.

23 Jovita Pineda, Appellant, v New York City Health and Hospitals Corporation et al., Respondents. [— NYS3d —]

Health—Ambulance Service—Transport of Mental Health Patient—Use of Restraints

Hospitals—Malpractice—Informed Consent

Order, Supreme Court, Bronx County (Alicia Gerez, J.), entered December 19, 2024, which, to the extent appealed from, granted the motion of defendants Empress Ambulance Service, Inc., Empress Ambulance Service LLC, and Emergacare NY, LLC's (collectively Empress) for summary judgment dismissing plaintiff's complaint against it and granted defendant New York City Health and Hospital Corporation (NYCHHC)'s motion for summary judgment to the extent of dismissing the lack of informed consent claim, as well as any claims regarding the conservative treatment rendered at Jacobi Hospital to plaintiff's ward Jovinard Pineda (Pineda), that Pineda was not a candidate for electroconvulsive therapy (ECT), and that NYCHCC deviated from the standard of care in the decision to transfer Pineda to another hospital, unanimously affirmed, without costs.

Empress made a prima facie showing that it was entitled to summary judgment with submission of affidavits in which its experts opined that in cases of hospital transfers of patients, it is the decision of the transferring facility, here Jacobi, as to whether a patient requires restraints. While plaintiff's expert stated that Empress was required to ask Pineda whether he was suicidal and refuse to transport him absent physical or chemical restraints, this statement is unsupported by any rule, protocol, or standard. New York Mental Hygiene Law § 33.04 and Department of Mental Hygiene Regulations (14 NYCRR) § 526.4, provide the limited circumstances under which a patient can be restrained, none of which was applicable to the transfer at issue. Moreover, plaintiff's expert's opinion is premised upon the claim that Pineda, if asked whether he was suicidal, would have answered in the affirmative. This assertion is contradicted by the record, which demonstrates that Pineda was cooperative, alert, and coherent at the time of his transfer, denying any homicidal or suicidal ideations. The motion court properly found the expert's opinion to be conclusory

and unsupported and thus insufficient to rebut Empress' showing (see *Alvarez v Prospect Hosp.*, 68 NY2d 320, 325 [1986]; *Coronel v New York City Health & Hosps. Corp.*, 47 AD3d 456, 457 [1st Dept 2008]).

The court properly granted NYCHHC's motion to the extent of dismissing the lack of informed consent claim, as well as any claims regarding the conservative treatment rendered at Jacobi to plaintiff's ward Jovinard Pineda, that Pineda was not a candidate for ECT, and that NYCHCC deviated from the standard of care in the decision to transfer Pineda to another hospital. Plaintiff's expert failed to address those claims concerning Pineda's treatment at Jacobi and its decision that Pineda should be transferred for ECT treatment at Montefiore. While the expert averred that Jacobi's failure to obtain a written informed consent prior to transfer was a deviation from the standard of care and thus malpractice, that conflation of the two distinct claims is not legally supportable. In any event, the procedure was never performed, and thus any claim arising from a claimed lack of informed consent necessarily fails (see Public Health Law § 2805-d [1], [3]; *Shkolnik v Hospital for Joint Diseases Orthopaedic Inst.*, 211 AD2d 347 [1st Dept 1995], *lv denied* 87 NY2d 895 [1995]; see also *Buchheim v Sanghavi*, 299 AD2d 229 [1st Dept 2002], *lv denied* 100 NY2d 506 [2003]). Concur—Moulton, J.P., Scarpulla, Shulman, Rodriguez, Michael, JJ.

24 In the Matter of L.R. and Another, Children Alleged to be Abused. J.T., Appellant; R.R. Sr., Intervenor-Respondent; Administration for Children's Services, Respondent, et al., Respondent. [— NYS3d —]

Parent, Child and Family—Abused or Neglected Child—Long-Term Order of Protection—Abuse and Derivative Abuse

Order of disposition, Family Court, Bronx County (Ronna H. Gordon-Galchus, J.), entered on or about October 21, 2024, which, to the extent appealed from as limited by the briefs, after a hearing, upon a determination that respondent J.T. abused the subject child K.T. and derivatively abused the subject children R.R. and L.R., directed respondent to comply with an order of protection enjoining him to stay away from R.R. and L.R. until their respective eighteenth birthdays, unanimously affirmed, without costs.

J.T.'s argument that Family Court Act § 1056 (4) is inapplicable is unpreserved for appellate review. Family Court Act § 1056 (4) permits the court to issue an independent order of protection lasting until a child's eighteenth birthday against a

person “who was a member of the child’s household or a person legally responsible . . . , and who is no longer a member of such household at the time of the disposition and who is not related by blood or marriage to the child or a member of the child’s household.” The record shows that, during summation, respondent expressly conceded that the provision applied and that the court could enter an order of protection to last until the children’s eighteenth birthdays. In any event, respondent testified that he had not resided with the mother and the children since the earlier order of protection had been issued.

Family Court also providently exercised its discretion in directing J.T. to stay away from R.R. and L.R. until their respective eighteenth birthdays (*see Matter of N.V. [Bethsaida C.]*, 203 AD3d 529, 530 [1st Dept 2022]). At the time of the order of disposition, respondent had consented to a finding of neglect pursuant to Family Court Act § 1051 (a) without admitting the allegation, but he had taken no responsibility for his conduct and repeatedly refused to attend a sex offender program or any alternative service. The record further demonstrates that respondent violated an existing order of protection, as shown by the video in evidence, and invoked the Fifth Amendment privilege when questioned about his contact with the children. Contrary to respondent’s contention that L.R. was differently situated from K.T., respondent was a person legally responsible for all three children, and L.R. is currently the same age K.T. was when J.T. abused K.T. In light of J.T.’s refusal to comply with court-ordered services and his violation of prior orders, Family Court reasonably concluded that a long-term order of protection was necessary to protect R.R. and L.R.

We have considered respondent’s remaining arguments and find them unavailing. Concur—Moulton, J.P., Scarpulla, Shulman, Rodriguez, Michael, JJ.

25 Manuel Reyes, Plaintiff, v Hite Construction, Inc., Respondent/Third-Party Plaintiff-Respondent. Everest Scaffolding Inc., Third-Party Defendant-Appellant, et al., Third-Party Defendant. [252 NYS3d 554]—

Indemnity—Contractual Indemnification—Past Consideration

Order, Supreme Court, Bronx County (Myrna Socorro, J.), entered on or about November 21, 2024, which, to the extent appealed from, denied the motion of third-party defendant Everest Scaffolding, Inc., for summary judgment dismissing the claim of defendant/third-party plaintiff Hite Construction, Inc., for contractual indemnification, unanimously reversed, on the law, without costs, and the motion granted.

Everest was entitled to summary judgment dismissing the contractual indemnification claim because the indemnification agreement in Hite's favor, executed in 2016, lacked consideration. Although the parties entered into a separate agreement in 2015 for Everest to obtain an initial permit and furnish, install, and remove scaffolds for the subject construction project, during which plaintiff was allegedly injured, Hite's full lump sum payment to Everest in connection with that agreement could not support the 2016 agreement, since "past consideration is no consideration" at common law (*Kastil v Carro*, 145 AD2d 388, 389 [1st Dept 1988] [internal quotation marks omitted], *lv dismissed* 74 NY2d 650 [1989]). Furthermore, the statutory exception for consideration that is "past or executed" under General Obligations Law § 5-1105 does not apply to the 2016 agreement as that agreement failed to recite any past or executed consideration in the writing.

Nor could Hite's rental payments for the scaffolds leased on a month-to-month basis under the 2015 agreement serve as consideration for the 2016 indemnity agreement. "[I]t is a fundamental principle of contract law that a promise to perform an existing obligation is not valid consideration" (*Zheng v City of New York*, 93 AD3d 510, 512 [1st Dept 2012], *affd* 19 NY3d 556 [2012]). Concur—Manzanet-Daniels, J.P., Higgitt, Rosado, O'Neill Levy, Chan, JJ.

26 Daulin Gabriel Rijo, Respondent, v YYY 62nd Street LLC et al., Appellants. (And a Third-Party Action.) [— NYS3d —]

Pleading—Sufficiency of Pleading—Fraud—Affirmative Defense

Order, Supreme Court, Bronx County (Matthew Parker-Raso, J.), entered on or about July 7, 2025, which denied defendants' motion to amend their answer pursuant to CPLR 3025 to assert an affirmative defense of fraud, unanimously affirmed, without costs.

Supreme Court providently exercised its discretion in denying defendants leave to amend their answer to assert an affirmative defense of fraud. Where a defense is based upon fraud, "the circumstances constituting the wrong shall be stated in detail" (CPLR 3016 [b]). CPLR 3016 (b) "imposes a more stringent standard of pleading than the generally applicable 'notice of the transaction' rule of CPLR 3013" (*Edison Stone Corp. v 42nd St. Dev. Corp.*, 145 AD2d 249, 257 [1st Dept 1989] [internal quotation marks omitted]). Conclusory allegations or mere suspicion of fraud are insufficient (*see Bank Leumi Trust Co. of N.Y. v D'Eвори Intl.*, 163 AD2d 26, 31-32 [1st Dept 1990]; *Langford v Cameron*, 73 AD2d 1001, 1003 [3d Dept 1980] ["An

affirmative defense of fraud must be pleaded with particularity . . . Bare allegations of fraud . . . without any supporting detail, are insufficient to satisfy the pleading requirements of CPLR 3013 or 3016 (subd [b])”).

The motion court properly found that defendants failed to plead with specificity what constituted the alleged fraud in its proposed amended answer and “merely set[] forth conclusory allegations that plaintiff made false representations on multiple instances.” Specifically, defendants’ proposed ninth affirmative defense broadly alleges that plaintiff has “intentionally and knowingly made false and fraudulent statements of material fact to others” and that he knew the misrepresentations were false and fraudulent when made. These general and conclusory allegations of “false representations” are insufficient to plead fraud (*see Barlow v Skroupa*, 221 AD3d 482, 483 [1st Dept 2023]).

Moreover, defendants’ motion is based on unrelated Racketeer Influenced and Corrupt Organizations Act (RICO) federal litigation involving allegations that plaintiff’s counsel and three of plaintiff’s medical providers conspired to inflate settlement and/or verdict amounts. “[U]nproven allegations of fraud against plaintiff’s . . . attorney[s] and medical providers in the RICO complaint do not, without more, warrant [an affirmative defense or] counterclaim for fraud against plaintiff himself” (*Santacruz v 58 Gerry St LLC*, 246 AD3d 600, 600 [1st Dept 2026], quoting *Linares v City of New York*, 233 AD3d 479, 480 [1st Dept 2024]; *see Anguisaca-Morales v St. Paul & St. Andrew United Methodist Church*, 238 AD3d 439, 440 [1st Dept 2025]).

Defendants also failed to plead the essential element of justifiable reliance with sufficient particularity (CPLR 3016 [b]; *see Anguisaca-Morales*, 238 AD3d at 440; *Breton v Dishy*, 234 AD3d 432, 432 [1st Dept 2025]). To the contrary, they have denied plaintiff’s allegations in their answer and throughout the litigation (*see Breton*, 234 AD3d at 432).

To the extent defendants claim that they have been damaged by having incurred litigation costs as a result of plaintiff’s pursuit of a fraudulent or frivolous claim, their remedy is to seek sanctions, including those available under CPLR 8303-a (*see Santacruz*, 246 AD3d at 601; *Breton*, 234 AD3d at 433). Furthermore, there is nothing preventing defendants from pursuing allegations related to, among other things, plaintiff’s alleged disproportionate medical treatment to undermine plaintiff’s credibility and damages claims.

We have considered defendants’ remaining arguments and find them unavailing. Concur—Manzanet-Daniels, J.P., Moulton, Gesmer, Mendez, Michael, JJ.

27 In the Matter of A.S., Appellant, v R.S., Respondent. [252 NYS3d 556]—

Parent, Child and Family—Custody—Sole Legal and Physical Custody—Best Interest of Children

Order, Family Court, New York County (Lyle E. Frank, J.), entered on or about April 5, 2024, which, after a fact-finding hearing, denied petitioner father’s petition for sole legal and physical custody of the subject children, and awarded sole legal and physical custody of the children to respondent mother, with parenting time to the father, unanimously affirmed, without costs.

There is a sound and substantial basis in the record for Family Court’s determination that it is in the children’s best interests to award sole legal and physical custody to the mother who has consistently been their primary caregiver (*see Matter of Deanna V. v Michael C.*, 179 AD3d 445, 446 [1st Dept 2020]). The court had the benefit of a full evidentiary hearing, and its determination rests on its assessments of the witnesses’ demeanor and credibility and there is no basis to disturb the court’s credibility determinations (*see Matter of Ivan J. v Felicia V.*, 228 AD3d 506, 506 [1st Dept 2024]; *Eschbach v Eschbach*, 56 NY2d 167, 172-174 [1982]). The record shows that the children have always resided with the mother, and that the mother, who is employed full-time, has consistently been able to provide financially for the children and meet their day-to-day needs while receiving little financial assistance from the father. The record also demonstrates that the mother has met the children’s health and educational needs. Having enrolled the children in a Mandarin Chinese school, where the children are thriving socially and intellectually, the mother, who speaks Mandarin, is able to assist the children with their homework.

The court acted within its sound discretion in considering the stability of the father’s employment in making a best interest determination (*see Matter of Shainiska D. v Gage D.*, 242 AD3d 411, 412 [1st Dept 2025], *lv denied* 44 NY3d 909 [2026]).

The court properly denied the father’s request for joint custody given the testimony of both parties regarding multiple and frequent verbal and physical altercations, and because both parents acknowledged that at times they each acted as gatekeepers to the other parent’s access to the children (*see Matter of Markis L. v Jacquelyn C.*, 189 AD3d 580, 581 [1st Dept 2020]).

We have considered the father’s remaining arguments and

find them unavailing. Concur—Manzanet-Daniels, J.P., Hig-gitt, Rosado, O'Neill Levy, Chan, JJ.

28 Cesar Salas, Respondent, v The New York-Presbyterian Hospital, Appellant. [— NYS3d —]

Hospitals—Malpractice—Placement of Automated Implantable Cardioverter/Defibrillator

Order, Supreme Court, New York County (John J. Kelley, J.), entered on or about August 27, 2025, which denied defendant's motion for summary judgment dismissing the complaint insofar as it alleged negligence in the surgical techniques used to implant an automated implantable cardioverter/defibrillator (ICD) (except insofar as the allegations concerned penetration of a needle into the artery next to the vein that led to plaintiff's heart and penetration of wires that had been placed within the heart chambers into the heart muscle itself) and found that defendant hospital was vicariously liable for any malpractice of nonparty Dr. Vivek Iyer as a matter of law, unanimously modified, on the law, to the extent of vacating the court's finding with respect to Dr. Iyer's employment status and vicarious liability, and otherwise affirmed, without costs.

Defendant failed to meet its prima facie burden of establishing entitlement to judgment as a matter of law with respect to defendant's malpractice. In order to meet its prima facie burden, a defendant medical provider is required to establish the absence of a departure "from good and accepted medical practice" or that any such departure was not a proximate cause, or a "substantial factor" in causing, plaintiff's injuries (*Anyie B. v Bronx Lebanon Hosp.*, 128 AD3d 1, 3 [1st Dept 2015]; *Malone v Kim*, 96 AD3d 477, 477 [1st Dept 2012]).

In support of its summary judgment motion, defendant submitted an affirmation from Jay Gross, M.D., a licensed physician, board-certified in internal medicine and cardiology and formerly certified in cardiovascular electrophysiology. Dr. Gross believed that Dr. Iyer had properly performed the placement of the ICD, and opined that the delayed onset of postoperative symptoms were "highly inconsistent with an ICD related complication." While Dr. Gross believed that there was "little doubt that anticoagulation played a role in this event," he went on to find that "[o]ne cannot absolutely exclude subclinical myocardial irritation from the procedure that was manifest only after anticoagulation."

As Supreme Court found, the expert affirmation was insufficient to eliminate all factual issues with respect to defendant's negligence. Dr. Gross acknowledged the post-surgical

injury and failed to completely rule out that Dr. Iver's departure from "good and accepted medical practice" had caused it (*Anyie B.*, 128 AD3d at 3). Dr. Gross's statements that the procedure had been properly performed and did not depart from the standard of care were conclusory and lacked the requisite specificity to award summary judgment in defendant's favor. Nor were defendant's pre-existing conditions sufficient to eliminate the possibility of malpractice.

As defendant failed to meet his prima facie burden, summary judgment on this issue was properly denied, irrespective of plaintiff's failure to submit an expert affirmation in opposition to defendant's motion (*see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]).

However, to the extent Supreme Court found that defendant hospital was vicariously liable for any malpractice of Dr. Iver on the basis of respondeat superior as a matter of law, that finding is vacated. There was no evidence presented on the motion as to Dr. Iyer's employment status. Further, the issue of vicarious liability was not raised by the parties on the motion, with the court improperly raising the issue sua sponte (*Abdou v Malone*, 166 AD3d 931, 932 [2d Dept 2018]). Regardless, Dr. Iyer's deposition testimony at least creates an issue of fact as to his employment status, as he testified that he was employed by a different (albeit related) entity and was unsure of the precise nature of the relationship between that entity and the defendant. Supreme Court thus improperly concluded that there was "no dispute" that Dr. Iyer was employed by defendant hospital at the time he rendered the care. Concur—Manzanet-Daniels, J.P., Higgitt, O'Neill Levy, Chan, JJ.

29 In the Matter of State Division of Human Rights et al., Petitioners, v Metrowireless 167, Inc., et al., Respondents. [252 NYS3d 555]—

Civil Rights—Discrimination in Employment—Gender—Pregnancy

Application pursuant to Executive Law § 298 to enforce petitioner State Division of Human Rights' (DHR) order, dated December 9, 2021, which found respondent MetroWireless 167 Inc. liable for discriminating against Stephanie Martinez based on sex in violation of the Human Rights Law, directed it to compensate Martinez in the amount of \$57,248.00 for lost wages and \$15,000 in damages for mental anguish, and pay a civil penalty of \$5,000 (transferred to this Court by order, Supreme Court, Bronx County [Veronica G. Hummel, J.], entered Nov. 19, 2024), unanimously granted, without costs.

Substantial evidence supports DHR's determination that respondent MetroWireless unlawfully discriminated against Martinez by significantly reducing her work hours and effectively terminating her employment shortly after learning that she was pregnant (see *State Div. of Human Rights v Demi Lass*, 232 AD2d 335, 335-336 [1st Dept 1996]; *Matter of Energy Expo v New York State Div. of Human Rights*, 112 AD2d 302, 303 [2d Dept 1985]). MetroWireless failed to appear at the hearing, and therefore did not rebut Martinez's prima facie showing (see *Matter of Jacobs v New York State Div. of Human Rights*, 131 AD3d 883, 884 [1st Dept 2015]).

Substantial evidence also supports DHR's award of backpay and compensatory damages (see *Mittl v New York State Div. of Human Rights*, 307 AD2d 881, 882 [1st Dept 2003], *lv denied* 2 NY3d 701 [2004]; *Matter of Goldberg v New York State Div. of Human Rights*, 85 AD3d 1166, 1167 [2d Dept 2011]; see also *Matter of State Div. of Human Rights v ARC XVI Inwood, Inc.*, 17 AD3d 239 [1st Dept 2005]). In light of the circumstances of this case, as well as the deference that must be given to the Administrative Law Judge's findings, the civil penalty of \$5,000 is not so disproportionate to the offense as to be shocking to one's sense of fairness (see *Matter of New York State Div. of Human Rights v Boro Park Senior Living Community, LLC*, 213 AD3d 671, 674 [2d Dept 2023]). Concur—Moulton, J.P., Scarpulla, Shulman, Rodriguez, Michael, JJ.

30 Travelers Indemnity Company of America, Appellant-Respondent, v Southwest Marine & General Insurance Company, Respondent-Appellant, and Endurance American Insurance Company, Respondent. [— NYS3d —]

Insurance—Duty to Defend and Indemnify—Priority of Coverage

Order, Supreme Court, Bronx County (Mary Ann Brigantti, J.), entered or about February 26, 2025, which, to the extent appealed from as limited by the briefs, granted so much of plaintiff's motion for summary judgment declaring that defendant Southwest Marine & General Insurance Company had a duty to defend in the underlying action and found sua sponte that defendants' coverage cap was \$1 million, and denied so much of the motion as sought a declaration that Southwest's duty to defend was primary to plaintiff's, unanimously modified, on the law, to vacate so much of the order as found that defendants' coverage cap was \$1 million, and otherwise affirmed, without costs.

Supreme Court properly concluded that Southwest's duty to defend was triggered by the allegations in the underlying

complaint (*see BP A.C. Corp. v One Beacon Ins. Group*, 8 NY3d 708, 714 [2007]). Extrinsic evidence offered by Southwest may not be considered, as the relevant subcontract provisions, which set forth Southwest's named insured's duty to indemnify plaintiff's insured, are not ambiguous as to the parties' roles and obligations (*see South Rd. Assoc., LLC v International Bus. Machs. Corp.*, 4 NY3d 272, 278 [2005]).

Nevertheless, upon reviewing and considering all the relevant policies, Supreme Court properly found that it would be premature to make a finding of priority of coverage as between plaintiff Travelers Indemnity Company of America and Southwest (*see BP A.C. Corp.*, 8 NY3d at 716; *Paramount Ins. Co. v Federal Ins. Co.*, 174 AD3d 476, 477 [1st Dept 2019]). Priority of coverage is determined by comparing the "other insurance clauses" of all policies covering the same risk and thus may depend on the interaction of multiple policies rather than a comparison of two policies in isolation (*Sport Rock Intl., Inc. v American Cas. Co. of Reading, Pa.*, 65 AD3d 12, 18 [1st Dept 2009] [internal quotation marks omitted]; *see Pecker Iron Works of N.Y. v Traveler's Ins. Co.*, 99 NY2d 391, 393-394 [2003]). The record, however, does not include other potential policies that may provide coverage, and Supreme Court therefore had no basis for making a finding on priority.

Travelers and Southwest agree that the court should not have declared that Southwest's coverage cap was \$1 million because they never briefed that issue (*see Matter of Agnew v New York City Dept. of Corr.*, 217 AD3d 490, 492 [1st Dept 2023], *lv dismissed* 40 NY3d 1061 [2023]). As a result, that portion of the order is vacated. Concur—Manzanet-Daniels, J.P., Higgitt, Rosado, O'Neill Levy, Chan, JJ.

31 James Waddell, Respondent, v City of New York et al., Appellants, et al., Defendants. [— NYS3d —]—

Municipal Corporations—Notice of Claim—Late Notice—Acceptable Excuse
Municipal Corporations—Notice of Claim—Late Notice—Actual Knowledge of
Essential Facts Constituting Claims

Order, Supreme Court, New York County (Jeanine R. Johnson, J.), entered January 14, 2025, which granted plaintiff's motion for leave to serve a late notice of claim upon defendants and deemed the notice of claim timely served nunc pro tunc, unanimously reversed, on the law, without costs, and the motion denied.

Supreme Court erred in granting plaintiff's motion to deem the notice of claim timely served on defendants. Plaintiff failed to establish any of the relevant statutory factors that would

warrant leave to serve a late notice of claim (*see* General Municipal Law § 50-e [5]; *Matter of Newcomb v Middle Country Cent. Sch. Dist.*, 28 NY3d 455, 460-461 [2016]). Plaintiff's averment that he was unaware of the time limits necessary to file a notice of claim and initially did not retain counsel after being released from custody because he was focusing on the criminal charges against him are not acceptable excuses for failing to file a timely notice of claim (*see Palmer v City of New York*, 226 AD2d 149 [1st Dept 1996]; *see also Mehra v City of New York*, 112 AD3d 417, 418 [1st Dept 2013]).

Furthermore, plaintiff failed to submit any evidence establishing that defendants acquired actual knowledge of the essential facts constituting the claims within 90 days of the accrual of the claims or within a reasonable time thereafter (*see Cassidy v New York City Tr. Auth.*, 238 AD3d 484, 485 [1st Dept 2025]). Plaintiff's allegations that NYPD officers participated in his false arrest and detention and that they assaulted and battered him do not satisfy plaintiff's burden of establishing that defendants acquired actual knowledge of the essential facts because his allegations do not constitute facts or evidence (*see Matter of Jaime v City of New York*, 41 NY3d 531, 543 [2024]). Plaintiff's allegation that defendants must have records regarding his arrest, detention, and prosecution is also unavailing, as "the alleged existence of records does not suffice to establish actual knowledge" (*Rivera v New York City Dept. of Transp.*, 235 AD3d 510, 511 [1st Dept 2025] [internal quotation marks omitted]).

Since plaintiff failed to make an initial showing that defendants were not prejudiced by the delay of about 11 months in filing the notice of claim, the burden never shifted to defendants to make a particularized showing of prejudice to their ability to defend on the merits (*see Matter of Cani v New York City Health & Hosps. Corp.*, 242 AD3d 408, 409 [1st Dept 2025]).

As defendants acknowledge, plaintiff's claim for malicious prosecution is timely because the notice of claim was served on defendants about 41 days after the charges were dismissed, which is well within the 90-day statutory time limit prescribed by General Municipal Law § 50-e (5) (*see Rochester v City of New York*, 168 AD3d 435, 436 [1st Dept 2019]). Concur—Manzanet-Daniels, J.P., Higgitt, Rosado, O'Neill Levy, Chan, JJ.

32 In the Matter of Jeremy Warneke, Petitioner, v Bronx Community Board 11 et al., Respondents. [252 NYS3d 557]—

Civil Rights—Discrimination in Employment—Hostile Work Environment—

Isolated Remarks

Order of respondent New York State Division of Human Rights (DHR), dated September 14, 2023, which adopted the recommended order of the Administrative Law Judge, dismissing petitioner's familial status discrimination and retaliation complaint, unanimously confirmed, the petition denied, and the proceeding brought pursuant to CPLR article 78 (transferred to this Court by order of Supreme Court, Bronx County [Wilma Guzman, J.], entered on or about Jan. 3, 2025), unanimously dismissed, without costs.

DHR's determination that petitioner did not experience a hostile work environment is supported by substantial evidence (*see Matter of Sullivan v New York State Div. of Human Rights*, 235 AD3d 549, 549 [1st Dept 2025], *lv denied* 44 NY3d 909 [2026]). Although the record contains evidence that petitioner's supervisor made negative comments about petitioner's prioritization of childcare responsibilities over work, "[i]solated remarks or occasional episodes of harassment [do] not support a finding of a hostile or abusive work environment" under the pre-2019 standard (*Ferrer v New York State Div. of Human Rights*, 82 AD3d 431, 431 [1st Dept 2011]; *see Pichardo v Carmine's Broadway Feast Inc.*, 199 AD3d 593, 594 [1st Dept 2021]).

DHR's dismissal of petitioner's retaliation claim was rational. Petitioner's employer, Bronx Community Board 11, did not take any adverse employment action against him following his discrimination complaint to the Bronx Borough President's Office (*see Pastor v August Aichhorn Ctr. for Adolescent Residential Care, Inc.*, 238 AD3d 645, 645 [1st Dept 2025]; *Harrington v City of New York*, 157 AD3d 582, 585 [1st Dept 2018]). Indeed, in the nine months after petitioner filed his discrimination complaint, he received better evaluations than he had previously and received two raises. Concur—Manzanet-Daniels, J.P., Higgitt, Rosado, O'Neill Levy, Chan, JJ.

33 Christopher Zapata, Appellant, v Jawara J. Edwards et al., Respondents, et al., Defendant. [252 NYS3d 560]—

Motor Vehicles—Collision—Bicycle—Entering Roadway from Sidewalk at Curb Cut

Order, Supreme Court, New York County (Suzanne J. Adams, J.), entered February 27, 2025, which granted defendants' motion for leave to renew their motion for summary judgment dismissing the complaint and, upon renewal, granted the motion, unanimously affirmed, without costs.

Supreme Court providently exercised its discretion in

granting defendants' motion to renew based on the parties' depositions that were held after the denial of defendants' initial motion (see *Han v Brighthouse Life Ins. Co. of NY*, 192 AD3d 421, 422 [1st Dept 2021]). The deposition transcripts contained "new facts not offered on the prior motion that would change the prior determination" of the court (CPLR 2221 [e] [2]).

Defendants established their prima facie entitlement to summary judgment by submitting surveillance footage taken from inside the bus involved in the accident, which demonstrated that it had the right of way before the accident. The footage shows plaintiff riding a bicycle on the sidewalk parallel to the bus and demonstrates that he "entered the roadway from the sidewalk at a curb cut without stopping or yielding the right of way" in violation of Vehicle and Traffic Law §§ 1143 and 1231 (*Rivera v Masola*, 246 AD3d 544, 544 [1st Dept 2026]; see also *Batista v Metropolitan Transp. Auth.*, 210 AD3d 487, 487-488 [1st Dept 2022]).

Plaintiff's assertion that defendant bus driver failed to exercise reasonable care to avoid the accident is belied by the record, which demonstrates that plaintiff attempted to enter the roadway after the front of the bus had already passed him. The bus driver had the right of way; thus, he was "entitled to assume that plaintiff would obey the traffic laws and not [enter the roadway] until it was safe to do so" (*Eltosam v Darling Ingredients Inc.*, 235 AD3d 404, 404 [1st Dept 2025]). Under these circumstances, the bus driver was not comparatively at fault (see *id.*). Concur—Manzanet-Daniels, J.P., Higgitt, Rosado, O'Neill Levy, Chan, JJ.

(April 21, 2026)

1 120 Main Hotel LLC, Respondent, v Sompo America Insurance Company, Appellant. [252 NYS3d 561]—

Insurance—Business Insurance—Policy Exclusion—Engagement in Customary Business Operations

Order, Supreme Court, New York County (Lyle E. Frank, J.), entered November 26, 2024, which, to the extent appealed as limited by the briefs, denied defendant's motion to dismiss the complaint, unanimously affirmed, without costs.

Supreme Court correctly denied defendant's motion to dismiss the complaint, as it failed to sustain its burden of establishing that an exclusion in its insurance policy applied to defeat coverage for a fire that occurred on plaintiff's premises (see *J.P. Morgan Sec. Inc. v Vigilant Ins. Co.*, 37 NY3d 552, 562

[2021]). The record presents issues of fact regarding the state of the property at the time of the fire, whether the premises contained covered property adequate to conduct business operations as a hotel, and whether plaintiff engaged in customary business operations on site shortly before the fire loss. These issues, in turn, bear on whether the hotel was “vacant or unoccupied” within the meaning of the exclusion foreclosing coverage for loss caused by vandalism and malicious mischief, which is the basis on which defendant declined coverage.

We have considered defendants’ remaining contentions and find them unavailing. Concur—Renwick, P.J., Friedman, Gesmer, Pitt-Burke, Hagler, JJ.

Motion by plaintiff to strike or disregard portions of defendant’s reply, granted to the extent it seeks to strike new arguments raised for the first time in reply.

2 B.A., Respondent, v H.K., Appellant. [252 NYS3d 529]—

Appeal—Records and Briefs on Appeal—Proper Record

Appeal from order, Supreme Court, Bronx County (La Tia W. Martin, J.), entered on or about June 14, 2024, which, to the extent appealed from as limited by the brief, after a hearing, granted plaintiff wife sole legal and physical custody of the subject child, awarded defendant husband unsupervised parental access, directed the husband to pay \$50 per month in child support, and declined to grant any ancillary relief, unanimously dismissed, without costs, for failure to perfect the appeal in accordance with the CPLR and the rules of this Court, and as moot.

Defendant husband’s challenge to the portions of the June 14, 2024 order which denied his request for equitable distribution is dismissed for failure to perfect the appeal in accordance with the CPLR and the rules of this Court (*see* CPLR 5526; 22 NYCRR part 600; *Borbon v Pescoran*, 106 AD3d 594, 594 [1st Dept 2013]). The husband failed to assemble a proper record, including the transcripts of the trial and a full copy of the order appealed from. Without the benefit of a proper record, this Court cannot render an informed decision on the merits (*see Lynch v Consolidated Edison, Inc.*, 82 AD3d 442, 442 [1st Dept 2011]).

The husband’s challenge to the court’s custody and visitation determinations is moot, as the child has reached the age of majority (*see Matter of Ivan R. v Lisandra F.*, 188 AD3d 543, 543 [1st Dept 2020]). Concur—Renwick, P.J., Friedman, Gesmer, Pitt-Burke, Hagler, JJ.

Motion by plaintiff wife to dismiss the appeal denied as academic.

3 Cincinnati Terrace Member LLC et al., Appellants, v Tartar Krinsky & Drogin LLC et al., Respondents. [— NYS3d —]—

Conflict of Laws—What Law Governs—Matter of Procedure—Claim Accrued Outside New York

Limitation of Actions—What Statute Governs—Choice of Law Provision—Application to Statute of Limitations

Fraud—Factual Misrepresentation—Duty to Disclose—Special Knowledge or Information

Order, Supreme Court, New York County (Nancy M. Bannon, J.), entered March 31, 2025, which, to the extent appealed from as limited by the briefs, granted the motion of defendants Robbins Kelly Patterson & Tucker (RKPT), Michael Galasso, Cincinnati Terrace LLC, Roys Poyiadjis, and Harris Stasis to dismiss the remaining causes of action asserted against them, and granted the separate motion of defendants Tartar Krinsky & Drogin LLP (TKD) and James Smith to dismiss the remaining causes of action insofar as asserted against them, unanimously affirmed, without costs.

This action stems from an alleged fraudulent scheme in which defendants Poyiadjis and Stasis, acting through Cincinnati Terrace Plaza LLC (CTP), contracted to sell 15 West 6th Street in Cincinnati, Ohio (the Property) two times—first to nonparty Cincinnati Development III (Development) and ONE day later to plaintiff Cincinnati Terrace Member LLC (CTM) which then assigned it to Cincinnati Terrace Associates LLC (CTA). Plaintiff Slabaki is a 20% member of both CTM and CTA. To induce CTM/CTA's eleven million dollar purchase and plaintiff Slabakis's mortgaging of his New York property to finance the Property's purchase, defendants Poyiadjis, Stasis, CTP and their counsel Smith of TKD and Galasso of RKPT, allegedly represented that no prior contract existed.

The court properly concluded that it lacked general jurisdiction over defendants RKPT, Galasso, and Stasis. RKPT and Galasso were residents of, or had their principal place of business in, Ohio, and Stasis was a resident of Cyprus. Plaintiffs failed to allege facts sufficient to confer long-arm jurisdiction over those defendants, since they failed to present facts suggesting that those defendants purposefully availed themselves of the privilege of conducting business in New York (*see Ford Motor Co. v Montana Eighth Jud. Dist. Ct.*, 592 US 351, 359-360 [2021]). Consummation of the subject real estate transaction required contact with New York residents, but there was

no evidence that the contacts were anything but fortuitous or that those defendants anticipated being haled into court in New York.

We reject the remaining defendants' argument that the claims asserted against them were properly dismissed as time-barred under Ohio's four-year statute of limitations for fraud. Defendants contend that the four-year Ohio statute of limitations, which begins to run when the plaintiffs discovered or should have discovered the fraud in the exercise of due diligence, is applicable under a choice-of-law analysis. Defendants TKD and its Partner Smith also argue that the choice of law provision in the contract mandates the application of Ohio law. We disagree.

The remaining defendants' analysis is flawed because under New York choice of law rules, matters of procedure are governed by the law of the forum (*Eccles v Shamrock Capital Advisors, LLC*, 42 NY3d 321, 335 [2024]). Thus, in an action pending in New York, the procedural law of New York applies, regardless of whatever substantive law governs the merits of the case. Because New York classifies the statute of limitations as procedural law—its operation affects only the remedy, not the rights at issue—the general rule is that New York's statute of limitations law applies to actions brought in New York (see *Tanges v Heidelberg N. Am.*, 93 NY2d 48, 54-55 [1999]; *Martin v Dierck Equip. Co.*, 43 NY2d 583, 588 [1978]).

CPLR 202 modifies this general rule when the claim accrued outside New York and the plaintiff was a nonresident at the time it accrued. In this case, however, plaintiffs are Delaware LLCs with their principal places of business in New York, and the individual plaintiff Slabakis is a New York resident as well. Additionally, “in the case of an economic injury, ‘the place of injury usually is where the plaintiff resides and sustains the economic impact of the loss’ ” (*Deutsche Bank Natl. Trust Co. v Barclays Bank PLC*, 34 NY3d 327, 331, 336 [2019], quoting *Global Fin. Corp. v Triarc Corp.*, 93 NY2d 525, 529 [1999]).

The remaining defendants' reliance on the subject contract's inclusion of a choice of law provision that called for application of Ohio law is misplaced. The Court of Appeals has held that, in the absence of an express intention in an agreement that a specific statute of limitations is to apply to a dispute, a choice of law provision cannot be read to encompass that limitations period (see e.g. *Portfolio Recovery Assoc., LLC v King*, 14 NY3d 410, 416 [2010] [“there is a significant difference between a choice-of-law question, which is a matter of common law, and (a) Statute of Limitations issue, which is governed by particu-

lar terms of the CPLR”]; *Royal Park Invs. SA/NV v Morgan Stanley*, 165 AD3d 460, 461 [1st Dept 2018] [“when parties include a choice-of-law provision in a contract, they intend application of only that state’s substantive law.” In other words, “(c)hoice of law provisions typically apply to only substantive issues”] [citations and internal quotation marks omitted]; see also *Deutsche Bank Natl. Trust Co. v Barclays Bank PLC*, 156 AD3d 401, 402-403 [1st Dept 2017]). The choice-of-law provision here does not specifically call for the application of the Ohio statute of limitations. The reference to “without giving effect to any choice of law or conflict of law provision” is boilerplate and thus insufficient to encompass that statute of limitations period (see *Baker v Greentech Capital Advisors, L.P.*, 206 AD3d 422, 423 [1st Dept 2022] [(a)s the choice-of-law provision in the partnership agreement does not expressly mention the application of the Delaware statute of limitations, the law of the forum state (New York) governs the limitations period”).

Thus, since it is undisputed that the fraud claims asserted against the remaining defendants were timely commenced within New York’s six-year statute of limitations, they were not subject to dismissal as time-barred. Plaintiffs were on notice of nonparty Development’s contract with defendant CTM no later than when the former entity commenced the Ohio action on August 7, 2018. Plaintiffs commenced this action on May 22, 2024, less than six years later.

Nevertheless, the fraud claims against the remaining defendants were properly dismissed for the reasons explained below. First, the fraud and abetting fraud claims asserted against TKD, its counsel Smith, and Poyiadjis were properly dismissed as insufficiently pled. The elements of a fraud claim are a misrepresentation or a material omission of fact, which was false and known to be false by defendant, made for the purpose of inducing the other party to rely upon it, justifiable reliance by the other party on the misrepresentation or material omission, and injury (see *Mandarin Trading Ltd. v Wildenstein*, 16 NY3d 173, 178 [2011]; *Lama Holding Co. v Smith Barney*, 88 NY2d 413, 421 [1996]).

If fraud is based on concealment or omission, there must be proof that defendant had a duty to disclose, as in a fiduciary relationship (see *Mandarin Trading Ltd.*, 16 NY3d at 173-179; *Kaufman v Cohen*, 307 AD2d 113, 119-120 [1st Dept 2003]). In the absence of a fiduciary duty, a party may be liable for nondisclosure where it has special knowledge or information not attainable by plaintiff or when it has made a misleading partial disclosure (see *Basis Yield Alpha Fund [Master] v Goldman Sachs Group, Inc.*, 115 AD3d 128, 135 [1st Dept 2014]).

Here, the complaint did not state a fraud cause of action against defendants TKD and its partner Smith because they had no duty to disclose the contract with nonparty Development to plaintiffs. The attorney defendants were not alleged to have special knowledge or information not available to plaintiffs or to have made partial disclosures. Further, the attorneys were required to maintain their clients' confidence. Prior to the closing, plaintiffs learned from a newspaper article that the Property had already been sold; their alleged reliance on statements made by defendant CTP'S counsel was not reasonable in that they were on opposite sides of the transaction.

Similarly, the complaint fails to state a fraud claim against defendant Poyiadjis because it did not allege specific false statements made by him. Plaintiffs failed to properly plead the underlying fraud claim against defendants TKD, its partner Smith, and Poyiadjis; thus the aiding and abetting fraud claims asserted against them must also fail, because to state a claim for aiding and abetting fraud, plaintiff must sufficiently allege the existence of the underlying fraud (*see Simon v FrancInvest, S.A.*, 192 AD3d 565, 569 [1st Dept 2021], *appeal dismissed* 37 NY3d 1005 [2021]; *Stanfield Offshore Leveraged Assets, Ltd. v Metropolitan Life Ins. Co.*, 64 AD3d 472, 476 [1st Dept 2009], *lv denied* 13 NY3d 709 [2009]).

With respect to defendant CTP, the fraud claim was properly dismissed as duplicative of the breach of contract cause of action asserted against it (*see MBW Adv. Network v Century Bus. Credit Corp.*, 173 AD2d 306, 306 [1st Dept 1991]). Generally, to recover damages for a tort in a contract action, plaintiff must plead a breach of duty distinct from or in addition to the breach of contract (*see GoSmile, Inc. v Levine*, 81 AD3d 77, 81 [1st Dept 2010], *lv dismissed* 17 NY3d 782 [2011]). Here, no such duty was pleaded.

Finally, the breach of contract claim asserted by plaintiff CTM against defendant Poyiadjis was properly dismissed because it is undisputed that Poyiadjis was not a signatory to the sale contract.

Because we conclude that the complaint was properly dismissed as against all defendants for the foregoing reasons, we need not reach plaintiffs' remaining arguments regarding, inter alia, issue and claim preclusion, judicial estoppel and standing. Concur—Renwick, P.J., Friedman, Gesmer, Pitt-Burke, Hagler, JJ.

4 Kristina Y. Dewald, Respondent, v Jerome W. Dewald, Appellant. [— NYS3d —]

Husband and Wife and Other Domestic Relationships—Support—Maintenance—Deviation from Statutory Formulas
Husband and Wife and Other Domestic Relationships—Support—Representations of Financial Status
Husband and Wife and Other Domestic Relationships—Counsel Fees—Procedural Requirements

Order, Supreme Court, New York County (Jeffrey H. Pearlman, J.), entered April 7, 2025, which, after a trial, to the extent appealed from as limited by the briefs, declined to award defendant husband spousal maintenance and ordered him to pay plaintiff wife \$5,500 in counsel fees in accordance with the Rules of the Chief Administrator of the Courts (22 NYCRR) § 130-1.1, unanimously modified, on the law, to the extent of vacating the counsel fee award, and otherwise affirmed, without costs.

The husband failed to establish that Supreme Court abused its discretion in deviating from the statutory guidelines to determine that he was not entitled to an award of post-divorce maintenance (*see Van Boxtel v Van Boxtel*, 233 AD3d 463, 463 [1st Dept 2024]; *Rennock v Rennock*, 203 AD3d 675 [1st Dept 2022]). After Supreme Court computed the presumptive amount and duration of maintenance under the guidelines set forth in Domestic Relations Law § 236 (B) (6) (e) (1), it considered the factors that warranted a deviation from the statutory formulas. These factors included but were not limited to the husband's age and assets, as well as his prior criminal conviction for fraud; the maintenance that the wife had already paid pendente lite; and the fact that the parties had spent time living apart during their relatively short marriage. Consideration of these factors provided a sufficient basis for the court's decision not to award maintenance to the husband. In addition, although the husband asserts that the court overlooked Domestic Relations Law § 236 (B) (6) factors that it was required to consider—for example, the large disparity in the parties' ages and their standard of living during the marriage—the record makes clear that the court did, in fact, consider those factors. Contrary to the husband's assertion otherwise, any factual errors made by the court in its assessment are largely immaterial and do not change the analysis.

We also reject the husband's assertions that he lacks assets after investing all his money in the marriage and the parties' lifestyle, and that his age prevents him from rebuilding financial security. The husband made these same arguments before Supreme Court, which properly rejected them, as it was not required to rely solely on his representations of his financial status (*see Warshaw v Warshaw*, 173 AD3d 582, 583 [1st Dept

2019]). The court also noted that it did not find the husband's testimony to be credible, and this finding is entitled to great deference (*Fishman v Fishman*, 244 AD3d 526, 527-528 [1st Dept 2025]; *Matter of Anthony L. v Bernadette R.*, 193 AD3d 510, 511 [1st Dept 2021]).

However, the award of counsel fees requires vacatur, as the court did not satisfy the procedural requirements of 22 NYCRR 130-1.2. Under that section, a court may award costs or impose sanctions “only upon a written decision setting forth the conduct on which the award or imposition is based, the reasons why the court found the conduct to be frivolous, and the reasons why the court found the amount awarded or imposed to be appropriate.” Here, the court did not set forth the conduct it found to be frivolous, nor did it provide the reason for its decision to impose counsel fees (*Gordon Group Invs., LLC v Kugler*, 127 AD3d 592, 595 [1st Dept 2015]).

We have considered the husband's remaining arguments and find them unavailing. Concur—Renwick, P.J., Friedman, Gesmer, Pitt-Burke, Hagler, JJ.

5 In the Matter of Jesus G., a Person Alleged to be a Juvenile Delinquent, Appellant. [252 NYS3d 564]—

Infants—Juvenile Offenders—Restitution—Vacatur

Order of disposition, Family Court, Bronx County (Ronna H. Gordon-Galchus, J.), entered on or about February 28, 2025, which adjudicated appellant a juvenile delinquent, upon his admission that he committed acts which, if committed by an adult, would constitute the crimes of criminal possession of stolen property in the fifth degree and unauthorized use of a vehicle in the third degree, placed him on probation for a period of 15 months, and ordered him to pay restitution of \$1,000.00, unanimously modified, on the law, to vacate the restitution award, and otherwise affirmed, without costs.

The case against appellant arises out of an incident in which an unapprehended person threatened and assaulted a car driver, who fled the car. Appellant then got into the car and drove it a few blocks before abandoning it. The car was recovered approximately one year later in inoperable condition. The driver's sworn witness affirmation and signed victim impact statement both state that he bought the car for \$4,100 one month before the incident, and the car's post-recovery condition constituted a “total loss.” At the time of the offense, appellant was 17 years old.

Appellant seeks vacatur of the restitution order, arguing that the Family Court improperly ordered \$1,000 in restitution

where his admission did not include an agreement to pay restitution or an admission of property damage. He further argues that a hearing was required to determine the value of the damage incurred, that no reliable evidence established irreparability of the car or cost of repair or replacement, and that the car driver's lost wages do not form a basis for restitution under the Family Court Act. Finally, appellant argues that the Court should have considered his ability to pay the restitution award.

The Family Court may order a juvenile offender to pay restitution in an amount not exceeding \$1,500.00 which represents the "fair and reasonable" cost to "replace the property [or] repair the damage caused by the respondent" (Family Ct Act § 353.6 [1] [a]). Whether restitution is warranted lies within the court's discretion (*Matter of Joshua C.*, 65 AD3d 971 [1st Dept 2009]; *Matter of Daytrill H.* 32 AD3d 736 [1st Dept 2006], *lv denied* 8 NY3d 802 [2007]). Restitution may be awarded not merely for the cost of repairing damaged property but also for replacing it (*see* Family Ct Act § 353.6 [1] [a]). The Court has held in similar circumstances that misdemeanor petit larceny (Penal Law § 155.25) and possession of stolen property are sufficient to support an award of restitution (*see e.g. Matter of Daytrill H.*, 32 AD3d at 736, *Matter of Deandre Mc.*, 124 AD3d 786, 788 [2d Dept 2015]).

The car driver's affirmation and victim impact statement establish that the car was purchased for \$4,100 one month before the incident and was completely damaged and not drivable upon return to its owner. A victim impact statement specifying the cost to the victim to replace the property may be sufficient to support a calculation of restitution (*see Matter of Jennifer A.*, 73 AD3d 566, 567 [1st Dept 2010]). Here, appellant admitted to stealing the car, rendering the car subject to Family Court Act § 353.6 (1) (a), and the Presentment Agency established that the restitution award represented the "fair and reasonable" cost of replacement by a preponderance of the evidence. (Family Ct Act §§ 350.3 [1], [2]; 353.6 [1]).

However, as appellant's admission did not include any agreement to pay restitution, we find that it should not have been ordered (*see Matter of Rashid F.*, 300 AD2d 960, 962 [3d Dept 2002]). Here, no claim for restitution was made in the charging document and the Presentment Agency did not indicate that it would seek restitution at disposition until January 16, 2025, well after appellant's November 19, 2024 admission which did not include an agreement to pay restitution. Accordingly, the restitution award should be vacated.

In light of our determination, we need not reach appellant's remaining arguments. Concur—Moulton, J.P., Pitt-Burke, O'Neill Levy, Michael, Chan, JJ.

6 In the Matter of the Accounting by Janet Marino Gerlach, Executor of the Will of Edward J. Marino, Deceased, for the Period of December 22, 2006 to December 31, 2012. In the Matter of the Accounting by Janet Marino Gerlach, Executor of the Will of Edward J. Marino, Deceased, for the Period of January 1, 2013 to March 31, 2019. In the Matter of Janet Marino Gerlach, Respondent, v Michael Marino, Respondent/Objectant-Appellant, and Christopher Marino, Respondent/Objectant. [253 NYS3d 619]—

Executors and Administrators—Breach of Fiduciary Duty—Prudent Investor Standard—Financial Loss

Executors and Administrators—Compensation—Management and Broker's Fees

Amended Decision and Order, Surrogate's Court, New York County (Rita M. Mella, S.), entered February 19, 2025, which, to the extent appealed from as limited by the briefs, denied objectant Michael Marino's motion for summary judgment sustaining certain objections to petitioner Janet Marino Gerlach's accountings as executor of the Estate of Edward J. Marino, unanimously affirmed, without costs.

The court properly denied objectants' motion for summary judgment because objectants did not show, as a matter of law, that any financial loss resulted from petitioner's alleged negligence or her alleged "failure to exercise that degree of care which prudent persons of discretion and intelligence in such matters employ in their own affairs" (*Matter of Bankers Trust Co. [Siegmund]*, 219 AD2d 266, 272 [1st Dept 1995], *lv dismissed* 87 NY2d 1055 [1996]). Objectants established prima facie that the corporations that owned the real property operated at a significant loss and that the fair market value of those real properties consistently declined in value during the five years after decedent's death, which petitioner did not dispute. However, petitioner raised a triable issue of fact by arguing that her investment strategy of renovating the properties and selling them when the real estate market improved was reasonable and resulted in significant gains (*see Matter of Janes*, 90 NY2d 41, 50 [1997]). Moreover, Articles V (D) and XIII (G) of the will afforded petitioner broad discretion in connection with management decisions and authorized her to retain the properties "for any period of time whatsoever." The prudent investor standard of care has "always been deemed subordinate to the provisions of the governing instrument"

(*Matter of HSBC Bank USA, N.A. [Knox]*, 98 AD3d 300, 310 [4th Dept 2012], *lv dismissed* 20 NY3d 1056 [2013]).

The court's reliance on Article XIII (G) of the will was not in error because that provision was not void as against public policy under EPTL 11-1.7. Article XIII (G) did not exonerate petitioner from liability for negligence but merely provided her with the discretion to refrain from selling the real property at any time. In any event, the court did not exclusively rely on the provisions of the will but rather cited other reasons to support its conclusion that petitioner presented sufficient evidence to raise a triable issue of fact.

The court properly concluded that objectants failed to demonstrate *prima facie* that petitioner overpaid herself management and broker's fees and, even if they had met that standard, petitioner presented sufficient evidence to raise a triable issue of fact. Petitioner stated that she received management and broker's fees during decedent's lifetime and continued to render those services when she became executor of the Estate. Moreover, her expert disagreed with objectants' expert as to the standard rate of compensation for the management services in the area where the real property was located. An executor who performs services that are beyond their executorial duties may be compensated for those extra services, including real estate broker's commissions (*see Matter of Tuttle*, 4 NY2d 159, 167 [1958]).

Finally, the court correctly found that objectants did not demonstrate as a matter of law that petitioner failed to withhold the estate tax attributable to the bequests to five named beneficiaries. In any event, petitioner raised a triable issue of fact based on the affidavit of her attorney that the estate taxes were in fact withheld from the distribution to the five named beneficiaries.

We have considered objectants' remaining arguments and find them unavailing. Concur—Renwick, P.J., Friedman, Gesmer, Pitt-Burke, Hagler, JJ.

7 Gaines Hearn, Appellant-Respondent, v Blended Family LLC, Respondent-Appellant, et al., Defendant-Respondent. [—NYS3d —]—

Labor—Safe Place to Work—Covered Worker under Labor Law § 240 (1)—Telecommunications Worker

Labor—Safe Place to Work—Construction-Related Activity—Alteration Indemnity—Contractual Indemnification—Savings Clause

Order, Supreme Court, Bronx County (Myrna Socorro, J.), entered on or about January 3, 2025, which, to the extent ap-

pealed from as limited by the briefs, granted in part the motion of defendant Abeken Apartments, LLP for summary judgment dismissing plaintiff's Labor Law § 240 (1) claim as against it and for judgment in its favor on its cross-claim for contractual indemnification against defendant Blended Family LLC to the extent of dismissing plaintiff's Labor Law § 240 (1) claim as against Abeken and granting Abeken conditional contractual indemnification against Blended Family, and granted the motion of defendant Blended Family for summary judgment dismissing plaintiff's Labor Law § 240 (1) claim as against it, unanimously affirmed, without costs.

Plaintiff, a telecommunications field technician employed by nonparty Verizon, alleges that he was injured while he was installing Wi-Fi services at a mixed-use building. The premises were owned by Abeken, which leased the commercial portion of its basement to Blended Family for operation of a daycare center. The lease did not include the basement on the residential side of the building, which contained a superintendent's office, storage room, sprinkler room, and telecommunications equipment room. Although the residential and commercial basements for the building were contiguous, there was no door connecting them; each was separately accessed from outside the building. Blended Family engaged Verizon to provide it with wireless internet services.

Plaintiff testified that when he arrived at the building, he proceeded to Blended Family's space. Upon inspection, he determined that Blended Family's router would be located inside its leased basement space and would be connected by wire to the building's Verizon's router, which was in a telecommunications equipment room inside the residential basement. Since plaintiff needed to access the basement, either he or one of Blended Family's employees contacted Abeken's superintendent, who unlocked the basement from the outside and escorted him in. According to plaintiff, connecting the Blended Family router to Verizon's equipment required a "long run" through the drop ceiling from Blended Family's space into the residential basement's hallway, and then to the telecommunications equipment room. Plaintiff stated that this required drilling a hole in the wall between Blended Family's space and the basement hallway and then a hole in the wall between the basement hallway and the Verizon equipment room to feed the cable through and back into the drop ceiling. Plaintiff set up one of his two ladders inside Blended Family's space and the other inside the telecommunications equipment room. According to plaintiff, since he would also need a ladder in the base-

ment hallway, he asked to use the building's ladder, which was in the basement of the building, so he would not have to move either of his two ladders. Plaintiff stated that he was allowed use of the building ladder by the superintendent. This is disputed by the superintendent who testified that he did not provide plaintiff with a ladder. According to plaintiff, he began feeding the wire through Blended Family's drop ceiling, through a hole he drilled in the wall between Blended Family's space and the building's hallway, and then into the hallway's drop ceiling. He then began to run the cable through the hallway's drop ceiling while standing on the building's ladder. While pulling the cable, he felt the ladder shift to the right and fall all the way over, taking him with it. According to plaintiff, he did not observe any defects or problems with the ladder before or after his accident and did not know what caused him to fall. He also did not remember how the ladder landed other than it was either closed or partially closed. He never inspected the ladder or determined whether it was broken.

The building superintendent testified that he allowed plaintiff into the basement telecommunications equipment room and remained outside during the entire time plaintiff performed his work. The superintendent testified that he observed plaintiff open the box and connect some wires. He did not see plaintiff drill any holes and did not know if plaintiff had a drill or whether plaintiff's work required drilling in order to run wires. The superintendent testified that after plaintiff completed his work, he locked the door to the telecommunications equipment room and walked plaintiff back to the daycare center. He testified that he never saw plaintiff again, that plaintiff never returned to the residential side of the building, and that plaintiff did not perform any other work in the basement later that day.

Plaintiff commenced suit against Abeken and Blended Family, alleging causes of action for common-law negligence and violations of Labor Law §§ 200, 240 (1), and 241 (6). Plaintiff subsequently moved for partial summary judgment on his claims pursuant to Labor Law § 240 (1), arguing that Abeken and Blended Family were subject to Labor Law liability as the owner and lessee of the premises, that he was a protected person engaged in an alteration activity, that the ladder shifted and thus was not a sufficient device, and that he was not the sole proximate cause of the accident.

Abeken moved for summary judgment dismissing the complaint and for judgment against Blended Family on its contractual indemnity claim. Abeken argued that plaintiff was

not a “covered worker” under the statute because the work that was performed—cable television work—was not a covered activity under the statute. Alternatively, Abeken argued that plaintiff was not a covered person because the work was a mere alteration not encompassed by Labor Law § 240 (1). Abeken also moved for indemnity against Blended Family.

Blended Family opposed that portion of Abeken’s motion for indemnity, arguing that Abeken was in exclusive control of the area of the accident and the ladder from which plaintiff fell, making any indemnity provision void. It also argued that the provision was not triggered because the accident did not occur in or about the demised premises.

Supreme Court denied plaintiff’s motion for partial summary judgment on his Labor Law § 240 (1) claim and granted the motions of Blended Family and Abeken seeking dismissal of that claim. As to Abeken, Supreme Court found that because plaintiff was a worker pursuant to Public Service Law § 228, he was not a covered employee under Labor Law § 240 (1). As to Blended Family, Supreme Court found that plaintiff’s work was not construction-related activity and did not effect a significant physical change to the premises; thus, according to Supreme Court, Labor Law § 240 (1) did not apply. Turning to the issue of indemnification, Supreme Court found that the broad provision was triggered because the accident occurred in the course of work being performed on behalf of Blended Family. However, it reasoned that because there were questions of fact concerning Abeken’s negligence in providing plaintiff with the ladder, the indemnification would be conditional. We agree with Supreme Court, in part.

Supreme Court erred when it dismissed plaintiff’s Labor Law § 240 (1) claim as against Abeken on the ground that it cannot be the subject of a Labor Law § 240 (1) claim in light of the application of Public Service Law § 228 (*see Abbatiello v Lancaster Studio Assoc.*, 3 NY3d 46, 52-53 [2004]). To further the availability of cable television, Public Service Law § 228 (1) provides, “No landlord shall . . . interfere with the installation of cable television facilities upon his property or premises.” However, a telecommunications company such as Verizon is not governed by the Public Service Law (*see* Public Service Law §§ 213 [1]; 228). Therefore, as plaintiff was not installing cable television facilities, but rather, was a telecommunications worker, Public Service Law § 228 does not apply to shield Abeken from liability under Labor Law § 240 (1).

We find, however, that the Labor Law § 240 (1) claims were properly dismissed as to both Abeken and Blended Family, as

plaintiff's work was not construction-related activity. Labor Law § 240 (1) applies to workers engaged in the “erection, demolition, repairing, altering, painting, cleaning or pointing of a building or structure.” “For work to qualify as ‘altering’ within the meaning of Labor Law § 240 (1), it must not be ‘simple, routine’, cosmetic, or decorative, and it must effect ‘a significant physical change to the configuration or composition of the building or structure’, including significantly changing the way an important component of the building functions,” although the change need not be permanent (*Mananghaya v Bronx-Lebanon Hosp. Ctr.*, 165 AD3d 117, 124 [1st Dept 2018] [citations and emphasis omitted], *lv dismissed* 33 NY3d 969 [2019]). Plaintiff's self-described action of drilling two holes in order to run the cable wire did not constitute an alteration pursuant to Labor Law § 240 (1) (*see Castaneda v Amsterco 67, LLC*, 220 AD3d 406, 406 [1st Dept 2023] [drilling anchors into building façade to attach pest control netting and setting up spikes on the building's ledges and windowsills did not constitute an “alteration”]; *Rhodes-Evans v 111 Chelsea LLC*, 44 AD3d 430, 432 [1st Dept 2007] [splicing fiber optic cable into a preexisting cable box on the wall of the parking garage was not an alteration under Labor Law § 240 (1)]).

Supreme Court correctly denied summary judgment in plaintiff's favor on his common-law negligence claims as to Abeken because questions of fact are presented regarding the furnishing of the ladder that allegedly caused plaintiff's accident.

Supreme Court correctly granted conditional summary judgment to Abeken on its contractual indemnity claim. The lease's indemnity provision was triggered because the claim arose by reason of work performed at the behest of Blended Family in and about the demised premises, and as a result of Blended Family's occupation and alteration of the demised premises. While questions of fact exist concerning Abeken's liability, the indemnification provision is not void under General Obligations Law § 5-322.1 because it contains a savings clause permitting partial liability (*see Hernandez v Argo Corp.*, 95 AD3d 782, 783 [1st Dept 2012]). Concur—Webber, J.P., Friedman, González, O'Neill Levy, Michael, JJ.

8 Ronald Moya et al., Respondents-Appellants, v The Mount Sinai Hospital et al., Appellants-Respondents. [— NYS3d —]—

Civil Rights—Discrimination in Employment—Religion—Selective Enforcement of Policy

Civil Rights—Discrimination in Employment—Accommodation of Religious Observance—Feasibility

Civil Rights—Discrimination in Employment—Cooperative Dialogue—Duty to Engage in Interactive Process

Order, Supreme Court, New York County (Richard G. Latin, J.), entered May 23, 2025, which, to the extent appealed from as limited by the briefs, granted so much of defendants' motion as sought summary judgment dismissing plaintiffs' claims under the New York State Human Rights Law (State HRL) and New York City Human Rights Law (City HRL) alleging that defendant Mount Sinai Hospital discriminated against them based on their religion, as well as all claims by plaintiff Brian Jones; denied so much of defendants' motion as sought dismissal of plaintiffs' claims for failure to accommodate under the State and City HRLs and failure to engage in a cooperative dialogue under the City HRL; and denied plaintiffs' cross-motion for summary judgment on their claims for failure to accommodate and failure to engage in a cooperative dialogue, unanimously modified, on the law, to deny defendants' motion insofar as it sought to dismiss Jones's claims for failure to accommodate and failure to engage in a cooperative dialogue and to reinstate those claims, and otherwise affirmed, without costs.

Plaintiffs, who are practicing Muslims and wear beards as part of their faith, were day-shift maintenance workers at Mount Sinai in the Building Services Department. In February 2021, the hospital required all Building Services personnel to pass a fit test for N-95 respirators and instructed plaintiffs to shave their beards in order to achieve a proper seal (*see* 29 CFR 1910.134 [g] [1] [i] [A]). Plaintiffs refused, citing their religious beliefs, and were sent home, suspended, and threatened with termination. Defendants offered plaintiffs alternative positions that were in a different department in the hospital and did not require the use of N-95 respirators. Plaintiffs Ronald Moya and Christopher Shaw declined evening shift positions, and the hospital treated their refusals to accept different positions as resignations. Jones accepted a day shift position as a food preparer but stopped coming to work five months later and was terminated for job abandonment.

Supreme Court properly dismissed plaintiffs' claim that defendants selectively enforced the fit test policy against them based on their religion. Defendants submitted evidence that plaintiffs were required to pass the fit test for the legitimate, nondiscriminatory reason that any Building Services employee could be called upon to clean a COVID-positive patient room, and, if they "were not able to safely wear an N[95], they would put themselves and others at risk." In response, plaintiffs failed

to raise a genuine issue of fact as to whether defendants' reason was pretextual or whether discrimination was a motivating factor for the fit tests (*see Hamburg v New York Univ. Sch. of Medicine*, 155 AD3d 66, 73 & n 7 [1st Dept 2017]). Plaintiffs do not dispute that all Building Services personnel were required to pass the fit test. Therefore, the record presents no evidence that plaintiffs were treated differently from similarly situated, non-Muslim employees (*see Tihan v Apollo Mgt. Holdings, L.P.*, 201 AD3d 557, 558 [1st Dept 2022], *lv denied* 38 NY3d 913 [2022]).

As proof of discriminatory animus, plaintiffs rely on statements made in the context of the accommodation discussion by defendant Jeffrey Cohen, Mount Sinai's Vice President of Labor Relations, in which he showed skepticism about plaintiffs' religious accommodation requests. Those comments, however, do not show that the hospital's enforcement of the fit test policy was motivated by discriminatory animus, as Cohen did not play any role in deciding which employees were required to pass fit tests for N-95s. Plaintiffs therefore fail to establish a nexus between the remark and the challenged employment decision (*Godbolt v Verizon N.Y. Inc.*, 115 AD3d 493, 494 [1st Dept 2014], *lv denied* 24 NY3d 901 [2014]).

Supreme Court also properly denied summary judgment for all parties on Moye's and Shaw's claims for failure to accommodate plaintiffs' religious observance (*see* Executive Law § 296 [10] [a]; Administrative Code of City of NY § 8-107 [3]). Plaintiffs introduced sufficient evidence to create an issue of fact as to whether it would have been feasible for defendants to permit plaintiffs to stay in their existing jobs without N-95s while avoiding COVID-positive areas, or to permit them to wait 30 minutes to enter a COVID-positive area. The evidence showed that plaintiffs only rarely were called upon to clean COVID-positive areas and carried out their responsibilities wearing only surgical masks until February 2021 (*see Friedman v Bloomberg, L.P.*, 230 AD3d 1060, 1061 [1st Dept 2024]).

Defendants further failed to satisfy their burden of showing that accommodating plaintiffs in their current positions would cause such "significant expense or difficulty[,] including a significant interference with the safe or efficient operation of the workplace" as to constitute an undue hardship under the State and City HRLs (Executive Law § 296 [10] [d]; Administrative Code § 8-107 [3] [b] [internal punctuation omitted]). The record suggests that only six Building Services employees requested relief from the fit-test requirement (*cf. Matter of Lebowitz v Board of Educ. of the City Sch. Dist. of the City of N.Y.*, 220

AD3d 537, 537 [1st Dept 2023] [agency rationally concluded that employer showed undue hardship where “more than 3,300 . . . employees had requested religious exemptions”], *lv denied* 41 NY3d 987 [2024]).

For their part, plaintiffs failed to foreclose all possible issues of fact as to whether it would have constituted an undue hardship to accommodate Moyer and Shaw in any way other than transfer to another department. Defendants submitted evidence showing that about 50 percent of the hospital was occupied by COVID-positive patients in February 2021, that Building Services had to be able to call upon any personnel to clean a COVID-positive area in the event that there were staff shortages, and that the hospital did not have enough powered air-purifying respirators (PAPRs) for everyone. This evidence is sufficient to defeat summary judgment.

Similarly, Supreme Court properly concluded that issues of fact precluded summary judgment for any party on Moyer’s and Shaw’s cooperative dialogue claims (*see* Administrative Code § 8-107 [28] [a] [1]). As of February 1, 2021, defendants were aware that plaintiffs refused to shave their beards because of their religious beliefs. This knowledge “triggered a duty to engage” in the interactive process (*Friedman*, 230 AD3d at 1061). Yet by February 7, defendants maintained that “anyone who doesn’t work for one week for failing to shave will be terminated.” Defendants then suspended plaintiffs with instructions to “report back to work, shaved and able to pass a fit test, or you will be terminated.” Cohen internally expressed skepticism about the sincerity of plaintiffs’ need. When asked by plaintiffs’ union representative whether accommodating a few employees in their current positions would be an undue hardship, Cohen stated, “No, no, no. Stop. We’re not doing that . . . that’s not how you run . . . a hospital.” The record therefore presents issues of fact as to whether defendants cut the dialogue process short and refused to consider accommodating plaintiffs in their current positions (*Gordon v Consolidated Edison Inc.*, 190 AD3d 639, 640-641 [1st Dept 2021]).

Plaintiffs were given to understand that they could violate their religious tenets by shaving or accept one of at most two transfer options they were offered, and that if they rejected these options the hospital would “consider[] their non-acceptance of the positions offered . . . as their resignation.” A reasonable jury could find that this process, under the specter of forced resignation, did not amount to a cooperative dialogue (*see Hosking v Memorial Sloan-Kettering Cancer Ctr.*, 186 AD3d 58, 64 [1st Dept 2020]).

Defendants nevertheless submitted sufficient evidence to defeat plaintiffs' motion for summary judgment. Defendants held a virtual meeting with plaintiffs and their union representative about the possibility of accommodation, discussed internally whether plaintiffs could be isolated to non-COVID areas or given PAPRs, and moved quickly to find plaintiffs alternative positions within the hospital.

The same issues of fact required denial of defendants' motion as to Jones's claims for failure to accommodate and failure to engage in a cooperative dialogue. The only distinction between Jones and the other plaintiffs is that Jones temporarily accepted the transfer offer before abandoning his job. Acceptance of an accommodation as the only alternative to forced resignation does not categorically preclude an employee from claiming that the accommodation was not reasonable or that no cooperative dialogue was provided under the State and City HRLs. Concur—Renwick, P.J., Friedman, Gesmer, Hagler, JJ.

9 John Owens et al., Respondents, v New Empire Corp. et al., Defendants, and US Weatherseal Windows & Doors Operation Inc., Appellant. [252 NYS3d 561]—

Negligence—Duty—Liability to Third Party—Unreasonable Risk of Harm

Order, Supreme Court, New York County (Suzanne Adams, J.), entered on or about July 17, 2024, which denied the motion of defendant US Weatherseal Windows & Doors Operation Inc. under CPLR 3211 (a) (7) to dismiss plaintiffs' eleventh cause of action for negligence, unanimously affirmed, with costs.

Plaintiffs, unit owners of a condominium, alleged that Weatherseal negligently designed, manufactured, and installed the windows for the building with the result that the sash does not seal tightly against the frame, and that Weatherseal made multiple visits to the affected units but failed to cure the defect. The alleged negligence in design, installation and faulty repairs of the windows caused persistent water leaks that damaged the drywall and hardwood floors of the affected units.

Weatherseal's motion to dismiss plaintiffs' sole cause of action against it was properly denied. Although a contractual obligation generally does not create liability in favor of a third party, there are three recognized exceptions to this general rule (*see Stiver v Good & Fair Carting & Moving, Inc.*, 9 NY3d 253, 257 [2007]; *Espinal v Melville Snow Contrs.*, 98 NY2d 136, 138 [2002]). Here, plaintiffs have sufficiently alleged facts to show that, at this pre-discovery stage, an exception applies in that Weatherseal may have "created an unreasonable risk of harm to [others]" or "increased that risk" in its design, installa-

tion and repair of the windows (*Powell v HIS Contrs., Inc.*, 75 AD3d 463, 464 [1st Dept 2010]). This exception to the general rule is not limited to personal injury actions and extends to actions involving property damage (see *Karydas v Ferrara-Ruurds*, 142 AD3d 771, 772 [1st Dept 2016]). Concur—Renwick, P.J., Friedman, Gesmer, Pitt-Burke, Hagler, JJ.

10 The People of the State of New York, Respondent, v Anzar Thompson, Appellant. [252 NYS3d 565]—

Crimes—Unlawful Search and Seizure—Stop and Frisk—Veracity of Tip

Judgment, Supreme Court, New York County (Robert Mandelbaum, J., at suppression hearing; Neil Ross, J., at plea; Gregory Carro, J., at sentencing), rendered January 9, 2023, convicting defendant, of attempted criminal possession of a weapon in the second degree, and sentencing him to a term of two years, unanimously affirmed.

Defendant failed to preserve his claim that the 911 caller did not provide sufficient information to furnish reasonable suspicion to stop and frisk him (see *People v Perez*, 156 AD3d 507, 507 [1st Dept 2017], *lv denied* 30 NY3d 1118 [2018]), and we decline to review it in the interest of justice. Alternatively, we reject it on the merits.

Based on the 911 call, the police had reasonable suspicion to stop and frisk defendant (see CPL 140.50 [3]; *People v Bannon*, 16 NY3d 596, 601-602 [2011]). The caller’s tip was “not anonymous, but rather had identifying characteristics that rendered it reliable, including a partial name and callback number” (*People v Hall*, 23 AD3d 151, 151 [1st Dept 2005], *lv denied* 6 NY3d 754 [2005]). The caller “provided a detailed and generally accurate description of defendant . . . as well as [his] location” and accurately described the Tennessee license plates on defendant’s car (*People v Rivera*, 84 AD3d 636, 636 [1st Dept 2011], *lv denied* 17 NY3d 904 [2011]). The recovering officer’s contemporaneous observations of defendant and his car corroborated the caller’s information and enhanced the caller’s veracity (see *People v Leighton R.*, — NY3d —, 2025 NY Slip Op 06534, *4 [2025]). Concur—Renwick, P.J., Friedman, Gesmer, Pitt-Burke, Hagler, JJ.

11 The People of the State of New York, Respondent, v Odalis Imbert, Appellant. [252 NYS3d 566]—Appeals having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Diane Kiesel, J.), rendered March 28, 2023, said appeals having been argued by counsel for the respective parties, due deliberation having

been had thereon, and finding the sentence not excessive, it is unanimously ordered that the judgment so appealed from be and the same is hereby affirmed. Concur—Renwick, P.J., Friedman, Gesmer, Pitt-Burke, Hagler, JJ.

12 The People of the State of New York, Respondent, v Victor Jimenez Cespedes, Appellant. [252 NYS3d 562]—

Crimes—Verdict—Sufficiency of Evidence—Sale of Controlled Substance

Judgment, Supreme Court, New York County (Daniel P. Conviser, J.), rendered December 19, 2024, convicting defendant, after a jury trial, of criminal sale of a controlled substance in the first degree, and sentencing him to a term of eight years, unanimously affirmed.

The verdict was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]; *see also People v Baque*, 43 NY3d 26 [2024]). There is no basis upon which to disturb the jury's credibility determinations, which are entitled to deference (*People v Bleakley*, 69 NY2d 490, 495 [1987]). The evidence at trial established that defendant entered an undercover officer's car carrying a box that contained more than 6,000 fentanyl pills and acted as the courier for a negotiated drug transaction between that officer and a narcotics trafficker for a sum of \$25,000, permitting the inference that defendant "kn[ew] what he possesse[d]" (*People v Reisman*, 29 NY2d 278, 285 [1971], *cert denied* 405 US 1041 [1972]; *see People v Green*, 35 NY2d 437, 442-443 [1974]; Penal Law § 220.43 [1]). Defendant's testimony failed to rebut that inference (*see People v Acosta*, 174 AD2d 181, 184 [1st Dept 1992], *lv denied* 79 NY2d 1045 [1992]), and the jury reasonably rejected his claim that he was unaware of the contents of the box, particularly where his testimony conflicted with the video evidence, and he admitted that he would receive \$2,000 after the exchange was completed. Concur—Renwick, P.J., Friedman, Gesmer, Pitt-Burke, Hagler, JJ.

13 Whitney Seymour et al., Appellants, v Ara Hovnanian et al., Respondents. Ara Hovnanian et al., Third-Party Plaintiffs-Respondents, v Autun Contractors et al., Third-Party Defendants. [— NYS3d —]—

Disclosure—Scope of Disclosure—Additional Depositions and Document Discovery—Materiality to Claims
Contracts—Construction—License Agreement—Requirement to Pay for Repairs

Order, Supreme Court, New York County (Melissa A. Crane, J.), entered December 17, 2024, which granted defendants' mo-

tion for leave to amend the answer, unanimously affirmed, without costs. Order, same court and Justice, entered March 26, 2025, which denied plaintiffs' motion for discovery related to defendants' new counterclaim, unanimously affirmed, without costs. Order, same court and Justice, entered April 14, 2025, which denied plaintiffs' motion for partial summary judgment, unanimously affirmed, without costs.

This action arose from property damage and toxic dust infiltration into plaintiffs' townhome due to renovations conducted on defendants' townhome. The two townhomes share a party wall.

The motion court providently exercised its discretion in granting defendants leave to amend their answer to include a counterclaim for a setoff (*see* CPLR 3025 [b], [c]; *Loomis v Civetta Corinno Constr. Corp.*, 54 NY2d 18, 23 [1981]). Defendants' proposed counterclaim seeking recoupment of potential increased costs to be paid due to plaintiffs' alleged delays was not palpably insufficient or devoid of merit (*see Trataros Constr., Inc. v New York City Hous. Auth.*, 34 AD3d 451, 452-453 [2d Dept 2006]).

The motion court properly exercised its discretion in denying plaintiffs' motion to compel additional depositions and document discovery from defendants (*see Those Certain Underwriters at Lloyds, London v Occidental Gems, Inc.*, 41 AD3d 362, 364 [1st Dept 2007], *affd* 11 NY3d 843 [2008]). The setoff counterclaim seeks to establish the reasons for plaintiffs' delays in complying with a 2020 order, and for the increase in their estimated remediation and repair costs for the work specified in the 2020 order from approximately \$514,000 to over \$9 million in the ensuing four-year period. Any alleged delays by defendants would not be material to defendants' setoff claims predicated on plaintiffs' delays and alleged failure to mitigate costs.

Plaintiffs' motion for partial summary judgment was correctly denied. Plaintiffs read terms into the parties' license agreement that are not there (*see NFL Enters. LLC v Comcast Cable Communications, LLC*, 51 AD3d 52, 59 [1st Dept 2008]). The terms of the license agreement, which permitted defendants' contractors to access plaintiffs' townhome on specified conditions did not require that defendants promptly pay for first class repairs to all damaged soft contents regardless of their actual value prior to the construction work. The agreement also did not require defendants to pay simply upon plaintiffs' submission of a bill for such costs, nor did it define the term "first class." On this record, factual issues exist as to

plaintiffs' entitlement to costs to remediate any dust contamination from its selected soft content possessions. Concur—Renwick, P.J., Friedman, Gesmer, Pitt-Burke, Hagler, JJ.

14 Kalomo J. Smith, Respondent, v Consolidated Edison Company of New York, Inc., Appellant-Respondent, and Verizon New York, Inc., Respondent-Appellant. [— NYS3d —]—

Negligence—Maintenance of Premises—Actual Notice—Sufficient Time to Take Corrective Action

Negligence—Maintenance of Premises—Responsibility for Maintenance—Joint Use Agreement

Order, Supreme Court, Bronx County (Paul L. Alpert, J.), entered on or about March 4, 2025, which denied the separate motions of defendants Consolidated Edison Company of New York, Inc. and Verizon New York, Inc. for summary judgment dismissing the complaint and Verizon's motion for summary judgment dismissing the cross-claims for indemnification and contribution as against it, unanimously affirmed, without costs.

Plaintiff was injured while driving his motorcycle when he encountered low-hanging wires from a utility pole, that then wrapped around his neck and dragged him until he collided with a parked car. Con Ed owns the joint use utility pole, as well as some of the wires attached to it, and Verizon also owns some of the wires attached to the utility pole. Both defendants moved for summary judgment dismissing the complaint, contending that they owed no duty to plaintiff because neither defendant owned the low-hanging wires that caused the accident. Supreme Court properly found otherwise.

As to Con Ed, it owns the joint utility pole and pursuant to the Joint Use Agreement, it is responsible for maintaining the pole in a safe condition (*see Balsam v Delma Eng'g Corp.*, 139 AD2d 292, 296-297 [1st Dept 1988], *lv dismissed in part, denied in part* 73 NY2d 783 [1988]). Although Con Ed's evidence suggests that the low-hanging wires were not a part of its electrical system, it was obligated under the Joint Use Agreement to maintain the pole to which the wires were attached.

Moreover, Con Ed had actual notice of the low-hanging wires from a customer complaint that was called in the morning of the accident (*see Del Marte v Leka Realty LLC*, 156 AD3d 453, 453 [1st Dept 2017]; *Atashi v Fred-Doug 117 LLC*, 87 AD3d 455, 456 [1st Dept 2011]). Con Ed submitted no evidence showing it lacked sufficient time to take corrective action, as it offered no evidence of any interim response, mitigation, or procedure followed after receipt of the complaint. Its own proof reflects that the site was not inspected until 5:55 p.m., at least six hours after the accident.

As to Verizon, under the Joint Use Agreement it was responsible for maintaining its attachments—or wires—to the utility pole. Verizon’s argument that another cable company owned the low-hanging wires at issue was speculative and was thus insufficient to establish, as a matter of law, that Verizon owed no duty to plaintiff. Verizon’s argument that it had transferred all its hardware off the utility pole prior to the accident is unpreserved, and, in any event, unsupported by the record (*see U.S. Bank N.A. v DLJ Mtge. Capital, Inc.*, 146 AD3d 603, 603-604 [1st Dept 2017]). Nor was Verizon able to establish *prima facie* that it lacked constructive notice of the dangerous condition because it failed to show that its inspection and maintenance practices were reasonable or that such practices were even followed (*see White v MP 40 Realty Mgt. LLC*, 187 AD3d 561, 562 [1st Dept 2020]).

Lastly, the court properly denied Verizon’s motion for summary judgment dismissing the cross-claims against it as there are issues of fact as to, *inter alia*, who owned the low-hanging wires.

We have considered defendants’ remaining arguments and find them unavailing. Concur—Renwick, P.J., Friedman, Pitt-Burke, Hagler, JJ.

15 Paul Tartell et al., Appellants, v Morton Klein et al., Respondents. [— NYS3d —]

Corporations—Business Judgment Doctrine—Independence of Board Members—Majority Declining to Take Action against Interested Board Members

Order, Supreme Court, New York County (Arthur F. Engoron, J.), entered on or about November 20, 2024, which, to the extent appealed from as limited by the briefs, denied plaintiffs’ motion to disqualify defense counsel, unanimously affirmed, without costs. Order, same court and Justice, entered May 5, 2025, which granted defendants’ motion to dismiss the complaint, unanimously affirmed, without costs.

The court properly granted defendants’ motion to dismiss based on the business judgment rule, which “bars judicial inquiry into actions of corporate directors taken in good faith and in the exercise of honest judgment in the lawful and legitimate furtherance of corporate purposes” (*Auerbach v Bennett*, 47 NY2d 619, 629 [1979]; *see Consumers Union of U.S., Inc. v State of New York*, 5 NY3d 327, 360 [2005]). While plaintiffs assert that defendant Morton Klein acted improperly in his role as national president of Zionist Organization of America (ZOA) and that four members of the board permitted his improper conduct and protected him from oversight, the

complaint contains insufficient allegations from which to question the independence of the majority of the remaining board members. On August 8, 2024, after this action was commenced but before plaintiffs filed their complaint, the board convened a committee to investigate plaintiffs' July 17, 2024 demand that the board investigate alleged misconduct. Subsequently, a majority of the board reelected Klein to his position, thus reaffirming the organization's support for him (*see Sanford v Colgate Univ.*, 36 AD3d 1060, 1061-1062 [3d Dept 2007] [the business judgment rule applies where an independent majority of the board declines to take action against the allegedly interested board members]).

Because the complaint is dismissed under the business judgment rule, it is unnecessary to reach defendants' arguments regarding plaintiffs' standing and the sufficiency of the pleadings.

The court providently exercised its discretion in denying plaintiffs' motion to disqualify counsel (*see O'Donnell, Fox & Gartner v R-2000 Corp.*, 198 AD2d 154, 155 [1st Dept 1993]). The record on plaintiffs' motion was insufficient to establish a conflict of interest between the board member defendants and nominal defendant ZOA (*see Stilwell Value Partners IV, L.P. v Cavanaugh*, 123 AD3d 641, 641-642 [1st Dept 2014]). Moreover, ZOA's executive director, who is not a named defendant, provided a written waiver of any potential conflict arising from joint representation (*see Ferolito v Vultaggio*, 99 AD3d 19, 28 [1st Dept 2012]).

We have considered plaintiffs' remaining arguments and find them unavailing. Concur—Renwick, P.J., Friedman, Gesmer, Pitt-Burke, Hagler, JJ.

16 Miguel Torres, Respondent, v Lenscrafters, Inc., Defendant, 390 West Broadway, Inc., Respondent, and Board of Managers of 388 West Broadway Condominium et al., Appellants. [253 NYS3d 138]—

Negligence—Sidewalks—Abutting Property Owner—Creation of Tripping Hazard

Order, Supreme Court, New York County (Gerald Lebovits, J.), entered August 11, 2022, which, to the extent appealed from as limited by the briefs, denied defendant Board of Managers of 388 West Broadway Condominium (388 West)'s motion for summary judgment dismissing the complaint against it, unanimously affirmed, without costs.

The motion court properly found that 388 West failed to establish its *prima facie* burden of showing that it bore no li-

ability for plaintiff's fall over a tripping hazard between the sidewalk abutting 388 West's property and the sidewalk abutting a neighboring property (see Administrative Code of City of NY § 7-210; *Sangaray v West Riv. Assoc., LLC*, 26 NY3d 793, 799-800 [2016]; *Delgado v 5008 Broadway Assoc., LLC*, 149 AD3d 583, 583-584 [1st Dept 2017]). The record establishes that 388 West or the prior owner of its property replaced the sidewalk in front of its building in 2002. In order to address a height difference of potentially three inches between 388 West's sidewalk and its neighbor's sidewalk, a slope or ramp was created which encroached onto the neighbor's sidewalk. While 388 West submitted evidence establishing that plaintiff fell on a portion of the ramp located on its neighbor's property, it failed to offer evidence that eliminated the possibility that it did not comply with its duties to maintain the sidewalk abutting its property in a reasonably safe condition and that 388 West was a proximate cause of plaintiff's injuries by leaving a tripping hazard between the sidewalk abutting 388 West's property and the sidewalk abutting the neighboring property (see *Delgado*, 149 AD3d at 583-584; *Jennings v City of New York*, 243 AD3d 411, 412 [1st Dept 2025]).

We have considered 388 West's remaining arguments and find them unavailing. Concur—Renwick, P.J., Friedman, Gesmer, Pitt-Burke, Hagler, JJ.

17 In the Matter of Pascal W., Respondent, v Carlos M.-J., Appellant. [252 NYS3d 563]—

Parent, Child and Family—Family Offense Proceeding—Harassment—Credibility Determination

Order, Family Court, New York County (Jacob K. Maeroff, Ref.), entered on or about April 8, 2025, which, after a fact-finding hearing, determined that respondent committed a family offense act that would constitute harassment in the second degree, suspended judgment for six months, and issued an order of protection to be in effect during the six-month period, unanimously affirmed, without costs.

The expiration of the order of protection by its own terms did not render this appeal moot, as the order finding that respondent committed a family offense can “prompt severely deleterious future legal rulings against” him (*Matter of Veronica P. v Radcliff A.*, 24 NY3d 668, 671-672 [2015]).

Nevertheless, a fair preponderance of the evidence supports the finding that respondent committed a family offense by performing an act that constitutes second-degree harassment by intentionally bumping into petitioner for no legitimate

purpose (Family Ct Act § 812; Penal Law § 240.26 [1]; *see Matter of Edward B. v Elizabeth T.*, 156 AD3d 423, 424 [1st Dept 2017]). Petitioner’s witness testified that as the parties passed each other on the sidewalk, respondent moved towards petitioner, bumped into him, and “kind of shove[d] him . . . to the left.” The court’s credibility determination that respondent was less credible than petitioner and the witness is entitled to great deference and there is no basis to disturb it (*see Matter of R.H. v M.C.H.*, 239 AD3d 577, 578 [1st Dept 2025]).

Family Court providently exercised its discretion in issuing a six-month order of protection upon finding that respondent committed a family offense (Family Ct Act § 842 [a]; *see Matter of Miriam M. v Warren M.*, 51 AD3d 581, 582 [1st Dept 2008]).

We have considered respondent’s remaining contentions and find them unavailing. Concur—Renwick, P.J., Friedman, Gesmer, Pitt-Burke, Hagler, JJ.

18 Wilmington Savings Fund Society, Appellant, v Adefunke Obatusin, Respondent, et al., Defendants. [252 NYS3d 566]—

Mortgages—Foreclosure—Referee’s Report—Affidavit and Calculations by Loan Servicer

Order, Supreme Court, Bronx County (Naita A. Semaj, J.), entered June 18, 2025, which denied plaintiff’s motion to confirm a Referee’s report and for a judgment of foreclosure and sale, unanimously reversed, on the law, without costs, the motion granted, the Referee’s report confirmed, and the Clerk directed to enter a judgment of foreclosure and sale in favor of plaintiff.

Contrary to Supreme Court’s determination, the Referee’s report was substantially supported by the affidavit of corporate counsel for plaintiff’s loan services, which detailed defendant borrower’s complete loan payment history, establishing the borrower’s default in payment on October 1, 2008, as well as the unpaid principal balance (*see Bank of Am., N.A. v Brannon*, 156 AD3d 1, 10 [1st Dept 2017]; *Bank of N.Y. Mellon v Gordon*, 171 AD3d 197, 209 [2d Dept 2019] [records received from other entities “may be admitted into evidence if the recipient can establish personal knowledge of the maker’s business practices and procedures, or establish that the records provided by the maker were incorporated into the recipient’s own records and routinely relied upon by the recipient in its own business”]). Moreover, the loan servicer’s uncontested calculations of the total amount owed, which included the unpaid principal balance, together with accrued interest, calculated using the subject note’s fixed interest rate, for a specified number of days,

was supported by the submitted records (*see U.S. Bank, N.A. v Ifemesia*, 239 AD3d 1022, 1024 [2d Dept 2025]; *see also AC 31, LLC v Fawer*, 232 AD3d 454, 454-455 [1st Dept 2024]). Concur—Renwick, P.J., Friedman, Gesmer, Pitt-Burke, Hagler, JJ.

(April 23, 2026)

1 AmBase Corporation et al., Appellants, v 111 West 57th Sponsor LLC et al., Respondents, et al., Defendants. [253 NYS3d 159]—

Indemnity—Contractual Indemnification—Joint Venture Agreement—First-Party Claims

Order, Supreme Court, New York County (Joel M. Cohen, J.), entered on or about September 10, 2025, which, to the extent appealed from as limited by the briefs, denied plaintiffs’ motion for summary judgment on the seventh cause of action for indemnification and declaratory relief as against defendants Kevin Maloney and Michael Stern, and granted defendants-respondents’ motion for summary judgment dismissing that cause of action as against Maloney and Stern and declaring that Maloney and Stern are not required to indemnify plaintiffs for first-party claims under section 8.7 (b) of the joint venture agreement (JVA) and the limited joinders, unanimously modified, on the law, to vacate so much of the declaration and deny defendants’ motion as to paragraph (i) of the limited joinders, and otherwise affirmed, without costs.

Supreme Court correctly denied plaintiffs’ motion and granted defendants’ motion insofar as paragraph (ii) of the limited joinders is concerned. Since indemnity provisions covering first-party claims are not “the norm in Delaware,” in order for an indemnity provision to apply to first-party claims, “that intent must be via a clear and unequivocal articulation” (*Fortis Advisors LLC v Boston Dynamics Inc.*, 2025 WL 1356521, *5, 2025 Del Super LEXIS 243, *12 [May 9, 2025, C.A. No. N23C-07-011 PRW CCLD] [internal quotation marks omitted]).

In paragraph (ii) of the limited joinders, Maloney and Stern agreed “to indemnify . . . Investor [i.e., plaintiff 111 West 57th Investment LLC] [and] Investor’s Affiliated Persons . . . in accordance with Section 8.7 (b)” of the JVA (underlining omitted), which is relatively broad. Usually, “the broader the indemnity provision’s language is, the less likely it will be read to cover first-party claims” (*Fortis*, 2025 WL 1356521, *6, 2025 Del Super LEXIS 243, *13). In addition, section 8.7 (b) of the JVA,

which paragraph (ii) of the joinders reference, requires written notice in the case of a material breach. A requirement of written notice for indemnification indicates that the indemnification obligation applies to third- rather than first-party claims (see e.g. *Menzies v Seyfarth Shaw LLP*, 2024 WL 2804813, *4, 2024 US Dist LEXIS 96992, *10 [D Del, May 30, 2024, No. 21-cv-249]).

However, the parties' respective interpretations of paragraph (i) of the joinders, i.e., plaintiffs' interpretation that it applies to first-party claims and defendants' interpretation that it applies only to third-party claims, are both reasonable. Thus, paragraph (i) of the joinders is ambiguous (see e.g. *Osborn ex rel. Osborn v Kemp*, 991 A2d 1153, 1160 [Del 2010]).

In contrast to paragraph (ii) of the joinders, paragraph (i) provides that Maloney and Stern agreed "to indemnify . . . Investor [and] Investor's Affiliated Persons . . . from and against any loss . . . incurred by such Persons by reason of Cause attributed to Sponsor [i.e., defendant 111 West 57th Sponsor LLC] as Manager." One of the definitions of "Cause" is when a "Manager or any of its Affiliates has materially breached its obligations under [the JVA], or materially breached its obligations under any other agreement with the Company or a Subsidiary, and such breach has caused material damage to . . . Investor." Given this language, it is difficult to see how this would apply to a third-party claim, as opposed to a first-party claim (see *Menzies*, 2024 WL 2804813, *4, 2024 US Dist LEXIS 96992, *9; *Schneider Natl. Carriers, Inc. v Kuntz*, 2022 WL 1222738, *30, 2022 Del Super LEXIS 165, *87 [Apr. 25, 2022, C.A. No. N21C-10-157-PAF]). "[T]here is no definitive language that must be used" (*Schneider*, 2022 WL 1222738, *30, 2022 Del Super LEXIS 165, *86 [internal quotation marks omitted]). The indemnity clause need not "expressly state that it covers first-party claims" (2022 WL 1222738, *31, 2022 Del Super LEXIS 165, *90).

The fact that the JVA already contains a fee-shifting provision (section 12.11) cuts against making Maloney and Stern's indemnification obligation apply to first-party claims (see *Menzies*, 2024 WL 2804813, *4, 2024 US Dist LEXIS 96992, *10; *Schneider*, 2022 WL 1222738, *31, 2022 Del Super LEXIS 165, *88-89).

Based on the foregoing, neither side is entitled to summary judgment on the seventh cause of action as that claim pertains to paragraph (i) of the limited joinders. Concur—Manzanet-Daniels, J.P., Kennedy, González, Pitt-Burke, Rosado, JJ.

2 Griffin Anderson et al., Respondents, v Joseph Lubin et al., Appellants. [253 NYS3d 164]—

Disclosure—Examination before Trial—Deposition before Responsive Pleading Due—Motion for Leave

Disclosure—Examination before Trial—Deviation from Priority—Special Circumstances

Disclosure—Examination before Trial—Commercial Division—Presumptive Limitation on Depositions

Order, Supreme Court, New York County (Nancy M. Bannon, J.), entered July 15, 2025, which, to the extent appealed as limited by the briefs, denied defendants' motion to vacate the court's June 17, 2025 compliance conference order, unanimously modified, on the law, to grant the motion to the extent of preserving defendants' party deposition priority under CPLR 3106 (a) with respect to depositions noticed before defendants' time to answer has elapsed, and to permit defendants to depose each plaintiff in this action, and otherwise affirmed, without costs.

Supreme Court should have granted defendants' motion to vacate the compliance conference order so as to preserve their priority in taking party depositions. Where a plaintiff seeks to depose a defendant before a responsive pleading is due, CPLR 3106 (a) requires that "[l]eave of the court, granted on motion, shall be obtained if notice of the taking of the deposition of a party is served by the plaintiff before that party's time for serving a responsive pleading has expired." Where, as here, defendants have filed a pre-answer motion to dismiss, extending their time to answer under CPLR 3211 (f), the extension also applies to the period in CPLR 3106 (a) (*see Peralta v John Tara, Inc.*, 30 AD3d 256, 256 [1st Dept 2006]; Patrick M. Connors, *Prac Commentaries*, McKinney's Cons Laws of NY, CPLR C3106:2). Accordingly, in order to obtain a priority for party depositions, plaintiffs were required to move for leave, which they did not do (CPLR 3106 [a]). In addition, the record does not contain any evidence that plaintiffs served a party deposition notice before defendants moved to preserve their priority.

Additionally, in order to deviate from the usual priority, plaintiffs were required to show that "special circumstances warrant the plaintiff's examining first," in which case, "the court has ample authority to vary priorities" (*Halitzer v Ginsberg*, 80 AD2d 771, 772 [1st Dept 1981] [ellipsis omitted]). To establish special circumstances, plaintiffs must show that there is a fiduciary duty between the parties and circumstances "in which the pertinent facts are wholly within the knowledge of the defendant" (*NOPA Realty Corp. v Central Caterers*, 91 AD2d 991, 992 [2d Dept 1983]).

Here, however, Supreme Court could not have adequately evaluated the extent to which any special circumstances might

exist because plaintiffs failed to oppose the motion. Therefore, although nonparty depositions are not subject to priority and may proceed under the court's deadlines, together with document discovery, defendants' party deposition priority remains intact to the extent provided under CPLR 3106 (a).

Supreme Court also should not have limited defendants' party depositions to 10 of the 27 plaintiffs. Where each plaintiff sues in his individual capacity, "[d]efendant is entitled, if it deems it necessary, to examine each plaintiff with respect to matters that are relevant and material" (*Histon v Hearn Dept. Stores*, 8 AD2d 801, 802 [1st Dept 1959]). Although rule 11-d (a) (1) of the Commercial Division of the Supreme Court (22 NYCRR 202.70) presumptively limits each side to 10 depositions, rule 11 (f) provides that "the court should consider the appropriateness of altering prospectively the presumptive limitations on depositions set forth in Rule 11-d." Accordingly, Supreme Court should have modified the compliance conference order to permit defendants to depose each individual plaintiff to ascertain the substance of each plaintiff's claims. Concur—Scarpulla, J.P., Friedman, Gesmer, Shulman, Chan, JJ.

3 In the Matter of V.B., a Child Alleged to be Abused and/or Neglected. Marcia C., Appellant; Administration for Children's Services, Respondent, et al., Respondent. [253 NYS3d 150]—

Parent, Child and Family—Abused or Neglected Child—Excessive Corporal Punishment and Sexual Abuse—Failure to Take Steps to Protect Child

Order, Family Court, Bronx County (E. Grace Park, J.), entered on or about March 27, 2025, which, to the extent appealed from as limited by the briefs, determined that respondent mother abused and neglected the subject child, unanimously modified, on the law, to the extent of vacating the finding of abuse against her, and otherwise affirmed, without costs.

The finding of neglect was supported by a preponderance of the evidence that the father of the subject child, who resided with the mother and the child, inflicted excessive corporal punishment on the child and subjected the child to sexual abuse, and that the mother knew or should have known but failed to take any steps to protect the child (*see Matter of Jonathan M. [Gilda L.]*, 139 AD3d 438, 438 [1st Dept 2016]; *see also Matter of M.R. [Manuel R.]*, 233 AD3d 454, 455 [1st Dept 2024]; *Matter of Angelica A. [Amalia R.]*, 200 AD3d 443, 444 [1st Dept 2021]). There is no basis for disturbing the court's determination that the child's testimony recounting the abuse

by her father was credible (*see Matter of Angelica A.*, 200 AD3d at 444). The mother’s vague speculation that the child made up the allegations so that the child could be placed in foster care in the child’s friend’s home was not supported by the record.

The court also providently exercised its discretion in conforming the pleadings to the proof in finding that the mother’s act of threatening the child with a knife after the child was released to her custody was sufficient in itself for a finding of neglect. While the incident occurred after the filing of the petition, the mother was on notice about it as it was the basis for the child’s removal and remand to ACS custody, and the mother was not prejudiced in any way because she “was afforded a sufficient opportunity to defend against the allegations” (*Matter of Jada W. [Ketanya B.]*, 104 AD3d 861, 861 [2d Dept 2013], *lv denied* 21 NY3d 862 [2013]; *see Matter of Pandora S.D. [Isabelle D.]*, 231 AD3d 575, 575-576 [1st Dept 2024], *lv denied* 43 NY3d 901 [2025]).

As argued by the mother and the attorney for the child, a finding of abuse against the mother was not supported by the evidence. Concur—Webber, J.P., González, Mendez, O’Neill Levy, Hagler, JJ.

4 Azfal Bacchus, Respondent, v 676 East 179 LLC et al., Appellants. 676 East 179 LLC et al., Third-Party Plaintiffs-Appellants, et al., Third-Party Defendant. [253 NYS3d 143]—

Labor—Safe Place to Work—Industrial Code Violations—Injury from Grinder Lacking Safeguard

Order, Supreme Court, Bronx County (Myrna Socorro, J.), entered on or about May 19, 2025, which, to the extent appealed from as limited by the briefs, granted plaintiff’s motion for partial summary judgment on the Labor Law § 241 (6) claim insofar as predicated on Industrial Code (12 NYCRR) §§ 23-1.5 (c) (1) and (3) and 23-9.2 (a) as against defendant 676 East 179 LLC (East 179), and denied East 179’s motion for summary judgment dismissing the same portions of that claim, unanimously modified, on the law, to deny plaintiff’s motion insofar as predicated on Industrial Code § 23-1.5 (c) (1), grant East 179’s motion as to that portion of the claim, and otherwise affirmed, without costs.

Supreme Court properly granted plaintiff partial summary judgment on the Labor Law § 241 (6) claim insofar as predicated on Industrial Code §§ 23-1.5 (c) (3) and 23-9.2 (a). It is undisputed that plaintiff was using a grinder that noticeably lacked a safeguard when it suddenly kicked back and injured him. Plaintiff submitted evidence supporting the inference that

his employer had notice of the grinder's visibly missing safeguard (*see Viruet v Purvis Holdings LLC*, 198 AD3d 587, 588 [1st Dept 2021]), thereby satisfying the notice element of both Industrial Code provisions (*see Nicholson v Sabey Data Ctr. Props., LLC*, 205 AD3d 620, 621 [1st Dept 2022]; *see also Cabral v Rockefeller Univ.*, 222 AD3d 474, 475 [1st Dept 2023]; *Becerra v Promenade Apts. Inc.*, 126 AD3d 557, 558-559 [1st Dept 2015]). The record demonstrates that plaintiff's supervisor and owner of third-party defendant, Rudy Peters, was present and supervising plaintiff's work which required the use of the unguarded grinder to cut parts of the commercial boiler. Plaintiff testified that the unguarded grinder was the only tool available capable of performing this task.

East 179, as the undisputed owner of the premises, was not entitled to dismissal by showing that it lacked notice of the missing safeguard. Rather, plaintiff's evidence established that his employer, a party within the construction chain, was negligent in permitting plaintiff to use the unguarded grinder in violation of the relevant Industrial Code provisions, thus establishing liability under Labor Law § 241 (6) (*see Rizzuto v L.A. Wenger Contr. Co.*, 91 NY2d 343, 351 [1998]).

The court should have dismissed the Labor Law § 241 (6) claim insofar as predicated on Industrial Code § 23-1.5 (c) (1). This provision is not sufficiently specific to serve as a predicate for Labor Law § 241 (6) liability (*see Gasques v State of New York*, 15 NY3d 869, 870 [2010]). Although East 179 raises this argument for the first time on appeal, we may consider it because it presents a purely legal question that is determinative without raising new facts (*see Bank of N.Y. Mellon v Arthur*, 125 AD3d 492, 492 [1st Dept 2015]). Concur—Manzanet-Daniels, J.P., Kennedy, González, Pitt-Burke, Rosado, JJ.

5 Bank of America, Respondent, v Nicholas J. Sands, Also Known as Nicholas Sands, Appellant, et al., Defendants. [252 NYS3d 567]—

Mortgages—Foreclosure—Confirmation of Referee's Report—Computations Based on Business Records

Mortgages—Foreclosure—Service of 90-Day Notice—Home Loan

Appeal from order, Supreme Court, New York County (Francis A. Kahn, III, J.), entered or about January 14, 2025, which granted plaintiff's motion for a judgment of foreclosure and sale and to confirm the Referee's report as to the amount due on the mortgage, deemed appeal from the judgment, same court and Justice, entered April 23, 2025, awarding judgment to plaintiff, and, so considered, the judgment unanimously affirmed, with costs.

Supreme Court properly confirmed the Referee's report, as the findings are substantially supported by the record (*see HSBC Bank USA, N.A. v Wu*, 242 AD3d 599, 601 [1st Dept 2025]; CPLR 4403). Plaintiff's affiant proffered the business records on which the calculations were based, all the documents annexed to the Referee's report were previously filed electronically with Supreme Court, and plaintiff's attorney affirmation in support of the motion referenced the docket numbers of those documents (CPLR 2214 [c]; *see Matter of Dubuche v New York City Tr. Auth.*, 230 AD3d 1026, 1027 [1st Dept 2024]). Plaintiff's affiant established these documents as business records on which the calculations were based (CPLR 4518 [a]). Defendant "identifies no evidentiary objections to the statements therein" and fails to identify any "unproduced business records," as his payment history after the default is specifically included (*U.S. Bank N.A. v Tiburcio*, 242 AD3d 591, 592 [1st Dept 2025]). Indeed, defendant was given the opportunity to submit evidence to the Referee showing any additional payments made or challenging the computations generally, but he failed to do so (*see id.*).

The failure to notice a hearing under CPLR 4313 is immaterial. Defendant was not prejudiced because he "opposed plaintiff's motion to confirm the report and had an opportunity to contest the report" (*id.*, citing *Aurora Loan Servs., LLC v Taylor*, 114 AD3d 627, 630 [2d Dept 2014], *affd* 25 NY3d 355 [2015]; *see also Wells Fargo Bank N.A. v Javier*, 153 AD3d 1199, 1200 [1st Dept 2017]).

We decline to review defendant's challenge to proper service of the 90-day notice under RPAPL 1304, as he abandoned his appeal of the order which granted summary judgment to plaintiff after finding compliance therewith, and he failed to raise the issue in opposition to the motion for a judgment of foreclosure and sale (*see Bray v Cox*, 38 NY2d 350, 353 [1976]; *Fellner v Aeropostale, Inc.*, 150 AD3d 598, 599 [1st Dept 2017]; *see also* Rules of App Div, All Depts [22 NYCRR] § 1250.10 [a]; *cf. Mongeau v SR Taxi Corp.*, 235 AD3d 500, 500-501 [1st Dept 2025]).

On the merits, defendant's argument is unavailing. The loan documents demonstrate that the loan in question was not a "home loan" under the statutory definition (RPAPL 1304 [6] [a] [1] [iii]). Defendant admittedly did not live in this condominium unit at the time he signed the original mortgage agreement, the 1-4 Family Rider in the original agreement deleted the occupancy-by-borrower requirement (*see Wall St. Mtge. Bankers, Ltd. v Berquin*, 213 AD3d 972, 975 [2d Dept 2023]),

and the modified mortgage agreement included a second home rider precluding occupancy as a primary residence (*see U.S. Bank N.A. v Simmons*, 230 AD3d 621, 622 [2d Dept 2024]; *JP Morgan Chase Bank, N.A. v Venture*, 148 AD3d 1269, 1271 [3d Dept 2017]).

We have considered defendant's remaining arguments and find them unavailing. Concur—Manzanet-Daniels, J.P., Kennedy, González, Pitt-Burke, Rosado, JJ.

6 In the Matter of Bridge and Tunnel Officers Benevolent Association, Inc., Appellant, v Triborough Bridge and Tunnel Authority, Respondent. [252 NYS3d 573]—

Arbitration—Confirming or Vacating Award—Public Sector Arbitrations—Timeliness of Application to Vacate or Modify Award

Judgment (denominated an order), Supreme Court, New York County (Lyle E. Frank, J.), entered December 11, 2024, which, to the extent appealed from, denied in part the petition to confirm the 2023 arbitration award, and modified the December 11, 2023 supplemental interim opinion and arbitration award to strike the cease-and-desist order, unanimously reversed, on the law, without costs, the modification vacated, the petition to confirm granted in its entirety, and the award confirmed. The Clerk is directed to enter judgment accordingly.

The court should have confirmed the entirety of the arbitration award. CPLR 7510-a (a) concerns public sector employee arbitrations and requires that “[t]he court shall confirm an award in a public sector arbitration proceeding upon application of a party made within one year after its delivery to the party, unless an application to vacate or modify the award . . . is made within ninety days after the delivery of the award to the party seeking to modify or vacate” (CPLR 7510-a [a]). Because respondent did not seek to vacate or modify the award within the statutorily prescribed 90 days, the award should have been confirmed (*see id.*). Petitioner preserved this claim by explicitly addressing the 90-day limitations period in the petition.

The fact that petitioner is not itself an employee of respondent, but rather a representative of respondent's public sector employees, does not change the application of CPLR 7510-a. The legislative history for CPLR 7510-a (a) does not set forth any rationale for excluding unions from the definition of employees (Assembly Mem in Support, Bill Jacket, L 2023, ch 679). Concur—Scarpulla, J.P., Friedman, Gesmer, Shulman, Chan, JJ.

7 Janice Campbell, Appellant, v New York City Health and Hospitals Corporation, Respondent. [252 NYS3d 568]—

Hospitals—Malpractice—Laceration of Bladder during Pelvic Surgery

Order, Supreme Court, Bronx County (Alicia Gerez, J.), entered September 10, 2024, which granted defendant New York City Health and Hospitals Corporation's motion for summary judgment dismissing the complaint, unanimously reversed, on the law, without costs, and the complaint reinstated.

In this medical malpractice action, defendant's surgeons inadvertently lacerated plaintiff's bladder during pelvic surgery. In opposition to defendant's summary judgment motion, plaintiff submitted an expert affidavit in which the expert opined that the surgeons deviated from the standard of care by not performing a retrograde bladder fill prior to separating the uterus from the adhesions that connected it to the bladder. The expert further averred that this technique would have expanded the bladder and made its margins more visible during the dissection. This claim, supported by medical records documenting the presence of significant adhesions throughout plaintiff's pelvis, creates an issue of fact warranting a trial (*see Diaz v New York Downtown Hosp.*, 99 NY2d 542, 544 [2002]; *Cregan v Sachs*, 65 AD3d 101, 108-109 [1st Dept 2009]). Contrary to defendant's argument, that claim was encompassed by plaintiff's bill of particulars, which alleged improper surgical technique (*see DB v Montefiore Med. Ctr.*, 162 AD3d 478, 478-479 [1st Dept 2018]). Concur—Manzanet-Daniels, J.P., Kennedy, González, Pitt-Burke, Rosado, JJ.

8 Irene Clarke et al., Respondents, v Fifth Ave. Development Co., LLC, et al., Appellants. [253 NYS3d 138]—

Landlord and Tenant—Lease—Fraudulent Inducement**Landlord and Tenant—Constructive Eviction—Elevator Service Disruption**

Order, Supreme Court, New York County (Leslie A. Stroth, J.), entered October 3, 2025, which denied defendants' motion for summary judgment on their counterclaim for unpaid rent, unanimously modified, on the law, to grant defendants' motion to the extent of granting them summary judgment as to plaintiffs' liability to pay them for use and occupancy of the subject apartment for the period from October 2020 to March 2021, during which time plaintiffs lived in the apartment after the restoration of elevator service, and otherwise affirmed, without costs.

Defendants established prima facie entitlement to summary judgment on their counterclaim for unpaid rent by submitting proof of the lease, tendering possession of the apartment to plaintiffs, and plaintiffs' nonpayment of rent after taking possession. Nevertheless there are triable issues of fact as to

whether defendants fraudulently intended to induce plaintiffs to sign the lease (*see Clarke v Fifth Ave. Dev. Co., LLC*, 211 AD3d 460, 461 [1st Dept 2022]). On a prior appeal in this case we held that there are issues of fact with respect to, among other things, defendants' alleged intent to defraud plaintiffs into believing that the elevator would be available without disruption during the entire term of their tenancy (*see id.* at 461; *see also Lukowsky v Shalit*, 110 AD2d 563, 568 [1st Dept 1985]).

Further, we also decline to grant summary judgment on defendants' counterclaim for unpaid rent because there are issues of fact concerning whether plaintiffs were partially constructively evicted from the apartment or whether plaintiffs unreasonably rejected an offer of alternative accommodation during the elevator service disruption to the apartment (*see Clarke*, 211 AD3d at 461). Finally, there remain issues of fact as to whether plaintiffs ratified the lease when they moved back into the apartment in October 2020, once the elevator service had been restored, because plaintiffs commenced this action shortly thereafter. However, regardless of ratification, defendants are entitled to partial summary judgment as to plaintiffs' liability to pay them for use and occupancy of the apartment for the period from October 2020 to March 2021 during which plaintiffs lived in the apartment after the restoration of elevator service.

We have considered defendants' remaining arguments and find them unavailing. Concur—Scarpulla, J.P., Friedman, Gesmer, Shulman, Chan, JJ.

9 Maria Alexandra De La Rosa, Also Known as Maria A. De La Rosa, Respondent, v Isabella Geriatric Center, Inc., Doing Business as Isabella Center for Rehabilitation and Nursing Care, Appellant, et al., Defendants. [253 NYS3d 147]—

Health—Nursing Homes—Emergency or Disaster Treatment Protection Act—Death from COVID-19 Contracted in Facility

Order, Supreme Court, New York County (Richard G. Latin, J.), entered March 11, 2025, which denied the motion of defendant Isabella Geriatric Center, Inc., doing business as Isabella Center for Rehabilitation and Nursing Care pursuant to CPLR 3211 (a) (7) to dismiss the complaint, unanimously affirmed, without costs.

Plaintiff alleges that decedent Bartolina Morel resided at defendant's nursing home facility in Manhattan. On April 4, 2020, while in defendant's care, decedent contracted COVID-19 and was transferred to New York Presbyterian Hospital. She died

later that same day. Plaintiff alleges that defendant failed to protect its residents, including decedent, from the COVID-19 virus, which ultimately caused decedent's death.

Supreme Court properly denied defendant's motion to dismiss the complaint because defendant failed to establish as a matter of law that it was entitled to immunity from liability under the Emergency or Disaster Treatment Protection Act (EDTPA) (*see Holder v Jacob*, 231 AD3d 78, 87 [1st Dept 2024]). Defendant submitted, among other things, decedent's certified medical records from defendant's facility, defendant's COVID-19 protocols, and an affidavit from Norma Feliz, a therapeutic recreation specialist defendant employed during the pandemic.

Here, of the three conditions imposed by former Public Health Law § 3082 (1), the evidence conclusively established two of the conditions in that defendant was a "health care facility" providing "health care services" that relate to the "the diagnosis, prevention, or treatment of COVID-19" (*see* former Public Health Law § 3081 [3], [5]; 3082 [1] [a], [b]). Plaintiff's medical records and defendant's pandemic-related policies issued in March 2020 reflect that decedent was monitored for COVID-19 systems, subjected to those policies, and evaluated and treated for a suspected COVID-19 infection while residing at defendant's facility (*cf. Jackson v BronxCare Health Sys.*, 236 AD3d 594, 595 [1st Dept 2025]). Further, it is self-evident that decedent's care was impacted by defendant's response to the pandemic because she died from COVID-19 (*see Holder*, 231 AD3d at 82-83; *Madourie v Montefiore Med. Ctr.*, 246 AD3d 467, 468-469 [1st Dept 2026]).

Nevertheless, the court correctly denied the motion, as issues of fact exist concerning plaintiff's claim of gross negligence and the third condition imposed by former Public Health Law § 3082 (1)—namely, whether defendant provided decedent "health care services in good faith" (former Public Health Law § 3082 [1] [c]). In opposition to defendant's motion, plaintiff submitted a May 18, 2020 citation issued to defendant less than six weeks after decedent died, for failing to use facemasks and to follow cohorting requirements. The citation was issued following a survey and interviews. Thus, at this stage, while the record shows that defendant implemented specific policies to prevent and control the spread of COVID-19, there remain questions concerning whether defendant complied with those same policies. Concur—Manzanet-Daniels, J.P., Kennedy, González, Pitt-Burke, Rosado, JJ.

10 Deutsche Bank National Trust Company, Respondent, v Jacob Adekola, Appellant, et. al., Defendants. [252 NYS3d 569]—

Appeal from order and judgment, Supreme Court, Bronx County (Naita A. Semaj, J.), entered March 19, 2025, which, to the extent appealed from as limited by the briefs, granted plaintiff's motion for an order confirming a Referee's report and for a judgment of foreclosure and sale and denied defendant Olushola Adekola's cross-motion to dismiss the complaint, and bringing up for review an order, same court and Justice, entered on or about June 2, 2017, which granted plaintiff's motion for a default judgment and order of reference, unanimously dismissed, without costs, as defendant-appellant Jacob Adekola is not an aggrieved party with standing to appeal the order.

Appellant failed to appear in this action before he filed the notice of appeal, and therefore did not oppose either the motion for a default judgment and an order of reference or the motion for an order confirming the Referee's report and granting a final judgment of foreclosure and sale (CPLR 5511; *see Figiel v Met Food*, 48 AD3d 330, 330 [1st Dept 2008]). Accordingly, appellant is not aggrieved by Supreme Court's grant of plaintiff's motions, and may not appeal from the resulting order (CPLR 5511; *Leader v Parkside Group*, 159 AD3d 523, 523 [1st Dept 2018]).

In light of this determination, we need not consider appellant's arguments for affirmative relief. Concur—Scarpulla, J.P., Friedman, Gesmer, Shulman, Chan, JJ.

11 In the Matter of Angel S. DuBose, Appellant, v City of New York et al., Respondents. [253 NYS3d 139]—

Proceeding against Body or Officer—Mandamus—Department of Investigation Commissioner—Petition to Compel Investigation
Judges—Recusal—Unrelated Litigation

Judgment (denominated an order), Supreme Court, New York County (Paul A. Goetz, J.), entered May 27, 2025, which granted the cross-motion of respondents to dismiss the petition to compel respondent Department of Investigation (DOI) to investigate criminal activity allegedly perpetrated against petitioner while she was employed by the New York City Public Advocate's Office, and dismissed the proceeding brought pursuant to CPLR article 78, and bringing up for review the order, same court, Justice, and date, denying petitioner's motion for recusal of the assigned Justice, unanimously affirmed, without costs.

A writ of mandamus may be sought "to enforce the performance of a ministerial duty" but not "to compel an act in respect to which a public officer may exercise judgment or discretion" (*Alliance to End Chickens as Kaporos v New York City*

Police Dept., 32 NY3d 1091, 1093 [2018] [internal quotation marks and brackets omitted], *cert denied* 587 US 1027 [2019]). The DOI commissioner “is authorized and empowered to make any study or investigation which in his opinion may be in the best interests of the city” (NY City Charter § 803 [b]). Thus, “the decision not to conduct an investigation was a matter of discretion and the remedy of mandamus does not lie” (*Iocovello v City of New York*, 272 AD2d 201, 201 [1st Dept 2000], *lv dismissed* 95 NY2d 879 [2000]). Contrary to petitioner’s contention, the Mayor’s Executive Order on the Commissioner of Investigation, Inspectors General, and Standards of Public Service (NY City Executive Order [Koch] No. 16) does not direct investigations into criminal conduct of the nature alleged to have occurred here.

The decision not to investigate the matter was not arbitrary and capricious (CPLR 7803 [3]; *see Matter of Pell v Board of Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester County*, 34 NY2d 222, 231 [1974]). Instead, DOI rationally directed the Public Advocate’s Office to have petitioner report the alleged criminal conduct to the police.

Supreme Court providently denied petitioner’s recusal motion. The assigned Justice was not “a party” to and had not “been attorney or counsel” in this proceeding, and petitioner does not contend that the Justice had “an interest” in the proceeding or was related to the parties (Judiciary Law § 14). It is inconsequential that the Justice was represented by the Office of the Attorney General in unrelated litigation before this Court. In the absence of any statutorily mandated disqualification and any legitimate suggestions of bias or impartiality to which petitioner can point, the assigned Justice’s decision not to recuse was appropriate as “a matter of personal conscience” (*People v Smith*, 63 NY2d 41, 68 [1984], *cert denied* 469 US 1227 [1985]; *see also* 22 NYCRR 100.3 [E] [1]).

We have considered petitioner’s remaining contentions and find them unavailing. Concur—Scarpulla, J.P., Friedman, Gesmer, Shulman, Chan, JJ.

12 In the Matter of A.G., an Infant. J.W., Respondent, v K.T. et al., Appellants. [253 NYS3d 145]—

Guardian and Ward—Appointment of Guardian—Nonparent Guardianship of Child

Order, Family Court, Bronx County (Ashley B. Black, J.), entered on or about March 12, 2024, which, after a hearing,

granted petitioner's request to appoint her as the guardian of the subject child and dismissed the father's and mother's petitions for custody of the child, unanimously affirmed, without costs.

Family Court properly found that petitioner established extraordinary circumstances conferring standing to seek nonparent guardianship of the subject child (*see* Family Ct Act § 1055-b [a] [iv] [A]; *Matter of Bennett v Jeffreys*, 40 NY2d 543, 549 [1976]; *Matter of T.G.V.*, 242 AD3d 476, 476 [1st Dept 2025]; *Matter of Caleesta S. [Daphne M.]*, 200 AD3d 504, 505 [1st Dept 2021]). The child was placed with petitioner immediately after birth in August 2018 as a result of neglect proceedings against the mother, and since that time, the child has been in petitioner's exclusive care and custody, and petitioner has assumed full responsibility for the child's daily needs.

In contrast, the mother has only had supervised contact with the child, and even that contact has been sporadic (*see Matter of Caron C.G.G. [Alicia G.—Jasmine D.]*, 165 AD3d 476, 476 [1st Dept 2018]). The mother has also provided no financial support and made no effort to participate in or obtain information regarding the child's education or medical care, nor has she articulated a clear plan for the child's return to her care (*see Matter of Prince T.A.M.-F.*, 224 AD3d 509, 509 [1st Dept 2024]). While the mother maintained that she was prepared to care for the child full-time, she did not at the time of her testimony have permanent or stable housing to bring the child to live. Moreover, in the five years following the child's removal, the mother failed to fully engage in services or comply with the requirements of her service plan. Her continued inability to address the conditions that placed her children at risk resulted in her loss of guardianship of her older daughter and in the removal in 2022 of her younger daughter, who remains in foster care to this day. Although the mother testified that she completed substance abuse counseling and was participating in mental health services, she provided no proof or documentation to substantiate that testimony.

With respect to the father, although he testified that he wished to have custody of the child, he failed to take any steps to make the child's placement with him feasible and presented no evidence showing that he has planned for the child's return to his care. He continued to live in supportive housing that could not accommodate even daytime visits with the child, let alone allow the child to reside there. In addition, the father admitted that he did not know anything about the child's medical and educational needs, made little effort to become involved

in the child's education, visited sporadically, relied on the child to initiate telephonic contact with him, and failed to provide the child with financial support (*see Matter of Chloe F.C. [Laura A.M.—Steven J.C.]*, 231 AD3d 426, 426 [1st Dept 2024]).

Family Court's determination that it was in the best interests of the child to award guardianship to petitioner, who has cared for the child since infancy, is supported by a sound and substantial basis in the record (*see Eschbach v Eschbach*, 56 NY2d 167, 171 [1982]; *Matter of Milagros R. v Quazay S.-R.*, 202 AD3d 419, 419-420 [1st Dept 2022]). The evidence demonstrated that petitioner has provided a loving and stable home for the child and has ensured that all their needs are met. Petitioner and the child share a strong bond, and petitioner affirmatively stated that if granted guardianship, she would continue to assist in fostering a bond between the parents and the child (*see Matter of Nicolas Jude B. [Rosetta B.]*, 195 AD3d 402, 403 [1st Dept 2021], *lv denied* 37 NY3d 905 [2021]). Additionally, although the child's wishes are not determinative, they are entitled to great weight, and the child expressed a strong preference to remain with petitioner (*see Melissa C.D. v Rene I.D.*, 117 AD3d 407, 408 [1st Dept 2014]). There is no basis to disturb the findings of the Family Court, which had the opportunity to observe the witnesses and hear their testimony (*see Matter of Jason Jiyell J.*, 203 AD3d 460, 462 [1st Dept 2022]). Concur—Manzanet-Daniels, J.P., Kennedy, González, Pitt-Burke, Rosado, JJ.

13 Luis Gavilanes, Respondent, v 919 Ground Lease LLC et al., Appellants. (And a Third-Party Action.) [253 NYS3d 144]—

Labor—Safe Place to Work—Elevation-Related Hazard—Climbing on Cross-Pipes of Structure

Order, Supreme Court, New York County (Leticia M. Ramirez, J.), entered on or about April 3, 2025, which, to the extent appealed from as limited by the briefs, granted plaintiff's motion for summary judgment as to liability on his Labor Law § 240 (1) claim and denied defendants' cross-motion seeking dismissal of the Labor Law § 240 (1) claim, unanimously affirmed, without costs.

The proponent of translated evidence has the burden of demonstrating "that the translation was provided by a competent, objective interpreter whose translation was accurate" (*Nava-Juarez v Mosholu Fieldston Realty, LLC*, 167 AD3d 511, 512 [1st Dept 2018] [internal quotation marks omitted]). Generally, a certification that the translator is professionally qualified and is competent in both languages is sufficient (*see National*

Puerto Rican Day Parade, Inc. v Casa Publs., Inc., 79 AD3d 592, 594 [1st Dept 2010]). Here, the translator attestations state only that each translator was fluent in both Spanish and English, with no indication of any other credentials.

The record contains sufficient evidence to establish that defendants' negligence resulted in a violation of Labor Law § 240 (1), and was a proximate cause of plaintiff's accident and injury. Plaintiff testified that although he needed a mobile scaffold to perform his work at the subject worksite, he was instead directed by his foreman immediately before the accident occurred to cross over to the other side of the structure by climbing on the cross-pipes of the structure without a harness. Plaintiff also testified that the foreman had directed him to climb the structure on a prior occasion. Plaintiff testified that although he had a harness, he could not tie it off because its hook was too small for the pipes (*see Hoffman v SJP TS, LLC*, 111 AD3d 467, 467 [1st Dept 2013]).

While there is some dispute as to whether a ladder was available at the worksite on the date of the accident, if it was available and plaintiff knew about it there is no evidence that plaintiff refused to use it or that it was a suitable alternative to the mobile scaffold (*see Ortiz v City of New York*, 224 AD3d 631, 631-632 [1st Dept 2024]). Concur—Manzanet-Daniels, J.P., Kennedy, González, Pitt-Burke, Rosado, JJ.

14 Lisa Johnson, Appellant, v AMF Bowling Centers, Inc., et al., Respondents. [253 NYS3d 151]—

Negligence—Maintenance of Premises—Slip and Fall in Bowling Alley

Appeal from order, Supreme Court, New York County (Eric Schumacher, J.), entered April 30, 2024, which granted defendants' motion for summary judgment dismissing the complaint, deemed an appeal from the judgment, same court and Justice, entered June 5, 2024, dismissing the complaint, and the judgment unanimously affirmed, without costs.

This personal injury action stems from plaintiff's slip-and-fall at defendants' bowling alley. Initially, defendants' argument that plaintiff's appeal from the order granting their motion for summary judgment dismissing the complaint must be dismissed because her right of direct appeal therefrom terminated with the entry of judgment in favor of defendants is without merit. CPLR 5501 (c) expressly provides that a "notice of appeal from an order directing summary judgment . . . shall be deemed to specify a judgment upon said order entered after service of the notice of appeal and before entry of the order of the appellate court upon such appeal."

To the extent Supreme Court based its decision on plaintiff's failure to submit a response to defendants' statement of material facts, we elect to substitute our discretion for that of the motion court and decide the appeal on the merits (*see generally Those Certain Underwriters at Lloyds, London v Occidental Gems, Inc.*, 11 NY3d 843, 845 [2008]). It is the policy preference of the courts of this State to decide cases on their merits, rather than on procedural technicalities (*see e.g. U.S. Bank N.A. v DLJ Mtge. Capital, Inc.*, 33 NY3d 72, 78 [2019]; *Norex Petroleum Ltd. v Blavatnik*, 23 NY3d 665, 679 [2014]; *N.E. v Parkash 242, LLC*, 238 AD3d 641, 642 [1st Dept 2025]).

Nevertheless, defendants' motion for summary judgment was properly granted. Plaintiff testified inconsistently as to whether she knew where in the bowling lane she slipped. Assuming that she slipped in the approach to the bowling lane (as opposed to in the lane itself), she did not identify any condition in that area that caused her fall, beyond mere slipperiness. Although she alleged in her complaint and bills of particulars that her fall was caused by defendants' excessive oiling, waxing, or conditioning of the floor, which led to creation of a dangerous slippery condition, she produced no evidence to support that allegation. Thus, it is "just as likely that" her accident was "caused by some other factor, such as a misstep or loss of balance," rather than defendants' negligence in cleaning and maintaining the bowling alley, meaning that "any determination by the trier of fact as to the cause of the accident would be based upon sheer speculation" (*Scivoletti v New York Mercantile Exch., Inc.*, 38 AD3d 326, 327 [1st Dept 2007] [internal quotation marks omitted], *lv denied* 9 NY3d 802 [2007]; *see also Acunia v New York City Dept. of Educ.*, 68 AD3d 631, 632 [1st Dept 2009] ["the fact that a floor is slippery by reason of its smoothness or polish, in the absence of any proof of the negligent application of wax or polish, does not give rise to a cause of action, or even an inference of negligence"]).

In opposition to defendants' prima facie showing, plaintiff failed to raise an issue of fact.

We have considered the remaining arguments and find them unavailing. Concur—Scarpulla, J.P., Friedman, Gesmer, Shulman, Chan, JJ.

15 In the Matter of Elisabeth Kepley, Also Known as Frances Lehman Loeb, Appellant, v John Loeb Jr. et al., Respondents. [253 NYS3d 146]—Order, Supreme Court, New York County (Paul A. Goetz, J.), entered on or about October 10, 2025, which, to the extent appealed from as limited by the briefs, denied petitioner's request for leave to move pursuant to CPLR 5015

(a) (1) and (3) to vacate the order, same court and Justice, dated September 19, 2025, dismissing the complaint, and for leave to file additional papers on the underlying motion, unanimously affirmed, with costs.

The court providently exercised its discretion in denying approval for petitioner to file additional papers in support of her petition, which approval was required by the previous order dismissing the petition, based on petitioner's prior abuse of the judicial process and initiation of meritless litigation. The additional papers which petitioner proposed to submit were irrelevant to the issues determined by the court in the order granting the motion to dismiss (*see Summit Solomon & Feldesman v Lacher*, 212 AD2d 487, 487 [1st Dept 1995]).

We have considered petitioner's remaining arguments and find them unavailing. Concur—Manzanet-Daniels, J.P., Kennedy, González, Pitt-Burke, Rosado, JJ.

16 Jeffrey Mendez, Respondent, v Federal 53 Inc., Appellant, et al., Defendant. [253 NYS3d 141]—

Motor Vehicles—Collision—Detached Bumper

Order, Supreme Court, Bronx County (Bianka Perez, J.), entered on or about September 27, 2023, which denied defendant Federal 53 Inc.'s motion for summary judgment dismissing the complaint as against it, unanimously affirmed, without costs. Order, same court and Justice, entered on or about January 14, 2026, brought up for review pursuant to CPLR 5517 (b) by the appeal from the aforementioned order, which granted Federal 53's motion for leave to reargue and, upon reargument, adhered to the prior decision, unanimously dismissed, without costs, as academic.

Plaintiff alleges that he was injured when the detached front bumper of defendants' tow truck came into contact with his vehicle as he drove on a city roadway. Defendants moved for summary judgment dismissing the complaint, arguing that plaintiff was the sole proximate cause of the collision because his moving vehicle struck the tow truck as the latter was legally stopped and parked.

Initially, although Supreme Court's September 27, 2023 order denied defendants' joint motion for summary judgment dismissing the complaint in its entirety, only that portion of the motion pertaining to Federal 53 is properly before us under the notice of appeal, which states that this appeal is from only the parts of the order that aggrieve Federal 53. Thus, we do not consider the contentions raised in the opening brief to the extent they advance arguments on behalf of the John Doe defendant.

As to the merits, Federal 53 failed to establish as a matter of law that it did not bear any fault for the collision, and thus did not eliminate all material issues of fact. Plaintiff's photographs, which were sufficiently authenticated, present issues of fact as to whether Federal 53 negligently allowed the detached front bumper of its tow truck to protrude into the plaintiff's lane of travel in violation of 34 RCNY 4-08 (k) (3), and if so, whether that negligent act was a proximate cause of the collision (*see Cordova v 653 Eleventh Ave. LLC.*, 190 AD3d 637, 638 [1st Dept 2021]; *compare Bertrand v Vingan*, 249 AD2d 13, 13 [1st Dept 1998], *with McLean v Ripoli*, 157 AD3d 604, 605 [1st Dept 2018]).

We have considered Federal 53's remaining contentions and find them unavailing. Concur—Scarpulla, J.P., Friedman, Gesmer, Shulman, Chan, JJ.

17 In the Matter of Cashay S. Middleton et al., Appellants, v New York City Transit Authority, Respondent. [253 NYS3d 148]—

Public Authorities—New York City Transit Authority—Drug and Alcohol Testing Program—Improper Influence on Medical Review Officer

Order, Supreme Court, New York County (Shahabuddeen Abid Ally, J.), entered on or about October 1, 2024, which denied the petition to confirm an arbitration award, granted respondent New York City Transit Authority's cross-motion to vacate the award, and remitted the matter to a different arbitrator for further determination, unanimously reversed, on the law, without costs, the arbitration award reinstated, the cross-motion denied, and the petition granted.

Supreme Court improperly vacated the arbitration award as violative of public policy (*see* CPLR 7511 [b] [1]; *Denson v Donald J. Trump for President, Inc.*, 180 AD3d 446, 450 [1st Dept 2020]). The arbitrator issued a reasoned decision acknowledging the limits of his authority under both the applicable regulations and the collective bargaining agreement (*see Matter of New York City Tr. Auth. v Transport Workers Union of Am., Local 100*, 14 NY3d 119, 124-125 [2010]). As in *Matter of Dowleyne v New York City Tr. Auth.* (309 AD2d 583 [1st Dept 2003], *revd* 3 NY3d 633 [2004]), the arbitrator properly reviewed the process by which the Medical Review Officer (MRO) came to his conclusion (*see* 49 CFR 40.209; *see also* 40.149 [a] [5]), not the substantive medical determination of the MRO (*see* 49 CFR 40.149 [c]). The arbitrator found the inexperienced MRO was improperly influenced by the Designated Employer Representative, who was not permitted to act. The improper influence

included urging the MRO to rescind his determination, after the MRO canceled the initial “refusal” drug test result (*see* 49 CFR 40.193 [d] [1] [i]; [i]; *see also* 40.123 [a]). Contrary to respondent’s contention, federal preemption does not compel a different result. Concur—Scarpulla, J.P., Friedman, Gesmer, Shulman, Chan, JJ.

18 In the Matter of MLN New York Inc. et al., Respondents, v Jinong Liu, Appellant. [— NYS3d —]—

Employment Relationships—Breach of Fiduciary Duty—Faithless Servant Doctrine

Judgment, Supreme Court, New York County (Lyle E. Frank, J.), entered June 25, 2025, in favor of petitioners, and bringing up for review an order, same court and Justice, entered on or about April 29, 2025, which granted the petition to confirm a final arbitration award and denied respondent’s cross-petition to set aside the award, unanimously affirmed, with costs.

Respondent’s argument for vacatur of the arbitration award as irrational is unavailing (*see Matter of Goodwin Law Group P.C. v Zilong Wang*, 226 AD3d 537, 538 [1st Dept 2024]). The award was predicated on the testimony of multiple witnesses who were employed at the time respondent was a 20% shareholder in petitioner corporation, the owner and operator of a restaurant. The testimony of the employee witnesses that respondent misreported employee hours, that he falsely blamed petitioner majority shareholder for the incomplete work hours reported, and that he tried to convince several employees to commence a lawsuit against the corporation to recover unpaid compensation provided he was paid a 20% kickback of any damage award resulting from such lawsuit, supports the arbitrator’s finding that respondent was a faithless servant and that he breached his fiduciary duty to the corporation.

Respondent’s further argument that the award should be vacated for its manifest disregard of the law is also unavailing (*see Transparent Value, L.L.C. v Johnson*, 93 AD3d 599, 601 [1st Dept 2012]). Respondent did not cite any controlling law on the issues raised when offered an opportunity by the arbitrator to do so. In any event, respondent’s argument that the evidence failed to support a finding that petitioners had viable counterclaims for breach of fiduciary duty or under the faithless servant doctrine is unavailing. A claim under the faithless servant doctrine is viable even absent a showing of damages to the corporation (*see Feiger v Iral Jewelry*, 41 NY2d 928, 928-929 [1977]; *Yukos Capital S.A.R.L. v Feldman*, 977 F3d 216, 242 [2d Cir 2020]), and damages awarded on a faithless ser-

vant claim (i.e., recoupment of salary) can satisfy the damage element of a breach of fiduciary duty claim (see *Beach v Touradji Capital Mgt., LP*, 144 AD3d 557, 563 [1st Dept 2016]; *Yukos*, 977 F3d at 242). Further, there was evidence in the record that the corporation was damaged to the extent it had to settle its employees' wage compensation complaints following respondent's intentional underpayment of employees for their hours, and that such actions and other disloyal acts by respondent had caused discontent among the corporation's employees.

We have considered respondent's remaining arguments and find them unavailing. Concur—Manzanet-Daniels, J.P., Kennedy, González, Pitt-Burke, Rosado, JJ.

19 In the Matter of NRD GP LLC et al., Appellants, v Colin McCarthy, Respondent. [253 NYS3d 152]—

Arbitration—Judicial Review—Interpretation of Contract—Advance of Litigation Fees Incurred in Arbitration

Judgment, Supreme Court, New York County (John J. Kelley, J.), entered October 2, 2024, awarding respondent the total amount of \$1,123,644.48, and bringing up for review an order, same court and Justice, entered on or about July 2, 2024, which denied the petition to vacate a partial final arbitration award, and granted respondent's cross-petition to confirm the award, to the extent appealed from, unanimously affirmed, without costs.

Supreme Court properly upheld the arbitrator's partial final award because petitioners failed to demonstrate that the arbitrator exceeded her power or that the award violates a strong public policy, is irrational, or clearly exceeds a specifically enumerated limitation on the arbitrator's power (CPLR 7511 [b]; see *American Intl. Specialty Lines Ins. Co. v Allied Capital Corp.*, 35 NY3d 64, 70 [2020]). Judicial review of arbitration awards is extremely limited (see *Matter of Falzone [New York Cent. Mut. Fire Ins. Co.]*, 15 NY3d 530, 534 [2010]; *Wien & Malkin LLP v Helmsley-Spear, Inc.*, 6 NY3d 471, 479 [2006], *cert dismissed* 548 US 940 [2006]), and an award will not be overturned merely because a court believes its interpretation of the contract would be better (see *Azrielant v Azrielant*, 301 AD2d 269, 275 [1st Dept 2002], *lv denied* 99 NY2d 509 [2003]).

Here, the parties disagree as to how the contract provisions should be interpreted and whether respondent, under the operative agreements, is entitled to an advance of the litigation fees incurred in the arbitration. The arbitrator found that nothing in the employment agreement preempts the operative

agreements' advancement right. Supreme Court properly recognized that a court is bound by an arbitrator's factual findings and interpretation of a contract and cannot examine the merits of an arbitration award or substitute its own contractual interpretation. In any event, the arbitrator's interpretation of the contracts did not change the agreements' terms (*cf. Kudler v Truffelman*, 93 AD3d 549, 550 [1st Dept 2012], *lv denied* 19 NY3d 815 [2012]), but rather was a rational interpretation of the agreements that the arbitrator was empowered to undertake. Nor did the arbitrator confuse the right to advancement with the right to indemnification. Instead, the arbitrator found that the right to advancement was a distinct right and that a determination of respondent's right, if any, to indemnification would be conducted at the end of the arbitration.

The arbitrator did not exceed her authority under Judicial Arbitration and Mediation Services (JAMS) rule 19 (d), which provides that she "may grant whatever interim measures are deemed necessary," which "may take the form" of a partial final award.

Finally, the interpretation of the applicable contract terms was within the province of the arbitrator, and the "manifest disregard" standard does not permit review of the arbitrator's interpretation of the parties' contracts even if we were to disagree with the interpretation (*see Cantor Fitzgerald Sec. v Refco Sec., LLC*, 83 AD3d 592, 593 [1st Dept 2011]). The record does not establish that the arbitrator knew of a governing legal principle yet either refused to apply it or ignored it altogether (*see Wien & Malkin LLP*, 6 NY3d at 481). On the contrary, it is apparent from a review of the arbitration award that the arbitrator considered the language of the contract and the applicable JAMS rules as identified by the parties and analyzed both extensively (*see Matter of Nexia Health Tech., Inc. v Miratech, Inc.*, 176 AD3d 589, 591-592 [1st Dept 2019]).

We have considered petitioners' remaining contentions and find them unavailing. Concur—Renwick, P.J., Kennedy, Friedman, Mendez, Hagler, JJ.

20 In the Matter of Joseph Pena, Appellant, v City of New York et al., Respondents. [253 NYS3d 156]—

Municipal Corporations—Notice of Claim—Late Notice—Actual Knowledge—High-Speed Police Chase

Order, Supreme Court, New York County (Arthur F. Engoron, J.), entered on or about December 9, 2024, which denied petitioner's amended petition for leave to file a late notice of claim against respondents the New York Police Department

(NYPD), Matthew D. Jackson, and the City of New York (collectively, the City) and to deem the notice of claim, filed July 1, 2024, timely filed, nunc pro tunc, unanimously affirmed, without costs.

Petitioner failed to satisfy his burden of establishing that the City acquired actual knowledge of the essential facts of his claim within 90 days of its accrual or within a reasonable time thereafter (General Municipal Law § 50-e [5]; *see Cassidy v New York City Tr. Auth.*, 238 AD3d 484, 485 [1st Dept 2025]; *Zapata v New York City Hous. Auth.*, 115 AD3d 606, 606 [1st Dept 2014]). Petitioner's allegation that an NYPD police officer caused the accident by engaging in a high-speed chase, causing a collision between the vehicle that was being pursued and the bus petitioner was operating, is insufficient to satisfy that burden because it does not constitute facts or evidence (*see Matter of Jaime v City of New York*, 41 NY3d 531, 543 [2024]). Nor does petitioner's assumption that the City investigated the accident establish that it actually acquired the requisite knowledge of the essential facts (*see Rivera v New York City Dept. of Transp.*, 235 AD3d 510, 511 [1st Dept 2025]).

The police accident report annexed to petitioner's leave application did not establish that the City had actual knowledge of the facts supporting his theory of liability, because it did not indicate that the NYPD vehicle was negligently engaged in a high-speed chase with the nonparty's vehicle or that the NYPD vehicle caused the accident (*see Matter of Kayam v City of New York*, 237 AD3d 474, 475 [1st Dept 2025]; *Lobos v City of New York*, 219 AD3d 720, 722 [2d Dept 2023]).

The incomplete notice of claim which petitioner allegedly served on the City on April 23, 2024, about six months after the expiration of the 90-day statutory deadline to file a timely notice of claim, is not in the record. In any event, that late notice could not have provided the City with actual notice because "without leave of court, [it] was a nullity" (*Cassidy*, 238 AD3d at 485 [1st Dept 2025]).

Finally, petitioner failed to carry his burden of demonstrating that the City was not prejudiced by the delay in filing the notice of claim; accordingly, the burden never shifted to the City to make a particularized showing of prejudice to its ability to defend on the merits (*see Matter of Cani v New York City Health & Hosps. Corp.*, 242 AD3d 408, 409 [1st Dept 2025]). Further, because petitioner failed to satisfy its burden in the first instance, it is irrelevant that the City did not oppose the leave application below. Concur—Scarpulla, J.P., Friedman, Gesmer, Shulman, Chan, JJ.

21 The People of the State of New York, Respondent, v Brandon Monegro, Appellant. [253 NYS3d 155]—

Crimes—Lesser Included Offense—Disorderly Conduct with Assault in Second Degree

Judgment, Supreme Court, New York County (Laurie Peterson, J., at plea; Jonathan Svetkey, J., at sentencing), rendered January 18, 2024, as amended April 10, 2024, convicting defendant of assault in the second degree, and sentencing him, as a second felony offender, to a term of 3 years, unanimously affirmed.

Judgment, Supreme Court, New York County (Marisol M. Alonso, J.), rendered May 7, 2024, convicting defendant, upon his plea of guilty, of assault in the third degree, and sentencing him to a jail term of 9 months, unanimously affirmed.

The charge of disorderly conduct was properly included in the Superior Court Information as a joinable lesser non-inclusory offense, alongside the triggering offense of assault in the second degree, which was charged in the felony complaint (*see People v Pierce*, 14 NY3d 564, 571 [2010]; *People v Fields*, 242 AD3d 524, 524 [1st Dept 2025], *lv denied* 44 NY3d 1065 [2026]). Both charges were “based upon the same act or upon the same criminal transaction” (CPL 200.20 [2] [a]). The felony complaint alleged that, on March 8, 2022, while on the subway, defendant struck someone “about the head and face with a cane causing bruising, swelling, redness to his face[,] and substantial pain.” Accordingly, the SCI properly charged defendant with second-degree assault and disorderly conduct, basing both charges upon this same alleged criminal act. Disorderly conduct is neither “a higher-grade offense than any contained in the felony complaint,” nor does it contain “an additional aggravating element” compared to second-degree assault (*People v Perkins*, 230 AD3d 977, 980-981 [1st Dept 2024]; *see* Penal Law §§ 120.05 [2]; 240.20).

Defendant’s contention that his subsequent guilty plea under indictment No. 73093/23 should be vacated in the event this Court reverses his conviction under SCI No. 70645/23 (*see People v Fuggazzatto*, 62 NY2d 862, 863 [1984]) is rendered moot by this Court’s affirmance of that prior conviction (*see People v Jean*, 186 AD3d 1175 [1st Dept 2020], *lv denied* 36 NY3d 929 [2020]). Concur—Manzanet-Daniels, J.P., Kennedy, González, Pitt-Burke, Rosado, JJ.

22 The People of the State of New York, Respondent, v Derwin Blanks, Appellant. [252 NYS3d 573]—An appeal having been taken to this Court by the above-named appellant from a

judgment of the Supreme Court, Bronx County (Marsha D. Michael, J.), rendered May 31, 2022, said appeal having been argued by counsel for the respective parties, due deliberation having been had thereon, and finding the sentence not excessive, it is unanimously ordered that the judgment so appealed from be and the same is hereby affirmed. Concur—Scarpulla, J.P., Friedman, Gesmer, Shulman, Chan, JJ.

23 The People of the State of New York, Appellant, v Diamond Haggan, Respondent. [253 NYS3d 154]—

Crimes—Disclosure—Automatic Discovery—Records Not in People’s Possession—Employment and Medical Records

Crimes—Disclosure—Automatic Discovery—Good Faith and Due Diligence

Order, Supreme Court, New York County (Laura A. Ward, J.), entered on or about February 28, 2025, which granted defendant’s CPL 30.30 motion to dismiss the indictment, unanimously reversed, on the law, the motion denied, the indictment reinstated, and the matter remitted for further proceedings.

Initially, the People were not required, as part of their initial discovery obligation under the automatic discovery rules at CPL 245.20 (1) to obtain and disclose employment and medical records that were not “in the possession, custody or control of the prosecution or persons under the prosecution’s direction or control” because these records fall under CPL 245.20 (2), as they were in the possession and control of third parties not under the prosecution’s direction or control (*see* former CPL 245.20 [1], [2], repealed L 2025, ch 56, § 1, part LL, § 2, eff Aug. 7, 2025; *see* L 2025, ch 56, § 1, part LL, §§ 1-8).

CPL 245.50 (1) directs that a certificate of compliance (COC) be filed when the People have made diligent, good faith efforts “to obtain and provide the discovery required by subdivision one of section 245.20.” This section does not mention subdivision two (*People v Walker*, 232 AD3d 1214, 1215-1217 [4th Dept 2024] [records failed to “meet the possessory prong required to prompt (the People’s) initial discovery obligation” under CPL 245.20 (1)], *lv denied* 42 NY3d 1082 [2025]). Thus, the validity of the People’s COC did not turn on the People’s disclosure of these records.

The People were required to disclose the victim’s entity report under CPL 245.20 (1) but improperly withheld it as duplicative. Nevertheless, defendant does not argue, and Supreme Court did not find that the entity report was withheld in bad faith. Accordingly, withholding the entity report did not warrant invalidating the COC and dismissing the indict-

ment under CPL 30.30 in light of, among other things, the People's disclosure of voluminous records and the apparently innocuous nature of the entity report (*see People v Cooperman*, 225 AD3d 1216, 1220 [4th Dept 2024]; *see People v Bay*, 41 NY3d 200, 211 [2023]). Moreover, defendant did not confer with the People about any deficiency in disclosure before making his motion to invalidate the COC.

The People established that they exercised due diligence and good-faith efforts in complying with their discovery obligations, and, thus, their certificate of compliance, filed on October 31, 2024, was valid (*see People v Bay*, 41 NY3d 200, 209-212 [2023]). Accordingly, Supreme Court improperly invalidated the People's October 31, 2024 certificate of compliance based on their alleged failure to exercise due diligence in attempting to obtain these records. As a result, the People were ready for trial within the statutorily allotted time (*see* CPL 30.30 [1] [a]), and Supreme Court should have denied the CPL 30.30 motion to dismiss the indictment. Concur—Scarpulla, J.P., Friedman, Gesmer, Shulman, Chan, JJ. [**Prior Case History: 85 Misc 3d 1224(A), 2025 NY Slip Op 50266(U).**]

24 The People of the State of New York, Respondent, v Diondre Holman, Appellant. [253 NYS3d 142]—Judgment, Supreme Court, Bronx County (Jeffrey M. Zimmerman, J.), rendered February 6, 2025, convicting defendant, upon his plea of guilty, of criminal possession of a weapon in the fourth degree, and sentencing him to three years of probation, unanimously modified, on the law, to the extent of striking the condition of probation requiring him to pay the mandatory surcharge and associated fees, and otherwise affirmed.

Defendant made a valid waiver of his right to appeal (*see People v Thomas*, 34 NY3d 545, 559 [2019], *cert denied* 589 US 1302 [2020]). This forecloses our review of his excessive sentence claim (*see People v Lowndes*, 239 AD3d 574, 575 [1st Dept 2025], *lv denied* 44 NY3d 1012 [2025]). Alternatively, we find no basis to reduce his sentence.

Defendant's valid waiver of his right to appeal does not foreclose review of his facial constitutional challenge to the "good moral character" provision of New York's gun licensing scheme, and he has standing to bring it despite his never having applied for a gun license (*see People v Johnson*, — NY3d —, —, 2025 NY Slip Op 06528, *2 [2025]). However, the contention is unpreserved, and we decline to review it in the interest of justice (*id.*). Alternatively, this claim is unavailing (*see People v Martinez*, 238 AD3d 423, 424 [1st Dept 2025], *lv denied* 44 NY3d 1067 [2026]).

Defendant's appeal waiver also does not foreclose his challenge to the legality of condition 10 of his probation and does not require preservation (*see Lowndes*, 239 AD3d at 575). That condition requires defendant to "[p]ay the mandatory surcharge, crime victim assistance fee, fine, sex offender registration fee, DNA databank fee, supplemental sex offender victim fee, and any other fee or surcharge imposed, as directed by the court." This condition is unrelated to ensuring that he leads a law-abiding life or to his rehabilitation (*see People v Percy*, 234 AD3d 619, 620 [1st Dept 2025]). We note that the People do not oppose this relief. Concur—Manzanet-Daniels, J.P., Kennedy, González, Pitt-Burke, Rosado, JJ.

25 The People of the State of New York, Respondent, v Durell Anderson, Appellant. [253 NYS3d 153]—An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Brendan T. Lantry, J.), rendered June 29, 2023, said appeal having been argued by counsel for the respective parties, due deliberation having been had thereon, and finding the sentence not excessive, it is unanimously ordered that the judgment so appealed from be and the same is hereby affirmed. Concur—Scarpulla, J.P., Friedman, Gesmer, Shulman, Chan, JJ.

26 The People of the State of New York, Respondent, v J.P., Appellant. [253 NYS3d 167]—

Mental Health—Person Acquitted of Crime by Reason of Insanity—Procedure Following Verdict or Plea—Initial Hearing—Ineffective Assistance of Counsel

Order, Supreme Court, Bronx County (Timothy Lewis, J.), entered on or about December 13, 2022, which found that defendant currently suffers from a dangerous mental disorder and committed him to the custody of the Commissioner of Mental Health for confinement in a secure psychiatric facility for six months, unanimously reversed, on the law, without costs, and the matter remitted for a new CPL 330.20 (6) hearing.

Although the examining witnesses who found that defendant suffered from a dangerous mental disorder did not testify at the CPL 330.20 (6) initial hearing, the hearing satisfied statutory and due process concerns, as defendant, who did not have the opportunity to cross-examine the witnesses, was otherwise afforded an opportunity at the hearing to challenge the People's evidence.

However, defendant did not receive meaningful representation from his counsel in connection with the hearing. Counsel did no more than briefly offer his personal view that defendant

did not presently suffer from a dangerous mental disorder, which was based entirely on the fact that during the six years since the underlying incident, a time in which defendant had always been in custody or supervised detention, there was no record of his engaging in violent conduct. Defense counsel otherwise failed to challenge the examiner reports that provided all the People's evidence as to defendant's dangerous mental disorder. Counsel did not seek the examiners' testimony to allow for cross-examination, did not seek an additional expert examination, and did not call any witnesses or present any evidence for the defense.

In the absence of any advice from a defense expert who personally examined defendant and advised that there was no basis for challenging the findings of the examining experts (*see People v Odell B.-P.*, 154 AD3d 534, 535 [1st Dept 2017], *lv denied* 30 NY3d 912 [2018]), or any indication in the record that defendant knowingly relinquished his right to contest the People's position, the representation by defense counsel was ineffective. Contrary to the People's contention, there is an insufficient basis to hold as a matter of law that cross-examination and other affirmative defense actions here would have been futile or destined for failure (*see People v Darryl T.*, 166 AD3d 68, 77 [1st Dept 2018], *lv dismissed & denied* 42 NY3d 1087 [2025]; *see also Matter of Matheson KK.*, 161 AD3d 1260, 1262 [3d Dept 2018], *lv dismissed* 32 NY3d 945 [2018]; *Matter of Brian HH.*, 39 AD3d 1007, 1009 [3d Dept 2007]). Concur—Scarpulla, J.P., Friedman, Gesmer, Shulman, Chan, JJ.

27 The People of the State of New York, Respondent, v Jamar Carr, Appellant. [253 NYS3d 157]—

Crimes—Appeal—Valid Waiver—Sufficiency of Colloquy and Written Waiver
 Crimes—Possession of Weapon—Constitutional Challenge to Gun Licensing Scheme
 Crimes—Sentence—Probation—Conditions

Judgment, Supreme Court, Bronx County (Shari R. Michels, J.), rendered June 11, 2024, convicting defendant, upon his plea of guilty, of criminal possession of a weapon in the fourth degree, and sentencing him to three years of probation, unanimously modified, on the law, to the extent of striking the conditions of probation requiring him to pay a surcharge and fees, submit to any drug or alcohol assessment and/or tests if directed by the Department of Probation, participate in an alcohol, substance abuse, intervention, domestic violence or alternative to violence program as directed by the Department of Probation, and “[r]efrain from wearing or displaying gang

paraphernalia” or “having any association with a gang or members of a gang if directed by the Department of Probation,” and otherwise affirmed.

Defendant made a valid waiver of his right to appeal (see *People v Thomas*, 34 NY3d 545 [2019], *cert denied* 589 US 1302 [2020]) as “[t]he combination of the court’s oral colloquy and the detailed written waiver that defendant signed after consultation with counsel satisfied the requirements of a valid waiver” (*People v Rivera*, 237 AD3d 481, 482 [1st Dept 2025], *lv denied* 44 NY3d 1068 [2026]). Contrary to defendant’s contentions, “[t]he language in the colloquy and the written waiver did not suggest that defendant waived his right to appellate counsel” (*People v Rosario*, 242 AD3d 527, 527 [1st Dept 2025], *lv denied* 44 NY3d 1068 [2026]), and his waiver is not rendered invalid merely because the court conducted the appeal waiver colloquy after defendant’s allocution (see *People v Jessamy*, 237 AD3d 619, 619 [1st Dept 2025], *lv denied* 43 NY3d 1046 [2025]).

Defendant’s valid waiver forecloses review of his excessive sentence claim (see e.g. *People v Nunez*, 220 AD3d 597, 597 [1st Dept 2023], *lv denied* 41 NY3d 1004 [2024]) and his as-applied constitutional challenges to the conditions of his probation (see *People v Thompson*, 245 AD3d 609, 610 [1st Dept 2026]). In any event, we perceive no basis for reducing defendant’s sentence.

Defendant’s waiver of appeal does not foreclose review of his Second Amendment claim pursuant to *New York State Rifle & Pistol Assn., Inc. v Bruen* (597 US 1 [2022]) (*People v Johnson*, — NY3d —, —, 2025 NY Slip Op 06528, *2 [2025]). Additionally, even though defendant did not apply for a gun license, he has standing to challenge the facial constitutionality of the state’s firearm licensing scheme (*id.*). On the merits, defendant’s Second Amendment claim fails. *Bruen* did not strike down New York’s gun-licensing regime in its entirety; rather, it “invalidated the statute’s proper cause requirement and left the balance of the statute undisturbed” (*People v Peguero*, 246 AD3d 668, 669 [1st Dept 2026]).

Defendant’s statutory challenges to six of the conditions of his probation also survive his waiver of appeal and are not subject to preservation requirements (*People v Lowndes*, 239 AD3d 574, 575 [1st Dept 2025], *lv denied* 44 NY3d 1012 [2025]). As to condition 7, requiring that defendant “[a]void injurious or vicious habits; refrain from frequenting unlawful or disreputable places; and . . . not consort with disreputable people,” we find that the court providently exercised its discretion in imposing it (see Penal Law § 65.10 [1]), given that defendant pos-

sessed a gun and used marijuana on a daily basis (*People v Holley*, 246 AD3d 583, 584-585 [1st Dept 2026]). We also find that the court providently imposed condition 14, requiring that he support dependents and meet other family responsibilities, as defendant is the father of eight children (*People v Balogh*, 245 AD3d 572, 573-574 [1st Dept 2026]; see Penal Law § 65.10 [2] [f]).

Considering the lack of any evidence that defendant's offense involved any drugs or alcohol, as well as the absence of any conclusion by the Department of Probation that defendant required substance abuse or related treatment, the conditions related to drug and alcohol testing and treatment (conditions 15 and 23) must be stricken (see *Balogh*, 245 AD3d at 574).

Condition 10, requiring defendant to pay the mandatory surcharge and fees, also must be stricken, as it is "not reasonably related to [his] rehabilitation, or necessary to ensure that he will lead a law-abiding life" (*People v Brown*, 246 AD3d 666, 667 [1st Dept 2026]; see also *People v Percy*, 234 AD3d 619, 620 [1st Dept 2025]). We note that the People do not oppose this relief.

Condition 24, requiring that defendant "[r]efrain from wearing or displaying gang paraphernalia" or associating with gang members, must also be stricken, as "[t]here is no evidence that [his] actions were connected to gang activity, or that [he] had a history of gang membership" (*People v Vasquetelles*, 241 AD3d 1208, 1209 [1st Dept 2025], *lv denied* 44 NY3d 1054 [2025]; see also *Brown*, 246 AD3d at 667). In light of our determination, defendant's constitutional challenge to condition 24 is academic.

Defendant's constitutional challenge to condition 7 under the First Amendment and the vagueness doctrine of due process under the Fifth and Fourteenth Amendments is unpreserved, and we decline to review it in the interest of justice (see *People v Cabrera*, 41 NY3d 35, 42-51 [2023]). As an alternate holding, we reject the argument on the merits (see *People v Andujar*, 245 AD3d 529, 529 [1st Dept 2026]). Concur—Manzanet-Daniels, J.P., Kennedy, González, Pitt-Burke, Rosado, JJ.

28 The People of the State of New York, Respondent, v Jesse Faulkner, Appellant. [253 NYS3d 160]—Judgment, Supreme Court, New York County (Ann D. Thompson, J., at plea; Marisol M. Alonso, J., at sentencing), rendered February 22, 2024, convicting defendant of criminal possession of a weapon in the second degree, and sentencing him to a term of 3½ years followed by five years of postrelease supervision, unanimously affirmed.

Defendant's Second Amendment claim is unpreserved (*see People v Cabrera*, 41 NY3d 35, 42-51 [2023]), and we decline to review it in the interest of justice. As an alternative holding, while defendant has standing to assert his facial challenge notwithstanding that he never applied for a license (*see People v Johnson*, — NY3d —, —, 2025 NY Slip Op 06528, *2 [2025]), he fails to establish that his conviction is unconstitutional on the ground that *New York State Rifle & Pistol Assn., Inc. v Bruen* (597 US 1 [2022]) invalidated the “good moral character” requirement (*see People v Martinez*, 238 AD3d 423, 424 [1st Dept 2025], *lv denied* 44 NY3d 1067 [2026]; *People v Guzman*, 237 AD3d 570, 571 [1st Dept 2025], *lv denied* 44 NY3d 993 [2025]).

Defendant's contention that his counsel rendered ineffective assistance by failing to preserve his Second Amendment claim is unreviewable on direct appeal because it involves matters not reflected in the record and thus must be raised in a CPL 440.10 motion (*see People v Williams*, 237 AD3d 569, 570 [1st Dept 2025], *lv denied* 44 NY3d 1014 [2025]; *People v Anderson*, 234 AD3d 603, 603-604 [1st Dept 2025], *lv denied* 43 NY3d 943 [2025]). In any event, counsel was not ineffective because the claim had “little or no chance of success” (*People v Caban*, 5 NY3d 143, 152 [2005] [internal quotation marks omitted]).

We perceive no basis for reducing the term of postrelease supervision. Concur—Scarpulla, J.P., Friedman, Gesmer, Shulman, Chan, JJ.

29 The People of the State of New York, Respondent, v Keyshawn Kitchens, Appellant. [253 NYS3d 168]—

Crimes—Right to Speedy Trial—Excludable Time—Adjournment for Exceptional Circumstances—DNA Test Results

Crimes—Assault—Sufficiency and Weight of Evidence—Initial Aggressor

Judgment, Supreme Court, New York County (Brandan T. Lantry, J., at speedy trial motion, and Gregory Carro, J., at trial and sentencing), rendered June 1, 2023, convicting defendant of assault in the first degree and assault in the second degree, and sentencing him to concurrent terms of seven years, unanimously affirmed.

Defendant failed to preserve his statutory speedy trial claims, and we decline to review them in the interest of justice (*see People v Winston*, 177 AD3d 524, 524-525 [1st Dept 2019], *lv denied* 34 NY3d 1164 [2020]). As an alternative holding, we deny the claims on the merits. On a CPL 30.30 motion the defendant may satisfy their initial burden “by alleging only that the prosecution failed to declare readiness within the statuto-

rily prescribed time period” (*People v Luperon*, 85 NY2d 71, 77-78 [1995]). In opposition, the People must identify the exclusions on which they intend to rely (see *People v Beasley*, 16 NY3d 289, 292 [2011]). The defendant preserves challenges to the People’s reliance on the exclusions by identifying any legal or factual impediments to the use of those exclusions (*id.*).

Defendant’s argument on appeal is focused on the period from March 28 to May 2, 2019, which was an adjournment sought by the People to obtain DNA test results from the Office of the Chief Medical Examiner. The parties agree that an adjournment for this purpose can qualify as an “exceptional circumstance[]” under CPL 30.30 (4) (g). In response to defendant’s motion before Supreme Court, the People argued that this period was excludable because they exercised the necessary due diligence in obtaining the DNA testing. Defendant did not submit any reply or dispute the People’s representation. Accordingly, Supreme Court properly denied the motion (*People v Hatcher*, 228 AD3d 565, 565 [1st Dept 2024] [CPL 30.30 motion properly denied where “(d)efendant did not raise any factual dispute in support of his motion and did not raise any factual dispute in response to the People’s showings of excludable time that would require a hearing”], *lv denied* 43 NY3d 1046 [2025]; *cf. People v Allard*, 28 NY3d 41, 46 [2016] [“By raising challenges to the People’s claimed exclusions in a reply or during a CPL 30.30 hearing, a defendant adequately brings his claims to the attention of the trial court at a time and in a way that gives the trial court the opportunity to remedy the problem and thereby avert reversible error” (internal quotation marks, brackets and citations omitted)]).

Defendant’s claim that the evidence adduced at trial was legally insufficient is also unpreserved. As an alternative holding, we reject it on the merits. Viewing the evidence in the light most favorable to the People, we find that the evidence supporting defendant’s convictions under Penal Law §§ 120.10 (1) and 120.05 (2) was legally sufficient to establish his guilt beyond a reasonable doubt and to merit rejection of his justification defense (see *People v Danielson*, 9 NY3d 342, 349 [2007]). There was sufficient evidence at trial that defendant was the initial aggressor in his encounter with the victim, and that the victim was not carrying a weapon when defendant stabbed him three times. Although the victim was an interested witness, the jury was free to consider the credibility of his testimony in the light of any inconsistencies highlighted by defendant. The victim’s narrative of events was also supported by surveillance video and the testimony of other witnesses. More-

over, the verdict was not against the weight of the evidence, and there is no basis to disturb the jury's credibility determinations (*id.* at 349-350; *see People v Rowe*, 192 AD2d 468, 469 [1st Dept 1993], *lv denied* 82 NY2d 759 [1993]).

Defendant's claim that the prosecutor's allegedly improper remarks at summation denied him a fair trial is also unpreserved, and we decline to review it in the interests of justice. As an alternative holding, we find that the prosecutor's summation was well within the range of acceptable argument and did not unfairly prejudice defendant, as the prosecutor's "approach . . . was understandable in view of the summation delivered by defendant's lawyer" (*People v D'Alessandro*, 184 AD2d 114, 119 [1st Dept 1992], *lv denied* 81 NY2d 884 [1993]). Furthermore, the trial court's instructions to the jury alleviated any alleged prejudice from the summation. Concur—Moulton, J.P., González, Mendez, Rodriguez, Pitt-Burke, JJ.

30 The People of the State of New York, Respondent, v Marques McGeachy, Appellant. [252 NYS3d 570]—

Crimes—Sentence—Youthful Offender

Judgment of resentence, Supreme Court, New York County (Ellen Biben, J.), rendered December 13, 2023, resentencing defendant to an aggregate term of 16 years, unanimously affirmed.

The court properly denied youthful offender treatment. Although defendant was eligible for youthful offender treatment (CPL 720.10 [1]), the record demonstrates that the court fully considered the proper factors in evaluating whether youthful offender status was appropriate (*see People v Cruickshank*, 105 AD2d 325, 334 [3d Dept 1985], *affd sub nom. People v Dawn Maria C.*, 67 NY2d 625 [1986]), and it providently exercised its discretion in declining to do so. We discern no basis upon which to disturb that discretionary determination, considering that defendant was convicted for his participation with a violent gang as an accomplice to murder, participated in multiple shootings, and engaged in violent conduct over a span of several months, involving multiple victims (*see People v Edwards*, 227 AD3d 513, 513 [1st Dept 2024], *lv denied* 42 NY3d 1019 [2024]).

We perceive no basis for reducing the sentence. Concur—Manzanet-Daniels, J.P., Kennedy, González, Pitt-Burke, Rosado, JJ.

31 The People of the State of New York, Respondent, v Michael Mable, Appellant. [252 NYS3d 570]—

Crimes—Appeal—Preservation of Issue for Review—Voluntariness of Guilty Plea

Judgment, Supreme Court, Bronx County (Michael J. Hartofilis, J., at plea; Bahaati E. Pitt, J., at sentencing), rendered December 3, 2019, convicting defendant, upon his plea of guilty, of criminal possession of a weapon in the third degree, and sentencing him, as a second felony offender, to a prison term of 2½ to 5 years, unanimously affirmed.

Defendant’s challenge to the voluntariness of his plea is unpreserved, and we decline to review it in the interest of justice. The narrow exception to the preservation rule for “where the defendant’s recitation of the facts underlying the crime pleaded to clearly casts significant doubt upon the defendant’s guilt or otherwise calls into question the voluntariness of the plea” (*People v Lopez*, 71 NY2d 662, 666 [1988]) does not apply because defendant said nothing during the plea colloquy that raised the possibility of a defense (*see People v Rios*, — NY3d —, —, 2026 NY Slip Op 00963, *3 [2026]). Defendant contends that he made statements that raised a defense of temporary lawful possession during his presentence interview, but the *Lopez* exception does not apply to statements in presentence reports (*see People v Grant*, 203 AD3d 477, 477-478 [1st Dept 2022], *lv denied* 38 NY3d 1033 [2022]; *People v Rojas*, 159 AD3d 468, 468 [1st Dept 2018], *lv denied* 31 NY3d 1086 [2018]).

As an alternative holding, we find that nothing in the record casts doubt on the voluntariness of the plea. Concur—Scarpulla, J.P., Friedman, Gesmer, Shulman, Chan, JJ.

32 The People of the State of New York, Respondent, v Shawn Batista, Appellant. [253 NYS3d 166]—

Crimes—Appeal—Waiver of Appeal

Judgment, Supreme Court, Bronx County (Albert Lorenzo, J., on motion to dismiss; Dineen A. Riviezzo, J., at plea and sentencing), rendered January 18, 2023, convicting defendant of attempted criminal possession of a weapon in the second degree, and sentencing him to a term of two years followed by two years of postrelease supervision, unanimously modified, as a matter of discretion in the interest of justice, to the extent of vacating the surcharge and fees imposed at sentencing, and otherwise affirmed.

Defendant validly waived his right to appeal (*see People v Thomas*, 34 NY3d 545 [2019], *cert denied* 589 US 1302 [2020]), which forecloses his as-applied constitutional challenge to the

age restriction in New York's gun licensing scheme (*see People v Johnson*, — NY3d —, —, 2025 NY Slip Op 06528, *2 [2025]). As alternative holdings, we find that the claim is unpreserved because it was not asserted in the trial court (*see People v Cabrera*, 41 NY3d 35, 41-52 [2023]; *People v Maldonado*, 242 AD3d 419, 420 [1st Dept 2025], *lv denied* 44 NY3d 1053 [2025]), and we decline to review it in the interest of justice. In any event, the claim has no merit (*see People v Thompson*, 235 AD3d 540, 541 [1st Dept 2025], *lv denied* 43 NY3d 1012 [2025]; *People v Bailey*, 234 AD3d 560, 561 [1st Dept 2025], *lv denied* 43 NY3d 1044 [2025]).

Defendant's facial challenge survives his voluntary waiver of the right to appeal, and he had standing to assert it on appeal regardless of whether he sought to obtain a gun license (*see Johnson*, — NY3d at —, 2025 NY Slip Op 06528, *2 [2025]). However, the facial constitutional challenge fails on the merits because *New York State Rifle & Pistol Assn., Inc. v Bruen* (597 US 1 [2022]) did not strike down New York's gun-licensing scheme in its entirety but rather invalidated the statute's proper cause requirement and left the balance of the statute undisturbed (*see Johnson*, — NY3d at —, 2025 NY Slip Op 06528, *3).

Defendant's valid waiver of his right to appeal also forecloses review of his excessive sentence claim. In any event, there is no basis for reducing the term of postrelease supervision.

However, based on our interest of justice powers, we vacate the mandatory surcharge and fees imposed on defendant at sentencing (*see People v Chirinos*, 190 AD3d 434, 435 [1st Dept 2021]). We note that the People do not oppose this relief. Concur—Scarpulla, J.P., Friedman, Gesmer, Shulman, Chan, JJ.

33 The People of the State of New York, Respondent, v Yanil Heredia Gomez, Appellant. [— NYS3d —]—

Crimes—Sentence—Probation—Conditions

Judgment, Supreme Court, Bronx County (Tara A. Collins, J.), rendered December 19, 2022, convicting defendant, upon his plea of guilty, of attempted assault in the second degree, and sentencing him to a term of five years of probation, unanimously modified, on the law, to the extent of striking the portion of the condition of probation requiring that he consent to a search by a probation officer of his person, vehicle, or place of abode for illegal drugs and drug paraphernalia, and striking the conditions of probation requiring him to support dependents and meet other family responsibilities, refrain from wear-

ing or displaying gang paraphernalia or having any association with a gang or members of a gang, submit to electronic monitoring, install a functioning Ignition Interlock Device, refrain from using or entering any Metropolitan Transportation Authority subway, train, bus, or other conveyance or facility, and refrain from using cannabis, and otherwise affirmed.

Defendant validly waived his right of appeal, which tracked the model colloquy the Court of Appeals endorsed in *People v Thomas* (34 NY3d 545, 567 [2019], *cert denied* 589 US 1302 [2020]) (see *People v Nunez*, 220 AD3d 597, 597-598 [1st Dept 2023], *lv denied* 41 NY3d 1004 [2024]). Defendant's waiver forecloses review of his excessive sentence claim. In any event, we perceive no basis for reducing the sentence.

Defendant's valid waiver also forecloses review of his as-applied challenges to probation conditions 7 and 24 under the First Amendment and the vagueness doctrine of due process under the Fifth and Fourteenth Amendments (see *People v Lombard*, 241 AD3d 1126, 1126 [1st Dept 2025]). To the extent that defendant asserts facial constitutional challenges to conditions 7 and 24, his claims survive his appeal waiver (see *People v Johnson*, — NY3d —, —, 2025 NY Slip Op 06528, *2 [2025]). However, defendant's constitutional challenges are unpreserved because he did not raise them before the trial court (see *People v Cabrera*, 41 NY3d 35, 42-51 [2023]), and we decline to reach them in the interest of justice. As an alternative holding, we find them unavailing.

Defendant's non-constitutional challenges to his probation conditions survive his waiver of the right to appeal and do not require preservation because the "issue implicates the legality of the sentence imposed" (*People v Alvarez*, 233 AD3d 619, 620 [1st Dept 2024], *lv denied* 43 NY3d 961 [2025]).

The court providently imposed condition 7, requiring him to "[a]void injurious or vicious habits," to "refrain from frequenting unlawful or disreputable places," and not to "consort with disreputable people," based on defendant's acting in concert with another to assault the victim with a large piece of wood, along with defendant's admitted daily alcohol use and association with negative peers (see *People v Casillas*, 245 AD3d 525, 526 [1st Dept 2026]; *People v Rivera*, 242 AD3d 421, 422 [1st Dept 2025], *lv denied* 44 NY3d 1067 [2026]).

The court providently imposed condition 13, requiring defendant to maintain "suitable employment, or pursue a course of study or vocational training approved by the Department of Probation," and to "[s]ubmit proof of such employment, study or training as directed by the Department of Probation," based

on his failure to register with the New York City school system despite his stated goal of attaining a high school diploma and becoming a physical education teacher.

However, the court improvidently imposed the portion of condition 28 authorizing warrantless searches by a probation officer for illegal drugs and drug paraphernalia because it was not reasonably related to defendant's rehabilitation (*see People v Rivera*, 239 AD3d 521, 522 [1st Dept 2025], *lv denied* 44 NY3d 1029 [2025]; *People v Thomas*, 233 AD3d 568, 569 [1st Dept 2024], *lv denied* 43 NY3d 932 [2025]). Defendant's crime "did not appear connected to the sale or use of drugs, he was not under the influence of any substance when he committed the offense, and he had no history of offenses involving substance abuse" (*Rivera*, 239 AD3d at 522-523 [internal quotation marks and citation omitted]).

Additionally, there is no evidence to support requiring defendant, who has no spouse or children, to "[s]upport dependents and meet other family responsibilities" (*see* Penal Law § 65.10 [2] [f]; *People v Thompson*, 245 AD3d 609, 610 [1st Dept 2026]). There is also no evidence to support requiring defendant to "[r]efrain from wearing or displaying gang paraphernalia and having any association with a gang or members of a gang if directed by the Department of Probation" because "[t]here is no evidence that defendant's actions were connected to gang activity, or that defendant had a history of gang membership," and defendant denied any gang affiliation (*People v Vasquetelles*, 241 AD3d 1208, 1209 [1st Dept 2025], *lv denied* 44 NY3d 1054 [2025]).

We strike the condition requiring defendant to "[s]ubmit to electronic monitoring and/or follow a schedule pursuant to Penal Law [§] 65.10 (4)" since the court did not make the required determination as to electronic monitoring under Penal Law § 65.10 (4) (*see People v Fitch*, 170 AD3d 1572, 1574 [4th Dept 2019], *lv denied* 33 NY3d 1069 [2019]).

There was no evidence that defendant was driving while intoxicated, and thus, no evidence to support requiring him to "[i]nstall or have installed and maintain a functioning Ignition Interlock Device" (*cf. People v Andrus*, 241 AD3d 447, 447-448 [1st Dept 2025]). Nor was there any evidence to justify requiring defendant to "[r]efrain from using or entering any Metropolitan Transportation Authority subway, train, bus, or other conveyance or facility for a period of up to three years" (*Alvarez*, 233 AD3d at 620), because defendant did not commit the crime on public transit. Finally, there was no evidence that defendant used cannabis and thus no evidence to support requiring

him to refrain from using cannabis or concentrated cannabis (see *People v Jones*, 247 AD3d 482, 2026 NY Slip Op 01324 [1st Dept 2026]). Concur—Manzanet-Daniels, J.P., Kennedy, González, Pitt-Burke, Rosado, JJ.

Motion by defendant to strike the references in the People's brief to the minutes of the grand jury proceeding, granted.

34 The People of the State of New York ex rel. Christopher Boyle, on Behalf of Kelvin Williams, Respondent, v Lynelle Maginley-Liddie, Appellant. [252 NYS3d 571]—

**Motions and Orders—Motion to Vacate Default—Meritorious Defense
Prisons and Incarcerated Individuals—Conditions of Confinement—Right to
Counsel**

Order, Supreme Court, New York County (April A. Newbauer, J.), entered May 2, 2025, which granted petitioner's CPLR article 78 petition for a writ of mandamus to compel respondent New York City Department of Correction (DOC) to institute certain procedures for legal visitors to detainees at the Rose M. Singer Enhanced Supervised Housing Unit (RESH), unanimously affirmed, without costs.

Petitioner initially brought this proceeding as a writ of habeas corpus on behalf of Kelvin Williams, who was detained at RESH, on the ground that DOC violated his right to counsel. After Williams was transferred out of RESH, petitioner moved to convert the writ of habeas corpus into an article 78 proceeding for a writ of mandamus; DOC did not submit a response to the motion. The court then granted the conversion motion on default and sought further briefing on the merits of the article 78 claims. In its opposition to the article 78 petition for mandamus, DOC asked the court to reconsider its decision on the article 78 conversion and to vacate the order that granted conversion.

Supreme Court did not abuse its discretion in declining to revisit the issue of the article 78 conversion, as DOC did not establish that it was entitled to vacatur of its default under CPLR 2005. We note that DOC did, in fact, provide a reasonable excuse for its failure to file an opposition to the conversion motion, as petitioner sent an email to DOC and to the court suggesting that the motion was no longer pending and the court failed to clarify the procedural posture of the motion (see *Cornwall Warehousing, Inc. v Lerner*, 171 AD3d 540, 540-541 [1st Dept 2019]; *Marine v Montefiore Health Sys., Inc.*, 129 AD3d 428, 429 [1st Dept 2015]).

However, DOC did not raise any meritorious defenses to the motion, as required for vacatur of a default (*see Cornwall Warehousing*, 171 AD3d at 540). Contrary to DOC's assertions otherwise, the failure to serve the motion on the New York City Corporation Counsel did not divest the court of jurisdiction. Once a proceeding is underway and the parties are represented by counsel, pleadings may be properly served upon the opposing party's attorney, and DOC properly served the writ of habeas corpus on counsel by mail (CPLR 2103 [b]). Similarly, DOC cannot establish a meritorious defense on the basis that Rikers Island is in Bronx County and that venue is therefore improper in New York County. New York County is the appropriate venue for the writ of habeas corpus, which is how this proceeding was commenced (CPLR 7002 [b] [5]). Although DOC argued the writ "must be transferred" if converted to an article 78 proceeding, it failed to timely move for a change of venue under CPLR 510, and thus has no meritorious defense on this basis.

In addition, despite DOC's assertions that RESH had adjusted its policies and procedures for legal visitors, rendering the matter moot, Supreme Court properly found that the matter was not in fact moot, as the issues raised were likely to repeat, typically evade review, and present significant questions (*see Matter of Hearst Corp. v Clyne*, 50 NY2d 707, 714-715 [1980]). In any event, the record suggests that RESH was still depriving detainees of the same right to counsel that they were afforded at other Rikers facilities.

Supreme Court properly granted mandamus relief, as petitioner established that DOC failed to perform its mandatory, nondiscretionary duty to protect the Sixth Amendment right to counsel for detainees housed at RESH. Mandamus may "compel acts that officials are duty-bound to perform, regardless of whether they may exercise their discretion in doing so" (*Klostermann v Cuomo*, 61 NY2d 525, 540 [1984]; *see also Matter of Natural Resources Defense Council v New York City Dept. of Sanitation*, 83 NY2d 215, 221 [1994]). In accordance with that principle, the court's order properly enforces only the minimum standard DOC was required to meet to avoid infringing the constitutionally protected right to counsel.

We also reject DOC's contention that Supreme Court's order deprived DOC of discretion in how it balanced security concerns against its duty to preserve the right to counsel for detainees at RESH. In rendering its decision, the court sought to standardize RESH protocols with the protocols at other Rikers facilities and to address a condition it deemed to burden the right to counsel.

Finally, DOC's objection to facilitating attorney access to the family waiting room during attorney visiting hours because it would require the expenditure of resources does not represent a legitimate penological concern (*see Matter of Natural Resources Defense Council v New York City Dept. of Sanitation*, 188 AD2d 415, 415 [1st Dept 1992] [rejecting "any suggestion that an administrative authority has discretion to suspend compliance with the mandate of a law . . . on the basis of budgetary constraints"], *affd* 83 NY2d 215 [1994]). Concur—Manzanet-Daniels, J.P., Kennedy, González, Pitt-Burke, Rosado, JJ.

35 Lynne Piazza et al., Respondents, v Georgiana A. Dobri, M.D., et al., Appellants, et al., Defendant. [253 NYS3d 161]—

Physicians and Surgeons—Malpractice—Failure to Diagnose Cushing's Syndrome—Causation

Order, Supreme Court, New York County (John J. Kelly, J.), entered August 26, 2025, which, to the extent appealed from as limited by the briefs, denied in part the motion of defendants-appellants for summary judgment dismissing the medical malpractice claim, unanimously reversed, on the law, without costs, and the motion granted. The Clerk is directed to enter judgment accordingly.

The court should have granted defendants' motion for summary judgment dismissing the medical malpractice claim in its entirety. The crux of plaintiffs' claim is that defendants failed to diagnose plaintiff with Cushing's syndrome. Defendants made a prima facie showing of entitlement to summary judgment through their expert's affidavit, who averred that defendants' treatment of plaintiff was within the standard of care and that none of plaintiffs' alleged injuries were caused by the care that defendants provided to plaintiff. The expert opined that defendants never had the biochemical evidence available to support a Cushing's syndrome diagnosis. With respect to proximate causation in particular, defendants' expert noted that during defendant's treatment of plaintiff there was no evidence of an adrenal tumor secreting excess cortisol or a tumor elsewhere secreting excess adrenocorticotrophic hormone (ACTH). The expert concluded that plaintiff did not have Cushing's, as confirmed by surgical pathology of plaintiff's pituitary gland in June and October 2019. The pathology results did not reveal Crookes hyaline change in June 2019, which defendants' expert concluded showed that plaintiff did not have Cushing's.

In opposition to defendants' prima facie showing, plaintiffs'

expert failed to meaningfully address defendants' expert's opinions regarding causation (*see Khurdayan v Kassir*, 223 AD3d 590, 591 [1st Dept 2024]). Plaintiffs' expert opined that plaintiff had a tumor or adenoma which grew or spread during the time in which they allege that defendant doctor failed to make a Cushing's diagnosis. Although plaintiffs' expert opined that plaintiff had Cushing's, plaintiffs' expert failed to meaningfully address the 2019 pathology results. In particular, the expert did not address the pathology results vis-à-vis the absence of adenomas or ACTH-producing tumors in the pituitary gland. In light of the foregoing, plaintiffs failed to raise an issue of fact as to causation. Concur—Scarpulla, J.P., Friedman, Gesmer, Shulman, Chan, JJ.

36 Desiree Ratner, M.D., P.C., Appellant, v Mount Sinai Health Partners IPA, LLC, et al., Respondents, et al., Defendants. [253 NYS3d 162]—

Pleading—Sufficiency of Pleading—Fraud

Order, Supreme Court, New York County (Leslie A. Stroth, J.), entered January 21, 2025, which, to the extent appealed from as limited by the briefs, granted defendant Mount Sinai Health Partners IPA, LLC's (MSHP) motion to dismiss the claims for promissory estoppel, breach of the covenant of good faith and fair dealing, fraud, and negligent misrepresentation, and granted defendant Mount Sinai Independent Practice Association, Inc.'s (MSIPA) motion to dismiss the claims for negligence and promissory estoppel, unanimously affirmed, without costs.

Plaintiff's promissory estoppel claim against MSHP was properly dismissed because it contradicts the terms of the parties' written agreement and is foreclosed by the merger clause (*see Capricorn Invs. III, L.P. v CoolBrands Intl., Inc.*, 66 AD3d 409, 410 [1st Dept 2009]; *EXRP 14 Holdings LLC v LS-14 Ave LLC*, 228 AD3d 498, 499 [1st Dept 2024]). The breach of the covenant of good faith and fair dealing claim was properly dismissed because it arises from the same facts and seeks the same damages as the breach of contract claim (*Mill Fin., LLC v Gillett*, 122 AD3d 98, 104 [1st Dept 2014]). The negligent misrepresentation claim against MSHP was also properly dismissed because the complaint fails to allege that the parties had a special relationship (*see Greentech Research LLC v Wissman*, 104 AD3d 540, 540 [1st Dept 2013]).

Moreover, the complaint fails to state a cause of action for fraud against MSHP. To the extent the claim is based on MSHP's alleged statement that plaintiff was already onboarded

with certain insurers when she was not, plaintiff's conclusory allegation that MSHP knew that its representation was false "is indefinite and conclusory, and therefore not actionable" (*Pacnet Network Ltd. v KDDI Corp.*, 78 AD3d 478, 479 [1st Dept 2010]; see CPLR 3016 [b]). To the extent the claim is premised on MSHP's alleged representations that it would help plaintiff recover for past services, those are "non-actionable promises of future conduct or events, rather than [statements of] present fact" (*Yablon v Stern*, 161 AD3d 594, 595 [1st Dept 2018]).

As to MSIPA, the complaint's illogical allegation that MSIPA promised plaintiff "that she could terminate her membership" in order to "induce . . . [her] to maintain her membership" fails to set forth a clear and unambiguous promise as required for promissory estoppel (see *StoreRunner Network, Inc. v CBS Corp.*, 8 AD3d 127, 128 [1st Dept 2004]). The negligence claim was properly dismissed because the complaint alleges no duty distinct from MSIPA's obligation to fulfill its alleged contractual duty to plaintiff (see *Ho v Star Contrs., Inc.*, 226 AD3d 511, 512 [1st Dept 2024]). Concur—Friedman, J.P., Gesmer, Shulman, Chan, JJ.

37 Laura Roberson-Fisch, Appellant, v Michael Fisch, Respondent. [253 NYS3d 163]—

Contempt—Civil Contempt—Divorce

Order, Supreme Court, New York County (Jeffrey H. Pearlman, J.), entered on or about August 26, 2025, which, to the extent appealed from as limited by the briefs, granted defendant's motion and held plaintiff in contempt for her failure to comply with this Court's order dated March 20, 2025 (*Roberson-Fisch v Fisch*, 236 AD3d 554 [1st Dept 2025], *lv dismissed* 44 NY3d 1075 [2026]), unanimously modified, on the law, the motion denied, the finding of contempt vacated, and otherwise affirmed, without costs.

Although the contempt has been purged, the appeal is not moot because the adjudication itself may carry potential enduring consequences (see *Behan v Kornstein*, 164 AD3d 1113, 1116 [1st Dept 2018], *lv denied & dismissed* 32 NY3d 1078 [2018]; *Matter of April G. v Duane M.*, 105 AD3d 491, 491 [1st Dept 2013]).

The court's determination holding the wife in contempt was an improvident exercise of discretion for two reasons. First, this Court's March 20, 2025 order did not specify any deadline for transferring the funds and therefore lacked the clear and unequivocal mandate required to support a civil contempt find-

ing (*see Spathis v Spathis*, 174 AD3d 407, 408 [1st Dept 2019]; *Matter of Lipsig [Manus]*, 139 AD3d 600, 601 [1st Dept 2016]; *Monaco v Monaco*, 116 AD3d 452, 453 [1st Dept 2014]; *Matter of Serena W. [Daniels—Wiltshire]*, 218 AD3d 597, 599 [2d Dept 2023]). Second, the motion court order finding the wife in contempt did not make the required finding that the wife's conduct was calculated to or actually did defeat, impair, impede, or prejudice the rights or remedies of the husband (*see* Judiciary Law § 753 [A] [3]; *Legacy Org., Inc. v Nomellini*, 221 AD3d 487, 488 [1st Dept 2023]; *Clinton Corner H.D.F.C. v Lavergne*, 279 AD2d 339, 341 [1st Dept 2001]), and did not make a recital to that effect (*see* Judiciary Law § 770; *Farkas v Farkas*, 209 AD2d 316, 319 [1st Dept 1994]). Concur—Scarpulla, J.P., Friedman, Gesmer, Shulman, Chan, JJ.

38 In the Matter of US Bank National Association, Appellant, v Moises R. Merino, Respondent, et al., Defendants. [253 NYS3d 149]—

Evidence—Business Records—Sufficiency of Foundation—Attestation of Business Records

Mortgages—Foreclosure—Tolling of Interest—Prejudice from Delay in Appointment of Referee

Order, Supreme Court, Bronx County (Naita A. Semaj, J.), entered on or about May 27, 2025, which denied without prejudice plaintiff's motion to confirm a Referee's report and for a judgment of foreclosure and sale, and which granted the cross-motion of defendant Moises R. Merino pursuant to CPLR 5001 (a) to toll interest on the subject mortgage from October 12, 2012, to March 20, 2020, and from November 3, 2020, to June 8, 2023, unanimously affirmed, without costs.

The court properly declined to confirm the Referee's report. In arriving at his conclusions regarding the amounts due from defendant Merino on the subject loan, the Referee relied exclusively on an affidavit from an employee of plaintiff's loan servicer, Specialized Loan Servicing LLC (SLS) and the exhibits annexed thereto. The employee laid a proper foundation for records from SLS and prior loan servicers, whose records he attested were routinely "integrated and boarded into SLS's systems" and whose accuracy SLS routinely relied upon (*see Bank of N.Y. Mellon v Gordon*, 171 AD3d 197, 209 [2d Dept 2019]). However, he did not state whether SLS or a prior servicer created the specific records that he relied on to show the amounts due from Merino, or whether those records instead came from plaintiff itself, about whose records he made no attestations. Nor were there sufficient identifying marks on the records indicating who made them or any other text identifying the loan with which the records were associated.

The court providently exercised its discretion in granting Merino's cross-motion to toll interest (*see People's United Bank v Patio Gardens III, LLC*, 189 AD3d 1622, 1622-1623 [2d Dept 2020]; *cf. Bank of N.Y. Mellon v Davis*, 219 AD3d 420, 420-421 [1st Dept 2023]). Plaintiff failed to explain the year-and-a-half gap between the appointment of the fourth referee and its motion to replace him, nor did it account for the nearly four-year delay between the appointment of the Referee whose report is at issue and the release of his report. In addition, the record suggests that plaintiff was responsible for the decision of one of the Referees to decline his appointment based on an "insufficient fee." The delays resulted in significant prejudice to Merino, since the accumulated interest exceeded the outstanding principal. Accordingly, tolling of the interest was within the court's equitable power (*see People's United Bank*, 189 AD3d at 1622). Concur—Manzanet-Daniels, J.P., Kennedy, González, Pitt-Burke, Rosado, JJ.

39 Christina Ventura, Appellant, v Zuel Ahmed, Respondent. [253 NYS3d 166]—

Appeal—Matters Appealable—Order upon Default

Appeal from order, Supreme Court, Bronx County (Fernando Tapia, J.), entered on or about April 9, 2025, which granted defendant's motion for summary judgment dismissing the complaint for lack of a serious injury within the meaning of Insurance Law § 5102 (d), unanimously dismissed, without costs, as taken from a nonappealable paper.

No appeal lies as of right from an order entered on a party's default (*see* CPLR 5511). Although plaintiff purported to file papers opposing defendant's motion, the order granting summary judgment to defendant rejected those papers as untimely and indicated that it granted defendant's motion because of plaintiff's default in responding (*see Estrella v 20 Bruckner, LLC*, 247 AD3d 524, 2026 NY Slip Op 01453 [1st Dept 2026]). Accordingly, plaintiff's proper remedy was to move to vacate her default and appeal the denial of that motion (*see e.g. Matter of Diamonds R-Us Ltd. v Raffaello & Co. Inc.*, 238 AD3d 664, 664-665 [1st Dept 2025]; *Manrique v Delgado*, 195 AD3d 554 [1st Dept 2021]).

In light of the foregoing, we decline to consider plaintiff's remaining arguments concerning the merits of the motion. Concur—Manzanet-Daniels, J.P., Kennedy, González, Pitt-Burke, Rosado, JJ.

40 Blanche Zelmanovich, Respondent, v Eastmore Owners Corp., Appellant, and Adam G. Seidel, Respondent. [— NYS3d —]—

Civil Rights—Discrimination in Housing—Discrimination Based on Disability—Sufficiency of Pleading—Noise Complaints About Medically Prescribed Emotional Support Dog
Civil Rights—Discrimination in Housing—Discrimination Based on Disability—Failure to Provide Reasonable Accommodation—Prescribed Emotional Support Dog

Order, Supreme Court, New York County (Verna L. Saunders, J.), entered on or about April 25, 2025, which, to the extent appealed from as limited by the briefs, denied the motion of defendant Eastmore Owners Corp. to dismiss the second, third, and fourth causes of action, unanimously affirmed, with costs.

Plaintiff stated causes of action for housing discrimination under the Fair Housing Act (42 USC § 3601 *et seq.*), the City Human Rights Law (Administrative Code of the City of New York §§ 8-102; 8-107 *et seq.*), and the New York State Human Rights Law (Executive Law § 296 *et seq.*) by pleading that she is a member of a protected class as a disabled person, that she was qualified for the tenancy, that defendant caused her to suffer an adverse action regarding her housing, and that the circumstances surrounding the adverse action gave rise to an inference of discrimination (*see Gibson v 526 W. 158th St. Hous. Dev. Fund Corp.*, 221 AD3d 455, 455 [1st Dept 2023]).

Moreover, plaintiff sufficiently alleges under the relevant statutes that the noise complaints about her medically prescribed emotional support dog, which served as the basis for a notice of default, were inaccurate because her dog was well-behaved and did not bark incessantly, and that some of the complaints were registered at times when the dog was not even in the apartment. At the pleading stage of the litigation, these allegations adequately give rise to an inference of discrimination, as they suggest that Eastmore had no legitimate reason to send plaintiff a notice of default. Plaintiff further alleges that Eastmore sent her the notice of default less than a month after she informed it of her disability, and the close temporal proximity between these two events creates an inference that the notice of default was related to the disability (*see Pelepelin v City of New York*, 189 AD3d 450, 452 [1st Dept 2020]). In addition, plaintiff pleads facts sufficient to suggest that she was subjected to disparate treatment as compared to her upstairs neighbor, who was also the subject of noise complaints but was not sent a notice of default.

Plaintiff also sufficiently pleads failure to provide a reasonable accommodation under the relevant statutes. Plaintiff alleges that she sent Eastmore a letter from her psychologist explaining that she had severe anxiety and was prescribed an emotional support dog that enables her to enjoy and use her

apartment. This allegation, taken as true, adequately pleads that plaintiff made a request for a reasonable accommodation (see *Mozaffari v New York State Div. of Human Rights*, 63 AD3d 643, 644 [1st Dept 2009]). Plaintiff also alleges that Eastmore refused her offer to meet to discuss her dog, thus failing to engage in an interactive process to determine whether a reasonable accommodation was available (see *Matter of Masaryk Towers Corp. v New York State Div. of Human Rights*, 234 AD3d 493, 493-494 [1st Dept 2025]). Concur—Manzanet-Daniels, J.P., Kennedy, González, Pitt-Burke, Rosado, JJ.

(April 28, 2026)

1 The Bank of New York Mellon, Formerly Known as The Bank of New York, Respondent, v Adam P10tch, LLC, Appellant, et al., Defendants. [253 NYS3d 620]—

Motions and Orders—Timeliness of Motion—Change in Law—Foreclosure Abuse Prevention Act

Order, Supreme Court, New York County (Francis A. Kahn, III, J.), entered on or about September 23, 2024, which denied defendant’s CPLR 2221 motion seeking to vacate the judgment of foreclosure and sale based on a change in the law, unanimously reversed, on the law, with costs, and the matter remanded for consideration of defendant’s motion based on the Foreclosure Abuse Prevention Act (FAPA).

On July 9, 2009, plaintiff brought an action to foreclose upon a mortgage. On August 13, 2012, defendant Adam P10tch, LLC, acquired the property, subject to the mortgage, at a condominium lien foreclosure sale. On March 19, 2014, while the 2009 action was pending, plaintiff brought this action to foreclose upon the same mortgage. The court granted plaintiff a judgment of foreclosure and sale on October 29, 2020. Defendant moved pursuant to CPLR 2221 to vacate the judgment based on FAPA.

The court should not have determined that the motion was untimely. Generally, a CPLR 2221 motion based upon a change in the law must be made prior to the entry of a final judgment or before the time to appeal has fully expired (see *Wilmington Trust N.A. v Fife*, 212 AD3d 550, 550 [1st Dept 2023]). However, following the Court of Appeals’s decision in *Article 13 LLC v Ponce De Leon Fed. Bank* (— NY3d —, 2025 NY Slip Op 06536 [2025]), this Court held that “the only way to effectuate the retroactive application of FAPA after a judgment has been entered and the time to appeal has expired, is by filing a mo-

tion to renew before the sale is conducted” (*21st Mtge. Corp. v Jin Hua Lin*, 246 AD3d 648, 649 [1st Dept 2026]). Defendant followed this precise process.

Accordingly, this matter is remanded for further proceedings, including consideration of the parties’ arguments concerning whether retroactive application of FAPA would violate the Takings and Due Process Clauses (*id.*; see *HSBC Bank USA, N.A. v Gifford*, 224 AD3d 447, 452-453 [1st Dept 2024]). Concur—Webber, J.P., Mendez, Rodriguez, Michael, JJ.

2 In the Matter of Eric Camacho, Respondent, v New York City Housing Authority, Appellant. [— NYS3d —]

Public Housing—Succession Rights—One-Year Continuous Authorized Occupancy

Public Housing—Succession Rights—Housing Authority—Estoppel

Order and judgment (one paper), Supreme Court, New York County (Nicholas W. Moyne, J.), entered July 31, 2024, which granted the petition to vacate a determination of respondent New York City Housing Authority, dated November 22, 2023, denying petitioner’s remaining family member (RFM) grievance, to the extent of remanding the matter to the Housing Authority, unanimously reversed, on the law, without costs, the petition denied, and the proceeding brought pursuant to CPLR article 78 dismissed.

In March 2019, the tenant of record asked management for written permission to add petitioner as a permanent member of the household. Management denied the request because petitioner, the tenant’s nephew, was not among the categories of relatives eligible for written permission under the Housing Authority’s policy in effect at the time. The tenant died in February 2020. In November 2023, the Housing Authority denied petitioner’s RFM grievance to succeed his aunt as tenant. Effective January 1, 2024, the Housing Authority adopted the Admissions and Continued Occupancy Policy (ACOP) which no longer limits written permanent permission to certain categories of relatives but still states that RFM status requires that the individual “must have resided in the apartment for at least 12 months from the date the permanent permission was granted in writing and for at least 12 months immediately prior to the date the resident died”; and must have “[r]emained continuously in the apartment, including on all [a]ffidavits of [i]ncome” (New York City Housing Authority, Chapter 6: Leasing, § K, <https://www.nyc.gov/site/nycha/residents/acop/chapter-6.page> [last accessed Mar. 30, 2026]).

The Housing Authority’s denial of petitioner’s RFM request

had a rational basis because, even if the tenant's March 2019 written permission request had been granted, petitioner would not have satisfied the one-year continuous authorized occupancy requirement before his aunt's death (*see Matter of Perez v New York City Hous. Auth.*, 99 AD3d 624, 624-625 [1st Dept 2012]; *Matter of Ortiz v Rhea*, 127 AD3d 665, 666 [1st Dept 2015]).

Petitioner's personal hardship and factors concerning his lack of housing alternatives and the fact that he gave up his own housing to care for his aunt do not provide a basis to annul the determination (*see Matter of McMillan v New York City Hous. Auth.*, 168 AD3d 643, 643 [1st Dept 2019]; *see also Matter of Curry v New York City Hous. Auth.*, 124 AD3d 530, 531 [1st Dept 2015]). Contrary to petitioner's contention, the Housing Authority "cannot be estopped from discharging its statutory duties when a claimant does not meet the eligibility requirements for succession rights to the apartment, even if the managing agent acquiesced in petitioner's occupancy" (*Matter of Perez*, 99 AD3d at 625). Nor did petitioner's payment of rent confer succession rights on him (*id.*).

Remand is unnecessary because the hypothetical retroactive application of the ACOP would not have changed the outcome of petitioner's RFM grievance. Concur—Webber, J.P., Mendez, Rodriguez, O'Neill Levy, Michael, JJ.

3 In the Matter of A.G., Appellant, v K.V., Respondent. [253 NYS3d 621]—

Courts—Family Court—Subject Matter Jurisdiction—Family Offense Proceeding

Order, Family Court, New York County (Genna D. Teitelbaum, Ref.), entered on or about January 9, 2025, which granted respondent's motion to dismiss the family offense petition, with prejudice, for lack of subject matter jurisdiction, unanimously modified, on the law, to the extent of deleting the phrase "with prejudice" in the decretal paragraph and otherwise affirmed, without costs.

Family Court properly determined that it lacked subject matter jurisdiction over the family offense petition, which was filed by petitioner against her adult stepson's wife. Although Family Court may have jurisdiction over parties who have a relationship of affinity, petitioner is not related by affinity to respondent, as respondent is not a blood relative of petitioner or petitioner's spouse (*see* Family Ct Act § 812 [1]; *Matter of Anstey v Palmatier*, 23 AD3d 780, 780, 781 [3d Dept 2005]). Petitioner has a relationship of affinity with her stepson (*see*

Matter of Arnold v Arnold, 119 AD3d 938, 939 [2d Dept 2014]), but that affinity does not extend to respondent. Nor does petitioner allege that she was in an “intimate relationship” with respondent within the meaning of Family Court Act § 812 (1) (e) (see *Matter of Singh v DiFrancisco*, 141 AD3d 598, 599 [2d Dept 2016]). Rather, petitioner alleges only that she and respondent had a hostile relationship. She points to a few interactions over the course of the five years leading up to the filing of the petition and acknowledges that she and respondent did not live in the same home. These allegations are insufficient to confer jurisdiction upon Family Court (see *Matter of Tyrone T. v Katherine M.*, 78 AD3d 545, 545 [1st Dept 2010]; *Matter of Welch v Lyman*, 100 AD3d 642 [2d Dept 2012]; see also *Matter of Jessica D. v Jeremy H.*, 77 AD3d 87, 89 [3d Dept 2010]).

Nevertheless, Family Court should not have dismissed the proceeding with prejudice, as it did not reach the merits of the petition (see *Matter of Daryl D. v Shameeka W.*, 161 AD3d 416 [1st Dept 2018]). Concur—Webber, J.P., Mendez, Rodriguez, O’Neill Levy, Michael, JJ.

4 Anthony Gordon, Appellant, et al., Plaintiff, v 476 Broadway Realty Corp., Respondent, et al., Defendant. (And a Third-Party Action.) [— NYS3d —]

Condominiums and Cooperatives—Proprietary Lease—Counsel Fees—Prevailing Party

Courts—Jurisdiction—Relief Not Requested

Appeal—Harmless and Prejudicial Error—Admission of Evidence

Order, Supreme Court, New York County (Debra A. James, J.), entered on or about December 13, 2023, which, to the extent appealed from as limited by the briefs, denied the motion of plaintiff Anthony Gordon (plaintiff) to modify or reject the report and recommendation of Judicial Hearing Officer (JHO) Alan C. Marin, dated March 15, 2022, and granted the motion of defendant 476 Broadway Realty Corp. (the Co-op) to confirm the report and recommendation as to the award of attorneys’ fees, unanimously modified, on the law, to deny the Co-op’s motion, grant plaintiff’s motion to the extent of disaffirming that portion of the report and recommendation that awarded attorneys’ fees to the Co-op and modifying the report and recommendation to award plaintiff \$100,751 on his claim for abatement, plus interest at the statutory rate from October 6, 2012, and otherwise affirmed, without costs.

In 1998, plaintiffs purchased shares appurtenant to a residential unit of 476 Broadway in Manhattan and entered into a proprietary lease with the Co-op. Prior to moving into the

apartment, plaintiffs performed gut renovations to remediate various identified issues. Despite the renovations, plaintiffs experienced significant leaking from 2006 through 2017. The Co-op, for its part, undertook a waterproofing project on the exterior of the building. Plaintiffs ultimately refused to pay maintenance and assessments related to the waterproofing project, contending that the work failed to remedy the ongoing leaks.

According to the Co-op, plaintiffs engaged in objectionable conduct related to their occupancy in the building, including refusing apartment access for water spray testing during most of 2012. Consequently, in September 2012, the Co-op's shareholders held a meeting and voted in favor of terminating plaintiffs' lease, and this action ensued. Among other claims, plaintiffs sought a declaration that the Co-op's notice terminating their lease was null and void; an abatement of rent, maintenance, assessment and/or use and occupancy; and damages for breach of the proprietary lease. The Co-op answered and asserted, as relevant here, a holdover counterclaim seeking immediate possession. The court awarded possession to the Co-op in 2014 (*see Gordon v 476 Broadway Realty Corp.*, 129 AD3d 547 [1st Dept 2015]). In the order currently appealed from, Supreme Court confirmed the JHO's report and recommendation which, among other things, awarded plaintiffs a 45.6% abatement from October 2006 until December 2017.

The parties' disputes concerning prevailing party attorneys' fees and the nature of plaintiffs' eighth cause of action have been preserved for appellate review. The final order appealed "disposed of all factual and legal issues raised in the case" (*Hurd v Lis*, 126 AD2d 163, 166 [3d Dept 1987], *lv dismissed* 70 NY2d 872 [1987]). That order, in turn, brings up for review the court's July 18, 2018 order, which deemed the Co-op to be the prevailing party and sua sponte deemed the eighth cause of action to be one for breach of the warranty of habitability (*see Matter of Quinn, Emanuel, Urquhart & Sullivan, LLP v AVRA Surgical Robotics, Inc.*, 233 AD3d 497, 497 [1st Dept 2024]).

Supreme Court should have disaffirmed that portion of the report and recommendation that awarded attorneys' fees to the Co-op. To begin, the July 18, 2018 order prematurely deemed the Co-op to be the prevailing party, as significant relief remained for adjudication. Now, on the merits, there is no prevailing party. "[T]o prevail, the party seeking attorneys' fees must be successful on the central relief sought" (*49 E. Owners Corp. v 825 Broadway Realty, LLC*, 224 AD3d 493, 493 [1st

Dept 2024] [internal quotation marks omitted]). Here, there was no single central issue. Rather, there were two main issues: whether plaintiffs could stay in their home and whether they were entitled to damages, or an abatement on their maintenance, due to the leaks in their apartment. Although the Co-op obtained summary judgment on its possession counterclaim, it did so under the deferential standard applied to business judgment (see *Gordon*, 129 AD3d at 548, citing *40 W. 67th St. v Pullman*, 100 NY2d 147, 155-156 [2003]). Even accepting the Co-op's award of possession as substantial relief on one of the main issues, under the circumstances plaintiffs' abatement of almost 50% for more than a decade precludes prevailing party attorneys' fees (see *49 E. Owners Corp.*, 224 AD3d at 493 ["Where the outcome of litigation is mixed and the relief awarded is not substantially favorable to either party, neither party can claim to be the prevailing party"]; *Pelli v Connors*, 7 AD3d 464, 464 [1st Dept 2004]).

The Co-op's cited authority does not counsel to the contrary. In *Peachy v Rosenzweig* (215 AD2d 301 [1st Dept 1995]), for example, the petitioner landlord was held to be the prevailing party because it succeeded in obtaining the central relief in the action it commenced. Although the respondent tenant was entitled to a \$4,825.21 abatement setoff, this represented approximately 22% of the sum awarded under the landlord's possessory judgment, and only 8% compared to the total amount the landlord recovered (see *id.* at 301-302; see also *Excelsior 57th Corp. v Winters*, 227 AD2d 146 [1st Dept 1996] [the petitioner landlord was the prevailing party despite rent abatement for 4½ of the 54 months at issue]). Here, the Co-op sought possession by counterclaim, and the issue was resolved relatively early in the litigation. Moreover, the Co-op's only monetary award was premised on prevailing party attorneys' fees (cf. *Peachy*, 215 AD2d at 302).

Supreme Court did not err in the 2018 order when, for the purpose of issuing its reference to the JHO for a determination as to credit and offsets to which plaintiffs were entitled, it sua sponte grouped the eighth cause of action with plaintiffs' fifth, sixth, and seventh causes of action. Contrary to plaintiff's argument, the court did not lack jurisdiction to grant relief that the Co-op did not request in its moving papers. As plaintiff acknowledges, the Co-op moved for summary judgment and such a motion empowers a court to search the record (see *Chateau D' If Corp. v City of New York*, 219 AD2d 205, 210 [1st Dept 1996], *lv denied* 88 NY2d 811 [1996]), and Supreme Court had ample basis to conclude that the eighth cause of action

was duplicative of the other causes of action asserted by plaintiffs. Notably, this case does not fall into that narrow category of “borderland situations where a legal duty independent of contractual obligations may be imposed by law as incident to the parties’ relationship” (*Duane Reade v SL Green Operating Partnership, LP*, 30 AD3d 189, 190 [1st Dept 2006] [internal quotation marks and brackets omitted], quoting *Sommer v Federal Signal Corp.*, 79 NY2d 540, 551 [1992]).

Turning to the JHO’s abatement award, plaintiff’s contention that the JHO should have awarded plaintiffs a 100% abatement instead of a 45.6% abatement is unavailing. The record clearly supports the JHO’s substantial partial abatement award, and the JHO was in the best position to determine the issues presented (*see Sichel v Polak*, 36 AD3d 416, 416 [1st Dept 2007]; *Nager v Panadis*, 238 AD2d 135, 136 [1st Dept 1997]; *Namer v 152-54-56 W. 15th St. Realty Corp.*, 108 AD2d 705, 705-706 [1st Dept 1985]).

Plaintiff’s various challenges to the JHO’s hearing rulings do not warrant reversal. Regarding the mold report, even if the JHO should have admitted reports about mold in plaintiffs’ apartment, any such error was harmless under the circumstances (*see Matter of Hassine*, 222 AD3d 522, 524 [1st Dept 2023]). Indeed, plaintiff’s testimony and exhibits addressed the mold condition in the apartment. Likewise, to the extent the JHO erred in declining to hear testimony from plaintiffs’ subpoenaed or proposed expert witnesses, any such error was harmless (*see id.*). Although plaintiff intended for these witnesses to testify about water leaks and damage, both he and his architect extensively covered these topics during the hearing.

Because the award of attorneys’ fees to the Co-op should be vacated, the \$100,751 abatement is no longer a mere offset to the award to the Co-op. Thus, plaintiff is entitled to an award of \$100,751, with statutory interest (CPLR 5001 [a]; *see Delulio v 320-57 Corp.*, 99 AD2d 253, 254 [1st Dept 1984]; *Solow v Wellner*, 86 NY2d 582, 589-590 [1995]). To avoid further delay in this old case, interest should be computed from “the date of commencement of the damage action” (*Delulio*, 99 AD2d at 255). Concur—Moulton, J.P., Kennedy, Rodriguez, Michael, Chan, JJ.

5 Nathan Gottlieb et al., Respondents, v Mountain Valley Indemnity Company, Appellant. [— NYS3d —]

Insurance—Disclaimer of Coverage—Determination of Number of Units—Unifying Features

Order, Supreme Court, New York County (Suzanne J. Adams, J.), entered on or about December 16, 2024, which denied defendant's motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

Determining the number of units within a property requires consideration of its "structural configuration," which takes into account each respective portion or area of the property having "its own kitchen, bathroom and separate entrance" (*Dauria v CastlePoint Ins. Co.*, 104 AD3d 406, 407 [1st Dept 2013]). Further, whether a dwelling is two-family, as contended by plaintiff insureds, who lived in one unit while their son and his family lived in the other, or three-family, as defendant fire insurer claims based on the configuration of the property's basement, "is determined by actual use" (*Castlepoint Ins. Co. v Jaipersaud*, 127 AD3d 401, 401 [1st Dept 2015]).

Summary judgment is not appropriate here because "unifying features" exist which could suggest that the basement was merely a space used by plaintiffs and their son's family, rather than a separate unit unto itself (*Mandelos v Karavasidis*, 86 NY2d 767, 769 [1995]). Defendant failed to satisfy its burden of establishing that it was entitled to disclaim coverage for fire damage based on its belief that the building was for three families instead of two, the number described in the fire policy. Defendant submitted testimony indicating that the basement had the same entrance as the other two units. Further, deposition testimony and photographs taken by defendant's own investigator suggest that stairs led directly from the basement to one of the units, raising a question whether the basement was completely separate from the rest of the property (see *Jaipersaud*, 127 AD3d at 401). Moreover, an affidavit submitted by defendant's field investigator failed to explain how he arrived at the conclusion that the basement was "an illegal apartment," nor did he state his qualifications for determining the legality of any part of the property's configuration (see *Residential Credit Solutions, Inc. v Gould*, 171 AD3d 638, 638-639 [1st Dept 2019]).

In any event, plaintiffs identified issues of fact in opposition. They submitted evidence that the basement was not a separate apartment but rather a space to accommodate extended family members and other visitors. Additionally, they explained that having a kitchen in the basement was consistent with the common practice of people in plaintiffs' Orthodox Jewish community, especially to facilitate the strict dietary laws observed during Passover. Concur—Webber, J.P., Mendez, Rodriguez, O'Neill Levy, Michael, JJ.

6 Virginia A. Harvey, Appellant, v The New York Foundling Hospital et al., Respondents. [253 NYS3d 626]—

Insurance—No-Fault Automobile Insurance—Serious Injury—Preexisting Injuries

Order, Supreme Court, New York County (James G. Clynes, J.), entered March 24, 2025, which granted defendants' motion for summary judgment dismissing the complaint on the ground that plaintiff did not sustain a serious injury as defined by Insurance Law § 5102 (d), unanimously affirmed, without costs.

Supreme Court correctly found that defendants established that plaintiff did not suffer a serious injury to her right shoulder, head, and spine related to the subject May 2020 motor vehicle accident, but rather had preexisting injuries for which she received treatment after an earlier motor vehicle accident on March 30, 2019. Defendants met their prima facie burden by submitting expert reports which compared MRI films of plaintiff's cervical and lumbar spine before and after the subject accident and concluded that plaintiff's alleged injuries were preexisting, chronic, and degenerative, and not causally related to the May 2020 accident (*see Monahan v Reyes*, 184 AD3d 460, 460 [1st Dept 2020]). As to plaintiff's right shoulder, defendants' experts opined that the MRI did not indicate a labral tear and that any discomfort was chronic and inflammatory in nature (*see id.*).

In opposition, plaintiff failed to raise a triable issue of fact. Her expert's affirmation did not address a prior motor vehicle accident "and did not purport to explain why the prior accident could be ruled out as the cause of her current alleged limitations" (*Jimenez v Polanco*, 88 AD3d 604, 604 [1st Dept 2011]; *see Monahan*, 184 AD3d at 461). In the absence of any issue of fact as to whether plaintiff's injuries were causally related to the accident, the court properly dismissed the 90/180-day claim (*see Sanchez v Steele*, 149 AD3d 458, 459 [1st Dept 2017]; *Jimenez*, 88 AD3d at 604). Concur—Webber, J.P., Mendez, Rodriguez, O'Neill Levy, Michael, JJ.

7 Francisco Lima, Respondent, v Skyline Restoration Inc., Appellant. [253 NYS3d 627]—

Labor—Safe Place to Work—Duty to Provide Reasonable Precautions—Creation of Condition

Labor—Safe Place to Work—Notice of Condition

Order, Supreme Court, New York County (Dakota D. Ramseur, J.), entered November 20, 2025, which granted plaintiff's CPLR 2221 (a) motion to modify the court's prior order dated August 14, 2025 and, upon modification, denied defendant's

motion for summary judgment dismissing plaintiff's common-law negligence cause of action, unanimously affirmed, without costs.

Defendant failed to establish that it did not create or have notice of the raised Masonite flooring that caused plaintiff's fall on the stairs leading to the building's roof (*see Balbuena v 395 Hudson N.Y., LLC*, 214 AD3d 586, 587 [1st Dept 2023]). Pursuant to the project specifications and contract between defendant and the building owner, defendant undertook a duty to provide reasonable precautions for the safety of plaintiff, a handyman employed by the building's owner (*see Bolson v UJA-FED Props., Inc.*, 224 AD3d 584, 585 [1st Dept 2024]). Defendant failed to establish that this duty lapsed or was otherwise transferred when the worksite was closed due to the COVID-19 shutdown. Although the work site was closed for approximately a month prior to the accident, defendant failed to establish that it did not create the condition by leaving the Masonite unsecured and failing to apply new tape when the board became raised (*see Reaves v Lakota Constr. Group, Inc.*, 154 AD3d 637, 638 [1st Dept 2017]).

Defendant also failed to establish prima facie that it lacked notice of the raised Masonite. Despite testimony that defendant's employee was inspecting the roof of the building approximately every day at the time of the accident, and that it was defendant's practice to replace the tape securing the Masonite periodically to make sure it was secured, defendant did not submit evidence showing that it had inspected or repaired the Masonite prior to plaintiff's accident (*see Bolson*, 224 AD3d at 585).

We have considered defendant's remaining arguments and find them unavailing. Concur—Webber, J.P., Mendez, Rodriguez, O'Neill Levy, Michael, JJ.

8 Theresa Maddicks et al., Respondents, v 106-108 Convent BCR, LLC, et al., Appellants. [253 NYS3d 626]—

Attorney and Client—Disqualification—Waiver—Conflict of Interest

Order, Supreme Court, New York County (Sabrina Kraus, J.), entered November 18, 2025, which denied defendants' motion to disqualify plaintiffs' counsel due to a conflict of interest, require counsel to produce related discovery, and dismiss the complaint based on the conflict, unanimously modified, on the law, to grant the motion to the extent of requiring plaintiffs' counsel to produce the requested discovery related to the conflict of interest claim, and otherwise affirmed, without costs.

The court improperly determined that defendants waived

their ability to move for an order to disqualify plaintiffs' counsel. Defendants allege a conflict of interest resulting from plaintiffs' counsel's prior representation of five to seven of the previous owners of the buildings at issue in this class action proceeding for rent regulatory violations. The record does not support the finding that defendants knew or should have known of the conflict of interest before the instant motion was made (*see Matter of Marotta v Marotta*, 218 AD3d 468, 471 [2d Dept 2023]; *Hele Asset, LLC v S.E.E. Realty Assoc.*, 106 AD3d 692, 694 [2d Dept 2013]). The record is devoid of evidence that prior discovery requests and orders encompassed the documents that defendants only recently reviewed and which revealed the alleged conflict. Nor does the record show that had there been proper compliance with the discovery requests and orders, evidence of the alleged conflict would have been discovered at that time.

Here, as the full record concerning the nature of the prior representation has not been disclosed, a ruling deciding the conflict issue is premature. As such, defendants' motion should be granted to the extent it seeks plaintiffs' counsel's itemized production of all files concerning its prior representation in connection with the buildings, as a review of those documents is necessary for the proper assessment of whether there is an actual conflict of interest warranting disqualification or dismissal of the complaint. Concur—Webber, J.P., Mendez, Rodriguez, O'Neill Levy, Michael, JJ.

9 Yolanda Murray, Appellant, v Planned Parenthood Federation of America, Respondent. [253 NYS3d 628]—

Pleading—Sufficiency of Pleading—Claim under Child Victims Act—Application of Adult Survivors Act

Pleading—Sufficiency of Pleading—Claim under Child Victims Act—Knowledge of Dangerous Propensities or Control over Employment Decisions

Order, Supreme Court, New York County (Lyle E. Frank, J.), entered on or about June 25, 2025, which granted defendant's motion to dismiss the complaint, unanimously affirmed, without costs.

This action, which involves misconduct alleged to have occurred in 1996, was properly dismissed as time-barred. Plaintiff's claims are not subject to the Adult Survivors Act (ASA) (CPLR 214-j) because she failed to allege "conduct that would constitute a violation of at least one of the criminal statutes enumerated" therein (*see Doe v Wilhelmina Models, Inc.*, 229 AD3d 128, 137 [1st Dept 2024] [internal quotation marks omitted]). The performance of an unauthorized abortion, as alleged here, is not the type of sexual misconduct the

ASA and similar “revival” statutes were designed to reach, even allowing for the fact, as alleged, that the provider made inappropriate comments to plaintiff while performing the procedure. Even if plaintiff was a minor at the time of the incident, as alleged in the complaint, the Child Victims Act (CPLR 214-g) would not save plaintiff’s claim, as the action was commenced two years after the revival window for such a claim closed.

Even if the complaint was not time-barred, it failed to allege the elements of any cognizable cause of action (*see Evans v New York & Presbyt. Hosp.*, 190 AD3d 454, 454 [1st Dept 2021]). For example, plaintiff did not allege that defendant had knowledge of any dangerous propensities possessed by the doctor who treated plaintiff which could have given rise to a claim for negligent hiring, retention, training, or supervision (*see A.M. v Holy Resurrection Greek Orthodox Church of Brookville*, 190 AD3d 470, 471 [1st Dept 2021]). Nor did she allege that defendant had any control over or involvement in employment and medical treatment decisions by its local affiliates, including the one that treated plaintiff. Indeed, the affirmation submitted in support of defendant’s motion established that it did not (*see Jane Doe Three v KIPP Academy Charter Sch.*, 235 AD3d 406, 407 [1st Dept 2025]). Plaintiff also did not allege any facts in support of her alter ego theory, which was first raised in opposition to defendant’s motion to dismiss (*see Cedar Capital Mgt. Group Inc. v Lillie*, 236 AD3d 508, 509 [1st Dept 2025]).

There is no support in the record for plaintiff’s claims of judicial bias. Concur—Webber, J.P., Mendez, Rodriguez, O’Neill Levy, Michael, JJ.

10 The People of the State of New York, Respondent, v Ameer Cassaberry, Appellant. [253 NYS3d 171]—Judgment, Supreme Court, New York County (Cori H. Weston, J.), rendered August 14, 2024, convicting defendant, upon his guilty plea, of criminal possession of a weapon in the second degree, and sentencing him to 3½ years’ imprisonment followed by 2½ years’ postrelease supervision, unanimously modified, as a matter of discretion in the interest of justice, to the extent of vacating the surcharge and fees imposed on defendant at sentencing, and otherwise affirmed.

Based on our own interest of justice powers, we vacate the mandatory surcharge and fees imposed on defendant at sentencing (*People v Chirinos*, 190 AD3d 434 [1st Dept 2021]). We note that the People do not oppose this relief. Concur—Webber, J.P., Mendez, Rodriguez, O’Neill Levy, Michael, JJ.

11 The People of the State of New York, Respondent, v Angel Rivas, Appellant. [— NYS3d —]—

Crimes—Sentence—Probation—Conditions

Judgment, Supreme Court, Bronx County (Dineen Ann Riviezzo, J.), rendered October 4, 2023, convicting defendant, upon his plea of guilty, of attempted criminal possession of a weapon in the second degree, and sentencing him to five years of probation, unanimously modified, on the law, to the extent of striking the conditions of probation requiring defendant to support dependents and meet other family responsibilities (Condition No. 14); submit to any drug or alcohol assessment and/or tests if directed by the Department of Probation (Condition No. 15); undergo medical/psychiatric treatment and/or remain in a specified institution if directed by the Department of Probation (Condition No. 22); participate in an alcohol, substance abuse, intervention, domestic violence or alternative to violence program as directed by the Department of Probation (Condition No. 23); refrain from wearing or displaying gang paraphernalia and having any association with a gang or members of a gang if directed by the Department of Probation (Condition No. 24); and install or have installed and maintain a functioning Ignition Interlock Device in his vehicle (Condition No. 27), and otherwise affirmed.

Defendant's challenges to the legality of the conditions of his probation are not foreclosed by his appeal waiver (*see People v Alvarez*, 233 AD3d 619, 620 [1st Dept 2024], *lv denied* 43 NY3d 961 [2025]) or the lack of preservation (*see People v Hakes*, 32 NY3d 624, 628 n 3 [2018]; *People v Vasquetelles*, 241 AD3d 1208, 1209 [1st Dept 2025], *lv denied* 44 NY3d 1054 [2025]).

The six challenged conditions of probation must be stricken because they are “not reasonably related to defendant’s rehabilitation, or necessary to ensure that he will lead a law-abiding life” (*Vasquetelles*, 241 AD3d at 1209; *see Alvarez*, 233 AD3d at 620; *see also* Penal Law § 65.10 [1]). The probation conditions requiring defendant to support dependents and meet other family responsibilities (Condition No. 14) and to refrain from wearing or displaying gang paraphernalia and having any association with a gang or its members (Condition No. 24) are not supported here. Considering that defendant lives with his parents and does not have any dependents, the condition that requires him to support dependents is not reasonably related to his rehabilitation. Nor is there any evidence that defendant had a history of gang affiliation or that his offense was connected to gang activity, and as such the condition related to a prohibition on gang affiliation is also not reasonably related to his rehabilitation (*see People v Balogh*, 245 AD3d 572, 574 [1st Dept 2026]; *Vasquetelles*, 241 AD3d at 1209). Additionally, the People do not oppose striking these two conditions.

The probation conditions requiring defendant to submit to drug and alcohol testing (Condition No. 15) and to participate in alcohol and substance abuse intervention, as well as treatment for domestic violence and alternatives to violence programs (Condition No. 23) are also improper here. Defendant denied the use of illegal drugs and alcohol, there is no evidence that defendant's offense involved any drugs or alcohol, the Department of Probation did not conclude that defendant required substance abuse or related treatment (*see Balogh*, 245 AD3d at 574), and there is no suggestion that defendant's crime involved domestic violence.

The probation condition requiring defendant to submit to mental health treatment (Condition No. 22) must likewise be stricken. Defendant denied any mental health issues, the People do not allege or provide any evidence to dispute this, and the Department of Probation did not make any recommendation with respect to mental health treatment.

The condition requiring defendant to install and maintain a functioning Ignition Interlock Device (Condition No. 27) should be stricken as well. There is no indication that defendant owns a vehicle, nor was one involved in the commission of defendant's crime. Additionally, the People do not oppose this relief, and, in any event, it appears that Condition No. 27 was not checked on the Conditions of Probation form. Concur—Webber, J.P., Mendez, Rodriguez, O'Neill Levy, Michael, JJ.

12 The People of the State of New York, Respondent, v Carlos Gonzalez, Appellant. [253 NYS3d 629]—An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, Bronx County (Martin Marcus, J.), rendered June 14, 2021, said appeal having been argued by counsel for the respective parties, due deliberation having been had thereon, and finding the sentence not excessive, it is unanimously ordered that the judgment so appealed from be and the same is hereby affirmed. Concur—Webber, J.P., Mendez, Rodriguez, O'Neill Levy, JJ.

13 The People of the State of New York, Respondent, v Khalid Wisdom, Appellant. [— NYS3d —]—

Crimes—Right to Counsel—Effective Representation—Decision Not to Heed Counsel's Advice

Crimes—Witnesses—Failure to Call Witness—Missing Witness Charge

Judgment, Supreme Court, New York County (Robert M. Mandelbaum, J.), rendered June 16, 2023, convicting defendant, after a jury trial, of two counts of criminal possession of a weapon in the second degree, and sentencing him, as a second

violent felony offender, to concurrent terms of 12 years, unanimously affirmed. Order, same court and Justice, entered on or about November 7, 2024, which denied defendant's CPL 440.10 motion to vacate the judgment, unanimously affirmed.

Based on the trial record, submissions, and testimony on defendant's CPL 440.10 motion, we find that defendant received effective assistance of counsel under the state and federal standards (see *People v Benevento*, 91 NY2d 708, 713-714 [1998]; *Strickland v Washington*, 466 US 668 [1984]), and that the court properly denied the motion. In light of the overwhelming evidence of defendant's guilt, defendant has not established prejudice in either a state or federal ineffective assistance claim (see *People v Stultz*, 2 NY3d 277, 283-284 [2004]). Considering the video evidence, which tracked defendant from the shooting to a bodega where he was fully visible, defendant was repeatedly advised to take the People's beneficial plea offer, which encompassed not only the instant charges but those in another case. Despite the urgings of counsel and defendant's possession of a copy of the video evidence, defendant remained stubborn in his desire for a lesser sentence than the People were willing to offer. His determination not to heed counsel's advice in no way constitutes ineffective assistance. In addition, defendant failed to preserve his argument that counsel was ineffective for failing to make a CPL 30.30 speedy trial motion, although we note that even considering the argument, the People did not exceed the required 181 days.

The court did not abuse its discretion in rejecting counsel's request for a missing witness charge (*People v Diaz*, 21 AD3d 58, 69 [1st Dept 2005], *appeal dismissed* 7 NY3d 831 [2006]). As the uncalled witness had been indicted for his role in the incident and was highly likely to invoke the Fifth Amendment privilege, which was supported by his lawyer's indication that he would not accept a subpoena, a missing witness charge would have been inappropriate (*People v Rodriguez*, 38 NY2d 95, 100 [1975]).

The court correctly declined to give the jury the circumstantial evidence charge, because the case did not rest exclusively on circumstantial evidence. The surveillance video provided direct evidence of defendant's guilt (see *People v Hardy*, 26 NY3d 245, 249-251 [2015]; *People v Harris*, 199 AD3d 497, 498 [1st Dept 2021], *lv denied* 38 NY3d 928 [2022]).

The court's determination not to afford defendant a hearing on his claim of actual innocence based on newly discovered evidence was likewise a provident exercise of the court's discretion (*People v Wright*, 27 NY3d 516, 520 [2016]). As a prelimi-

nary matter, none of the proffered evidence was new. Given the overwhelming evidence of defendant's guilt and the overall nature of the evidence, it was highly unlikely to change the result (*People v Velazquez*, 143 AD3d 126, 131-132 [1st Dept 2016], *lv denied* 28 NY3d 1189 [2017]; CPL 440.10 [1] [g]).

We find the sentence imposed was appropriate given the facts and circumstances presented.

We have considered defendant's remaining arguments, including those raised in his pro se supplemental brief, and find them unavailing. Concur—Webber, J.P., Mendez, Rodriguez, O'Neill Levy, Michael, JJ.

14 The People of the State of New York, Respondent, v Sean Terry, Appellant. [253 NYS3d 171]—An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Brendan T. Lantry, J.), rendered October 16, 2024, said appeal having been argued by counsel for the respective parties, due deliberation having been had thereon, and finding the sentence not excessive, it is unanimously ordered that the judgment so appealed from be and the same is hereby affirmed. Concur—Webber, J.P., Mendez, Rodriguez, O'Neill Levy, Michael, JJ.

15 The People of the State of New York, Respondent, v Yordani Urena, Appellant. [— NYS3d —]—

Crimes—Sentence—Probation—Conditions

Judgment, Supreme Court, Bronx County (Connie Morales, J.), rendered October 23, 2024, convicting defendant, upon his guilty plea, of assault in the second degree, and sentencing him to a three-year term of probation, unanimously modified, on the law and as a matter of discretion in the interest of justice, to the extent of striking the condition of probation that defendant pay the mandatory surcharge and fees imposed at sentencing, and otherwise affirmed.

Defendant's claim that the condition of his probation requiring him to "[a]void injurious or vicious habits; refrain from frequenting unlawful or disreputable places; and not consort with disreputable people" is facially unconstitutional is unpreserved (*see People v Johnson*, — NY3d —, —, 2025 NY Slip Op 06528, *2 [2025]), and we decline to review it in the interest of justice. As an alternative holding, we find the claim to be unavailing (*People v Andujar*, 245 AD3d 529, 530 [1st Dept 2026]).

Defendant's contention that this condition of probation is not "reasonably necessary to insure that [he] will lead a law-

abiding life or to assist him to do so” (Penal Law § 65.10 [1]) does not require preservation (*see People v Lowndes*, 239 AD3d 574, 575 [1st Dept 2025], *lv denied* 44 NY3d 1012 [2025]; *People v Alvarez*, 233 AD3d 619, 620 [1st Dept 2024], *lv denied* 43 NY3d 961 [2025]). However, the court providently deemed this condition as reasonably necessary, given the violent nature of his criminal conduct (*see People v Berkley*, 241 AD3d 1167, 1168 [1st Dept 2025]).

We strike the condition of probation which requires that defendant pay the mandatory surcharge and fees imposed at sentencing, as not reasonably related to defendant’s rehabilitation, or necessary to ensure that he will lead a law-abiding life (*see People v Wood*, 239 AD3d 484 [1st Dept 2025]; *People v Percy*, 234 AD3d 619 [1st Dept 2025]). We note that the People do not oppose this relief. Concur—Webber, J.P., Mendez, Rodriguez, O’Neill Levy, Michael, JJ.

16 The People of the State of New York, Respondent, v Julsean Thompson, Appellant. [253 NYS3d 172]—Judgment, Supreme Court, New York County (Maxwell T. Wiley, J.), rendered July 26, 2023, convicting defendant, upon his plea of guilty, of custodial interference in the first degree, and sentencing him as a second felony offender to a term of two to four years of imprisonment, unanimously modified, as a matter of discretion in the interest of justice, to the extent of reducing the sentence of imprisonment to a term of 1½ to 3 years, and otherwise affirmed.

We find the sentence excessive to the extent indicated. Concur—Kennedy, J.P., Kapnick, Rodriguez, Michael, Hagler, JJ.

17 Moises Ramirez, Appellant, v 2500 Webb LLC, Respondent, et al., Defendant. [253 NYS3d 622]—

Labor—Safe Place to Work—Target of Disassembly—Inconsistent Testimony

Order, Supreme Court, Bronx County (Erik L. Gray, J.), entered on or about May 30, 2025, which denied plaintiff’s motion for partial summary judgment on the Labor Law § 240 (1) claim, unanimously affirmed, without costs.

There are triable issues concerning whether plaintiff was injured by an object that was the target of disassembly (*see Wilinski v 334 E. 92nd Hous. Dev. Fund Corp.*, 18 NY3d 1, 11 [2011]). Plaintiff testified that, while disassembling a sidewalk bridge, he was injured by a horizontal pipe that fell while a coworker disconnected it from a vertical post. However, in his workers’ compensation claim form, plaintiff identified a “[v]erti-

cal support pipe” as the object that struck him, and in his deposition testimony he expressed confusion between the words “vertical” and “horizontal.” This inconsistency raised a triable issue as to the identity of the object that struck him. Moreover, if the object was a vertical pipe or post, a further issue of fact exists as to whether it was a target of disassembly at the time of plaintiff’s accident (*see Abad v Brookfield Props. OLP Co. LLC*, 190 AD3d 471, 471 [1st Dept 2021]). In addition, there are factual issues regarding whether there was a safety device that would have prevented the accident (*see Palermo v 7 W. 21 LLC*, 192 AD3d 560, 561 [1st Dept 2021]). Concur—Webber, J.P., Mendez, Rodriguez, O’Neill Levy, Michael, JJ.

18 Wells Fargo Bank, N.A., Respondent, v Reyes Merino, Appellant, et al., Defendants. [253 NYS3d 170]—

Mortgages—Foreclosure—Compliance with RPAPL 1304—Standard Office Mailing Procedure

Mortgages—Foreclosure—Use as Primary Residence

Order, Supreme Court, Bronx County (Naita A. Semaj, J.), entered on or about April 30, 2025, which, to the extent appealed from as limited by the briefs, granted plaintiff’s motion for summary judgment against defendant Reyes Merino, unanimously reversed, on the law, without costs, and plaintiff’s motion denied.

Plaintiff failed to demonstrate that it had strictly complied with RPAPL 1304 (*see U.S. Bank N.A. v Moran*, 191 AD3d 451, 452 [1st Dept 2021]; *U.S. Bank N.A. v Nahum*, 232 AD3d 715, 717 [2d Dept 2024]). Plaintiff submitted an affidavit from one of its vice presidents of loan documentation, who averred that she had personal knowledge of plaintiff’s business records and that according to the records she reviewed, the 90-day notice, as well as the notice of default, were served via certified and first-class mail at the property secured by the mortgage. However, the affiant did not attest that she was familiar with the standard office mailing procedures of Covius Services, LLC, the third-party vendor that sent the RPAPL 1303 and 1304 notices on behalf of plaintiff. The affidavit therefore did not establish proof of a standard office mailing procedure designed to ensure that items were properly addressed and mailed (*see Nahum*, 232 AD3d at 717; *CitiMortgage, Inc. v Moran*, 167 AD3d 461 [1st Dept 2018]). The affidavit also did not address the nature of plaintiff’s relationship with Covius, nor did it address whether Covius’s records were incorporated into plaintiff’s own records or routinely relied upon in plaintiff’s business (*Nahum*, 232 AD3d at 717). Thus, under the circumstances presented, the tracking numbers on the copies of the 90-day

notices did not by themselves suffice to establish proper mailing under RPAPL 1304 (*id.*).

We reject plaintiff’s argument that this action does not involve a “home loan” as defined under RPAPL 1304. Plaintiff failed to provide evidence establishing that defendant never used the property as a primary residence. In any event, even if plaintiff established that defendant was not living at the property when this action was commenced, plaintiff still would not have been relieved of the obligation to serve the RPAPL 1304 notice, as the record, including defendant’s affidavit, shows that defendant had previously occupied the property as a primary residence (*see U.S. Bank N.A. v Maher*, 219 AD3d 1372, 1375 [2d Dept 2023]).

We have considered the remaining arguments and find them unavailing. Concur—Webber, J.P., Mendez, Rodriguez, O’Neill Levy, Michael, JJ.

(April 30, 2026)

1 325 Management Corp., Respondent, v Danielle Statuto, Appellant. [253 NYS3d 633]—Appeal from order, Supreme Court, New York County (Paul A. Goetz, J.), entered March 13, 2025, which denied defendant’s CPLR 2221 (d) motion for leave to reargue, unanimously dismissed, without costs, as taken from a nonappealable paper.

No appeal lies as of right from an order denying reargument (CPLR 5701 [a]; *see Manhattan Telecom., Corp. v Coordinated Behavioral Care, Inc.*, 216 AD3d 428, 428 [1st Dept 2023]), and we decline to deem defendant’s notice of appeal an application for leave to appeal from the order denying reargument (*cf. All Craft Fabricators, Inc. v ATC Assoc., Inc.*, 153 AD3d 1159, 1160 [1st Dept 2017] [notice of appeal from an order not appealable as of right deemed to be a motion for leave to appeal where relief granted by Supreme Court, sua sponte dismissal of the complaint, was of an “extraordinary nature”]). Concur—Kennedy, J.P., Gesmer, González, Rosado, Chan, JJ.

2 Belina Anderson, Appellant, v Artimus Construction, Inc., et al., Respondents. [253 NYS3d 631]—

**Corporations—Shareholders’ Derivative Action—Pre-Litigation Demand
Corporations—Business Judgment Doctrine—Breach of Fiduciary Duty
Declaratory Judgments—When Remedy Available—Hypothetical Events**

Order, Supreme Court, New York County (Debra A. James, J.), entered November 1, 2024, which, to the extent appealed

from, granted defendants' respective motions pursuant to CPLR 3211 to dismiss the complaint in its entirety, unanimously affirmed, without costs.

Initially, any argument that the court's order is invalid based on CPLR 2219 (a) is unavailing (*see Anderson v Harris*, 68 AD3d 472, 474 [1st Dept 2009]).

Plaintiff's derivative claims were properly dismissed, as her complaint does not state that she made a pre-litigation demand pursuant to Business Corporation Law § 626 (c) to the joint board or the non-college board (on whose behalf she purports to sue) (*see Central Laborers' Pension Fund v Blankfein*, 111 AD3d 40, 46-47 [1st Dept 2013]). Plaintiff also made no apparent assertions in the complaint as to the futility of a pre-litigation demand (*see Asbestos Workers Phila. Pension Fund v Bell*, 137 AD3d 680, 682 [1st Dept 2016]). Moreover, any futility argument is contradicted by admissions in the complaint that the joint board responded to her demands on several occasions.

As to plaintiff's individual breach of fiduciary duty claims, including her individual nuisance claim, the complaint did not contain any allegations of fraud, self-dealing, or unconscionability (*see Perlbindner v Board of Mgrs. of 411 E. 53rd St. Condominium*, 65 AD3d 985, 989 [1st Dept 2009]). Rather, the allegations of the complaint indicate that the joint board and/or the college defendants merely declined to take certain actions or to consistently respond to her complaints in the way that she desired. These allegations do not constitute the type of misconduct that would overcome the business judgment rule. Additionally, these claims appear to be based on contractual duties, thus foreclosing allegations of a breach of fiduciary duty (*see Mosaic Caribe, Ltd. v AllSettled Group, Inc.*, 117 AD3d 421, 423 [1st Dept 2014]).

As to plaintiff's individual claims for declaratory judgment, a cause of action for declaratory judgment lacks merit where it "depends on a future event that is beyond the parties' control and may never occur" (*see AG Super Fund Intl. Partners, L.P. v Winthrop Realty Trust*, 149 AD3d 629, 629 [1st Dept 2017]). Plaintiff's direct claim against Artimus Construction, Inc. and 110th Street Equities, LLC, contingent on the outcome of pending litigation, depends on hypothetical events that may never occur. As to the direct claim concerning the durability of the primary residence covenant, plaintiff points to no allegations in the complaint that she intended to either pay off the enforcement mortgage or dispose of the property (*cf. 40-56 Tenth Ave. LLC v 450 W. 14th St. Corp.*, 22 AD3d 416, 417 [1st Dept

2005]). Plaintiff's direct claim regarding her purported reporting obligation as to the noncompliance of other unit owners with the primary residence requirement was properly dismissed, as neither the complaint nor the documentary evidence contain any indication that plaintiff might have such an obligation.

We have considered plaintiff's remaining arguments and find them unavailing. Concur—Kennedy, J.P., Gesmer, González, Rosado, Chan, JJ.

3 Arena Vantage SPV, LLC, Respondent, v Actionable Process LLC et al., Appellants. [— NYS3d —]

Contracts—Breach or Performance of Contract—Action against Deal Agent under Loan Agreement—Mandatory, Non-Discretionary Obligation
Suretyship and Guarantee—Scope of Guarantee—Loan Agreement
Covenants—Covenant of Good Faith and Fair Dealing—Loan Agreement

Order, Supreme Court, New York County (Andrew J. Borrok, J.), entered on or about January 22, 2025, which, to the extent appealed from, denied so much of defendants' motions as sought to dismiss the second cause of action for breach of contract against defendant guarantors and the third cause of action for breach of contract against defendant CoVenture—Vantage Credit Opportunities GP, LLC (Deal Agent), and the fourth cause of action for breach of the implied covenant of good faith and fair dealing as against all defendants, unanimously modified, on the law, to grant the motion as to the third cause of action for breach of contract against Deal Agent, and otherwise affirmed, without costs.

Although Supreme Court correctly concluded that the loan agreement precluded plaintiff from asserting a breach of contract cause of action against the borrower, we disagree with the court's conclusion that the plaintiff stated a claim against the Deal Agent, because nothing in the loan agreement affirmatively requires the Deal Agent to take enforcement action designed to protect what plaintiff perceives to be in its own best interest. Pursuant to paragraph 9.1 (a) of the loan agreement, the Deal Agent's obligations upon default are limited to those expressly set forth in the loan agreement. Section 7.2 of the loan agreement provides that the Deal Agent "[m]ay with the consent of the Required Lenders, or at the direction of the Required Lenders shall" take certain remedial action in the event of default. Section 9.1 (c) of the loan agreement provides that the Deal Agent "shall take such action with respect to such Event of Default . . . as may be requested by the Required Lenders, or as the Deal Agent shall deem advisable or in the best interest of the Lenders." It is undisputed that the

Required Lenders have not directed the Deal Agent to take any action. The loan agreement gives the Deal Agent discretion to determine whether an action is “advisable or in the best interest of the Lenders.” Since the complaint fails to allege that the Deal Agent violated any mandatory, non-discretionary obligation under the loan agreement, it fails to state a cause of action for breach of contract by the Deal Agent (*see IKB Intl., S.A. v Wells Fargo Bank, N.A.*, 40 NY3d 277, 285 [2023]).

The same cannot be said, however, with respect to plaintiff’s breach of contract action against the guarantors. Section 10.1 of the loan agreement provides that “each Guarantor hereby unconditionally and irrevocably guarantees to the Lenders, the due and punctual payment of . . . principal of and interest on” the amounts outstanding under the loan agreement. In the event the borrower failed to make the guaranteed payment, “each Guarantor hereby unconditionally agrees to make such payment . . . as if such payment were made by the Borrower.” Section 10.2 reiterates this point by stating that “[t]he obligations of the Guarantors under this Article X shall be unconditional and absolute.” Unlike the provision governing the Deal Agent, nothing in this section restricts recovery by the lenders on the guaranty to collective action. We can assume from the difference in the language employed between the two sections that the parties intended that the lenders could severally seek to enforce the agreement (*see generally Frank B. Hall & Co. of N.Y. v Orient Overseas Assoc.*, 48 NY2d 958, 959 [1979]).

Supreme Court correctly found that plaintiff’s cause of action for breach of the implied covenant of good faith and fair dealing was not duplicative of the breach of contract claims, as the “complaint alleges conduct that is separate from the conduct constituting the alleged breach of contract and such conduct deprived the other party of the benefit of its bargain” (*AEA Middle Mkt. Debt Funding LLC v Marblegate Asset Mgt., LLC*, 214 AD3d 111, 133 [1st Dept 2023]). This is true even though, as we find here, the Deal Agent did not violate the terms of the loan agreement by failing to take the enforcement action sought by plaintiff (*see Credit Agricole Corporate v BDC Fin., LLC*, 135 AD3d 561, 561 [1st Dept 2016]), and even though some of the allegations overlap (*see Botbol v Frosch Intl. Travel Inc.*, 222 AD3d 471, 472 [1st Dept 2023]).

We have considered the remaining arguments and find them unavailing. Concur—Kennedy, J.P., Gesmer, González, Rosado, Chan, JJ. **[Prior Case History: 85 Misc 3d 1203(A), 2025 NY Slip Op 50085(U).]**

4 John Doe, Respondent, v Roman Catholic Archdiocese of New York, Also Known as Archdiocese of New York, Appellant, et al., Defendants. [253 NYS3d 630]—

Disclosure—Scope of Disclosure—Deliberate and Repetitive Practice of Silencing Abuse Accusations—Documents and Information Related to Nonparty Priests

Order, Supreme Court, Bronx County (Sabrina Kraus, J.), entered on or about August 1, 2025, which, to the extent appealed from, denied the motion of defendant Roman Catholic Archdiocese of New York, also known as Archdiocese of New York (the Archdiocese) to vacate an order, same court and Justice, entered April 22, 2025, after in camera review, directing the Archdiocese to produce certain documents with specified redactions, and for a protective order, unanimously affirmed, without costs.

Supreme Court providently exercised its discretion in declining both to vacate its prior order and to grant the Archdiocese a protective order, and in directing the Archdiocese to produce documents and information related to certain nonparty priests accused of sexual abuse. Plaintiff’s claim is not merely that the Archdiocese “‘created a culture of laxity’ that facilitated [the plaintiff’s] abuse” (*Nellenback v Madison County*, 44 NY3d 329, 336 [2025]). Rather, the argument is that the Archdiocese “engaged in a habit or pattern of conduct when notified with allegations of child sexual abuse committed by members of its clergy. . . . [E]vidence of the [Archd]iocese’s deliberate and repetitive practice of silencing accusations, if any, is relevant and could permit an inference that the [Archd]iocese was negligent in this particular instance by failing to act when confronted with allegations of . . . abuse” by the priest alleged to have abused plaintiff in this case (*Melfe v Roman Catholic Diocese of Albany, N.Y.*, 196 AD3d 811, 814 [3d Dept 2021]; see *S.B. v Roman Catholic Archdiocese of N.Y.*, 242 AD3d 404, 405 [1st Dept 2025]). Such evidence is discoverable regardless of whether it ultimately will be admissible at trial (see e.g. *Matter of Steam Pipe Explosion at 41st St. & Lexington Ave.*, 127 AD3d 554, 555 [1st Dept 2015], *affd* 27 NY3d 985 [2016], quoting *Mendelowitz v Xerox Corp.*, 169 AD2d 300, 307 [1st Dept 1991]).

We have considered the Archdiocese’s remaining arguments and find them unavailing. Concur—Kennedy, J.P., Gesmer, González, Rosado, Chan, JJ.

5 Forrest Equities LLC et al., Appellants, v Old Republic National Title Insurance Company, Respondent. (And a Third-Party Action.) [— NYS3d —]—

Insurance—Title Insurance—Unmarketable Title**Insurance—Title Insurance—Notice of Enforcement Action Recorded in Public Records—Automated City Register Information System**

Order and judgment (one paper), Supreme Court, Bronx County (Mary Ann Brigantti, J.), entered on or about May 12, 2025, which, after a nonjury trial, dismissed the complaint, unanimously affirmed, with costs.

In June 2018, plaintiffs entered into a contract to purchase a multiple-dwelling residential building in the Bronx from third-party defendant NJCRE 2013 Fund, LLC. At the time of the contract, plaintiffs were aware of an explosion that had occurred at the property, destroying a portion of the building and leading the Department of Buildings to issue a vacate order for the tenants, most or all of whom were rent stabilized. Plaintiffs were also aware that as a result of the explosion, they would likely be subject to relocation and emergency repair liens, as well as other potential liabilities. The closing for the sale occurred in October 2018.

The title policy that plaintiffs purchased from defendant Old Republic National Title Insurance Company insured plaintiffs against a number of risks. These included covered risk 3, insuring against loss arising from “Unmarketable Title”; covered risk 5, insuring against loss arising from the violation or enforcement of any law relating to the occupancy, use, or enjoyment of the property; and covered risk 6, which, under certain conditions, covered loss arising from “[a]n enforcement action based on the exercise of a governmental police power not covered by Covered Risk 5.” Both Covered Risks 5 and 6 required that “a notice of the enforcement action, describing any part of the Land,” be “recorded in the Public Records.” “Public Records,” in turn, is defined as “[r]ecords established under state statutes . . . for the purpose of imparting constructive notice of matters relating to real property to purchasers for value and without Knowledge.” In addition, paragraph 3 (a) of the policy’s exclusions excluded liens and other matters “created, suffered, assumed, or agreed to by the Insured Claimant.” Exclusion paragraph 3 (d) excluded matters “attaching or created subsequent to Date of Policy.”

In November 2018, NYC Department of Housing Preservation and Development (HPD) commenced an action against plaintiffs, seeking civil penalties for failure to correct housing violations, and that same month, four former occupants of the property commenced an RPAPL article 7-A proceeding against plaintiffs, seeking the restoration of the building’s essential services so that they could regain occupancy of their units.

Supreme Court properly found that plaintiffs did not demonstrate coverage under covered risk 3. A lis pendens does not itself create an encumbrance apart from the equity on which the action is founded (*see Heidi Assoc. v Lawyers Tit. Ins. Co.*, 112 AD2d 844, 849 [1st Dept 1985] [Rosenberger, J., dissenting], *revd* 67 NY2d 1041 [1986] [agreeing with dissent that in rem proceeding was not a separate encumbrance]). Rather, a lis pendens filing simply provides notice that an action is pending and may affect title. Similarly, the filing of a vacate order is not itself a lien (*see City of New York v 1103 Hoe LLC*, 195 AD3d 465, 465 [1st Dept 2021]). Nor did the HPD and article 7-A litigation, both of which occurred postclosing, constitute defects rendering title unmarketable. For these reasons, to the extent that plaintiff relied on covered risk 3 of title policy, the complaint's allegations did not offer "a reasonable possibility of coverage" so as to require Old Republic to defend the HPD and article 7-A litigation (*see BP A.C. Corp. v One Beacon Ins. Group*, 8 NY3d 708, 714 [2007] [internal quotation marks omitted]).

Similarly, plaintiff cannot properly rely on covered risks 5 and 6 for coverage because under the terms of the policy itself, the lien had to be recorded in the Automated City Register Information System (ACRIS) system for those provisions to apply. The record evidence, however, shows that the lis pendens was never recorded in ACRIS, and that the relocation lien was not listed in ACRIS until more than a year after the closing. Although plaintiffs assert that the vacate order is part of the public record, they offer no basis to conclude that Supreme Court erred in finding that it had to be recorded in ACRIS under the express, unambiguous terms of the policy (*see Eurotech Constr. Corp. v QBE Ins. Corp.*, 184 AD3d 523, 523-524 [1st Dept 2020], *lv denied* 36 NY3d 906 [2021]).

The analysis is not changed on the basis that Old Republic knew about the tenants' relocation status and stated at one point before closing that it would be responsible for the vacate order. The policy itself controls, and the policy must be interpreted according to general rules of contract interpretation (*see Gilbane Bldg. Co./TDX Constr. Corp. v St. Paul Fire & Mar. Ins. Co.*, 143 AD3d 146, 151 [1st Dept 2016], *affd* 31 NY3d 131 [2018]).

Similarly, although the parties agreed to omit exceptions 2, 11, and 32 in the marked-up policy—for rights of tenants in possession, emergency repair liens that may exist but are not filed, and vacate order docketed March 27, 2026, respectively—those omissions would allow coverage under covered risk 3

only if that risk covered the matters in the first instance, which it did not.

We have considered plaintiffs' remaining contentions and find them unavailing. Concur—Kennedy, J.P., Gesmer, González, Rosado, Chan, JJ.

6 Gordon Grubb, Appellant, v City of New York et al., Respondents, et al., Defendants. [253 NYS3d 632]—

Municipal Corporations—Notice of Street Defect—Trip and Fall in Crosswalk—Sufficiency of Written Acknowledgment

Order, Supreme Court, New York County (Carol Sharpe, J.), entered on or about May 14, 2025, which, to the extent appealed from as limited by the briefs, granted defendant City of New York's motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

In this action where plaintiff was injured when he tripped and fell on a southern crosswalk at the intersection of Madison Avenue and East 52nd Street, the City established prima facie entitlement to summary judgment by demonstrating that it did not receive prior written notice of the alleged dangerous condition as required by Administrative Code of City of NY § 7-201 (c) (2) (*see Gray v City of New York*, 195 AD3d 538, 538 [1st Dept 2021]). In opposition, plaintiff failed to raise an issue of fact on the prior written notice requirement. The records upon which plaintiff relies as evidence of a "written acknowledgment" of the defect by the City do not demonstrate an acknowledgment of the existence and the dangerous nature of the specific condition that plaintiff alleges caused his accident (*see Bruni v City of New York*, 2 NY3d 319, 324-325 [2004]). Plaintiff's conclusory allegations do not create a triable issue with respect to any of the exceptions to the written notice requirement (*see Yarborough v City of New York*, 10 NY3d 726, 728 [2008]).

We have considered plaintiff's remaining arguments and find them unavailing. Concur—Kennedy, J.P., Gesmer, González, Rosado, Chan, JJ.

7 In the Matter of K.V. and Another, Children Alleged to be Neglected. Administration for Children's Services of the City of New York, Respondent; M.K.V., Appellant. In the Matter of M.R., a Child Alleged to be Neglected. Commissioner of Administration for Children's Services of the City of New York, Respondent; M.K.V., Appellant. [— NYS3d —]—

Parent, Child and Family—Abused or Neglected Child—Corroboration of Child's Out-of-Court Statement—Caseworker Observation and Photographs

Parent, Child and Family—Abused or Neglected Child—Excessive Corporal Punishment—Acts of Domestic Violence
Parent, Child and Family—Abused or Neglected Child—Derivative Neglect—Excessive Corporal Punishment

Orders of disposition, Family Court, Bronx County (Pamela B. Scheininger, J.), entered on or about March 12, 2025, to the extent they bring up for review a fact-finding order, same court (E. Grace Park, J.), entered on or about February 18, 2025, which found that respondent mother neglected her eldest child and derivatively neglected her two other children, unanimously affirmed, without costs.

A preponderance of the evidence supports the finding that the mother, in choking her eldest child and pulling and ripping the child's shirt, neglected the child by inflicting excessive corporal punishment on the child (*see* Family Ct Act §§ 1012 [f] [i] [B]; 1046 [b] [i]). The child's out-of-court statement that the mother caused the scratches to the neck and stomach during the incident were properly admitted because that statement was corroborated by a caseworker's observation of the scratches on the child and the photographs of the injuries, which the caseworker took the day after they were inflicted (*see Matter of Aameena C. [Wykisha C.]*, 83 AD3d 606, 607 [1st Dept 2011]).

Family Court, in its discretion and in light of the credible evidence, properly rejected the mother's denial of excessive corporal punishment, and we find no basis to disturb the court's credibility determinations on appeal (*see Matter of Ivahly M. [Jennifer L.]*, 159 AD3d 423, 424 [1st Dept 2018]). That the eldest child's injuries were the result of a single incident does not preclude a finding of excessive corporal punishment (*see Matter of EJ W. [Leroy E.W.]*, 212 AD3d 568, 568 [1st Dept 2023]).

The finding of neglect is also supported by a preponderance of the evidence establishing that the mother committed acts of domestic violence against the eldest child's father during the same incident (*see Matter of Allyerra E. [Alando E.]*, 132 AD3d 472, 473 [1st Dept 2015], *lv denied* 26 NY3d 913 [2015]). The evidence shows that the mother's acts posed imminent danger to the child's emotional and mental wellbeing. The mother's own fact-finding testimony establishes that the child was in the room and crying during the incident (*see Matter of J.A.W. [Lance W.]*, 216 AD3d 480, 481 [1st Dept 2023]).

The evidence of the mother's use of excessive corporal punishment against the eldest child supports the finding of derivative neglect as to the two other children because the mother's behavior demonstrated such an impaired level of parental judg-

ment as to create a substantial risk of harm for any child in her care (see Family Ct Act § 1046 [a] [i]; *Matter of Empress B. [Henrietta L.]*, 204 AD3d 562, 563 [1st Dept 2022]). The fact-finding testimony establishes that the other children were home during the incident and witnessed part of it (see *id.*; *Matter of Tyson T. [Latoyer T.]*, 146 AD3d 669, 670 [1st Dept 2017]). Concur—Kennedy, J.P., Gesmer, González, Rosado, Chan, JJ.

8 In the Matter of Harold Peerenboom, Appellant, v Marvel Entertainment, LLC, Respondent. Isaac Perlmutter, Nonparty Respondent. [253 NYS3d 635]—

Costs—Award of Costs—Reasonable Production Costs of Nonparty Witness—Attorneys’ Fees and Vendor Costs

Order, Supreme Court, New York County (Nancy M. Bannon, J.), entered July 25, 2024, which, to the extent appealed from as limited by the briefs, granted respondent’s motion under CPLR 3111 and 3122 (d) for reimbursement of its reasonable production expenses incurred in responding to a subpoena, unanimously affirmed, without costs.

Initially, we reject petitioner’s contention that no costs should have been awarded based on a balancing test formulated by the federal courts under federal rules. Under the CPLR, “[t]he reasonable production expenses of a non-party witness shall be defrayed by the party seeking discovery” (CPLR 3111, 3122 [d]).

Supreme Court providently exercised its discretion in granting respondent’s motion for reimbursement as a nonparty witness seeking to recover the reasonable production expenses incurred while producing documents in response to a subpoena from petitioner, and in determining the amount due to respondent in this proceeding (see *Matter of Barons Media, LLC v Shapiro Legal Group, PLLC*, 231 AD3d 639, 640 [1st Dept 2024]). Respondent provided invoices reflecting the production costs incurred, including third-party vendor costs and attorneys’ fees. Contrary to petitioner’s contention, attorneys’ fees are available for inclusion in the award of expenses (see *id.*). Supreme Court providently reduced the hourly rates sought by respondent, using the blended rate initially proffered by respondent, which was less than the hourly attorney fee rate used in its motion for reimbursement (see e.g. *JHAC LLC v Advance Entertainment, LLC*, 2022 NY Slip Op 30251[U], *6 [Sup Ct, NY County 2022]). Further, the CPLR does not bar recovery of costs related to withholding documents based on relevance or privilege (see generally *Barons Media, LLC*, 231 AD3d at 640, citing 22 NYCRR 202.70 Ap-

pendix A [VIII] [B] [1]). That some courts have declined to award costs expended to decide whether documents are privileged or irrelevant does not bar such recovery here (*cf. Peters v Peters*, 2016 NY Slip Op 31254[U], *4-5 [Sup Ct, NY County 2016]).

We have considered petitioner’s remaining contentions and find them unavailing. Concur—Kennedy, J.P., Gesmer, González, Rosado, Chan, JJ.

9 The People of the State of New York, Respondent, v Luis Mendez, Appellant. [253 NYS3d 634]—

Crimes—Unlawful Search and Seizure—Approach of Defendant Wearing Fanny Pack Appearing Heavy

Judgment, Supreme Court, Bronx County (Denis Boyle, J., at suppression hearing; Albert Lorenzo, J., at plea and sentencing), rendered February 10, 2023, convicting defendant of attempted criminal possession of a weapon in the second degree and burglary in the third degree, and sentencing him, as a second felony offender, to concurrent terms of three years and 2 to 4 years, respectively, unanimously affirmed.

Defendant validly waived his right to appeal (*see People v Thomas*, 34 NY3d 545, 559, 567 [2019], *cert denied* 589 US 1302 [2020]), which forecloses review of his challenge to the suppression ruling (*see People v McCreary*, 237 AD3d 412, 412 [1st Dept 2025], *lv denied* 43 NY3d 1047 [2025]).

As an alternative holding, we find that Supreme Court properly denied defendant’s suppression motion. Initially, there is no basis to disturb the court’s credibility determinations. After receiving an intelligence report highlighting a “trend” of carrying firearms in fanny packs in the area, the police lawfully approached defendant, who was holding a fanny pack that appeared heavy. Defendant alerted his companion to a police van, apparently in order to avoid it, repositioned the fanny pack away from the officers upon making eye contact with one of them, after they saw him cross the street outside of a crosswalk in violation of former 34 RCNY 4-04 (c) (2) (amended NY City Rec, May 27, 2025, eff June 26, 2025) (*see People v Sainz-Mantilla*, 129 AD3d 508, 508 [1st Dept 2015], *lv denied* 26 NY3d 1011 [2015]; *see also People v Simms*, 25 AD3d 425, 425 [1st Dept 2006], *lv denied* 6 NY3d 838 [2006]). Defendant’s subsequent flight, paired with his volunteering that he did not have anything on him, justified the officers’ pursuit (*see People v Delgado*, 4 AD3d 310, 310-311 [1st Dept 2004], *lv denied* 2 NY3d 798 [2004]). Defendant’s abandonment of the fanny pack that contained a .22 caliber pistol in the course of his flight

thus was not the product of unlawful police activity (*see People v Basono*, 122 AD3d 553, 553 [1st Dept 2014], *lv denied* 25 NY3d 1069 [2015]). Concur—Kennedy, J.P., Gesmer, González, Rosado, Chan, JJ.

10 The People of the State of New York, Respondent, v Michael T. Jackson, Appellant. [253 NYS3d 636]—Judgment, Supreme Court, Bronx County (Steven J. Hornstein, J.), rendered December 18, 2024, convicting defendant, upon his plea of guilty, of criminal possession of a firearm, and sentencing him to 3 years of probation, unanimously affirmed.

Defendant validly waived his right to appeal (*see People v Thomas*, 34 NY3d 545, 559 [2019], *cert denied* 589 US 1302 [2020]), which forecloses review of his excessive sentence claim (*see People v Lowndes*, 239 AD3d 574, 575 [1st Dept 2025], *lv denied* 44 NY3d 1012 [2025]). As an alternative holding, we perceive no basis to reduce his sentence.

Defendant’s facial challenge to the “good moral character” provision of New York’s gun licensing scheme survives his waiver of the right to appeal, and he has standing to bring it despite his never having applied for a gun license (*see People v Johnson*, —NY3d —, —, 2025 NY Slip Op 06528, *2 [2025]). However, the contention is unpreserved and we decline to review it in the interest of justice (*id.*) Alternatively, we find the claim unavailing (*see People v Martinez*, 238 AD3d 423, 424 [1st Dept 2025], *lv denied* 44 NY3d 1067 [2026]).

Defendant’s ineffective assistance claim based on trial counsel’s failure to raise his good moral character argument is not reviewable because it involves matters not reflected in the record and thus must first be raised in a CPL 440.10 motion (*see People v Martinez*, 231 AD3d 448, 449 [1st Dept 2024], *lv denied* 42 NY3d 1081 [2025]). To the extent the record permits review, we find that defendant has failed to establish that counsel was ineffective (*see People v Caban*, 5 NY3d 143, 152 [2005]).

Defendant’s as-applied constitutional challenges to condition 7 of his probation, which requires him to “[a]void injurious or vicious habits; refrain from frequenting unlawful or disreputable places; and do not consort with disreputable people” are foreclosed by his valid waiver of the right to appeal (*see Lowndes*, 239 AD3d at 575). They are also unpreserved, and we decline to review them in the interest of justice (*id.*). Concur—Kennedy, J.P., Gesmer, González, Rosado, Chan, JJ.

11 The People of the State of New York, Respondent, v Joshua Brooks, Appellant. [253 NYS3d 633]—An appeal having

been taken to this Court by the above-named appellant from a judgment of the Supreme Court, Bronx County (Tara Collins, J.), rendered December 17, 2024, said appeal having been argued by counsel for the respective parties, due deliberation having been had thereon, and finding the sentence not excessive, it is unanimously ordered that the judgment so appealed from be and the same is hereby affirmed. Concur—Kennedy, J.P., Gesmer, González, Rosado, Chan, JJ.

12 The People of the State of New York, Respondent, v Mauro Vivar, Appellant. [— NYS3d —]—

Crimes—Appeal—Invalid Waiver of Right to Appeal—Failure to Explain Appellate Rights

Crimes—Confession—Custodial Interrogation

Crimes—Harmless and Prejudicial Error—Denial of Motion to Suppress Statements—Decision to Plead Guilty

Judgment, Supreme Court, Bronx County (Martin Marcus, J., at suppression motion; James McCarty, J., at plea and sentencing), rendered June 6, 2022, convicting defendant of attempted assault in the second degree, and sentencing him to three years of probation, unanimously reversed, the plea vacated, and the matter remitted for further proceedings on the indictment.

Under the “totality of the circumstances,” defendant’s waiver of the right to appeal was invalid (*People v Thomas*, 34 NY3d 545, 559 [2019], *cert denied* 589 US 1302 [2020]). The court did not explain the nature of appellate rights to defendant, or that a waiver of these rights was separate and distinct from the rights automatically forfeited by a guilty plea (*People v Bradshaw*, 18 NY3d 257, 264 [2011]). The court also relied solely on defense counsel to explain the written waiver (*see People v Eason*, 228 AD3d 443, 444 [1st Dept 2024] [defense counsel’s confirmation that he reviewed the written waiver with the defendant “was not a substitute for the court conducting its own inquiry”], *lv denied* 42 NY3d 926 [2024]; *see also People v Trulove*, 238 AD3d 55, 61 [1st Dept 2025]). Indeed, the People elected not to defend the waiver of the right to appeal in this case.

The court should have granted defendant’s motion to suppress his statements to the arresting officer, as they were made during a custodial interrogation regarding the underlying incident which happened four months earlier, in response to questions that the officer should have known were reasonably likely to elicit an incriminating response (*see e.g. People v Robinson*, — NY3d —, —, 2025 NY Slip Op 05871, *3 [2025]). The People noted that the motion court’s reliance on *People v*

Huffman (41 NY2d 29 [1976]) was “questionable” and essentially conceded that the decision was error.

The court’s failure to grant defendant’s motion to suppress was not harmless error. Where, as here, “the error is of constitutional dimension,” courts make two inquiries to determine whether the error is harmless (*People v Robles*, 42 NY3d 694, 696 [2024]). First, courts look to whether the remaining proof constitutes “overwhelming proof of defendant’s guilt” (*id.* at 696-697 [internal quotation marks omitted]). “[E]ven when there are facts in the record that make possible that part of the analysis, a court must still determine that there is no reasonable possibility that the error contributed to the defendant’s decision to plead guilty for harmless error to apply” (*id.* at 697). This is not “one of the rare situations where the record leave[s] no question regarding [the defendant’s] independent motivation to plead guilty” (*id.* [internal quotation marks omitted]). The statements defendant sought to suppress could be construed as internally contradictory as to whether he knew or had previously interacted with the complainant. At a minimum, as the People concede, defendant’s statements could be used to indicate consciousness of guilt or to impeach defendant’s credibility, had he testified at trial. The fact that defendant sought to suppress them indicates that he considered them to be significant. Accordingly, there is a reasonable possibility that the court’s failure to grant defendant’s suppression motion contributed to defendant’s decision to plead guilty, and “we cannot say with certainty that the erroneous ruling played no part in that decision” (*id.* at 695).

Although defendant has already served his sentence, we reject his request to dismiss the indictment, given the seriousness of the crime charged (*see id.* at 698; *People v Bush*, 38 NY3d 66, 72 n 2 [2022] [“This Court has never dismissed a felony indictment on the ground that further proceedings would serve no useful penological purposes” (internal quotation marks omitted)]; *People v Peters*, 157 AD3d 79, 85 [1st Dept 2017] [declining to dismiss indictment where the defendant was convicted of a “serious offense”], *lv denied* 30 NY3d 1118 [2018]). Accordingly, defendant’s guilty plea is vacated and the case is remitted to Supreme Court for further proceedings on the indictment. Concur—Manzanet-Daniels, J.P., Moulton, Gesmer, Mendez, Michael, JJ.

13 The People of the State of New York, Respondent, v Stephanie Rodriguez, Appellant. [253 NYS3d 638]—An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, Bronx County (James

A. McCarty, Jr., J.), rendered June 22, 2022, said appeal having been argued by counsel for the respective parties, due deliberation having been had thereon, and finding the sentence not excessive, it is unanimously ordered that the judgment so appealed from be and the same is hereby affirmed. Concur—Kennedy, J.P., Gesmer, González, Rosado, Chan, JJ.

14 Daulin Gabriel Rijo, Respondent, v YYY 62nd Street LLC et al., Appellants. (And a Third-Party Action.) [253 NYS3d 638]—

Labor—Safe Place to Work—Elevation-Related Hazard—Fall into Trench without Guardrails

Order, Supreme Court, Bronx County (Matthew Parker-Raso, J.), entered on or about August 29, 2025, which, to the extent appealed from as limited by the briefs, granted plaintiff's motion for summary judgment as to liability on his Labor Law § 240 (1) claim and denied defendants' cross-motion for summary judgment dismissing plaintiff's Labor Law § 240 (1) claim, unanimously affirmed, without costs.

Supreme Court properly granted plaintiff's motion for summary judgment as to liability on his Labor Law § 240 (1) claim. Plaintiff's uncontradicted testimony established that, as he was walking to his work area he slipped on gravel and fell into a trench that was approximately four-feet wide and varied in depth, with the deepest part reaching 10 to 12 feet. The trench, which had a makeshift staircase or pathway for workers to use to enter the space, was dug along the façade of the building so that work could be completed on the building's foundation. The trench did not have any guardrails to stop a worker from falling in (*see Altamirano v Frick Collection*, 245 AD3d 401, 401 [1st Dept 2026]; *Gjeka v Iron Horse Transp., Inc.*, 151 AD3d 463, 464 [1st Dept 2017]).

In opposition, defendants failed to raise an issue of fact. Defendants' argument that any safety device that would have prevented the accident would have been impractical, illogical, or contrary to the work is unpersuasive. Even if a covering over the trench would have been contrary to the work, defendants fail to point to any evidence of a work-related reason for the absence of a guardrail (*see Wilson v AC 320 Hotel Partners LLC*, 238 AD3d 581, 582 [1st Dept 2025]; *cf. Salazar v Novalex Contr. Corp.*, 18 NY3d 134, 140 [2011]). Concur—Kennedy, J.P., Gesmer, González, Rosado, Chan, JJ.

15 Richard Stumacher, Respondent, v Medical Liability Mutual Insurance Company et al., Appellants. [253 NYS3d 639]—

Damages—Punitive Damages—Action by Insured against Insurer

Attorney and Client—Malpractice—Failure to Inform Defendant That Plaintiff Had Offered to Accept Policy Limits

Order, Supreme Court, New York County (Judith N. McMahon, J.), entered March 31, 2025, which denied defendant Medical Liability Mutual Insurance Company's (MLMIC) motion pursuant to CPLR 3211 (a) (7) to dismiss the third cause of action against it and any claim or demand for punitive damages, and the motion by defendants Marshall Dennehey Warner Coleman & Goggin, P.C. and Kevin Ryan pursuant to CPLR 3211 (a) (1) and (7) to dismiss the complaint as against them in its entirety, unanimously modified, on the law, to the extent of dismissing the third cause of action against MLMIC, and otherwise affirmed, without costs.

The court properly denied MLMIC's motion to dismiss the demand for punitive damages, but should have dismissed the third cause of action for such relief. Plaintiff's complaint, which is to be afforded a liberal construction and the facts of which we are required to accept as true (*see Leon v Martinez*, 84 NY2d 83, 87 [1994]), alleges egregious conduct directed not only at him but more broadly at MLMIC's other insureds within the State of New York and nationwide. This alleged behavior went beyond a failure to settle the underlying malpractice claim within policy limits, but rather included, inter alia, a callous disregard of the probability of an excess verdict, the assignment by MLMIC of a single law firm to represent multiple defendants with conflicting interests, and the failure to notify plaintiff of settlement offers. Thus, while "no separate cause of action for punitive damages lies for pleading purposes . . . the complaint . . . adequately alleges a demand for punitive damages" against MLMIC (*Pergament v Government Empls. Ins. Co. ["GEICO"]*, 225 AD3d 799, 801 [2d Dept 2024] [internal quotation marks omitted]; *see Rocanova v Equitable Life Assur. Socy. of U.S.*, 83 NY2d 603, 613 [1994]).

The court properly denied defendants Marshall Dennehey and Ryan's motion to dismiss. The complaint adequately alleges that defendants breached their duty of care, and that such breach caused ascertainable damages. The allegations were not wholly speculative since there is evidence in the record that plaintiff expressed concern about the possibility of an excess verdict, and because plaintiff alleged he would have agreed to settle the underlying action had he been informed that the plaintiff in that action had offered to accept the policy limits. Further, the documentary evidence submitted by defendants does not conclusively establish a defense to the legal malpractice cause of action as a matter of law (*see Weil, Gotshal*

& *Manges, LLP v Fashion Boutique of Short Hills, Inc.*, 10 AD3d 267, 271 [1st Dept 2004]).

We have considered the remaining contentions and find them unavailing. Concur—Kennedy, J.P., González Rosado, Chan, JJ.

16 Donald J. Trump, Respondent, v Mary L. Trump, Appellant, et al., Defendants. [253 NYS3d 637]—

Disclosure—Scope of Disclosure—Action for Breach of Confidentiality Provision of Settlement Agreement—Materials Related to Valuation of Assets in Agreement

Order, Supreme Court, New York County (Robert R. Reed, J.), entered May 21, 2025, which, to the extent appealed from, denied defendant Mary Trump’s motion to compel certain discovery, unanimously reversed, on the law, without costs, the motion granted and the matter remanded for further proceedings.

Plaintiff commenced this action against defendant for breach of the confidentiality provisions of a 2001 settlement agreement. In her answer, defendant asserted the affirmative defense of fraudulent inducement. Specifically, she alleged that she relied upon the valuation of certain assets set forth in the parties’ 2001 settlement agreement, and that those valuations were false. Defendant’s motion to compel seeks discovery of materials related to the valuations provided in the settlement agreement. Plaintiff bears the burden of establishing that the discovery sought by defendant, which relates to an affirmative defense of fraudulent inducement that plaintiff has not otherwise challenged in this action, is improper (*see Roman Catholic Church of Good Shepherd v Tempco Sys.*, 202 AD2d 257, 258 [1st Dept 1994]).

Supreme Court improvidently exercised its discretion in denying defendant’s motion. CPLR 3101 (a) directs “full disclosure of all matter material and necessary in the prosecution or defense of an action,” and is to be “interpreted liberally to require disclosure, upon request, of any facts bearing on the controversy which will assist preparation for trial by sharpening the issues and reducing delay and prolixity” (*Allen v Crowell-Collier Publ. Co.*, 21 NY2d 403, 406 [1968]). These principles entitle defendant to the requested discovery material to establish her affirmative defense (*see Rivera v NYP Holdings Inc.*, 63 AD3d 469, 469 [1st Dept 2009]; *Roman Catholic Church of Good Shepherd*, 202 AD2d at 257-258). Concur—Webber, J.P., González, Mendez, O’Neill Levy, Hagler, JJ. **[Prior Case History: 87 Misc 3d 579.]**

17 Anne K. Yates, Respondent, v City of New York et al., Defendants, and 494 Eighth Avenue LLC, Appellant. [253 NYS3d 640]—

Negligence—Sidewalks—Trivial Defect

Order, Supreme Court, New York County (Hasa A. Kingo, J.), entered November 27, 2024, which, to the extent appealed from as limited by the briefs, denied defendant 494 Eighth Avenue LLC’s motion for summary judgment dismissing the complaint as against it, unanimously affirmed, without costs.

Plaintiff alleges that on December 29, 2017, at around 2:30 p.m., she was injured when she tripped on the sidewalk in front of 494 Eighth Avenue, a building owned by defendant, and landed on a disassembled wooden police barricade on the sidewalk. Plaintiff testified at her 50-h hearing and at her deposition that she tripped and fell on an uneven portion of the sidewalk where there was an “imbalance” higher than the surrounding area by about an inch or an inch and a half.

Supreme Court properly found that defendant was not entitled to judgment as a matter of law on the basis that the alleged defect was trivial, as defendant failed to make a prima facie showing that the defect was, under the circumstances, physically insignificant and that the characteristics of the defect did not increase the risks that it posed (*see Hutchinson v Sheridan Hill House Corp.*, 26 NY3d 66, 79 [2015]; *Trinidad v Catsimatidis*, 190 AD3d 444, 444-445 [1st Dept 2021]). The evidence that defendant submitted in support of its motion, including photographs of the sidewalk where plaintiff was allegedly injured and the affidavit of the superintendent of defendant’s building, are inconclusive and, therefore, insufficient to demonstrate that the defect was trivial as a matter of law and, thus, not actionable (*see Trinidad*, 190 AD3d at 445; *Sahni v Kitridge Realty Co., Inc.*, 114 AD3d 837, 838 [2d Dept 2014]; *see also Trincere v County of Suffolk*, 90 NY2d 976 [1997]).

The photographs that defendant submitted—which, notably, do not depict any device measuring the defect to be a certain height (*cf. McGrane-Mungo v Dag Hammarskjold Tower*, 242 AD3d 458, 458 [1st Dept 2025])—do not unequivocally demonstrate that the defect was trivial as a matter of law, as “its size is not discernable and the photos appear to show that the defect has an edge, which could constitute a tripping hazard” (*Munasca v Morrison Mgt. LLC*, 111 AD3d 564, 564 [1st Dept 2013]; *see Abreu v New York City Hous. Auth.*, 61 AD3d 420 [1st Dept 2009]). There is also a lack of evidence demonstrating the dimensions of the defect at the time of plaintiff’s trip and fall

(see *Munasca*, 111 AD3d at 564; *Valentin v Columbia Univ.*, 89 AD3d 502, 503 [1st Dept 2011]). Defendant's reliance on the affidavit of the superintendent asserting that the defect was less than one half inch in depth is insufficient to satisfy its prima facie burden, as his assertion was at best an estimate of the size of the defect and not based on any actual measurement (see *Munasca*, 111 AD3d at 564; cf. *Vazquez v JRG Realty Corp.*, 81 AD3d 555 [1st Dept 2011]). In any event, plaintiff testified that the height differential was approximately one to one and half inches—which, if true, would be a violation Administrative Code of City of NY § 19-152—thereby raising an issue of fact (see *Trinidad*, 190 AD3d at 445). While such a differential “is not per se non-trivial, and therefore actionable as a matter of law, violation of Administrative Code § 19-152 is one factor to consider when deciding the issue of triviality” (*id.*).

Furthermore, plaintiff's testimony suggesting that, because she was looking “straight ahead to . . . find a clear area to get around a crowd of people on the sidewalk” at the time of her trip and fall, it was difficult to detect the defect further raises an issue of fact (see *id.*; *Argenio v Metropolitan Transp. Auth.*, 277 AD2d 165, 166 [1st Dept 2000]). Notably, the accident occurred during the holiday season on a heavily-traveled area of Eighth Avenue, between Penn Station and Time Square (see *Argenio*, 277 AD3d at 166).

Defendant's arguments as to purported inconsistencies in plaintiff's medical records and statements that she made after the trip and fall as to what caused the accident, whether it was the defect in the sidewalk or a police barricade, are unavailing (see *S.J. Capelin Assoc. v Globe Mfg. Corp.*, 34 NY2d 338, 341 [1974]; *Glick & Dolleck v Tri-Pac Export Corp.*, 22 NY2d 439, 441 [1968]). Concur—Moulton, J.P., Mendez, Rodriguez, Rosado, Hagler, JJ.

18 Rose Group Park Avenue LLC, Respondent, v Third Church Christ, Scientist, of New York City, Appellant. [— NYS3d —]—

Landlord and Tenant—Lease—Right to Audit Tenant's Gross Sales
Landlord and Tenant—Lease—Termination—Service of Notice to Cure
Landlord and Tenant—Alteration of Leased Premises—Minor, Nonstructural Repairs

Judgment, Supreme Court, New York County (Jennifer G. Schecter, J.), entered January 26, 2024, to the extent appealed from as limited by the briefs, awarding damages and declaratory and injunctive relief to plaintiff, and bringing up for review an order, same court and Justice, entered October 26, 2023, which, after a nonjury trial, granted in part plaintiff's claims

and denied in part defendant's counterclaims, unanimously affirmed, with costs.

The trial court properly determined that sections 3.5 (E) and (G) of the lease precluded defendant landlord from performing an audit of plaintiff tenant's gross sales seeking amounts beyond the previous lease year in order to determine the "additional rent" due. As we explained in a prior appeal in this matter, "defendant's right to audit plaintiff's gross sales was limited to no more than once per year (section 3.5 [G] [i]) and plaintiff was required to maintain supporting documents for at least one year (section 3.5 [E])" (*Rose Group Park Ave. LLC v Third Church Christ, Scientist, of N.Y. City*, 198 AD3d 506, 507 [1st Dept 2021]). These provisions support the trial court's conclusion that, after the one-year period, the landlord no longer has a right under the lease to challenge the tenant's calculation of gross sales or the sufficiency of the documents provided for that year.

For the same reasons, defendant's challenge to the amounts purportedly owed by plaintiff by underreporting amounts paid to plaintiff's affiliate was properly limited to section 3.5's one-year audit period. Thus, the court correctly found that certain relevant third-party payroll records should be included in the audit documents going forward, but that defendant was foreclosed from requiring plaintiff to produce those records for audits associated with earlier years based on the express limits in the lease. Because section 3.5 (D) (ii) defines gross sales to exclude service charges paid directly to plaintiff's "employees," service charges paid directly to plaintiff's affiliate's employees fall within that definition as well.

The court properly directed defendant to return plaintiff's protest payment of the amounts demanded by defendant for purported underpayments of gross sales, less those amounts that the court calculated were due from plaintiff's affiliate. According to plaintiff's principal's unrebutted testimony, defendant never sought documents from plaintiff before 2019 using the procedure set forth in the lease. Accordingly, plaintiff's purported failure to produce documents did not entitle defendant to any remedy and warranted the court's denial of damages for conduct outside section 3.5's one-year audit period.

The court also properly found that plaintiff was entitled to redact information from its tax returns unrelated to gross sales before producing the returns to defendant. Under section 3.5 (G) (i), defendant is permitted to review the documents in section 3.5 (E), which permits gross sales information to be "segregated from other business matters" together with "all books

and records pertaining thereto.” While broad, these sections demonstrate that defendant is not entitled to records or information contained within documents beyond those specifically relevant to gross sales.

Turning to the trial court’s directive to follow the arbitration procedures set forth in section 37.1 relating to sharing the cost of the façade repairs, the court did not do so sua sponte. Rather, plaintiff specifically sought relief under that section, as was its right to do under the lease.

We also find no basis to disturb the declaratory and injunctive relief awarded. The record supports the court’s finding that there was an agreement between the parties, renewable annually at the landlord’s discretion, allowing the tenant to use the premises on 17 Wednesdays per year, at times usually reserved for defendant’s use. The court therefore properly determined that plaintiff’s future use of the premises on Wednesdays requires defendant’s consent. We decline to reach defendant’s argument raised for the first time on appeal that it is entitled to damages for plaintiff’s prior use (*see Diarras-souba v Consolidated Edison Co. of N.Y. Inc.*, 123 AD3d 525, 525 [1st Dept 2014]).

The court properly rejected defendant’s contention that it was entitled to terminate the lease on that basis without service of a notice to cure (*see Village Ctr. for Care v Sligo Realty & Serv. Corp.*, 95 AD3d 219, 222 [1st Dept 2012]). The lack of evidence in the record of any damages incurred by defendant is an indication that plaintiff’s use did not constitute an incurable defect (*see e.g. Empire State Bldg. Assoc. v Trump Empire State Partners*, 245 AD2d 225, 229 [1st Dept 1997]).

The trial court properly determined that defendant’s contention that plaintiff’s use of the premises is subordinate to defendant’s for all purposes runs contrary to the express language of sections 9.1 and 35.1 of the lease and this Court’s findings in its 2012 order from the appeal of the denial of plaintiff’s liquor license (*see Rose Group Park Ave. LLC v New York State Liq. Auth.*, 93 AD3d 1, 12 [1st Dept 2012], *lv denied* 18 NY3d 953 [2012]). Although section 9.1 permits defendant to use specific areas of the basement for Sunday school and a nursery, it does not permit defendant to operate those areas as a reading room that is open to the public seven days a week. Defendant’s contention that plaintiff is not harmed by the operation of a reading room is irrelevant to plaintiff’s claim for the declaratory relief sought here to resolve the ongoing justiciable controversy between the parties (CPLR 3001).

We see no basis to disturb the trial court’s declaration that

plaintiff acquired the right “to occupy the Literature Distribution/Committee Room, Treasurer’s Office, and 4th Floor storage space on a non-exclusive basis” based on its improvements to those areas and defendant’s acquiescence in that arrangement (*see e.g. Simon & Son Upholstery v 601 W. Assoc.*, 268 AD2d 359, 360 [1st Dept 2000]).

Defendant’s contention that it must be permitted to use plaintiff’s affiliate’s lighting and audio-visual (AV) equipment is meritless, as those systems did not exist when the parties drafted section 35.2 requiring plaintiff to turn on the lights before church services. Therefore, section 35.2 could not have contemplated defendant’s use of the new AV equipment when the lease was drafted (*see Duane Reade, Inc. v Cardtronics, LP*, 54 AD3d 137, 140 [1st Dept 2008]).

Defendant’s complaints relating to plaintiff’s performance of minor, nonstructural alterations and repairs were properly rejected by the trial court. A tenant “is at liberty to erect structures for the purpose of carrying on [its] legitimate business . . . even where, as here, the lease has a provision that alterations may not be made without the landlord’s consent” (*see Harar Realty Corp. v Michlin & Hill*, 86 AD2d 182, 186 [1st Dept 1982] [internal quotation marks and citations omitted], *lv dismissed* 57 NY2d 836 [1982]). Additionally, defendant’s challenge to the injunction precluding it from erecting signs on or near the premises absent plaintiff’s permission fails, because, during its events, plaintiff has a right under section 27.1 to limit the display of signs reflecting that the premises is a church. That right would be undermined by defendant’s placement of signs without plaintiff’s consent.

We also decline to disturb the judgment’s directives under section 35.2 that the auditorium remain set up for church services when not in use by plaintiff. The “specifications” by which plaintiff must abide are expressed in that section. Defendant does not proffer a basis upon which plaintiff is required to do anything further except that which is set forth in the court’s order.

We have considered defendant’s remaining contentions and find them unavailing. Concur—Kennedy, J.P., Gesmer, González, Rosado, Chan, JJ.

SECOND DEPARTMENT, APRIL, 2026

(April 1, 2026)

1 70-35 113th St. Holdings, LLC, Appellant, v Auberge Grand Central, LLC, Respondent, et al., Defendant. [— NYS3d —]—

Specific Performance—Contract for Sale of Real Property—Time of Essence—Substantial Performance

In an action, inter alia, for specific performance of a contract for the sale of real property, the plaintiff appeals from a judgment of the Supreme Court, Queens County (Leonard Livote, J.), dated December 15, 2020. The judgment, insofar as appealed from, after a nonjury trial, is in favor of the defendant Auberge Grand Central, LLC, and against the plaintiff dismissing the complaint insofar as asserted against the defendant Auberge Grand Central, LLC.

Ordered that the judgment is affirmed insofar as appealed from, with costs.

In January 2014, the plaintiff was the successful bidder at a foreclosure auction of the subject real property. The terms of sale dated January 10, 2014, made time of the essence as to the plaintiff. However, the plaintiff did not have sufficient funds and was unable to obtain financing, and thus, was unable to close on the property despite multiple adjournments of the closing date. The defendant Auberge Grand Central, LLC (hereinafter Auberge), which was also the plaintiff in the foreclosure action, was ultimately the successful bidder at a second foreclosure auction held in August 2014. The plaintiff commenced this action for specific performance of the terms of sale for the property or, in the alternative, to recover damages for breach of contract. After a nonjury trial, the Supreme Court issued a judgment, inter alia, in favor of Auberge and against the plaintiff dismissing the complaint insofar as asserted against Auberge. The plaintiff appeals from so much of the judgment as dismissed the complaint insofar as asserted against Auberge.

The elements of a cause of action for specific performance of a contract for the sale of real property are that the plaintiff substantially performed its contractual obligations and was ready, willing, and able to perform its remaining obligations, that the defendant was able to convey the property, and that there was no adequate remedy at law (*see Kugel v Reynolds*, 228 AD3d 743, 748 [2024]; *Treasure Is. of Asbury Park Self-Storage, LLC v MBAR Realty, LLC*, 216 AD3d 1200, 1203

[2023]; *Rha v Blangiardo*, 189 AD3d 1098, 1099 [2020]). A party seeking specific performance of a contract for the sale of real property is required to establish not only that it was ready, willing, and able to close on the scheduled closing date, but also that the other party was in default (see *Treasure Is. of Asbury Park Self-Storage, LLC v MBAR Realty, LLC*, 216 AD3d at 1203; *141 Park Ave. Realities, Inc. v 141 Park Ave. Holdings, LLC*, 216 AD3d 881, 883 [2023]; *Rha v Blangiardo*, 189 AD3d at 1099). The decision whether to grant or deny the remedy of specific performance lies within the sound discretion of the court (see *Rha v Blangiardo*, 189 AD3d at 1099; *Cho v 401-403 57th St. Realty Corp.*, 300 AD2d 174, 175 [2002]).

When a contract for the sale of real property contains a provision that time is of the essence, the parties are obligated to comply strictly with its terms (see *Bank of Am. v Petit*, 89 AD3d 652, 653 [2011]), and the parties bound by that clause must tender performance on the law day unless the time for performance has been extended by mutual agreement (see *184 Joralemon, LLC v Brklyn Hts Condos, LLC*, 117 AD3d 699, 702 [2014]). Where time is of the essence, performance on the specific date is a material element of the contract, and failure to perform on that date constitutes a material breach of the contract (see *id.*; *Bank of Am. v Petit*, 89 AD3d at 653; *Kaiser-Haidri v Battery Place Green, LLC*, 85 AD3d 730, 733 [2011]).

Here, the Supreme Court properly dismissed the complaint insofar as asserted against Auberge. At trial, the plaintiff failed to establish that it was entitled to specific performance of the terms of sale for the property. Pursuant to the terms of sale, time was made of the essence as to the plaintiff. After four adjournments at the plaintiff's request, the plaintiff and Auberge entered into a written stipulation dated May 5, 2014, under which they agreed that the closing would be adjourned to May 29, 2014, with time being of the essence as to the plaintiff. The evidence at trial demonstrated that the plaintiff did not substantially perform its contractual obligations and was not ready, willing, and able to perform its remaining obligations, as the plaintiff did not appear at the May 29, 2014 closing and did not have the necessary financing in place at that time. Because time was made of the essence in the terms of sale, no separate notice of an intent to declare a default was necessary (cf. *Nehmadi v Davis*, 63 AD3d 1125 [2009]; *Guip-pone v Gaias*, 13 AD3d 339 [2004]). Moreover, the plaintiff was collaterally estopped from relitigating the issue of its default in closing, as that issue was raised in an action brought by Wing Fung Chau, on behalf of the plaintiff, and was decided against

the plaintiff after a full and fair opportunity to contest that issue in that action (*see Simmons v Trans Express Inc.*, 37 NY3d 107, 112 [2021]; *Buechel v Bain*, 97 NY2d 295, 303 [2001]; *Caminero v Michael Flynn, Esq., PLLC.*, 239 AD3d 818 [2025]). In addition, the plaintiff failed to demonstrate that Auberge was in default under the terms of sale.

Accordingly, the Supreme Court properly dismissed the complaint insofar as asserted against Auberge. Christopher, J.P., Ford, Warhit and Voutsinas, JJ., concur.

2 Nataizia Anderson, as Administrator of the Estate of Rosemund Canterbury, Deceased, Appellant, v Robert Israel, M.D., et al., Respondents, et al., Defendants. [252 NYS3d 754]—

Hospitals—Malpractice—Accepted Standard of Care—Expert Affidavits

In an action, inter alia, to recover damages for medical malpractice, the plaintiff appeals from an order of the Supreme Court, Kings County (Genine D. Edwards, J.), dated June 15, 2021. The order granted the separate motions of the defendants Robert Israel and NYU Hospitals Center for summary judgment dismissing the complaint insofar as asserted against each of them.

Ordered that the order is affirmed, with one bill of costs.

The plaintiff's decedent underwent elective arthroscopic knee surgery on December 15, 2008, performed by the defendant Robert Israel at the defendant NYU Hospitals Center (hereinafter NYU, and together with Israel the defendants), and was discharged the same day. The decedent presented to the emergency department of Kings County Hospital on December 26, 2008, complaining of shortness of breath that began one day earlier. The decedent was admitted to that hospital with a diagnosis of pneumonia and was released on February 9, 2009. The decedent passed away in 2016 and there is no claim for wrongful death.

Prior to her death, the decedent commenced this action against, among others, the defendants, inter alia, to recover damages for medical malpractice, alleging, among other things, that the elective arthroscopic knee surgery should not have been performed, that the surgery was not performed under the specifications recommended by the decedent's cardiologist, that the decedent was prematurely discharged after the surgery, and that Israel failed to provide proper follow-up care. Israel and NYU separately moved for summary judgment dismissing the complaint insofar as asserted against each of them. In an order dated June 15, 2021, the Supreme Court granted the defendants' separate motions. The plaintiff appeals.

“A defendant seeking summary judgment in a medical malpractice action must make a prima facie showing either that he or she did not depart from the accepted standard of care or that any departure was not a proximate cause of the plaintiff’s injuries” (*Hiltz v DiLorenzo*, 206 AD3d 631, 633 [2022] [internal quotation marks omitted]; see *Mattocks v Ellant*, 231 AD3d 813, 815 [2024]; *Pirri-Logan v Pearl*, 192 AD3d 1149, 1151 [2021]). “Once the defendant has made such a showing, the plaintiff, in opposition, must submit evidentiary facts or materials to rebut the defendant’s prima facie showing” (*Chillious v Edouard*, 234 AD3d 737, 739 [2025] [internal quotation marks omitted]; see *Hiltz v DiLorenzo*, 206 AD3d at 633). “‘To rebut the defendant’s prima facie showing, a plaintiff must submit an expert opinion that specifically addresses the defense expert’s allegations’ ” (*Mattocks v Ellant*, 231 AD3d at 816, quoting *Pirri-Logan v Pearl*, 192 AD3d at 1150). “‘General allegations that are conclusory and unsupported by competent evidence tending to establish the essential elements of medical malpractice are insufficient to defeat a defendant’s motion for summary judgment’ ” (*Kerrins v South Nassau Communities Hosp.*, 148 AD3d 795, 796 [2017], quoting *Bezerman v Bailine*, 95 AD3d 1153, 1154 [2012]; see *Messeroux v Maimonides Med. Ctr.*, 181 AD3d 583, 585 [2020]).

Contrary to the plaintiff’s contention, the defendants established their prima facie entitlement to judgment as a matter of law dismissing the complaint insofar as asserted against each of them through, inter alia, expert affidavits in which an orthopedic surgeon, anesthesiologist, and infectious disease specialist opined that the defendants’ treatment of the decedent was within the accepted standard of care and that, in any event, any alleged departures were not a proximate cause of the decedent’s injuries (see *Mattocks v Ellant*, 231 AD3d at 816; *Balgobind v Long Is. Jewish Med. Ctr.*, 218 AD3d 428, 429 [2023]; *Samer v Desai*, 179 AD3d 860, 862 [2020]; *Brady v Westchester County Healthcare Corp.*, 78 AD3d 1097, 1098 [2010]). In opposition, the plaintiff failed to raise a triable issue of fact. The affirmations of the plaintiff’s experts were conclusory and speculative (see *Mattocks v Ellant*, 231 AD3d at 816; *Pirri-Logan v Pearl*, 192 AD3d at 1151).

Accordingly, the Supreme Court properly granted the defendants’ separate motions for summary judgment dismissing the complaint insofar as asserted against each of them. Barros, J.P., Christopher, Warhit and Voutsinas, JJ., concur.

3 Ilana Aronov, Respondent, v Evgeny Matvienko, Appellant. [251 NYS3d 778]—

Contempt—Civil Contempt—Failure to Comply with Subpoena

In an action for a divorce and ancillary relief, the defendant appeals from an order of the Supreme Court, Queens County (Elisa S. Koenderman, J.), entered November 10, 2021. The order denied the defendant's motion, inter alia, to hold the plaintiff and nonparty Mazol Aksakalova in contempt for failure to comply with certain so-ordered subpoenas and, sua sponte, pursuant to CPLR 3126 (2), directed that the plaintiff shall be precluded from introducing or opposing evidence of her income at trial.

Ordered that on the Court's own motion, the notice of appeal from so much of the order as, sua sponte, pursuant to CPLR 3126 (2), directed that the plaintiff shall be precluded from introducing or opposing evidence of her income at trial is deemed to be an application for leave to appeal from that portion of the order, and leave to appeal is granted (*see id.* § 5701 [c]); and it is further,

Ordered that the order is reversed, on the law, without costs or disbursements, and the matter is remitted to the Supreme Court, Queens County, for further proceedings in accordance herewith.

The parties were married on April 3, 2016, and had one child during the marriage. In November 2017, the plaintiff commenced this action for a divorce and ancillary relief. In March 2021, the defendant moved, inter alia, to hold the plaintiff and nonparty Mazol Aksakalova in contempt for failure to comply with certain so-ordered subpoenas. In an order entered November 10, 2021, the Supreme Court denied the defendant's motion and, sua sponte, pursuant to CPLR 3126 (2), directed that the plaintiff shall be precluded from introducing or opposing evidence of her income at trial. The defendant appeals.

"Failure to comply with a subpoena issued by a judge, clerk or officer of the court shall be punishable as a contempt of court" (CPLR 2308 [a]). Here, the Supreme Court should have conducted a hearing to resolve factual issues as to the defendant's motion for contempt and to determine the appropriate remedy (*see id.*; *Matter of Ling v Sans Souci Owners Corp.*, 187 AD3d 755 [2020]). Accordingly, we remit the matter to the Supreme Court, Queens County, for a hearing to determine whether the plaintiff and nonparty Mazol Aksakalova should be held in contempt for alleged noncompliance with certain so-ordered subpoenas, and a new determination thereafter of the defendant's motion.

The defendant's remaining contention is without merit. Chambers, J.P., Dowling, McCormack and Quirk, JJ., concur.

4 Bank of America, N.A., Respondent, v Victor Alfaro Marquez, Also Known as Victor Marquez, Appellant, et al., Defendants. [— NYS3d —]—

Mortgages—Foreclosure—Compliance with RPAPL 1304—90-Day Notice

In an action to foreclose a mortgage, the defendant Victor Alfaro Marquez appeals from an order of the Supreme Court, Suffolk County (Christopher Modelewski, J.), dated March 13, 2024. The order, insofar as appealed from, granted those branches of the plaintiff's motion which were for summary judgment on the complaint insofar as asserted against the defendant Victor Alfaro Marquez, to strike his answer, and for an order of reference.

Ordered that the order is reversed insofar as appealed from, on the law, with costs, and those branches of the plaintiff's motion which were for summary judgment on the complaint insofar as asserted against the defendant Victor Alfaro Marquez, to strike his answer, and for an order of reference are denied.

In January 2019, the plaintiff commenced this action against, among others, the defendant Victor Alfaro Marquez (hereinafter the defendant), to foreclose a mortgage on certain real property located in Selden alleging, inter alia, that the defendant defaulted on the subject loan on August 1, 2018. The defendant interposed an answer in which he asserted affirmative defenses alleging, among other things, that the plaintiff failed to comply with the 90-day notice requirement of RPAPL 1304. The plaintiff moved, inter alia, for summary judgment on the complaint insofar as asserted against the defendant, to strike his answer, and for an order of reference. The defendant opposed the motion. In an order dated March 13, 2024, the Supreme Court, among other things, granted those branches of the plaintiff's motion. The defendant appeals.

“Where a defendant in a residential foreclosure action raises the issue of compliance with RPAPL 1304, the plaintiff must tender sufficient evidence demonstrating the absence of triable issues of fact as to its strict compliance with that statute” (*Sparta GP Holding Reo Corp. v Lynch*, 186 AD3d 894, 895 [2020]; see *U.S. Bank N.A. v Cox*, 203 AD3d 1206, 1209 [2022]). Pursuant to RPAPL 1304 (1), the notice must, inter alia, set forth “the durational extent and dollar amount of the alleged payment default” (*Emigrant Bank v Cohen*, 205 AD3d 103, 108 [2022]).

Here, the 90-day notice stated, among other things, that as of August 3, 2018, “your home is 33 days . . . in default,”

reflecting a date of default of July 1, 2018. However, the complaint alleged that the date of default was August 1, 2018. Based upon this discrepancy as to the date of default, the plaintiff failed to eliminate a triable issue of fact as to whether the 90-day notice was defective on its face (*see Green Tree Servicing, LLC v Helmsorig*, 227 AD3d 1053, 1055 [2024]; *U.S. Bank N.A. v Cox*, 203 AD3d at 1210).

Accordingly, since the plaintiff failed to establish, *prima facie*, its strict compliance with RPAPL 1304, the Supreme Court should have denied those branches of the plaintiff's motion which were for summary judgment on the complaint insofar as asserted against the defendant, to strike the defendant's answer, and for an order of reference, regardless of the sufficiency of the opposition papers (*see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]).

In light of our determination, we need not reach the parties' remaining contentions. Connolly, J.P., Wooten, Taylor and Landicino, JJ., concur.

5 Krzysztof Bista, Appellant, v State of New York, Respondent. [— NYS3d —]

Labor—Safe Place to Work—Fall from Ladder—Proximate Cause

In a claim to recover damages for personal injuries, the claimant appeals from an order of the Court of Claims (Carmen St. George, J.), dated May 10, 2024. The order, insofar as appealed from, denied the claimant's motion for summary judgment on the issue of liability on the cause of action alleging a violation of Labor Law § 240 (1).

Ordered that the order is reversed insofar as appealed from, on the law, with costs, and the claimant's motion for summary judgment on the issue of liability on the cause of action alleging a violation of Labor Law § 240 (1) is granted.

The claimant allegedly was injured when he fell off of a ladder while working on a construction project at Farmingdale State College. The claimant commenced this claim against the defendant asserting, *inter alia*, a cause of action alleging a violation of Labor Law § 240 (1). The claimant moved for summary judgment on the issue of liability on that cause of action. In an order dated May 10, 2024, the Court of Claims, among other things, denied the motion. The claimant appeals.

"Labor Law § 240 (1) imposes on owners or general contractors and their agents a nondelegable duty, and absolute liability for injuries proximately caused by the failure to provide appropriate safety devices to workers who are subject to

elevation-related risks” (*Paiba v 56-11 94th St. Co., LLC*, 228 AD3d 881, 882 [2024] [internal quotation marks omitted]). “To succeed on a cause of action under Labor Law § 240 (1), a plaintiff must establish that the defendant violated its duty and that the violation proximately caused the plaintiff’s injuries” (*id.* [internal quotation marks omitted]).

“Whether a device provides proper protection is a question of fact, except when the device collapses, moves, falls, or otherwise fails to support the plaintiff and his or her materials” (*Yi Jiang Pai v Nelson Senior Hous. Dev. Fund Corp.*, 232 AD3d 822, 825 [2024] [internal quotation marks omitted]). Thus, “where a ladder slides, shifts, tips over, or otherwise collapses for no apparent reason, the plaintiff has established a violation” (*Cioffi v Target Corp.*, 188 AD3d 788, 791 [2020]; *see Rosario v Horizon Networks, Inc.*, 240 AD3d 537, 539 [2025]).

“Where an accident is caused by a violation of Labor Law § 240 (1), the plaintiff’s own negligence does not furnish a defense; however, there can be no liability under Labor Law § 240 (1) where the plaintiff’s own actions are the sole proximate cause of the accident” (*Paiba v 56-11 94th St. Co., LLC*, 228 AD3d at 882 [internal quotation marks omitted]; *see Salinas v 64 Jefferson Apts., LLC*, 170 AD3d 1216, 1222 [2019]; *Alvarez v Vingsan L.P.*, 150 AD3d 1177, 1178-1179 [2017]).

Here, the claimant demonstrated his prima facie entitlement to judgment as a matter of law on the issue of liability on the cause of action alleging a violation of Labor Law § 240 (1). The claimant’s deposition testimony established that the unsecured ladder moved suddenly and tilted to the left, causing him to fall (*see Garcia v Fed LI, LLC*, 239 AD3d 942, 945 [2025]; *Paiba v 56-11 94th St. Co., LLC*, 228 AD3d at 882; *Cioffi v Target Corp.*, 188 AD3d at 791; *Salinas v 64 Jefferson Apts., LLC*, 170 AD3d at 1222). In opposition, the defendant failed to raise a triable issue of fact as to whether the claimant’s own acts or omissions were the sole proximate cause of the accident (*see Paiba v 56-11 94th St. Co., LLC*, 228 AD3d at 882-883; *Salinas v 64 Jefferson Apts., LLC*, 170 AD3d at 1222-1223; *Alvarez v Vingsan L.P.*, 150 AD3d at 1178-1179).

Accordingly, the Court of Claims should have granted the claimant’s motion for summary judgment on the issue of liability on the cause of action alleging a violation of Labor Law § 240 (1). Barros, J.P., Wooten, Taylor and McCormack, JJ., concur.

6 Lin Chen et al., Appellants, v Zum Development, Inc., et al., Respondents. [— NYS3d —]

Vendor and Purchaser—Contract for Sale of Real Property—Fraudulent Misrepresentation—Caveat Emptor
Negligence—Negligent Misrepresentation—Relationship of Privity
Judgments—Default Judgment—Reasonable Excuse

In an action, *inter alia*, to recover damages for breach of contract and fraudulent misrepresentation, the plaintiffs appeal from (1) an order of the Supreme Court, Nassau County (Dawn Jimenez, J.), entered October 4, 2022, and (2) an order of the same court entered January 17, 2023. The order entered October 4, 2022, insofar as appealed from, granted those branches of the motion of the defendants Zum Development and Ehsan Elnaghavé which were pursuant to CPLR 3211 (a) to dismiss the second, third, fourth, and fifth causes of action insofar as asserted against them and the sixth and seventh causes of action insofar as asserted against the defendant Ehsan Elnaghavé. The order entered January 17, 2023, insofar as appealed from, denied the plaintiff's motion for leave to enter a default judgment against the defendant Albert Salem and granted those branches of the cross-motion of the defendant Albert Salem which were, in effect, to vacate his default in appearing or answering, to extend the time to answer the complaint, and pursuant to CPLR 3211 (a) to dismiss the sixth and seventh causes of action insofar as asserted against him.

Ordered that the orders are affirmed insofar as appealed from, with one bill of costs.

On February 23, 2021, the defendant Zum Development, Inc. (hereinafter Zum Development), entered into a contract of sale in which it agreed to sell a residential property (hereinafter the house) located in Great Neck to the plaintiffs for \$1,750,000. In February 2022, the plaintiffs commenced this action, *inter alia*, alleging fraudulent misrepresentation (second cause of action), negligent misrepresentation (third cause of action), fraudulent concealment (fourth cause of action), fraudulent inducement (fifth cause of action), promissory estoppel (sixth cause of action), and unjust enrichment (seventh cause of action). The first cause of action, to recover damages for breach of contract, was asserted against Zum Development only. The plaintiffs alleged that the defendants represented to them that the house was brand new when the house had actually been built on top of an existing foundation. The plaintiffs further asserted that the property had a variety of issues related to Zum Development's alleged faulty construction of the house.

Zum Development and the defendant Ehsan Elnaghavé (hereinafter together the Zum defendants) moved, among other things, pursuant to CPLR 3211 (a) to dismiss the second, third,

fourth, fifth, sixth, and seventh causes of action insofar as asserted against them. In an order entered October 4, 2022, the Supreme Court, *inter alia*, granted those branches of the motion which were pursuant to CPLR 3211 (a) to dismiss the second, third, fourth, and fifth causes of action insofar as asserted against the Zum defendants and the sixth and seventh causes of action insofar as asserted against Elnaghavé. The defendant Albert Salem failed to appear in the action. The plaintiffs moved for leave to enter a default judgment against Salem. Salem opposed the plaintiffs' motion and cross-moved, among other things, in effect, to vacate his default in appearing or answering, to extend the time to answer the complaint, and pursuant to CPLR 3211 (a) to dismiss the sixth and seventh causes of action insofar as asserted against him. In an order entered January 17, 2023, the court, *inter alia*, denied the plaintiffs' motion and granted those branches of Salem's cross-motion. The plaintiffs appeal from the order entered October 4, 2022, and the order entered January 17, 2023.

"On a motion to dismiss pursuant to CPLR 3211 (a) (7), the complaint is to be afforded a liberal construction, the facts alleged are presumed to be true, the plaintiff is afforded the benefit of every favorable inference, and the court is to determine only whether the facts as alleged fit within any cognizable legal theory" (*Granizo v Krystal Fruits & Vegetables, Inc.*, 238 AD3d 719, 720 [2025]; *see Gorbatov v Tsirelman*, 155 AD3d 836, 837 [2017]). "Where evidentiary material is submitted and considered on a motion to dismiss a complaint pursuant to CPLR 3211 (a) (7), and the motion is not converted into one for summary judgment, the question becomes whether the plaintiff has a cause of action, not whether the plaintiff has stated one and, unless it has been shown that a material fact as claimed by the plaintiff to be one is not a fact at all and unless it can be said that no significant dispute exists regarding it, dismissal should not eventuate" (*Granizo v Krystal Fruits & Vegetables, Inc.*, 238 AD3d at 720; *see Guggenheimer v Ginzburg*, 43 NY2d 268, 275 [1977]). "A motion to dismiss a complaint pursuant to CPLR 3211 (a) (1) may be granted only if the documentary evidence submitted by the moving party utterly refutes the factual allegations of the complaint and conclusively establishes a defense to the claims as a matter of law" (*Granizo v Krystal Fruits & Vegetables, Inc.*, 238 AD3d at 720; *see MJ Lilly Assoc., LLC v Ovis Creative, LLC*, 221 AD3d 805, 806 [2023]).

The Supreme Court properly granted those branches of the Zum defendants' motion which were to dismiss the second, fourth, and fifth causes of action insofar as asserted against

them. “A cause of action to recover damages for fraudulent misrepresentation requires a misrepresentation or a material omission of fact which was false and known to be false by defendant, made for the purpose of inducing the other party to rely upon it, justifiable reliance of the other party on the misrepresentation or material omission, and injury” (*R. Vig Props., LLC v Rahimzada*, 213 AD3d 871, 872 [2023] [internal quotation marks omitted]; see *Mandarin Trading Ltd. v Wildenstein*, 16 NY3d 173, 179 [2011]). “A cause of action to recover damages for fraudulent concealment requires, in addition to the elements of a cause of action to recover damages for fraudulent misrepresentation, an allegation that the defendant had a duty to disclose material information and that it failed to do so” (*R. Vig Props., LLC v Rahimzada*, 213 AD3d at 872; see *Mandarin Trading Ltd. v Wildenstein*, 16 NY3d at 179). “In the context of real estate transactions, a claim of fraudulent misrepresentation must be analyzed within the doctrine of caveat emptor” (*R. Vig Props., LLC v Rahimzada*, 213 AD3d at 872; see *Hecker v Paschke*, 133 AD3d 713, 716 [2015]). “New York adheres to the doctrine of caveat emptor and imposes no liability on a seller for failing to disclose information regarding the premises when the parties deal at arm’s length, unless there is some conduct on the part of the seller which constitutes active concealment” (*R. Vig Props., LLC v Rahimzada*, 213 AD3d at 872 [internal quotation marks omitted]; see *Razdolskaya v Lyubarsky*, 160 AD3d 994, 996 [2018]). “If however, some conduct (i.e., more than mere silence) on the part of the seller rises to the level of active concealment, a seller may have a duty to disclose information concerning the property” (*R. Vig Props., LLC v Rahimzada*, 213 AD3d at 873 [internal quotation marks omitted]; see *Razdolskaya v Lyubarsky*, 160 AD3d at 996). “To maintain a cause of action to recover damages for active concealment, the plaintiff must show, in effect, that the seller or the seller’s agents thwarted the plaintiff’s efforts to fulfill his responsibilities fixed by the doctrine of caveat emptor” (*R. Vig Props., LLC v Rahimzada*, 213 AD3d at 873 [internal quotation marks omitted]; see *Razdolskaya v Lyubarsky*, 160 AD3d at 996).

Here, the Supreme Court correctly determined that the second, fourth, and fifth causes of action, sounding in fraud, were barred by the specific terms of the contract of sale (see *Comora v Franklin*, 171 AD3d 851, 853 [2019]; *JPMorgan Chase Bank, N.A. v Rosa*, 169 AD3d 887, 891 [2019]). Moreover, contrary to the plaintiffs’ contentions, the facts alleged to have been misrepresented and/or improperly concealed were not matters peculiarly within the Zum defendants’ knowledge,

which could not have been discovered by the plaintiffs by the exercise of ordinary intelligence, and did not thwart the plaintiffs in their efforts to fulfill their responsibilities fixed by the doctrine of caveat emptor (see *R. Vig Props., LLC v Rahimzada*, 213 AD3d at 872). Accordingly, the court properly granted those branches of the Zum defendants' motion which were pursuant to CPLR 3211 (a) to dismiss the second, fourth, and fifth causes of action insofar as asserted against them.

The Supreme Court properly granted that branch of the Zum defendants' motion which was pursuant to CPLR 3211 (a) to dismiss the third cause of action, alleging negligent misrepresentation, insofar as asserted against them. "To recover on a theory of negligent misrepresentation, a plaintiff must establish that the defendant had a duty to use reasonable care to impart correct information because of some special relationship between the parties, that the information was incorrect or false, and that the plaintiff reasonably relied upon the information provided" (*Atlasman v Korol*, 238 AD3d 826, 830 [2025]; see *Grammer v Turits*, 271 AD2d 644, 645 [2000]). "Generally, [a] special relationship does not arise out of an ordinary arm's length business transaction between two parties" (*Atlasman v Korol*, 238 AD3d at 830 [internal quotation marks omitted]; see *Neurological Surgery, P.C. v MLMIC Ins. Co.*, 208 AD3d 1238, 1240 [2022]). "[A] plaintiff in an action for negligent misrepresentation must show either privity of contract between the plaintiff and the defendant or a relationship so close as to approach that of privity" (*Atlasman v Korol*, 238 AD3d at 830 [internal quotation marks omitted]; see *Sykes v RFD Third Ave. 1 Assoc., LLC*, 15 NY3d 370, 372 [2010]). Here, the facts alleged in the complaint do not suggest that the parties were in a relationship of privity or near-privity when the Zum defendants made their alleged negligent misrepresentations as the alleged negligent misrepresentations were made prior to the execution of the contract of sale. Moreover, the facts alleged are duplicative of the breach of contract cause of action (see *Crawford v Integrated Asset Mgt. Servs., LLC*, 236 AD3d 750, 752 [2025]).

The Supreme Court properly granted those branches of the Zum defendants' motion and Salem's cross-motion which were pursuant to CPLR 3211 (a) to dismiss the sixth and seventh causes of action, alleging promissory estoppel and unjust enrichment, insofar as asserted against Elnaghavé and Salem, respectively, as the condition of the house and any required repairs were covered by the contract of sale between Zum Development and the plaintiffs (see *Clark-Fitzpatrick, Inc. v*

Long Is. R.R. Co., 70 NY2d 382, 388-389 [1987]; *Auquilla v Villa*, 240 AD3d 48 [2025]). Moreover, the plaintiffs' sixth and seventh causes of action are based on the alleged unjust enrichment of Zum Development and the alleged promises made by Zum Development, and there are no allegations that any representations were made by Elnaghavé or Salem or that they were directly unjustly enriched. As such, the conclusory allegations in the complaint were insufficient to state a cause of action alleging unjust enrichment or promissory estoppel against Elnaghavé or Salem (*see Weinstein v Natalie Weinstein Design Assoc., Inc.*, 86 AD3d 641, 643 [2011]).

The Supreme Court also properly denied the plaintiffs' motion for leave to enter a default judgment against Salem and granted those branches of Salem's cross-motion which were, in effect, to vacate his default in appearing or answering and to extend the time to answer the complaint. "On a motion for leave to enter a default judgment against a defendant based on the failure to answer or appear, a plaintiff must submit proof of service of the summons and complaint, proof of the facts constituting the cause of action, and proof of the defendant's default" (*Pantanilla v Yuson*, 237 AD3d 1213, 1214 [2025] [internal quotation marks omitted]; *see* CPLR 3215 [f]; *Nationstar Mtge., LLC v Gross*, 201 AD3d 942, 944 [2022]). "To defeat a facially sufficient CPLR 3215 motion, a defendant must show either that there was no default, or that it had a reasonable excuse for its delay and a potentially meritorious defense" (*Pantanilla v Yuson*, 237 AD3d at 1215; *National Loan Invs., L.P. v Bruno*, 191 AD3d 999, 1002 [2021]). "A party seeking to vacate his or her default in answering the complaint pursuant to CPLR 5015 (a) (1) must demonstrate both a reasonable excuse for the default and a potentially meritorious defense to the action" (*Bank of N.Y. Mellon v Gaston*, 241 AD3d 1242, 1246 [2025]). "Whether a proffered excuse is reasonable is a sui generis determination to be made by the court based on all relevant factors, including the extent of the delay, whether there has been prejudice to the opposing party, whether there has been willfulness, and the strong public policy in favor of resolving cases on the merits" (*Mountain Val. Indem. Co. v Cabrera*, 241 AD3d 541, 544 [2025]).

Here, considering the short time that Salem was in default, the lack of willfulness, the lack of prejudice to the plaintiffs, and the strong public policy in favor of resolving cases on the merits, Salem offered a reasonable excuse for his default (*see Torres v Sawyers*, 240 AD3d 927 [2025]). Further, Salem demonstrated that he had meritorious defenses to the plaintiffs'

causes of action (*see Mountain Val. Indem. Co. v Cabrera*, 241 AD3d 541 [2025]). Connolly, J.P., Wooten, Taylor and Landicino, JJ., concur.

7 Elite Promotion Systems, Inc., Appellant, v State of New York, Respondent. [— NYS3d —]—

Eminent Domain—Valuation—Highest and Best Use—Zoning Regulations

In a claim to recover damages arising from the taking of real property, the claimant appeals from a judgment of the Court of Claims (Michael E. Hudson, J.), dated May 28, 2020. The judgment, insofar as appealed from, upon a decision of the same court dated March 2, 2020, made after a nonjury trial, is in favor of the claimant and against the defendant in the principal sum of only \$3,400,000.

Ordered that the judgment is affirmed insofar as appealed from, with costs.

The claimant was the owner of a 20,167-square-foot parcel of real property located in Greenpoint, Brooklyn near the Brooklyn-Queens Expressway. The property was improved with two tenant-occupied industrial buildings. In addition, two billboard signs used for advertising were erected on the property. In 2011, the New York State Department of Transportation appropriated the property pursuant to Highway Law § 30 and the Eminent Domain Procedure Law for the purpose of improving the Kosciuszko Bridge along the Brooklyn-Queens Expressway. In 2014, the claimant commenced this claim to recover damages from the State of New York as just compensation for the taking. Following a nonjury trial, the Court of Claims issued a decision dated March 2, 2020, finding that the claimant was entitled to the principal sum of \$3,400,000 as just compensation for the taking of the property. A judgment dated May 28, 2020, was then entered in favor of the claimant and against the State in the principal sum of \$3,400,000. The claimant appeals.

“When the State takes property by eminent domain, the Constitution requires that it compensate the owner so that he [or she] may be put in the same relative position, insofar as this is possible, as if the taking had not occurred” (*Lebov, LLC v State of New York*, 185 AD3d 911, 912 [2020] [internal quotation marks omitted], quoting *Matter of City of New York [Kaiser Woodcraft Corp.]*, 11 NY3d 353, 359 [2008]). “The measure of damages in a condemnation case must reflect the fair market value of the property in its highest and best use on the date of the taking, regardless of whether the property is being put to such use at the time” (*Elpa Bldrs., Inc. v State of New*

York, 196 AD3d 541, 543 [2021] [internal quotation marks omitted], quoting *Matter of 730 Equity Corp. v New York State Urban Dev. Corp.*, 142 AD3d 1087, 1088 [2016]). “The determination of highest and best use must be based upon evidence of a use which reasonably could or would be made of the property in the near future” (*Matter of 730 Equity Corp. v New York State Urban Dev. Corp.*, 142 AD3d at 1088).

“In determining an award to an owner of condemned property, the findings must either be within the range of expert testimony or be supported by other evidence and adequately explained by the court” (*Matter of Village of Haverstraw [Ray Riv. Co., Inc.]*, 191 AD3d 994, 996 [2021] [internal quotation marks omitted], quoting *Matter of 730 Equity Corp. v New York State Urban Dev. Corp.*, 142 AD3d at 1089). “In condemnation cases, the authority of this Court to review findings of fact after a nonjury trial is as broad as that of the trial court” (*id.* at 995, quoting *Matter of Mazur Bros., Inc. v State of New York*, 97 AD3d 826, 828 [2012]). “This court may render the judgment it finds warranted by the facts, taking into account that in a close case the trial court had the advantage of seeing and hearing the witnesses” (*id.* [internal quotation marks omitted]). However, “[w]here the trial court’s explanation of its award is supported by the evidence, it is entitled to deference and will not be disturbed on appeal” (*Elpa Bldrs., Inc. v State of New York*, 196 AD3d at 543 [internal quotation marks omitted]).

Here, since the Court of Claims’s determination of the amount of damages that the claimant was entitled to was within the range of the parties’ expert testimony and was also adequately explained, there is no reason to disturb the determination (*see 20 Rewe St., Ltd. v State of New York*, 208 AD3d 1140, 1142 [2022]; *Lebov, LLC v State of New York*, 185 AD3d at 912; *Chester Indus. Park Assoc., L.P. v State of New York*, 103 AD3d 827, 828 [2013]). Contrary to the claimant’s contention, the court’s determination not to award any damages for the two billboard signs was within the range of expert testimony and supported by the record. There was expert testimony, inter alia, that the signs violated the applicable zoning regulations because they were within 200 feet of an arterial highway; that while the signs were initially permitted as accessory signs, they could no longer be used as accessory signs given their size and the claimant’s failure to continually use them as accessory signs; and that there was no reasonable probability that the zoning regulations would be changed to permit the use of the signs for advertising. Thus, the court

properly rejected the claimant's contention that the highest and best use of the property included the use of the two signs (see *Matter of Town of Islip [Mascioli]*, 49 NY2d 354, 360 [1980]; *J. Nazzaro Partnership, L.P. v State of New York*, 205 AD3d 690, 693 [2022]).

In addition, the Court of Claims's determination to value the vacant land in between the two industrial buildings at \$400,000 was within the range of expert testimony and supported by the record. The court properly rejected the claimant's proposed highest and best use of the property to include the development of this land given the evidence that the land was needed to satisfy certain parking requirements and provided necessary access to the two industrial buildings (see *J. Nazzaro Partnership, L.P. v State of New York*, 205 AD3d at 693).

The claimant's remaining contention is without merit. Dillon, J.P., Wooten, Landicino and McCormack, JJ., concur.

8 Manuel Antonio Estrella et al., Appellants, v BMG Monroe I, LLC, et al., Respondents, et al., Defendants. (And a Third-Party Action.) [253 NYS3d 723]—

Labor—Safe Place to Work—Metal Plank as Passageway
 Labor—Safe Place to Work—Hazardous Opening—Trench
 Labor—Safe Place to Work—Dangerous Condition

In an action to recover damages for personal injuries, etc., the plaintiffs appeal from an order of the Supreme Court, Orange County (E. Loren Williams, J.), dated July 15, 2024. The order, insofar as appealed from, denied those branches of the plaintiffs' motion which were for summary judgment on the issue of liability on the causes of action alleging violations of Labor Law §§ 240 (1) and 241 (6) and granted those branches of the separate motions of the defendants BMG Monroe I, LLC, Verticon II, LLC, and Upstate Framing, Inc., which were for summary judgment dismissing the complaint insofar as asserted against each of them.

Ordered that the order is affirmed insofar as appealed from, with one bill of costs.

In January 2019, the plaintiff Manuel Antonio Estrella (hereinafter the injured plaintiff) was performing framing work for his employer, Plaza Construction, at a project called Smith Farms, which was owned by the defendant BMG Monroe I, LLC (hereinafter BMG). The defendant Verticon II, LLC (hereinafter Verticon), was the general contractor for the project. The defendant Upstate Framing, Inc. (hereinafter Upstate Framing), had subcontracted to perform framing work on the project, and Upstate Framing, in turn, subcontracted the framing work to Plaza Construction.

On January 29, 2019, the injured plaintiff and his coworkers had been installing plywood floors in a house as part of the project. An eight- or nine-foot-deep trench surrounded parts of the foundation that had not yet been backfilled, and the injured plaintiff's coworkers had placed a metal plank, intended for the purpose of pouring concrete, across the trench as a makeshift ramp. It was snowing, and the injured plaintiff stepped on the metal plank to take a phone call to discuss whether the work should continue. The metal plank, which was not secured, shifted and fell into the trench, causing the injured plaintiff to fall and allegedly sustain injuries. It is undisputed that there was a means of accessing the house through the garage, which had already been backfilled and did not require traversing over a trench.

The injured plaintiff, and his wife suing derivatively, commenced this action against BMG, Verticon, and Upstate Framing (hereinafter collectively the defendants), among others, alleging violations of Labor Law §§ 200, 240 (1), and 241 (6), and common-law negligence. Following the completion of discovery, the plaintiffs moved, inter alia, for summary judgment on the issue of liability on the causes of action alleging violations of Labor Law §§ 240 (1) and 241 (6). The defendants separately moved, among other things, for summary judgment dismissing the complaint insofar as asserted against each of them. In an order dated July 15, 2024, the Supreme Court, inter alia, denied those branches of the plaintiffs' motion and granted those branches of the defendants' separate motions. The plaintiffs appeal.

The Supreme Court properly granted those branches of the defendants' motions which were for summary judgment dismissing the cause of action alleging a violation of Labor Law § 240 (1) insofar as asserted against each of them and properly denied that branch of the plaintiffs' motion which was for summary judgment on the issue of liability on that cause of action. "Labor Law § 240 (1) 'imposes on owners or general contractors and their agents a nondelegable duty, and absolute liability for injuries proximately caused by the failure to provide appropriate safety devices to workers who are subject to elevation-related risks'" (*Caracciolo v SHS Ralph, LLC*, 226 AD3d 861, 863 [2024], quoting *Saint v Syracuse Supply Co.*, 25 NY3d 117, 124 [2015]). "Under Labor Law § 240 (1), '[a]ll contractors and owners . . . shall furnish or erect, or cause to be furnished or erected, . . . scaffolding, hoists, stays, ladders, slings, hangers, blocks, pulleys, braces, irons, ropes, and other devices which shall be so constructed, placed and operated as

to give proper protection to [construction workers employed on the premises]” (*Crutch v 421 Kent Dev., LLC*, 192 AD3d 977, 979 [2021], quoting Labor Law § 240 [1]; see *Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 499-500 [1993]). Here, the record demonstrates that the injured plaintiff was attempting to use the metal plank as a passageway at the worksite (see *Castro v Wythe Gardens, LLC*, 217 AD3d 822, 825 [2023]; *Palacios v 29th St. Apts, LLC*, 110 AD3d 698, 699 [2013]; *Salcedo v Swiss Ranch Estates, Ltd.*, 79 AD3d 843, 844 [2010]). Accordingly, “it did not come within the purview of Labor Law § 240 (1)” (*Castro v Wythe Gardens, LLC*, 217 AD3d at 825).

The Supreme Court also properly granted those branches of the defendants’ motions which were for summary judgment dismissing the cause of action alleging a violation of Labor Law § 241 (6) insofar as asserted against each of them and properly denied that branch of the plaintiffs’ motion which was for summary judgment on the issue of liability on that cause of action. Insofar as that cause of action was premised upon a violation of 12 NYCRR 23-1.22 (b), the defendants established that the regulation is inapplicable to the facts of this case, as the metal plank from which the injured plaintiff fell was not a runway or ramp constructed for the use of persons (see *Calle v City of New York*, 212 AD3d 763, 764 [2023]; *Gray v City of New York*, 87 AD3d 679, 680 [2011]). Insofar as that cause of action was premised upon a violation of 12 NYCRR 23-1.7 (b), Upstate Framing established that the regulation is inapplicable to the facts of this case, as the trench, which was located outside of the area where the injured plaintiff was working, was not a hazardous opening as contemplated by the regulation (see *Ramirez v Metropolitan Transp. Auth.*, 106 AD3d 799, 801 [2013]; *Forschner v Jucca Co.*, 63 AD3d 996, 999 [2009]; *Alvia v Teman Elec. Contr.*, 287 AD2d 421, 423 [2001]). Although BMG and Verticon failed to raise the argument that the trench was not a hazardous opening in their moving papers, “a motion for summary judgment, irrespective of by whom it is made, empowers a court, even on appeal, to search the record and award judgment” (*Grimaldi v Pagan*, 135 AD2d 496, 496 [1987]; see CPLR 3212 [b]). Because the plaintiffs did not cross-move to amend their bill of particulars to allege a violation of 12 NYCRR 23-1.7 (d), but instead requested that relief in opposition to the defendants’ motions, the Supreme Court providently exercised its discretion in not entertaining that request on the merits (see CPLR 2215; *Fried v Jacob Holding, Inc.*, 110 AD3d 56, 64-65 [2013]). In any event, the injured plaintiff unambiguously testified at his deposition that it had only started snowing 30 minutes prior to the accident and that

he did not slip on the snow, but rather that the metal plank fell because it was unsecured and he lost concentration (*cf. Booth v Seven World Trade Co., L.P.*, 82 AD3d 499, 501 [2011]).

Contrary to the plaintiffs' contention, the Supreme Court properly granted those branches of the defendants' motions which were for summary judgment dismissing the causes of action alleging common-law negligence and a violation of Labor Law § 200 insofar as asserted against each of them. "Labor Law § 200 is a codification of the common-law duty of owners, contractors, and their agents to provide workers with a safe place to work" (*Doto v Astoria Energy II, LLC*, 129 AD3d 660, 663 [2015]; *see Montes-Vidal v New York State Thruway Auth.*, 238 AD3d 1131, 1133-1134 [2025]). "Where, as here, a plaintiff contends that an accident occurred because a dangerous condition existed on the premises where the work was being undertaken, a defendant moving for summary judgment dismissing causes of action alleging common-law negligence and a violation of Labor Law § 200 must make a prima facie showing that it neither created the dangerous condition nor had actual or constructive notice of its existence" (*Calle v City of New York*, 212 AD3d at 765).

Here, the defendants demonstrated, prima facie, that the injured plaintiff's alleged injuries did not result from a dangerous condition, but rather were caused by the injured plaintiff's own conduct in stepping on a metal plank, which was not intended for that purpose (*see id.*; *Singh v 180 Varick, LLC*, 203 AD3d 1194, 1196 [2022]). In opposition, the plaintiffs failed to raise a triable issue of fact. Barros, J.P., Wooten, Love and Quirk, JJ., concur.

9 Everest Homes, Inc., Respondent, v Winfred M. Justice, Appellant. [— NYS3d —]—

Motions and Orders—Motion to Vacate Default—Reasonable Excuse

In an action for the partition and sale of real property, the defendant appeals from an order of the Supreme Court, Kings County (Larry D. Martin, J.), dated May 13, 2024. The order denied the defendant's motion for leave to reargue and renew the plaintiff's unopposed motion, inter alia, to confirm a referee's report, which had been granted in an order of the same court dated September 17, 2020.

Ordered that the order dated May 13, 2024, is affirmed, with costs.

The plaintiff commenced this action in 2016 against the defendant seeking the partition and sale of certain real property located in Brooklyn. The defendant failed to appear or answer

the complaint. In an order and interlocutory judgment of partition and sale dated September 28, 2018, the Supreme Court, inter alia, declared that the plaintiff owned a two-thirds interest in the property and the defendant owned a one-third interest in the property and directed the partition and sale of the property.

Thereafter, the defendant moved, among other things, to vacate the order and interlocutory judgment of partition and sale, arguing that he had not been served with process. The Supreme Court directed a hearing on the issue of whether the defendant was properly served with process. Following the hearing, a referee determined that service of process was properly effectuated on the defendant pursuant to CPLR 308 (2). The plaintiff moved, inter alia, to confirm the referee's report. The defendant did not oppose the motion. In an order dated September 17, 2020, the court, among other things, granted the plaintiff's unopposed motion, determining that service was valid, and denied the defendant's motion.

In April 2024, the defendant moved for leave to reargue and renew the plaintiff's unopposed motion. In an order dated May 13, 2024, the Supreme Court denied the defendant's motion. The defendant appeals.

The proper procedure to cure a default in opposing a motion is to move pursuant to CPLR 5015 (a) (1) to vacate the default, and, if necessary, to appeal that determination (*see Ernest v St. Juste*, 240 AD3d 667, 668 [2025]; *U.S. Bank, N.A. v Blagman*, 188 AD3d 1284, 1285 [2020]). Since the order dated September 17, 2020, was entered upon the defendant's default in opposing the plaintiff's motion, the Supreme Court should have treated the defendant's motion for leave to reargue and renew as one seeking to vacate the default, and we construe it as such (*see Ernest v St. Juste*, 240 AD3d at 668; *Day v Sguera Props., LLC*, 205 AD3d 996, 997 [2022]; *Dobbyn-Blackmore v City of New York*, 123 AD3d 1083, 1083 [2014]).

"In order to vacate a default in opposing a motion pursuant to CPLR 5015 (a) (1), the moving party is required to demonstrate a reasonable excuse for his or her default and a potentially meritorious opposition" (*U.S. Bank, N.A. v Blagman*, 188 AD3d at 1285 [internal quotation marks omitted]). Here, the defendant offered no excuse for his default in opposing the plaintiff's motion. Since the defendant failed to demonstrate a reasonable excuse for his default, we need not consider whether he demonstrated the existence of a potentially meritorious opposition to the plaintiff's motion (*see U.S. Bank N.A. v Morino*, 207 AD3d 776, 777-778 [2022]; *Day v Sguera Props., LLC*, 205 AD3d at 997).

The parties' remaining contentions either are improperly raised for the first time on appeal or need not be reached in light of our determination. Genovesi, J.P., Christopher, Wan and Ventura, JJ., concur.

10 Patricia Finn, Appellant, v Frederick Piesco, Jr., Respondent. [— NYS3d —]—

**Husband and Wife and Other Domestic Relationships—Support—Maintenance
Husband and Wife and Other Domestic Relationships—Divorce—Ineffective
Assistance of Counsel
Husband and Wife and Other Domestic Relationships—Counsel Fees—
Detailed Billing Records**

In an action for a divorce and ancillary relief, the plaintiff appeals from stated portions of a judgment of divorce of the Supreme Court, Rockland County (Sherri L. Eisenpress, J.), dated November 9, 2021. The judgment of divorce, made after a nonjury trial, inter alia, did not award maintenance to the plaintiff and awarded attorney's fees to the defendant in the sum of \$10,000 pursuant to 22 NYCRR 130-1.1.

Ordered that the judgment of divorce is modified, on the law, by deleting the provision thereof awarding attorney's fees to the defendant in the sum of \$10,000 pursuant to 22 NYCRR 130-1.1; as so modified, the judgment of divorce is affirmed insofar as appealed from, with costs to the plaintiff, and the matter is remitted to the Supreme Court, Rockland County, for a hearing and a new determination as to the amount of attorney's fees to be awarded to the defendant pursuant to 22 NYCRR 130-1.1 and for the entry of an appropriate amended judgment of divorce thereafter.

The parties were married in 1995. In April 2013, the plaintiff commenced this action for a divorce and ancillary relief, and, after a nonjury trial, the Supreme Court issued a judgment of divorce dated November 9, 2021. Pursuant to the judgment of divorce, the court, among other things, did not award maintenance to the plaintiff and awarded attorney's fees to the defendant in the sum of \$10,000 pursuant to 22 NYCRR 130-1.1. The plaintiff appeals from stated portions of the judgment of divorce.

"The amount and duration of maintenance is a matter committed to the sound discretion of the trial court, and every case must be determined on its unique facts" (*Culen v Culen*, 157 AD3d 926, 928 [2018]; see *Carroll v Carroll*, 125 AD3d 710, 711 [2015]). Here, considering the relevant factors, including the determination that the plaintiff's law practice constituted her separate property, the Supreme Court providently exercised its discretion in denying the plaintiff's request for maintenance

(see *Ostrower v Ostrower*, 148 AD3d 819, 820 [2017]; *Szewczuk v Szewczuk*, 107 AD3d 692, 693 [2013]).

The Supreme Court properly refused to consider a photocopy of a document that the plaintiff alleged was an executed copy of the parties' separation agreement. Where, as here, there is a dispute as to the contents of a document, the best evidence rule requires the production of the original writing (see *Schozer v William Penn Life Ins. Co. of N.Y.*, 84 NY2d 639, 643 [1994]; *Billingy v Blagrove*, 84 AD3d 848, 848 [2011]).

The plaintiff, who proceeded pro se, was not deprived of the effective assistance of counsel. Here, the plaintiff had no statutory or constitutional right to counsel concerning the financial aspects of the matrimonial action at issue (see *Matter of Smiley*, 36 NY2d 433 [1975]; *Socci v Socci*, 186 AD3d 1289, 1290 [2020]). Further, "[i]n the context of civil litigation, a claim of ineffective assistance will not be entertained, absent extraordinary circumstances" (*Salvatore v Salvatore*, 68 AD3d 966, 967 [2009]). Here, the plaintiff, who is an attorney, failed to demonstrate the existence of extraordinary circumstances.

The Supreme Court should have held a hearing as to the amount of attorney's fees to be awarded to the defendant before issuing an award of attorney's fees to the defendant's counsel in the sum of \$10,000 pursuant to 22 NYCRR 130-1.1. There were no detailed billing records submitted to demonstrate whether the amount of attorney's fees awarded was reasonable (see *Gertler v Davidoff Hutcher & Citron, LLP*, 233 AD3d 846, 847-848 [2024]; *Lancer Indem. Co. v JKH Realty Group, LLC*, 127 AD3d 1035, 1036 [2015]). Thus, the matter must be remitted to the Supreme Court, Rockland County, for a hearing and a new determination as to the amount of attorney's fees to be awarded to the defendant pursuant to 22 NYCRR 130-1.1 and for the entry of an appropriate amended judgment of divorce thereafter (see *Neeman v Smith*, 227 AD3d 818, 821 [2024]; *Kiszenik v Country Lincoln-Mercury W., LLC*, 48 AD3d 756, 756 [2008]).

The plaintiff's remaining contentions are either improperly raised for the first time on appeal or without merit. Duffy, J.P., Ford, Landicino and Ventura, JJ., concur.

11 Antoni Fuczynski, Appellant, v 144 Division, LLC, Respondent, et al., Defendant. [— NYS3d —]

Motions and Orders—Motion Papers—Late Submission

Labor—Safe Place to Work—Proximate Cause

Labor—Safe Place to Work—Employment at Premises

In an action to recover damages for personal injuries, the

plaintiff appeals from an order of the Supreme Court, Kings County (Peter P. Sweeney, J.), dated February 24, 2023. The order denied those branches of the plaintiff's motion which were for summary judgment on the issue of liability on the causes of action alleging violations of Labor Law §§ 240 (1) and 241 (6), and granted the motion of the defendant 144 Division, LLC, for leave to file supplemental opposition to those branches of the plaintiff's motion which were for summary judgment on the issue of liability on the causes of action alleging violations of Labor Law §§ 240 (1) and 241 (6).

Ordered that the order is affirmed, with costs.

The plaintiff allegedly was injured while performing construction work on a commercial renovation project at a building in Manhattan located at 38 Canal Street (hereinafter the premises), which was owned by the defendant 144 Division, LLC (hereinafter the defendant). The plaintiff commenced this personal injury action against, among others, the defendant, alleging violations of Labor Law §§ 200, 240 (1), and 241 (6), and negligent maintenance.

Approximately 10 months after the note of issue was filed, the plaintiff moved for leave to serve and file a late motion for summary judgment and, thereupon, for summary judgment on the issue of liability on the causes of action alleging violations of Labor Law §§ 240 (1) and 241 (6). The defendant opposed the motion. In an order dated July 21, 2020, the Supreme Court denied the plaintiff's motion, determining that the plaintiff failed to establish the requisite good cause for filing a late motion for summary judgment. The plaintiff appealed. In a decision and order dated September 14, 2022, this Court reversed the order, granted that branch of the plaintiff's motion which was for leave to serve and file a late motion for summary judgment, and remitted the matter to the Supreme Court for a determination on the merits of those branches of the plaintiff's motion which were for summary judgment on the issue of liability on the causes of action alleging violations of Labor Law §§ 240 (1) and 241 (6) (*see Fuczynski v 144 Div., LLC*, 208 AD3d 1153, 1155-1156 [2022]).

Thereafter, in October 2022, the defendant moved for leave to file supplemental opposition to those branches of the plaintiff's motion which were for summary judgment on the issue of liability on the causes of action alleging violations of Labor Law §§ 240 (1) and 241 (6). The defendant contended that during the pendency of the appeal, the contractor it had hired to perform work at the premises at the time of the plaintiff's accident had been located. It thereafter disclosed the

contractor as a potential witness at trial, and the plaintiff subpoenaed and deposed the contractor. The defendant requested that the Supreme Court consider the contractor's deposition testimony and the defendant's supplemental arguments based thereon. The plaintiff opposed the defendant's motion. In an order dated February 24, 2023, the court granted the defendant's motion and denied those branches of the plaintiff's motion. The plaintiff appeals.

"[T]he Supreme Court has the authority to regulate the motion practice before it, as well as the discretion to determine whether to accept late papers or even surreply papers for 'good cause'" (*U.S. Bank Trust, N.A. v Rudick*, 156 AD3d 841, 842 [2017], quoting CPLR 2214 [c]; see *Gluck v New York City Tr. Auth.*, 118 AD3d 667, 668 [2014]). Under the circumstances presented here, "the Supreme Court did not improvidently exercise its discretion in determining that it would consider the supplemental evidence sought to be submitted by the [defendant]" (*U.S. Bank Trust, N.A. v Rudick*, 156 AD3d at 842). Notably, the delay was minimal, as the defendant moved for leave to file supplemental opposition approximately one month after this Court reversed the original denial of the plaintiff's motion. Additionally, since the plaintiff was given a full opportunity to respond to and submit further evidence addressing the defendant's supplemental opposition, the plaintiff was not prejudiced by the late submission (see *id.*; *Emigrant Mtge. Co., Inc. v Lifshitz*, 143 AD3d 755, 756 [2016]; *Gluck v New York City Tr. Auth.*, 118 AD3d at 668).

"To prevail on a Labor Law § 240 (1) cause of action, a plaintiff must prove that the defendant violated the statute and that such violation was a proximate cause of his or her injuries" (*Zokir v Teller Owner, LLC*, 237 AD3d 1008, 1009 [2025], quoting *Correa v 455 Ocean Assoc., LLC*, 218 AD3d 435, 436 [2023]). Similarly, "[t]o sustain a cause of action pursuant to Labor Law § 241 (6), a plaintiff must demonstrate that his or her injuries were proximately caused by a violation of an Industrial Code regulation that is applicable to the circumstances of the accident" (*Medina v 1277 Holdings, LLC*, 234 AD3d 839, 842 [2025], quoting *Yaucan v Hawthorne Vil., LLC*, 155 AD3d 924, 926 [2017]).

Here, at his deposition, the plaintiff testified that on March 7, 2016, he was employed by First Quality Group, Inc., and was working on a construction job at the premises that included framing, sheetrock, sound installation of the ceilings, and laying big marble slab flooring. On that date, his supervisor directed him to install sheetrock on a ceiling on the first floor

of the premises. According to the plaintiff, while disconnecting a lighting fixture from the ceiling, he suffered an electric shock and fell from a six-foot tall Baker scaffold, which lacked guardrails, allegedly sustaining injuries. This testimony was sufficient to establish, *prima facie*, that violations of Labor Law §§ 240 (1) and 241 (6) were the proximate cause of the plaintiff's injuries (*see Lopes v County of Suffolk*, 236 AD3d 883, 884 [2025]; *Wittenberg v Long Is. Power Auth.*, 225 AD3d 730, 733 [2024]).

However, in opposition, the defendant raised a triable issue of fact as to whether the plaintiff was ever employed at the premises during the relevant time period by submitting a transcript of the contractor's deposition testimony. At his deposition, the contractor testified that on March 7, 2016, his company, Innovative Solutions, Inc., was only engaged to perform tile work on the floor at the premises. The contractor was never associated with First Quality Group, Inc. While the contractor had previously been associated with an entity denominated Quality First Group, LLC, that entity was not engaged to perform work at the premises. The contractor further testified that he performed all the work at the premises by himself, that he worked alone on the date of the accident, that no one else was present at that time at the premises, and that no scaffold was present at the premises. The contractor's testimony contradicted the plaintiff's testimony and raised triable issues of fact as to whether the accident occurred and whether the defendant may be held liable under Labor Law §§ 240 (1) and 241 (6) (*see Singh v New York City Hous. Auth.*, 211 AD3d 496 [2022]; *Smigielski v Teachers Ins. & Annuity Assn. of Am.*, 137 AD3d 676 [2016]).

Accordingly, the Supreme Court properly denied those branches of the plaintiff's motion which were for summary judgment on the issue of liability on the causes of action alleging violations of Labor Law §§ 240 (1) and 241 (6). Connolly, J.P., Voutsinas, Wan and Taylor, JJ., concur.

12 Carol Francis Gabbe, Respondent, v Eliot at Erie Station et al., Defendants, and Orange Regional Medical Center et al., Appellants. [— NYS3d —]

Witnesses—Privileged Communications—Quality Assurance Review Program—Party Statements

In an action, *inter alia*, to recover damages for medical malpractice, the defendants Orange Regional Medical Center and Greater Hudson Valley Health System, Inc., appeal from an order of the Supreme Court, Orange County (David J. Squirrell,

J.), dated November 15, 2023. The order, insofar as appealed from, denied that branch of those defendants' motion which was pursuant to CPLR 3103 (a) for a protective order with respect to an incident report dated April 26, 2016.

Ordered that the order is affirmed insofar as appealed from, without costs or disbursements.

On April 26, 2016, Carol Francis Gabbe was a patient in the emergency department of the defendant Orange Regional Medical Center (hereinafter ORMC) when she allegedly was injured as a result of a fall while being escorted to the bathroom by a member of ORMC's staff. In October 2018, Jacqueline G. Goldman, as guardian of Gabbe, commenced this action against, among others, ORMC and the defendant Greater Hudson Valley Health System, Inc. (hereinafter together the defendants), inter alia, to recover damages for medical malpractice. In a demand for documents and information dated March 14, 2019, Goldman sought, among other things, copies of accident and incident records concerning Gabbe. Gabbe subsequently died, and an amended complaint was filed naming Gabbe, deceased, by and through Goldman, as administrator of Gabbe's estate, as the plaintiff. In June 2023, the defendants moved, inter alia, pursuant to CPLR 3103 (a) for a protective order with respect to the requested incident reports, asserting that they were privileged pursuant to Education Law § 6527 (3) and Public Health Law § 2805-m. In an order dated November 15, 2023, the Supreme Court, after reviewing the incident reports in camera, among other things, denied that branch of the defendants' motion which was for a protective order with respect to an incident report dated April 26, 2016 (hereinafter the subject incident report), finding that the subject incident report was subject to disclosure as it was not attributed to any person. The defendants appeal.

Pursuant to Public Health Law § 2805-j (1) "[e]very hospital shall maintain a coordinated program for the identification and prevention of medical . . . malpractice." Such a program must include at least, inter alia, the "establishment of a quality assurance committee with the responsibility to review the services rendered in the hospital in order to improve the quality of medical . . . care of patients and to prevent medical . . . malpractice" (*id.* § 2805-j [1] [a]). Education Law § 6527 (3) shields from disclosure under CPLR article 31 "the proceedings [and] the records relating to performance of a medical or a quality assurance review function or participation in a medical . . . malpractice prevention program" (see *Logue v Velez*, 92 NY2d 13, 16-17 [1998]; *Hernandez v City of New York*, 207

AD3d 450, 453 [2022]; *Siegel v Snyder*, 202 AD3d 125, 136 [2021]). “The purpose of the discovery exclusion is to enhance the objectivity of the review process and to assure that medical review committees may frankly and objectively analyze the quality of health services rendered by hospitals. By guaranteeing confidentiality to quality review and malpractice prevention procedures, this provision is designed to encourage thorough and candid peer review of physicians, and thereby improve the quality of medical care” (*Logue v Velez*, 92 NY2d at 17 [citation and internal quotation marks omitted]; see *Hernandez v City of New York*, 207 AD3d at 453; *vanBergen v Long Beach Med. Ctr.*, 277 AD2d 374, 374 [2000]). Public Health Law § 2805-m (2) contains an identical protection for “records, documentation or committee actions or records” required, among other things, pursuant to Public Health Law § 2805-j (see *Hernandez v City of New York*, 207 AD3d at 453; *Siegel v Snyder*, 202 AD3d at 137).

“It is the burden of the entity seeking to invoke the privilege to establish that the documents sought were prepared in accordance with the relevant statutes” (*Marte v Brooklyn Hosp. Ctr.*, 9 AD3d 41, 46 [2004]; see *Kneisel v QPH, Inc.*, 124 AD3d 729, 730 [2015]). The party asserting the privilege “‘is required, at a minimum, to show that it has a review procedure and that the information for which the exemption is claimed was obtained or maintained in accordance with that review procedure’” (*Kivlehan v Waltner*, 36 AD3d 597, 599 [2007], quoting *Bush v Dolan*, 149 AD2d 799, 800-801 [1989]; see *Siegel v Snyder*, 202 AD3d at 137). Here, the defendants demonstrated through an affidavit of ORMC’s vice president of quality that the subject incident report was created as part of a required quality-assurance review program (see *Siegel v Snyder*, 202 AD3d at 138; *Robertson v Brookdale Hosp. Med. Ctr.*, 153 AD3d 743, 744 [2017]).

“However, both Education Law § 6527 (3) and Public Health Law § 2805-m (2) contain identical exceptions for the discovery of ‘statements made by any person in attendance at such a [quality control or medical malpractice] meeting who is a party to an action or proceeding the subject matter of which was reviewed at such meeting’” (*Lamacchia v Schwartz*, 94 AD3d 712, 714 [2012] [internal quotation marks omitted], quoting *Logue v Velez*, 92 NY2d at 18), as “[t]hose persons whose conduct is subject to review [are] not intended to benefit from the protections afforded by the statutes” (*Siegel v Snyder*, 202 AD3d at 137; see *vanBergen v Long Beach Med. Ctr.*, 277 AD2d at 374-375). In general, it is the defendants’ burden to demon-

strate that any statements were not made by a party, and by failing to identify the speaker, the defendant fails to demonstrate that the statements sought to be withheld are not party statements (*see Siegel v Snyder*, 202 AD3d at 138). Here, the defendants did not meet their burden of demonstrating that the statements contained therein were not made by a party.

Accordingly, the Supreme Court properly denied that branch of the defendants' motion which was for a protective order with respect to the subject incident report. Barros, J.P., Wooten, Love and Quirk, JJ., concur.

13 Byron Graham, Appellant, v City of New York et al., Respondents. [— NYS3d —]

Municipal Corporations—Notice of Claim—Motion to Dismiss—Facts in Complaint

In an action to recover damages for personal injuries, the plaintiff appeals from an order of the Supreme Court, Queens County (Kevin J. Kerrigan, J.), entered May 15, 2024. The order granted the defendants' motion pursuant to CPLR 3211 (a) (7) to dismiss the complaint.

Ordered that the order is reversed, on the law, with costs, and the defendants' motion pursuant to CPLR 3211 (a) (7) to dismiss the complaint is denied.

On November 4, 2020, in Queens County, the plaintiff allegedly was injured after a vehicle owned and operated by the defendants struck his vehicle. On or about April 5, 2021, the plaintiff moved for leave to file a late notice of claim. The motion was denied.

In December 2021, the plaintiff commenced this action to recover damages for personal injuries. In the complaint, the plaintiff claimed to have served a notice of claim on the defendants City of New York and New York City Police Department within 90 days of the incident.

In February 2024, the defendants moved pursuant to CPLR 3211 (a) (7) to dismiss the complaint, claiming that the plaintiff, inter alia, failed to comply with General Municipal Law § 50-e. The defendants attached the order denying the plaintiff's motion for leave to file a late notice of claim as proof that the plaintiff did not serve a timely notice of claim. In opposition, the plaintiff claimed that he learned after filing the motion for leave to file a late notice of claim that his prior attorney had filed a timely notice of claim. The plaintiff attached evidence from his prior attorney that indicated that a notice of claim had been filed in November 2020. In an order entered May 15, 2024, the Supreme Court granted the defendants' motion.

“In any case founded upon tort where a notice of claim is required by law as a condition precedent to the commencement of an action or special proceeding against a public corporation, . . . the notice of claim shall comply with and be served . . . within ninety days after the claim arises” (General Municipal Law § 50-e [1] [a]). “Failure to comply with a statutory notice of claim requirement is a ground for dismissal pursuant to CPLR 3211 (a) (7) for failure to state a cause of action” (*Parpounas v Ohagan*, 216 AD3d 985, 986 [2023]).

“On a motion to dismiss a complaint pursuant to CPLR 3211 (a) (7) for failure to state a cause of action, the complaint is to be afforded a liberal construction, the facts alleged are presumed to be true, the plaintiff is afforded the benefit of every favorable inference, and the court is to determine only whether the facts as alleged fit within any cognizable legal theory” (*Watts v City of New York*, 186 AD3d 1577, 1578 [2020]). “At the same time, defendants bear the burden of establishing that the complaint fails to state a viable cause of action” (*Connolly v Long Is. Power Auth.*, 30 NY3d 719, 728 [2018]). “A court may consider evidentiary material submitted by a defendant in support of a motion to dismiss pursuant to CPLR 3211 (a) (7)” (*Meyer v North Shore-Long Is. Jewish Health Sys., Inc.*, 137 AD3d 880, 881 [2016]). “When evidentiary material is considered on a motion to dismiss a complaint pursuant to CPLR 3211 (a) (7), and the motion has not been converted to one for summary judgment, the criterion is whether the plaintiff has a cause of action, not whether he or she has stated one, and, unless it has been shown that a material fact as claimed by the plaintiff to be one is not a fact at all and unless it can be said that no significant dispute exists regarding it, dismissal should not eventuate” (*Meyer v North Shore-Long Is. Jewish Health Sys., Inc.*, 137 AD3d at 881).

Here, as the plaintiff correctly contends, the evidentiary material submitted in support of the defendants’ motion failed to demonstrate that any fact alleged in the complaint was undisputedly not a fact at all, as the defendants’ evidence proved only that the plaintiff’s motion for leave to serve a late notice of claim had been denied, not that the plaintiff’s prior attorney had failed to file a timely notice of claim in the first place (see *Bokhour v GTI Retail Holdings, Inc.*, 94 AD3d 682, 683 [2012]). Accordingly, the defendants’ motion pursuant to CPLR 3211 (a) (7) to dismiss the complaint should have been denied.

Brathwaite Nelson, J.P., Ford, Dowling and Goldberg Velazquez, JJ., concur.

14 Greenpoint Mortgage Funding, Inc., Respondent, v Pete A. McFarlane, Appellant, et al., Defendants. [— NYS3d —]

Mortgages—Foreclosure—Referee's Report—Business Records

Mortgages—Foreclosure—Delays in Prosecuting Action—Accrual of Interest

In an action to foreclose a mortgage, the defendant Pete A. McFarlane appeals from (1) an order of the Supreme Court, Suffolk County (Thomas F. Whelan, J.), dated May 24, 2023, and (2) an order and judgment of foreclosure and sale (one paper) of the same court entered June 2, 2023. The order, insofar as appealed from, granted those branches of the plaintiff's motion which were to confirm a referee's report and for a judgment of foreclosure and sale, and denied the application of the defendant Pete A. McFarlane to toll the accrual of interest on the subject note from November 1, 2011, to September 13, 2022. The order and judgment of foreclosure and sale, insofar as appealed from, granted the same relief to the plaintiff, confirmed the referee's report, awarded the plaintiff interest on the note running from May 1, 2007, and directed the sale of the subject property.

Ordered that the appeal from the order is dismissed, without costs or disbursements; and it is further,

Ordered that the order and judgment of foreclosure and sale is modified, on the facts and in the exercise of discretion, by deleting the provision thereof awarding the plaintiff interest on the note from November 1, 2011, to September 13, 2022, and substituting therefor a provision tolling the accrual of interest on the note from November 1, 2011, to September 13, 2022; as so modified, the order and judgment of foreclosure and sale is affirmed insofar as appealed from, without costs or disbursements, the application of the defendant Pete A. McFarlane to toll the accrual of interest on the note from November 1, 2011, to September 13, 2022, is granted, the order is modified accordingly, and the matter is remitted to the Supreme Court, Suffolk County, for a new determination of the amount of accrued interest in accordance herewith and the entry of an appropriate amended judgment of foreclosure and sale thereafter.

The appeal from the order must be dismissed because the right of direct appeal therefrom terminated with the entry of the order and judgment of foreclosure and sale in the action (*see Matter of Aho*, 39 NY2d 241, 248 [1976]). The issues raised on the appeal from the order are brought up for review and have been considered on the appeal from the order and judgment of foreclosure and sale (*see* CPLR 5501 [a] [1]).

In December 2004, the defendant Pete A. McFarlane (herein-

after the defendant) executed a note in the amount of \$700,000 in favor of the plaintiff. The note was secured by a mortgage on certain real property located in Suffolk County.

In October 2007, the plaintiff commenced this action to foreclose the mortgage against the defendant, among others. In an order dated November 1, 2011, the Supreme Court directed dismissal of the complaint. In an order dated January 31, 2018, the court granted the plaintiff's motion to restore the action to the active calendar and directed the plaintiff to move for an order of reference within 90 days.

In September 2022, the plaintiff moved, among other things, for leave to enter a default judgment against the defendant and for an order of reference. In an order dated October 17, 2022, the Supreme Court, *inter alia*, granted those branches of the plaintiff's motion.

In January 2023, the plaintiff moved, among other things, to confirm a referee's report and for a judgment of foreclosure and sale. In support of its motion, the plaintiff submitted the referee's report, which computed the amount owed by the defendant as of July 15, 2022. The referee's report was based on an affidavit of Felix Rodriguez, an employee of PHH Mortgage Corporation (hereinafter PHH), the loan servicer for the plaintiff's assignee, who attested that he was familiar with PHH's records and record-keeping practices. Rodriguez attached certain records to his affidavit that included the defendant's name, the address of the property, and the total amount required to payoff the note as of July 15, 2022.

The defendant opposed the plaintiff's motion and argued that the accrual of interest on the note should be tolled from November 1, 2011, to September 13, 2022, due to the plaintiff's delay in moving for a judgment of foreclosure and sale. The defendant argued that the "[p]laintiff did not move for an order of reference until September 13, 2022," which was not within the 90 days directed by the Supreme Court in the January 31, 2018 order.

In an order dated May 24, 2023, the Supreme Court, *inter alia*, granted those branches of the plaintiff's motion which were to confirm the referee's report and for a judgment of foreclosure and sale, and denied the defendant's application to toll the accrual of interest on the note from November 1, 2011, to September 13, 2022. In an order and judgment of foreclosure and sale entered June 2, 2023, the court, among other things, granted the same relief to the plaintiff, confirmed the referee's report, awarded the plaintiff interest on the note running from May 1, 2007, and directed the sale of the property. The defendant appeals.

Here, the Supreme Court properly confirmed the referee's report. The report of a referee should be confirmed whenever the findings are substantially supported by the record and the referee has clearly defined the issues and resolved matters of credibility (see *Pennymac Corp. v Pryce*, 211 AD3d 1029, 1030 [2022]; *Matter of Cincotta*, 139 AD3d 1058 [2016]). Contrary to the defendant's contention, "[t]here is no requirement that a plaintiff in a foreclosure action rely on any particular set of business records to establish a prima facie case, so long as the plaintiff satisfies the admissibility requirements of CPLR 4518 (a), and the records themselves actually evince the facts for which they are relied upon" (*Citigroup v Kopelowitz*, 147 AD3d 1014, 1015 [2017]; see *U.S. Bank N.A. v Goldberg*, 171 AD3d 981, 982 [2019]). Here, the plaintiff submitted an admissible business record demonstrating the amount owed by the defendant as of July 15, 2022. The defendant's remaining contention regarding the admissibility of Rodriguez's affidavit and the attached business records is improperly raised for the first time on appeal (see *MTGLQ Invs., L.P. v Tupper*, 228 AD3d 753, 754 [2024]).

However, the Supreme Court should have granted the defendant's application to toll the accrual of interest on the note from November 1, 2011, to September 13, 2022. "A foreclosure action is equitable in nature and triggers the equitable powers of the court" (*Onewest Bank, FSB v Kaur*, 172 AD3d 1392, 1393-1394 [2019], quoting *Rajic v Faust*, 165 AD3d 716, 717 [2018]). "Once equity is invoked, the court's power is as broad as equity and justice require" (*U.S. Bank N.A. v Losner*, 145 AD3d 935, 938 [2016], quoting *Norstar Bank v Morabito*, 201 AD2d 545, 546 [1994]; see *Rajic v Faust*, 165 AD3d at 718). "In an action of an equitable nature, the recovery of interest is within the court's discretion. The exercise of that discretion will be governed by the particular facts in each case, including any wrongful conduct by either party" (*Onewest Bank, FSB v Kaur*, 172 AD3d at 1394, quoting *BAC Home Loans Servicing, L.P. v Jackson*, 159 AD3d 861, 862 [2018]; see CPLR 5001 [a]).

Here, the plaintiff failed to explain its six-year delay in moving to restore the action to the active calendar, and further failed to explain its four-year delay in moving for leave to enter a default judgment against the defendant and for an order of reference after the action was restored to the active calendar. Under the circumstances of this case, since the defendant was prejudiced by these unexplained delays, during which time interest had been accruing, the interest on the note should have been tolled from November 1, 2011, to September 13,

2022 (see *BAC Home Loans Servicing, L.P. v Jackson*, 159 AD3d at 862).

Accordingly, we remit the matter to the Supreme Court, Suffolk County, for a new determination of the amount of accrued interest in accordance herewith and the entry of an appropriate amended judgment of foreclosure and sale thereafter.

Brathwaite Nelson, J.P., Ford, Dowling and Goldberg Velazquez, JJ., concur.

15 Alex Henry et al., Appellants, v Ehsan Khan, Respondent, et al., Defendants. [— NYS3d —]

Adverse Possession—Title to Land—Claim of Right

In an action pursuant to RPAPL article 15 to quiet title to real property, the plaintiffs appeal from an order of the Supreme Court, Richmond County (Ronald Castorina, Jr., J.), dated February 6, 2024. The order, insofar as appealed from, granted the cross-motion of the defendant Ehsan Khan for summary judgment dismissing the complaint insofar as asserted against him and, in effect, declaring that the plaintiffs did not acquire title to the subject property by adverse possession, and denied the plaintiffs' motion for leave to amend the complaint.

Ordered that the order is affirmed insofar as appealed from, with costs, and the matter is remitted to the Supreme Court, Richmond County, for the entry of a judgment, inter alia, declaring that the plaintiffs did not acquire title to the subject property by adverse possession.

In 2020, the defendant Ehsan Khan (hereinafter the defendant) acquired title to real property located in Staten Island. In October 2023, the plaintiffs commenced this action pursuant to RPAPL article 15 to quiet title to the property against, among others, the defendant, alleging that the plaintiffs were the owners of the property by adverse possession.

The plaintiffs moved to consolidate the action with an eviction proceeding that the defendant had commenced in July 2023 in the Civil Court against two nonparties to this action and John and Jane Does. In an order dated November 20, 2023, the motion was denied without prejudice to renew upon proper service of the summons and complaint in this action. Thereafter, the plaintiffs effectuated service of the summons and complaint upon the defendant, among others.

The defendant cross-moved for summary judgment dismissing the complaint insofar as asserted against him and, in effect, declaring that the plaintiffs did not acquire title to the

subject property by adverse possession. The plaintiffs moved for leave to amend the complaint.

In an order dated February 6, 2024, the Supreme Court, inter alia, granted the defendant's cross-motion and denied the plaintiffs' motion for leave to amend the complaint. The plaintiff appeals.

"To establish a claim of adverse possession, the occupation of the property must be (1) hostile and under a claim of right (i.e., a reasonable basis for the belief that the subject property belongs to a particular party), (2) actual, (3) open and notorious, (4) exclusive, and (5) continuous for the statutory period" (169 *MLS Realty Corp. v One 69 Skill Corp.*, 197 AD3d 1079, 1081 [2021] [internal quotation marks omitted]; see RPAPL 501; *Buckheit v Aiken*, 232 AD3d 842, 843 [2024]). "In 2008, the adverse possession statute (RPAPL art 5) was amended in its entirety (L 2008, ch 269) to, among other things, discourage people from claiming adverse possession over real property they know belongs to another with superior ownership rights" (*Estate of Becker v Murtagh*, 19 NY3d 75, 81 n 4 [2012]). "Claim of right" is now defined as "a reasonable basis for the belief that the property belongs to the adverse possessor or property owner, as the case may be" (RPAPL 501 [3]).

As the Supreme Court properly determined, the complaint failed to allege that the plaintiffs' possession of the property was under a claim of right. The plaintiffs' proposed amended complaint pleaded facts that negated that element, prima facie rebutting the element of possession under a claim of right necessary for a determination of adverse possession (see RPAPL 501 [3]; *Perillo v Charles*, 237 AD3d 984 [2025]; *Deutsche Bank Natl. Trust Co. v Nachimovsky*, 188 AD3d 811, 811-812 [2020]). Under these circumstances, the court properly granted the defendant's cross-motion for summary judgment dismissing the complaint insofar as asserted against him and, in effect, declaring that the plaintiffs did not acquire title to the subject property by adverse possession (see *Park Slope Auto Ctr., Inc. v Papa*, 190 AD3d 754, 757 [2021]). We remit the matter to the Supreme Court, Richmond County, for the entry of a judgment, inter alia, declaring that the plaintiffs did not acquire title to the property by adverse possession (see *Lanza v Wagner*, 11 NY2d 317 [1962]; *Park Slope Auto Ctr., Inc. v Papa*, 190 AD3d at 757).

In light of the above, the Supreme Court providently exercised its discretion in denying the plaintiffs' motion for leave to amend the complaint, as the proposed amendments were patently devoid of merit (see *Singh v T-Mobile*, 232 AD3d

662, 667 [2024]; *Precious Care Mgt., LLC v Monsey Care, LLC*, 221 AD3d 922, 924 [2023]).

The plaintiffs' remaining contention is without merit. Connelly, J.P., Wooten, Voutsinas and McCormack, JJ., concur. **[Prior Case History: 81 Misc 3d 1241(A), 2024 NY Slip Op 50122(U).]**

16 Marie Hernandez et al., Appellants, v City of New York et al., Respondents, et al., Defendants. [— NYS3d —]—

Affidavits—Affidavit by Attorney—Affirmation of Good Faith—Discovery Dispute

Disclosure—Penalty for Failure to Disclose—Striking of Pleadings

Torts—Spoliation of Evidence—Sanctions

In an action, inter alia, to recover damages for violation of the common-law right of sepulcher, the plaintiffs appeal from an order of the Supreme Court, Kings County (Leon Ruchelsman, J.), dated December 4, 2024. The order, insofar as appealed from, denied those branches of the plaintiffs' motion which were pursuant to CPLR 3126 to strike the answers of the defendant New York City Health and Hospitals Corporation and the defendants City of New York, Office of Chief Medical Examiner of the City of New York, and New York City Department of Health and Mental Hygiene.

Ordered that the order is affirmed insofar as appealed from, with one bill of costs to the respondents appearing separately and filing separate briefs.

The plaintiffs commenced this action to recover damages for violation of the common-law right of sepulcher against, among others, the defendant New York City Health and Hospitals Corporation (hereinafter HHC) and the defendants City of New York, Office of Chief Medical Examiner of the City of New York, and New York City Department of Health and Mental Hygiene (hereinafter collectively the City defendants). In April 2024, the plaintiffs moved, inter alia, pursuant to CPLR 3126 to strike the answers of the City defendants and of HHC for failure to comply with the plaintiffs' discovery demands and court-ordered discovery and for spoliation of evidence. In an order dated December 4, 2024, the Supreme Court, among other things, denied those branches of the motion. The plaintiffs appeal.

HHC contends that the plaintiffs' motion was properly denied because the plaintiffs' attorney did not comply with the good faith requirements of 22 NYCRR 202.7. "Pursuant to 22 NYCRR 202.7, all motions relating to disclosure or to a bill of particulars must include 'an affirmation that counsel has

conferred with counsel for the opposing party in a good faith effort to resolve the issues raised by the motion’ ” (*Behar v Wiblishauser*, 219 AD3d 793, 794 [2023], quoting 22 NYCRR 202.7 [a]; see *Muchnik v Mendez Trucking, Inc.*, 212 AD3d 640, 641 [2023]). “The affirmation of the good faith effort to resolve the issues raised by the motion shall indicate the time, place and nature of the consultation and the issues discussed and any resolutions, or shall indicate good cause why no such conferral with counsel for opposing parties was held’ ” (*Behar v Wiblishauser*, 219 AD3d at 794, quoting 22 NYCRR 202.7 [c]; see *Muchnik v Mendez Trucking, Inc.*, 212 AD3d at 641). Here, since the record reveals that the discovery dispute could not be resolved without court intervention, there was good cause for the plaintiffs’ attorney’s failure to confer with opposing counsel prior to making the motion (see *Moran v Grand Slam Ventures, LLC*, 221 AD3d 994, 996 [2023]; *Capacity Group of NY, LLC v Duni*, 186 AD3d 1482, 1483 [2020]).

“Pursuant to CPLR 3126, a court may impose discovery sanctions, including the striking of a pleading or preclusion of evidence, where a party ‘refuses to obey an order for disclosure or wilfully fails to disclose information which the court finds ought to have been disclosed’ ” (*Aha Sales, Inc. v Creative Bath Prods., Inc.*, 110 AD3d 1019, 1019 [2013], quoting CPLR 3126). “The determination of whether to strike an answer pursuant to CPLR 3126 is addressed to the sound discretion of the trial court” (*Pinto v Tenenbaum*, 105 AD3d 930, 931 [2013]). Since public policy strongly favors the resolution of cases on the merits (see *Warner v Orange County Regional Med. Ctr.*, 126 AD3d 887, 887 [2015]), “the drastic remedy of striking an answer is inappropriate absent a clear showing that the failure to comply with discovery demands is willful, contumacious, or in bad faith” (*Jenkins v Proto Prop. Servs., LLC*, 54 AD3d 726, 726-727 [2008] [internal quotation marks omitted]; see *Laskin v Friedman*, 90 AD3d 617, 617-618 [2011]).

Here, the plaintiffs failed to make a clear showing that the City defendants or HHC willfully or contumaciously failed to comply with discovery demands or acted in bad faith (see *Borchkhadze v McMahon*, 235 AD3d 944, 946 [2025]; *Farrell v Keldiyarov*, 234 AD3d 933, 935 [2025]). Accordingly, the Supreme Court properly declined to strike the answers of the City defendants and of HHC based on their alleged failure to comply with discovery demands and court-ordered discovery.

The Supreme Court also properly declined to strike the answers of the City defendants and of HHC for spoliation of evidence. “[U]nder the common-law doctrine of spoliation, when

a party negligently loses or intentionally destroys key evidence, thereby preventing the non-responsible party from being able to prove its claim or defense, the responsible party may be sanctioned by the striking of its pleading” (*May v American Multi-Cinema, Inc.*, 191 AD3d 657, 658 [2021] [alteration and internal quotation marks omitted]). “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] [internal quotation marks omitted]; see *Golan v North Shore-Long Is. Jewish Health Sys., Inc.*, 147 AD3d 1031, 1032 [2017]). “A culpable state of mind for purposes of a spoliation sanction includes ordinary negligence” (*Dagro Assoc. II, LLC v Chevron U.S.A., Inc.*, 206 AD3d 793, 795 [2022] [internal quotation marks omitted]; see *Washington v Church & Nostrand Apparel Corp.*, 238 AD3d 1096, 1098 [2025]). “If the evidence is determined to have been negligently destroyed, the party seeking spoliation sanctions must establish that the destroyed evidence was relevant to the party’s claim or defense” (*Phelps-Vachier v Genovese Drug Stores, Inc.*, 207 AD3d 582, 584 [2022] [alterations and internal quotation marks omitted]; see *Schaum v Glass Gardens, Inc.*, 230 AD3d 711, 712-713 [2024]).

Here, the plaintiffs failed to demonstrate that the City defendants or HHC intentionally or negligently spoliated evidence that was within their possession or control or that the absence of allegedly spoliated evidence deprived the plaintiffs of their ability to prove their claim (see *Octobre v Soiefer*, 240 AD3d 503, 506 [2025]; *De Abreu v Syed Rests. Enters., Inc.*, 231 AD3d 1116, 1118 [2024]; *Crosbie v KBC Food Corp.*, 190 AD3d 684, 686 [2021]).

The plaintiffs’ remaining contentions are either not properly before this Court or without merit. Christopher, J.P., Wan, Ventura and Hom, JJ., concur.

17 Francisco Hernandez-Morataya, Appellant, v M&L Equities Auto, LLC, et al., Respondents. [— NYS3d —]

Workers’ Compensation—Exclusiveness of Remedy—Alter Ego—Single Integrated Entity or Complete Dominion

In an action to recover damages for personal injuries, the plaintiff appeals from an order of the Supreme Court, Orange

County (E. Loren Williams, J.), dated July 9, 2024. The order granted the defendants' motion for summary judgment dismissing the amended complaint.

Ordered that the order is reversed, on the law, with costs, and the defendants' motion for summary judgment dismissing the amended complaint is denied.

The plaintiff allegedly was injured during the course of his employment as a car wash attendant with M&L Car Services, Inc. (hereinafter M&L Car Services), when he was struck by a vehicle operated by a customer of the car wash. Thereafter, the plaintiff commenced this personal injury action against the defendant M&L Equities Auto, LLC (hereinafter M&L Equities Auto), the owner of the real property on which the car wash was situated, and the defendants Paul LeDuc and Tara LeDuc, the principal officers of M&L Equities Auto and M&L Car Services. Subsequently, the defendants moved for summary judgment dismissing the amended complaint. In an order dated July 9, 2024, the Supreme Court granted the motion. The plaintiff appeals.

"The defense afforded to employers by the exclusivity provisions of the Workers' Compensation Law may also extend to suits brought against an entity that is found to be the alter ego of the corporation that employs the plaintiff" (*Gerardi v I.J. Litwak Realty Ltd. Partnership*, 177 AD3d 679, 680 [2019]; see *Fung v Japan Airlines Co., Ltd.*, 9 NY3d 351, 358-359 [2007]; *Haines v Verazzano of Dutchess, LLC*, 130 AD3d 871, 872 [2015]). A defendant moving for summary judgment under this theory must show, prima facie, that it was the alter ego of the plaintiff's employer (see *Haines v Verazzano of Dutchess, LLC*, 130 AD3d at 872; *Batts v IBEX Constr., LLC*, 112 AD3d 765, 766 [2013]). "A defendant may establish itself as the alter ego of a plaintiff's employer by demonstrating that one of the entities controls the other or that the two operate as a single integrated entity" (*Quizhpe v Luvin Constr. Corp.*, 103 AD3d 618, 619 [2013]; see *Haines v Verazzano of Dutchess, LLC*, 130 AD3d at 872; *Samuel v Fourth Ave. Assoc., LLC*, 75 AD3d 594, 594-595 [2010]). "However, a mere showing that the entities are related is insufficient where a defendant cannot demonstrate that one of the entities controls the day-to-day operations of the other" (*Batts v IBEX Constr., LLC*, 112 AD3d at 767; see *Clarke v First Student, Inc.*, 160 AD3d 921, 922 [2018]).

Here, the defendants failed to establish, prima facie, that M&L Equities Auto and the plaintiff's employer, M&L Car Services, were operated as a single integrated entity or that either of the entities exercised complete domination and control of the

other entity's day-to-day operations (see *Mauro v Zorn Realities, Inc.*, 206 AD3d 645, 647 [2022]; *Everett v CMI Servs. Corp.*, 206 AD3d 620, 622 [2022]; *Batts v IBEX Constr., LLC*, 112 AD3d at 767). Since the defendants failed to sustain their prima facie burden, denial of their motion for summary judgment dismissing the amended complaint was required without regard to the sufficiency of the plaintiff's opposition papers (see *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; *Batts v IBEX Constr., LLC*, 112 AD3d at 767). Accordingly, the Supreme Court improperly granted the defendants' motion for summary judgment dismissing the amended complaint.

The plaintiff's remaining contentions either are without merit or need not be reached in light of our determination. Barros, J.P., Wooten, Love and Quirk, JJ., concur.

18 HSBC Bank USA, National Association, Respondent, v Samuel Ehrenthal et al., Appellants, et al., Defendants. [— NYS3d —]

**Mortgages—Foreclosure—Referee's Report—Credited Witness at Trial
Mortgages—Foreclosure—Accrual of Interest—Responsibility for Delay
Attorney and Client—Frivolous Conduct—Reimbursement of Attorneys' Fees**

In an action to foreclose a mortgage, the defendants Samuel Ehrenthal and Frimet Ehrenthal appeal from an order and judgment of foreclosure and sale (one paper) of the Supreme Court, Rockland County (Paul I. Marx, J.), dated May 15, 2023. The order and judgment of foreclosure and sale, upon an order of the same court dated July 27, 2022, inter alia, granting that branch of the plaintiff's motion which was to confirm a referee's finding, made after a trial, that the plaintiff had standing to commence this action, granted the plaintiff's motion, among other things, to confirm the referee's report of computation and for a judgment of foreclosure and sale, denied the cross-motion of the defendants Samuel Ehrenthal and Frimet Ehrenthal to toll all interest, costs, and fees due to the plaintiff from the date of commencement of this action to the present and pursuant to 22 NYCRR 130-1.1 for an award of attorneys' fees and costs, confirmed the referee's report of computation, and directed the sale of the subject property.

Ordered that the order and judgment of foreclosure and sale is modified, on the facts and in the exercise of discretion, by deleting the provision thereof denying that branch of the cross-motion of the defendants Samuel Ehrenthal and Frimet Ehrenthal which was to toll all interest due to the plaintiff from the date of commencement of this action to the present, and substituting therefor a provision granting that branch of

the cross-motion to the extent of tolling the accrual of interest from August 20, 2015, to August 19, 2019; as so modified, the order and judgment of foreclosure and sale is affirmed, without costs or disbursements.

In August 2009, HSBC Bank USA, National Association, as trustee for MHL 2007-2 (hereinafter HSBC/MHL), commenced this action against the defendants Samuel Ehrenthal and Frimet Ehrenthal (hereinafter together the defendants), among others, to foreclose a mortgage on certain real property located in Monsey. By corporate assignment of mortgage dated October 7, 2013, the mortgage was assigned by HSBC/MHL to HSBC Bank USA, National Association, as Trustee for MortgageIT Securities Corp. Mortgage Loan Trust, Series 2007-2, Mortgage Pass-Through Certificates (hereinafter HSBC/MortgageIT).

On August 20, 2015, HSBC/MHL moved, inter alia, for summary judgment on the complaint insofar as asserted against the defendants, to dismiss the defendants' affirmative defenses, in effect, for leave to amend the caption to name HSBC/MortgageIT as the plaintiff, and for an order of reference. In support of the motion, HSBC/MHL submitted, among other things, an affidavit of Mahilet Ayalew, a vice president of loan documentation employed by Wells Fargo Bank, NA (hereinafter Wells Fargo), HSBC/MHL's loan servicer. Ayalew attested, inter alia, that "[HSBC/MortgageIT] had possession of the Promissory Note on or before August 28, 2009, the date that this action was commenced." The defendants cross-moved for summary judgment dismissing the complaint insofar as asserted against them. By order dated December 30, 2015, the court granted HSBC/MHL's motion and denied the defendants' cross-motion.

Upon the defendants' appeal from the order dated December 30, 2015 (hereinafter the prior appeal), this Court modified the December 30, 2015 order by denying those branches of HSBC/MHL's motion which were for summary judgment on the complaint insofar as asserted against the defendants, to dismiss the defendants' affirmative defenses, in effect, for leave to amend the caption to name HSBC/MortgageIT as the plaintiff, and for an order of reference (*see HSBC Bank USA, N.A. v Ehrenthal*, 158 AD3d 668, 669 [2018]). Among other things, the Court found that Ayalew's affidavit was insufficient to establish standing "in the absence of an allegation and evidence that [HSBC/MortgageIT] was the same entity as [HSBC/MHL]" (*id.* at 670).

Thereafter, HSBC/MHL moved, inter alia, for summary judgment on the complaint insofar as asserted against the defend-

ants, to strike the defendants' answer, to amend the caption to name HSBC/MortgageIT as the plaintiff, and for an order of reference, this time submitting an affidavit attesting that HSBC/MHL was an abbreviation for, and the same entity as, HSBC/MortgageIT. In an order dated August 19, 2019, the Supreme Court denied the motion, finding that HSBC/MHL's submissions had "fail[ed] to provide proof to support this position." The court directed that a trial be held on the issue of standing, at which "plaintiff shall produce admissible evidence identifying HSBC/MortgageIt and HSBC/MHL as the same entity."

The trial was held on December 4, 2019, and August 11, 2021. After the trial, a referee submitted a report (hereinafter the referee's report after trial) recommending that the Supreme Court determine that HSBC/MHL had established through admissible evidence and testimony that HSBC/MHL was the same entity as HSBC/MortgageIT and that "the two acronyms are used interchangeably with different parties to refer to the same trust." Accordingly, the referee recommended that the court determine that HSBC/MHL had established possession of the note, and therefore its standing, at the time of commencement of this action. In addition, "due to the history of this case," in which HSBC/MHL "was given at least three opportunities to prove its standing, . . . yet [HSBC/MHL] failed, and was given another opportunity with this limited issue hearing," the referee recommended that the court toll interest from February 14, 2018, the date of this Court's decision and order on the prior appeal, to August 19, 2019, the date of the Supreme Court's order directing that the trial be held, "or another date range that the Court deems appropriate."

In October 2021, HSBC/MHL moved, among other things, to confirm the referee's report after trial, to amend the caption to name HSBC/MortgageIT as the plaintiff, and for an order of reference. The defendants cross-moved to reject the referee's report after trial or, in the alternative, to dismiss the action for lack of standing.

By order dated July 27, 2022, the Supreme Court granted HSBC/MHL's motion and denied the defendants' cross-motion, confirmed the referee's report after trial, and appointed a referee to compute the amounts due. Thereafter, HSBC/MortgageIT (hereinafter the plaintiff) moved, inter alia, to confirm the referee's report of computation and for a judgment of foreclosure and sale. The defendants opposed the motion and cross-moved to toll all interest, costs, and fees due to the plaintiff from the commencement of this action to the present

and pursuant to 22 NYCRR 130-1.1 for an award of attorneys' fees and costs as a sanction for frivolous conduct. By order and judgment of foreclosure and sale dated May 15, 2023, the Supreme Court granted the plaintiff's motion, denied the defendants' cross-motion, confirmed the referee's report of computation, and directed the sale of the property. The defendants appeal.

"The report of a referee should be confirmed whenever the findings are substantially supported by the record, and the referee has clearly defined the issues and resolved matters of credibility" (*U.S. Bank N.A. v Dallas*, 212 AD3d 680, 681 [2023] [internal quotation marks omitted]). "A referee's credibility determinations are entitled to great weight because, as the trier of fact, he or she has the opportunity to see and hear the witnesses and to observe their demeanor" (*Anvaer v Anvaer*, 160 AD3d 794, 796 [2018] [internal quotation marks omitted]). Here, a witness at the trial, an employee of Wells Fargo, identified certain documents, including a pooling and servicing agreement, that supported her testimony that HSBC/MHL and the plaintiff were the same entity. Therefore, the referee's determination to credit the testimony of the sole witness at the trial was substantially supported by the record. Accordingly, the Supreme Court properly confirmed the referee's report after trial.

"A foreclosure action is equitable in nature and triggers the equitable powers of the court" (*Deutsche Bank Natl. Trust Co. v Ould-Khatti*, 201 AD3d 701, 703 [2022] [internal quotation marks omitted]; see *Krupnick v Romano*, 220 AD3d 941, 942 [2023]). "[I]n an action of an equitable nature, interest and the rate and date from which it shall be computed [is] in the court's discretion" (CPLR 5001 [a]; see *Krupnick v Romano*, 220 AD3d at 942; *Wells Fargo Bank, N.A. v Chun Fei Lee*, 208 AD3d 1384, 1386 [2022]). "The exercise of that discretion will be governed by the particular facts in each case, including any wrongful conduct by either party" (*Krupnick v Romano*, 220 AD3d at 942, quoting *Dayan v York*, 51 AD3d 964, 965 [2008]).

Here, the defendants are correct that the plaintiff's changing theory of the case was responsible for much of the delay in this matter. While the referee recommended, and the Supreme Court directed, that the accrual of interest be tolled from February 14, 2018, the date of this Court's decision and order on the prior appeal modifying the Supreme Court's December 30, 2015 order so as to deny those branches of HSBC/MHL's motion which were for summary judgment on the complaint insofar as asserted against the defendants, to dismiss the de-

fendants’ affirmative defenses, in effect, for leave to amend the caption, and for an order of reference, to August 19, 2019, the date of the Supreme Court’s order directing that the trial be held, we find that the accrual of interest should be tolled from August 20, 2015, when HSBC/MHL first moved, among other things, for summary judgment on the complaint insofar as asserted against the defendants and for an order of reference based on submission of prior affidavits and affirmations representing that HSBC/MHL and the plaintiff were separate entities, to August 19, 2019.

“A court, ‘in its discretion, may award to any party or attorney in any civil action or proceeding before the court . . . costs in the form of reimbursement for actual expenses reasonably incurred and reasonable attorney’s fees, resulting from frivolous conduct’ ” (*Stone Mtn. Holdings, LLC v Spitzer*, 119 AD3d 548, 550 [2014], quoting 22 NYCRR 130-1.1 [a]; *see U.S. Bank N.A. v Tait*, 234 AD3d 889, 891-892 [2025]). “Although the advancement of a meritless position may serve as the basis for a finding of frivolity, the standard for such a showing is high: the rule provides that a position will be deemed frivolous only where it is ‘completely without merit in law and cannot be supported by a reasonable argument for an extension, modification or reversal of existing law’ ” (*Stone Mtn. Holdings, LLC v Spitzer*, 119 AD3d at 550, quoting 22 NYCRR 130-1.1 [c] [1]; *see U.S. Bank N.A. v Tait*, 234 AD3d at 891-892). Here, the defendants failed to meet their burden to demonstrate that the plaintiff engaged in frivolous conduct within the meaning of 22 NYCRR 130-1.1 (c) (*see U.S. Bank Trust, N.A. v Johnson*, 201 AD3d 841, 842 [2022]).

Contrary to the plaintiff’s contention, under the circumstances, the defendants’ cross-motion to reject the referee’s report after trial was timely filed. As to the defendants’ cross-motion to toll all interest, costs, and fees due to the plaintiff from the commencement of this action to the present and pursuant to 22 NYCRR 130-1.1 for an award of attorneys’ fees and costs, we find that the Supreme Court did not improvidently exercise its discretion by, in effect, extending the defendants’ time to file their cross-motion (*see CPLR 2004; Yadegar v Deutsche Bank Natl. Trust Co.*, 164 AD3d 945, 948 [2018]). Barros, J.P., Iannacci, Voutsinas and Quirk, JJ., concur.

19 George Ignatiadis, as Executor of the Estate of Aristidis Ignatiadis, Deceased, Appellant, v Shore Front Nursing Home, Respondent, et al., Defendants. [253 NYS3d 718]—

Health—Nursing Homes—Patient Neglect—Care Reasonably Necessary

In an action, *inter alia*, to recover damages for medical malpractice, the plaintiff appeals from a judgment of the Supreme Court, Kings County (Genine D. Edwards, J.), dated July 29, 2021. The judgment, upon an order of the same court dated May 25, 2021, granting the motion of the defendant Shorefront Jewish Geriatric Center, Inc., incorrectly sued herein as Shore Front Nursing Home, for summary judgment dismissing the complaint insofar as asserted against it, is in favor of that defendant and against the plaintiff dismissing the complaint insofar as asserted against that defendant.

Ordered that the judgment is affirmed, with costs.

On May 10, 2012, Aristidis Ignatiadis (hereinafter the decedent) was admitted to the defendant Shorefront Jewish Geriatric Center, Inc. (hereinafter Shorefront), incorrectly sued herein as Shore Front Nursing Home, from New York Presbyterian Brooklyn Methodist Hospital (hereinafter Methodist Hospital) where, *inter alia*, he had been treated for a urinary tract infection with antibiotics. Upon the decedent's admission to Shorefront, the staff performed a fall risk assessment, implemented fall precautions, and ordered a urinalysis and urine culture, which were negative. The decedent was non-ambulatory and diagnosed with multiple medical conditions, including dementia. The decedent was prescribed Zyprexa to treat agitation resulting from his dementia and received a catheter to address urinary retention. On May 25, 2012, the decedent was found on the floor, having apparently fallen from his bed. On May 28, 2012, the decedent's catheter was removed, and he was able to urinate without pain.

On May 31, 2012, the decedent was discharged home after insurance coverage for his stay at Shorefront terminated. That same day, the decedent returned to Methodist Hospital due to ankle edema. The hospital performed a repeat urinalysis and urine culture, and the decedent was diagnosed with a urinary tract infection.

Thereafter, the plaintiff, the decedent's son and executor of his estate, commenced this action against Shorefront, among others, to recover damages for, *inter alia*, medical malpractice and a violation of Public Health Law § 2801-d.

In January 2021, Shorefront moved for summary judgment dismissing the complaint insofar as asserted against it. The plaintiff opposed the motion. In an order dated May 25, 2021, the Supreme Court granted the motion. A judgment was issued on July 29, 2021, in favor of Shorefront and against the plaintiff dismissing the complaint insofar as asserted against Shorefront. The plaintiff appeals.

“The elements of a medical malpractice cause of action are a deviation or departure from accepted community standards of practice, and that such departure was a proximate cause of the plaintiff’s injuries” (*Barnaman v Bishop Hucles Episcopal Nursing Home*, 213 AD3d 896, 898 [2023], quoting *Schwartz v Partridge*, 179 AD3d 963, 964 [2020]). “On a motion for summary judgment dismissing the complaint in a medical malpractice action, a defendant must make a prima facie showing either that there was no departure from good and accepted medical practice, or that the plaintiff was not injured by any such departure” (*Deitch v Sands Point Ctr. for Health & Rehabilitation*, 237 AD3d 1043, 1044 [2025], quoting *Quinones v Winthrop Univ. Hosp.*, 230 AD3d 1170, 1171 [2024]). “In order to sustain this . . . burden, the defendant must address and rebut any specific allegations of malpractice set forth in the plaintiff’s . . . bill of particulars” (*Barnaman v Bishop Hucles Episcopal Nursing Home*, 213 AD3d at 898, quoting *Martinez v Orange Regional Med. Ctr.*, 203 AD3d 910, 912 [2022]). “Once a defendant makes a prima facie showing, the burden shifts to the plaintiff to demonstrate the existence of a triable issue of fact as to the elements on which the defendant met the prima facie burden” (*Quinones v Winthrop Univ. Hosp.*, 230 AD3d at 1171 [internal quotation marks omitted]; see *Donnelly v Parikh*, 150 AD3d 820, 822 [2017]).

“Although summary judgment is not appropriate in a medical malpractice action where the parties adduce conflicting medical expert opinions, expert opinions that are conclusory, speculative, or unsupported by the record are insufficient to raise triable issues of fact” (*Barnaman v Bishop Hucles Episcopal Nursing Home*, 213 AD3d at 898-899, quoting *Longhi v Lewit*, 187 AD3d 873, 877-878 [2020]). “In order not to be considered speculative or conclusory, expert opinions in opposition should address specific assertions made by the movant’s experts, setting forth an explanation of the reasoning and relying on specifically cited evidence in the record” (*id.* at 899, quoting *Longhi v Lewit*, 187 AD3d at 878).

Here, Shorefront established, prima facie, that it did not deviate from acceptable standards of care and that any alleged deviation was not a proximate cause of the injuries alleged, thereby demonstrating its entitlement to judgment as a matter of law dismissing the cause of action alleging medical malpractice insofar as asserted against it (see *id.*; *Bowe v Brooklyn United Methodist Church Home*, 150 AD3d 1067, 1068 [2017]). In opposition, the plaintiff failed to raise a triable issue of fact, as his expert’s opinion was conclusory, speculative, and nonre-

sponsive to the specific assertions of Shorefront's expert (see *Barnaman v Bishop Hucles Episcopal Nursing Home*, 213 AD3d at 899; *Carradice v Jamaica Hosp. Med. Ctr.*, 198 AD3d 863, 865 [2021]).

“The general rule is that [a] plaintiff cannot, for the first time in opposition to a motion for summary judgment, raise a new or materially different theory of recovery against a party from those pleaded in the complaint and the bill of particulars” (*Rich v Donnenfeld*, 191 AD3d 909, 910 [2021], quoting *Larcy v Kamler*, 185 AD3d 564, 566 [2020]). “If the theory is discernable from the pleadings, it may be considered, especially if the theory is referred to in the depositions” (*id.* [internal quotation marks omitted]; see *Palagye v Loulmet*, 203 AD3d 729, 731 [2022]). Here, the plaintiff's expert raised a new theory of liability when he alleged that Shorefront materially increased the decedent's fall risk by prescribing Zyprexa (see *Larcy v Kamler*, 185 AD3d at 566). This theory was not discernable from the pleadings or the deposition of Shorefront's representative (see *id.*; *E.G. v Alzoobaee*, 237 AD3d 1052, 1054 [2025]). Therefore, the Supreme Court properly declined to consider that theory.

Further, “liability under the Public Health Law contemplates injury to the patient caused by the deprivation of a right conferred by contract, statute, regulation, code or rule, subject to the defense that the facility exercised all care reasonably necessary to prevent and limit the deprivation and injury to the patient” (*Van DeVeerdonk v North Westchester Restorative Therapy & Nursing Ctr.*, 223 AD3d 702, 705 [2024] [internal quotation marks omitted]; see Public Health Law § 2801-d [1], [2]). “Public Health Law § 2801-d authorizes a private right of action by patients of residential health care facilities for the violation of rights enumerated in Public Health Law § 2803-c” (*Dray v Staten Is. Univ. Hosp.*, 160 AD3d 614, 619 [2018] [internal quotation marks omitted]).

Shorefront established, *prima facie*, that it did not violate the various federal and state regulations set forth in the complaint by submitting an affirmation of its expert, who opined that Shorefront provided all care reasonably necessary (see *Van DeVeerdonk v North Westchester Restorative Therapy & Nursing Ctr.*, 223 AD3d at 705; *Schwartz v Partridge*, 179 AD3d at 965). In opposition, the plaintiff's expert provided no opinion as to whether Shorefront had violated any regulations.

Shorefront's contentions regarding the statute of limitations are improperly raised for the first time on appeal (see *Aly v Abououkal, Inc.*, 153 AD3d 481, 483 [2017]; *Choudhary v First Option Tit. Agency*, 107 AD3d 657, 659 [2013]).

Connolly, J.P., Brathwaite Nelson, Hom and Goldberg Velazquez, JJ., concur.

20 J & T Beach Corp., Doing Business as Blu Iguana, Respondent, v Town of Oyster Bay et al., Appellants, et al., Defendants. [— NYS3d —]

Judgments—Res Judicata—Same Factual Grouping or Transaction

In an action, inter alia, to recover damages for breach of contract, the defendants Town of Oyster Bay, Town Board of the Town of Oyster Bay, and Joseph G. Pinto, as Commissioner of the Town of Oyster Bay Department of Parks, appeal from an order of the Supreme Court, Nassau County (Jerome C. Murphy, J.), entered March 22, 2024. The order, insofar as appealed from, denied those branches of those defendants' motion which were pursuant to CPLR 3211 (a) (5) to dismiss the first and second causes of action insofar as asserted against them.

Ordered that the order is reversed insofar as appealed from, on the law, with costs, and those branches of the motion of the defendants Town of Oyster Bay, Town Board of the Town of Oyster Bay, and Joseph G. Pinto, as Commissioner of the Town of Oyster Bay Department of Parks, which were pursuant to CPLR 3211 (a) (5) to dismiss the first and second causes of action insofar as asserted against them are granted.

In April 2023, the plaintiff, J & T Beach Corp. (hereinafter J & T), commenced a proceeding (hereinafter the prior proceeding) pursuant to CPLR article 78 against the Town of Oyster Bay, Town Board of the Town of Oyster Bay, and Joseph G. Pinto, as Commissioner of the Town of Oyster Bay Department of Parks (hereinafter collectively the Town defendants). In the prior proceeding, J & T challenged the Town defendants' determination to terminate a license agreement (hereinafter the agreement) permitting J & T to operate a beach bar concession stand, alleging, inter alia, that the Town defendants terminated the agreement more than 10 months prior to the end of the term of the agreement and that J & T "was not given the thirty (30) days written notice as required under Section 36 of the [a]greement." In an order dated May 26, 2023, the Supreme Court denied the petition and, in effect, dismissed the prior proceeding.

In July 2023, J & T commenced this action against, among others, the Town defendants, among other things, to recover damages for breach of the agreement. The amended complaint asserted, inter alia, that J & T was entitled to "certain credits for overpayments" made to the Town defendants due to the termination of the agreement. The Town defendants moved

pursuant to CPLR 3211 (a) to dismiss the amended complaint insofar as asserted against it, contending, among other things, that the action was barred by the doctrine of res judicata. In an order entered March 22, 2024, the Supreme Court, inter alia, denied those branches of the Town defendants' motion which were pursuant to CPLR 3211 (a) (5) to dismiss the first and second causes of action insofar as asserted against them as barred by the doctrine of res judicata. The Town defendants appeal.

The Supreme Court should have granted those branches of the Town defendants' motion which were pursuant to CPLR 3211 (a) (5) to dismiss the first and second causes of action insofar as asserted against them on the ground that they were barred by the doctrine of res judicata. "Under res judicata, or claim preclusion, a valid final judgment bars future actions between the same parties on the same cause of action" (*Simmons v Trans Express Inc.*, 37 NY3d 107, 111 [2021] [internal quotation marks omitted]; see *Yu Chan Li v City of New York*, 240 AD3d 832, 834 [2025]). "The doctrine of res judicata operates to preclude the reconsideration of claims actually litigated and resolved in a prior proceeding, as well as claims for different relief against the same party which arise out of the same factual grouping or transaction, and which should have or could have been resolved in the prior proceeding" (*Sunny v Hossain*, 236 AD3d 699, 700-701 [2025] [internal quotation marks omitted]). "[O]nce a claim is brought to a final conclusion, all other claims arising out of the same transaction or series of transactions are barred, even if based upon different theories or if seeking a different remedy" (*Simmons v Trans Express Inc.*, 37 NY3d at 111 [emphasis omitted], quoting *O'Brien v City of Syracuse*, 54 NY2d 353, 357 [1981]).

Here, the Supreme Court should have granted dismissal of the first and second causes of action on the ground that they were barred by the doctrine of res judicata (see *Heller v NYC Sch. Support Servs., Inc.*, 237 AD3d 674, 676 [2025]; *Albanes v Charles*, 134 AD3d 657, 658 [2015]). Although the amended complaint is based upon a different theory than the petition in the prior proceeding, the first and second causes of action in this action arise from the same factual grouping or transaction as in the prior proceeding and could have been resolved in the prior proceeding (see *Yu Chan Li v City of New York*, 240 AD3d at 834-835; *Montalbano, Condon & Frank, P.C. v Rodi*, 54 AD3d 1012, 1013-1014 [2008]).

The parties' remaining contentions either are without merit or need not be reached in light of our determination.

Accordingly, the Supreme Court should have granted those branches of the Town defendants' motion which were pursuant to CPLR 3211 (a) (5) to dismiss the first and second causes of action insofar as asserted against them. Duffy, J.P., Ford, Golia and Quirk, JJ., concur.

21 J.L. et al., Appellants, v Elaine Sklar, M.D., et al., Respondents, et al., Defendants. [— NYS3d —]—

Hospitals—Malpractice—Expert Affirmation—Triable Issues
Hospitals—Malpractice—Vicarious Liability

In an action, inter alia, to recover damages for medical malpractice, etc., the plaintiffs appeal from an order of the Supreme Court, Kings County (Ellen M. Spodek, J.), dated May 19, 2020. The order, insofar as appealed from, granted those branches of the separate motions of the defendants Elaine Sklar and Boro Park Obstetrics and Gynecology, P.C., and the defendant Maimonides Medical Center which were for summary judgment dismissing the causes of action alleging medical malpractice and loss of services insofar as asserted against each of them.

Ordered that the order is reversed insofar as appealed from, on the law, with one bill of costs payable by the respondents appearing separately and filing separate briefs, and those branches of the separate motions of the defendants Elaine Sklar and Boro Park Obstetrics and Gynecology, P.C., and the defendant Maimonides Medical Center which were for summary judgment dismissing the causes of action alleging medical malpractice and loss of services insofar as asserted against each of them are denied.

The plaintiffs commenced this action, inter alia, to recover damages for medical malpractice against, among others, the defendants Elaine Sklar, Boro Park Obstetrics and Gynecology, P.C. (hereinafter Boro Park), and Maimonides Medical Center (hereinafter Maimonides). The plaintiffs alleged, among other things, that those defendants deviated from good and accepted medical practice during the labor of the plaintiff Jennifer L. (hereinafter the mother) and the delivery of the plaintiff J.L. (hereinafter the infant plaintiff) at Maimonides, resulting in injuries to the infant plaintiff and the mother. Sklar and Boro Park moved, and Maimonides separately moved, inter alia, for summary judgment dismissing the causes of action alleging medical malpractice and loss of services insofar as asserted against each of them. In an order dated May 19, 2020, the Supreme Court, among other things, granted those branches of the separate motions. The plaintiffs appeal.

“The elements of a medical malpractice cause of action are a deviation or departure from accepted community standards of practice, and that such departure was a proximate cause of the plaintiff’s injuries” (*Schwartz v Partridge*, 179 AD3d 963, 964 [2020] [internal quotation marks omitted]; see *Barnaman v Bishop Hucles Episcopal Nursing Home*, 213 AD3d 896, 898 [2023]). “In moving for summary judgment dismissing a cause of action alleging medical malpractice, a defendant must establish, prima facie, that there was no departure or deviation from the accepted standard of care or that such departure or deviation was not a proximate cause of any injury to the plaintiff” (*Attia v Klebanov*, 192 AD3d 650, 651 [2021]; see *Daniels v Pisarenko*, 222 AD3d 831, 832 [2023]). “In order to sustain this prima facie burden, the defendant must address and rebut any specific allegations of malpractice set forth in the plaintiff’s complaint and bill of particulars” (*Wiater v Lewis*, 197 AD3d 782, 783 [2021]; see *Barnaman v Bishop Hucles Episcopal Nursing Home*, 213 AD3d at 898). “[A] defendant’s expert’s affidavit or affirmation that merely recounts the treatment rendered and opines in a conclusory manner that such treatment did not represent a departure from good and accepted medical practice is insufficient to meet this burden” (*Martinez v Orange Regional Med. Ctr.*, 203 AD3d 910, 912 [2022] [alterations and internal quotation marks omitted]; see *Danziger v Mayer*, 236 AD3d 755, 758 [2025]).

Here, Sklar and Boro Park failed to establish their prima facie entitlement to judgment as a matter of law dismissing the causes of action alleging medical malpractice insofar as asserted against them. The expert affirmation submitted by those defendants in support of their motion failed to address specific allegations of malpractice set forth in the complaint and bills of particulars (see *Huichun Feng v Accord Physicians, PLLC*, 194 AD3d 795, 797 [2021]), and failed to eliminate all triable issues of fact, inter alia, as to whether those defendants ordered the appropriate dosage of a medication to induce the mother’s labor and properly attempted to deliver the infant plaintiff using a vacuum extractor, rather than performing an emergency cesarean section, despite indications that the mother was experiencing uterine tachysystole. The expert’s affirmation also failed to eliminate triable issues of fact as to whether these alleged departures from good and accepted medical practice were a proximate cause of the mother’s and the infant plaintiff’s injuries (see *id.*; *Smarkucki v Kleinman*, 171 AD3d 1118, 1119 [2019]).

Maimonides also failed to establish its prima facie entitle-

ment to judgment as a matter of law dismissing the causes of action alleging medical malpractice insofar as asserted against it. “Although, generally, a hospital cannot be held vicariously liable for the negligence of a private attending physician, concurrent liability will be imposed where, inter alia, a hospital’s employees commit independent acts of negligence” (*Rosenstack v Wong*, 106 AD3d 804, 805 [2013]; see *Pezulich v Grecco*, 206 AD3d 827, 829 [2022]). Here, the affirmation of Maimonides’s expert who specialized in the fields of obstetrics, gynecology, and maternal fetal medicine failed to eliminate triable issues of fact as to whether Maimonides’s staff committed independent acts of negligence (*cf. Corletta v Fischer*, 101 AD3d 929, 930 [2012]). Moreover, the affirmation of Maimonides’s expert neonatologist was conclusory and insufficient to establish Maimonides’s prima facie entitlement to judgment as a matter of law (see *Hiegel v Orange Regional Med. Ctr.*, 219 AD3d 910, 914 [2023]).

Accordingly, the Supreme Court should have denied those branches of the separate motions of Sklar and Boro Park and Maimonides which were for summary judgment dismissing the causes of action alleging medical malpractice insofar as asserted against each of them, regardless of the sufficiency of the plaintiffs’ opposition papers (see *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]).

The causes of action alleging loss of services are derivative in nature (see *Buzeska v Crystal Run Healthcare Physicians, LLP*, 234 AD3d 656, 659 [2025]; *Sokoloff v Schor*, 176 AD3d 120, 133 [2019]). In light of our determination that the Supreme Court should have denied those branches of the separate motions of Sklar and Boro Park and Maimonides which were for summary judgment dismissing the causes of action alleging medical malpractice insofar as asserted against each of them, the court also should have denied those branches of the separate motions which were for summary judgment dismissing the causes of action alleging loss of services insofar as asserted against each of them (see *Buzeska v Crystal Run Healthcare Physicians, LLP*, 234 AD3d at 659).

The parties’ remaining contentions either are without merit or need not be reached in light of our determination. Barros, J.P., Christopher, Warhit and Voutsinas, JJ., concur.

22 David Liu et al., Appellants, v Adolfo Carrion, Jr., in His Official Capacity as Commissioner of the New York City Department of Housing Preservation and Development, et al., Respondents. [251 NYS3d 784]—

In an action, inter alia, for a judgment declaring that a lien the defendant New York City Department of Housing Preservation and Development placed upon the plaintiffs' property is null and void, the plaintiffs appeal from an order of the Supreme Court, Kings County (Patria Frias-Colón, J.), dated September 8, 2023. The order granted the defendants' motion pursuant to CPLR 3211 (a) (7) to dismiss the complaint.

Ordered that the order is affirmed, with costs.

On October 7, 2020, the defendant New York City Department of Housing Preservation and Development (hereinafter HPD) filed a notice of lien in the Kings County Clerk's Office seeking "hotel/shelter expenses" and administrative costs in the total amount of \$73,287.89, purportedly incurred in providing relocation services for displaced tenants of premises owned by the plaintiffs pursuant to the Administrative Code of the City of New York § 26-301 (1) (a) (v). Thereafter, the plaintiffs commenced this action, inter alia, for a judgment, in effect, declaring that HPD lacks the authority to place a lien upon the plaintiffs' property for reimbursement of relocation expenses because the persons on whose behalf HPD purportedly incurred relocation expenses were not "tenants" within the meaning of Administrative Code § 26-305 and enjoining HPD from enforcing the lien. The defendants moved pursuant to CPLR 3211 (a) (7) to dismiss the complaint. By order dated September 8, 2023, the Supreme Court granted the defendants' motion. The plaintiffs appeal.

Where, as here, "there [is] no defect upon the face of the notice of lien, any dispute regarding the validity of the lien must await trial thereof by foreclosure" (*Matter of Retek v City of New York*, 14 AD3d 708, 709 [2005], quoting *Matter of Lowe*, 4 AD3d 476, 476 [2004]; see *Rivera v Department of Hous. Preserv. & Dev. of the City of N.Y.*, 29 NY3d 45 [2017]; *2922 LLC v Been*, 158 AD3d 428, 429 [2018]). Accordingly, the Supreme Court properly granted the defendants' motion pursuant to CPLR 3211 (a) (7) to dismiss the complaint.

In light of our determination, we need not reach the plaintiffs' remaining contention. Barros, J.P., Warhit, Landicino and Love, JJ., concur.

23 M.P., Appellant, v Joshua Allen Wilson, M.D., Respondent. [— NYS3d —]

Torts—Assault and Battery—Consent to Contact
Negligence—Duty—Duty of Care

In an action to recover damages for battery and negligence, the plaintiff appeals from an order of the Supreme Court, Nas-

sau County (Gary M. Carlton, J.), dated March 11, 2025. The order, insofar as appealed from, granted that branch of the defendant's motion which was pursuant to CPLR 3211 (a) (7) to dismiss the complaint.

Ordered that the order is affirmed insofar as appealed from, with costs.

In July 2024, the plaintiff commenced this action against the defendant to recover damages for battery and negligence. The complaint alleged, inter alia, that the parties engaged in consensual unprotected sexual intercourse, during which the defendant allegedly "inseminated" the plaintiff without her consent, resulting in the plaintiff's ectopic pregnancy, internal bleeding, miscarriage, and salpingectomy. The defendant interposed an answer asserting various affirmative defenses. Thereafter, the defendant moved, among other things, pursuant to CPLR 3211 (a) (7) to dismiss the complaint for failure to state a cause of action. In an order dated March 11, 2025, the Supreme Court, inter alia, granted that branch of the defendant's motion. The plaintiff appeals.

On a motion to dismiss a complaint pursuant to CPLR 3211 (a) (7) for failure to state a cause of action, the court must accept as true the facts as alleged in the complaint and submissions in opposition to the motion, accord the plaintiff the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory (*see Leon v Martinez*, 84 NY2d 83, 87-88 [1994]).

"To recover damages for battery, a plaintiff must prove that there was bodily contact, that the contact was offensive, i.e., wrongful under all of the circumstances, and intent to make the contact without the plaintiff's consent" (*Higgins v Hamilton*, 18 AD3d 436, 436 [2005]; *see Hines v Westchester County*, 207 AD3d 621, 622 [2022]; *Thaw v North Shore Univ. Hosp.*, 129 AD3d 937, 938-939 [2015]). Here, the plaintiff failed to state a cause of action to recover damages for battery. The allegations contained in the complaint demonstrate that the plaintiff consented to the bodily contact at issue.

"The elements of a common-law negligence cause of action are a duty owed by the defendant to the plaintiff, a breach of that duty, and an injury proximately resulting therefrom" (*Jiminez v Shahid*, 83 AD3d 900, 901 [2011]). "In the absence of a duty, as a matter of law, there can be no liability" (*Pasternack v Laboratory Corp. of Am. Holdings*, 27 NY3d 817, 825 [2016]). Here, the plaintiff failed to state a cause of action to recover damages for negligence. Under the circumstances of this case in which the plaintiff consented to unprotected sexual inter-

course with the defendant and did not allege that she withdrew her consent, the defendant did not owe the plaintiff a duty of care.

The parties' remaining contentions are either without merit or not properly before this Court.

Accordingly, the Supreme Court properly granted that branch of the defendant's motion which was pursuant to CPLR 3211 (a) (7) to dismiss the complaint. Genovesi, J.P., Ford, Ventura and Quirk, JJ., concur.

24 Anna Marie Mangiarcina, Respondent, v Ridgewood 69, LLC, et al., Appellants. [— NYS3d —]—

Estates—Life Estates—Interest in Deed
Adverse Possession—Hostile Possession—Permissive Use

In an action, inter alia, for a judgment declaring that the plaintiff has a life estate in certain real property, the defendants appeal from an order of the Supreme Court, Queens County (Nicole A. McGregor Mundy, J.), dated April 11, 2024. The order, insofar as appealed from, denied, as premature, those branches of the defendants' motion which were for summary judgment dismissing the complaint, for summary judgment on their counterclaim for a judgment declaring that the plaintiff does not have a life estate in the subject property, and, in effect, for summary judgment declaring that the plaintiff is not the owner of the subject property by adverse possession.

Ordered that the order is reversed insofar as appealed from, on the law, with costs, those branches of the defendants' motion which were for summary judgment dismissing the complaint, for summary judgment on their counterclaim for a judgment declaring that the plaintiff does not have a life estate in the subject property, and, in effect, for summary judgment declaring that the plaintiff is not the owner of the subject property by adverse possession are granted, and the matter is remitted to the Supreme Court, Queens County, for the entry of a judgment making the appropriate declarations in favor of the defendants in accordance herewith.

In January 2023, the plaintiff commenced this action for a judgment declaring that she has a life estate in certain real property located in Ridgewood (hereinafter the property) and to recover damages predicated on a determination that she possessed a life estate in the property or, alternatively, that she acquired title to the property by adverse possession. The complaint alleged, inter alia, that by deed dated September 28, 1987 (hereinafter the 1987 deed), the plaintiff's mother, Mary Mangiaracina, conveyed the property to Joseph C. Murania,

while reserving a life estate for herself and the plaintiff. The complaint further alleged that the plaintiff's mother died in May 2017 and the defendants purchased the property from the testamentary trust of Joseph C. Murania by deed dated September 9, 2022. The defendants interposed an answer and asserted counterclaims, among other things, for a judgment declaring that the plaintiff does not have a life estate in the property.

Thereafter, the defendants moved, inter alia, for summary judgment dismissing the complaint, for summary judgment on their counterclaim for a judgment declaring that the plaintiff does not have a life estate in the property, and, in effect, for summary judgment declaring that the plaintiff is not the owner of the subject property by adverse possession. The plaintiff opposed the defendants' motion. In an order dated April 11, 2024, the Supreme Court, among other things, denied those branches of the defendants' motion as premature. The defendants appeal.

The defendants established their prima facie entitlement to judgment as a matter of law dismissing the cause of action for a judgment declaring that the plaintiff has a life estate in the property and the related causes of action predicated on a determination that the plaintiff possessed a life estate in the property, and on their counterclaim for a judgment declaring that the plaintiff does not have a life estate in the property. The defendants demonstrated that even though the plaintiff's mother reserved a life estate for herself and the plaintiff in the 1987 deed, this did not create a valid interest in favor of the plaintiff since she was a "stranger to the deed," even assuming that it was the intention of the plaintiff's mother to create such a life estate (*Matter of Estate of Thomson v Wade*, 69 NY2d 570, 573 [1987]; see *Sganga v Grund*, 1 AD3d 342, 343 [2003]). In opposition, the plaintiff failed to raise a triable issue of fact.

Further, the defendants established their prima facie entitlement to judgment as a matter of law dismissing the cause of action for a judgment declaring that the plaintiff is the owner of the property by adverse possession and, in effect, for summary judgment declaring that the plaintiff is not the owner of the subject property by adverse possession. The defendants demonstrated that the plaintiff's initial use of the property was permissive until, at the earliest, her mother's death in May 2017, which was less than 10 years before the commencement of this action (see *Schwarz v Trustees of Freeholders & Commonalty of Town of Huntington*, 85 AD3d 1008, 1009 [2011]). In opposition, the plaintiff failed to raise a triable issue of fact.

The Supreme Court erred in denying those branches of the defendants' motion as premature. "Although determination of a summary judgment motion may be delayed to allow for further discovery where evidence necessary to oppose the motion is unavailable to the opponent of the motion (*see* CPLR 3212 [f]), a determination of summary judgment cannot be avoided by a claimed need for discovery unless some evidentiary basis is offered to suggest that discovery may lead to relevant evidence" (*Wyllie v District Attorney of County of Kings*, 2 AD3d 714, 717 [2003] [alterations and internal quotation marks omitted]; *see Sloan v 216 Bedford Kings Corp.*, 208 AD3d 1192, 1193 [2022]). Here, the plaintiff offered nothing more than hope and speculation that discovery might uncover evidence sufficient to raise a triable issue of fact as to whether she was the so-called "true grantee" of the property under the 1987 deed or with regard to her claim of adverse possession.

Accordingly, the Supreme Court should have granted those branches of the defendants' motion which were for summary judgment dismissing the complaint, for summary judgment on their counterclaim for a judgment declaring that the plaintiff does not have a life estate in the property, and, in effect, for summary judgment declaring that the plaintiff is not the owner of the subject property by adverse possession.

The plaintiff's remaining contention is without merit.

Since this is, in part, a declaratory judgment action, we remit the matter to the Supreme Court, Queens County, for the entry of a judgment making the appropriate declarations in favor of the defendants (*see Lanza v Wagner*, 11 NY2d 317, 334 [1962]). Genovesi, J.P., Christopher, Wan and Ventura, JJ., concur.

25 Gina Mattiello, Appellant, v Town of Oyster Bay, Respondent. [— NYS3d —]—

Municipal Corporations—Notice of Claim—Prior Written Notice—Defective or Dangerous Condition

In an action to recover damages for personal injuries, the plaintiff appeals from an order of the Supreme Court, Nassau County (Christopher T. McGrath, J.), entered October 7, 2024. The order granted the defendant's renewed motion for summary judgment dismissing the complaint.

Ordered that the order is affirmed, with costs.

On February 6, 2021, the plaintiff allegedly slipped and fell on an icy condition on a paved walking path in Theodore Roosevelt Memorial Park in the Town of Oyster Bay. The plaintiff commenced this action to recover damages for personal

injuries against the Town. Thereafter, the Town moved for summary judgment dismissing the complaint. In an order dated June 6, 2024, the Supreme Court denied the defendant's motion "without prejudice on procedural grounds and with leave to resubmit its motion."

The Town subsequently made a renewed motion for summary judgment dismissing the complaint. In an order entered October 7, 2024, the Supreme Court granted the renewed motion. The plaintiff appeals.

"When a municipality has adopted a prior written notice law, the municipality cannot be held liable for a defect within the scope of the law absent the requisite written notice, unless an exception to the requirement applies. Where such a local law is in effect, prior written notice of a defective condition is a condition precedent to maintaining an action against a municipality" (*Walker v City of Newburgh*, 222 AD3d 809, 810 [2023] [citation, alteration, and internal quotation marks omitted]; see *Amabile v City of Buffalo*, 93 NY2d 471, 473-476 [1999]; *Reynolds v City of Poughkeepsie*, 230 AD3d 1260, 1260-1261 [2024]). "To be entitled to summary judgment, the municipality must first establish that it lacked prior written notice of the alleged defect. Once that showing is made, the burden shifts to the plaintiff to demonstrate the applicability of one of two recognized exceptions to the rule—that the municipality affirmatively created the defect through an act of negligence or that a special use resulted in a special benefit to the locality" (*Canaday v Village of Wappingers Falls*, 220 AD3d 731, 732 [2023] [citation and internal quotation marks omitted]; see *Yarborough v City of New York*, 10 NY3d 726, 728 [2008]; *Smith v City of New York*, 210 AD3d 53, 62 [2022]).

Contrary to the plaintiff's contention, the Town established, prima facie, that its prior written notice statute applied because the paved walkway where the accident occurred was the functional equivalent of a sidewalk (see Code of Town of Oyster Bay § 160-1 [B]; *Sanchez v County of Nassau*, 222 AD3d 685, 687 [2023]; *Bryan v City of Peekskill*, 74 AD3d 1115 [2010]). Moreover, the Town demonstrated, prima facie, that it did not receive prior written notice of the alleged defective or dangerous condition by submitting affidavits of its employees, who averred that their records searches failed to reveal any prior written notice of a defective or dangerous condition at the subject location (see *Callaghan v County of Nassau*, 236 AD3d 725, 727 [2025]; *Discepolo v County of Nassau*, 226 AD3d 646, 647 [2024]; *Brower v County of Suffolk*, 185 AD3d 774, 776 [2020]). "To the extent the plaintiff contends that the defend-

ant, in order to establish its prima facie entitlement to judgment as a matter of law, was required to demonstrate that it did not create the alleged defect through an affirmative act of negligence, the plaintiff has misstated the applicable law” (*Goodman v City of New York*, 230 AD3d 1115, 1117 [2024]; see *Smith v City of New York*, 210 AD3d at 69-70). In opposition to the Town’s prima facie showing of entitlement to judgment as a matter of law, the plaintiff failed to raise a triable issue of fact.

Accordingly, the Supreme Court properly granted the Town’s renewed motion for summary judgment dismissing the complaint. Barros, J.P., Wooten, Love and Quirk, JJ., concur.

26 Joaquin Moreno, Respondent, v 105 Lombardy NY, LLC, Appellant. (And a Third-Party Action.) [— NYS3d —]

Negligence—Maintenance of Premises—Out-of-Possession Landlord
Negligence—Maintenance of Premises—Actual Notice—Dangerous or Defective Condition

In an action to recover damages for personal injuries, the defendant appeals from an order of the Supreme Court, Kings County (Carolyn E. Wade, J.), dated February 9, 2024. The order denied that branch of the defendant’s motion which was for summary judgment dismissing the complaint and granted the plaintiff’s motion for summary judgment on the issue of liability.

Ordered that the order is affirmed, with costs.

In December 2018, the plaintiff was employed by the third-party defendant, Time Marble and Granite, Inc. (hereinafter Time Marble), at a warehouse located in Brooklyn (hereinafter the premises). The defendant, 105 Lombardy NY, LLC, owned the premises, which the defendant leased in its entirety to Time Marble. On December 6, 2018, the plaintiff allegedly was injured when he was caused to trip and fall by an uncovered trench in the floor of the premises.

Thereafter, the plaintiff commenced this action against the defendant alleging that it was negligent in maintaining the premises and allowing it to be and remain in a defective and dangerous condition. After discovery, the defendant moved, inter alia, for summary judgment dismissing the complaint, and the plaintiff moved for summary judgment on the issue of liability. In an order dated February 9, 2024, the Supreme Court denied that branch of the defendant’s motion and granted the plaintiff’s motion. The defendant appeals.

“‘A property owner has a duty to maintain its premises in a reasonably safe condition’” (*L.R. v Evergreen Charter Sch.*, 232

AD3d 923, 924 [2024], quoting *Grullon v 57-115 Assoc., L.P.*, 229 AD3d 608, 609 [2024]; see *Gronski v County of Monroe*, 18 NY3d 374, 379 [2011]). “That duty is premised on the landowner’s exercise of control over the property, as the person in possession and control of property is best able to identify and prevent any harm to others” (*Gronski v County of Monroe*, 18 NY3d at 379 [internal quotation marks omitted]; see *L.R. v Evergreen Charter Sch.*, 232 AD3d at 924; *Grullon v 57-115 Assoc., L.P.*, 229 AD3d at 609). Thus, “[a]n out-of-possession landlord is not liable for injuries that occur on its premises unless the landlord has retained control over the premises and has a duty imposed by statute or assumed by contract or a course of conduct” (*L.R. v Evergreen Charter Sch.*, 232 AD3d at 924-925 [internal quotation marks omitted]; see *Gronski v County of Monroe*, 18 NY3d at 379; *Grullon v 57-115 Assoc., L.P.*, 229 AD3d at 609).

Here, the defendant failed to establish its prima facie entitlement to judgment as a matter of law dismissing the complaint on the ground that it was an out-of-possession landlord. Although a lease agreement established that Time Marble leased the premises and was responsible for its maintenance, the defendant’s submissions also demonstrated that Zhang Zhao Kang, a partner in the defendant, was present on the premises every day. Although Kang was also a shareholder of Time Marble, he testified at his deposition that he was involved, in his capacity as a partner of the defendant, in addressing hazardous conditions at the premises, including the uncovered trench that allegedly caused the plaintiff’s injuries. Under these circumstances, the defendant failed to demonstrate, prima facie, that it was an out-of-possession landlord (see *L.R. v Evergreen Charter Sch.*, 232 AD3d at 925; *Grullon v 57-115 Assoc., L.P.*, 229 AD3d at 609-610; *Rosas v 397 Broadway Corp.*, 19 AD3d 574, 574 [2005]).

Moreover, the plaintiff demonstrated his entitlement to judgment as a matter of law on the issue of liability. “To impose liability upon a defendant in a trip-and-fall action, there must be evidence that a dangerous or defective condition existed, and that the defendant either created the condition or had actual or constructive notice of it” (*Sermos v Gruppuso*, 95 AD3d 985, 986 [2012] [internal quotation marks omitted]; see *Rosas v 397 Broadway Corp.*, 19 AD3d at 574).

Here, in support of his motion, the plaintiff submitted, among other things, a transcript of Kang’s deposition testimony. Kang testified that prior to the date of the plaintiff’s accident, he observed the uncovered trench in the floor of the premises.

Thereafter, as “the owner” and “the landlord” of the premises, he instructed Time Marble’s owner to cover the trench. Given this testimony, the plaintiff established, *prima facie*, that the defendant had actual notice of the uncovered trench and failed to remedy it before the plaintiff’s accident (*see Shiu Ya Luo v Croyden Apts., Inc.*, 219 AD3d 1364, 1366 [2023]; *cf. Taliana v Hines REIT Three Huntington Quadrangle, LLC*, 197 AD3d 1349, 1352 [2021]; *Rosas v 397 Broadway Corp.*, 19 AD3d at 574). Further, the plaintiff established, and the parties do not dispute, that the uncovered trench was a dangerous condition and that it caused the plaintiff’s accident. In opposition, the defendant failed to raise a triable issue of fact.

Accordingly, the Supreme Court properly denied that branch of the defendant’s motion which was for summary judgment dismissing the complaint and granted the plaintiff’s motion for summary judgment on the issue of liability. Dillon, J.P., Chambers, Wan and McCormack, JJ., concur.

27 In the Matter of Jane M. Azia et al., Appellants, v Town of Shelter Island et al., Respondents. [— NYS3d —]

Municipal Corporations—Zoning—Variance—Denial

In a proceeding pursuant to CPLR article 78 to review so much of a determination of the Town of Shelter Island Zoning Board of Appeals dated January 25, 2022, as, after a hearing, granted the petitioners’ application for an area variance only to a certain extent, the petitioners appeal from a judgment of the Supreme Court, Suffolk County (Christopher Modelewski, J.), dated October 16, 2023. The judgment denied the petition and dismissed the proceeding.

Ordered that the judgment is affirmed, with costs.

The petitioners commenced this proceeding against the Town of Shelter Island, the Town of Shelter Island Building Department (hereinafter the Building Department), and the Town of Shelter Island Zoning Board of Appeals (hereinafter the ZBA) pursuant to CPLR article 78 to review so much of a determination of the ZBA as granted the petitioners’ application for an area variance for their real property only to a certain extent. Specifically, the petitioners sought an area variance of 15 feet from the side setback requirement of 30 feet in order to replace an existing garage with a larger guest house, an accessory building with sleeping quarters. After a public hearing, in a determination dated January 25, 2022, the ZBA granted the application to the extent of granting a variance of 9.8 feet. In a judgment dated October 16, 2023, the Supreme Court denied the petition and dismissed the proceeding. The petitioners appeal.

As an initial matter, the Town and the Building Department are not proper parties to this CPLR article 78 proceeding, since they did not render the determination (*see Matter of Town of Mount Pleasant v Loomis*, 218 AD3d 779 [2023]; *Matter of Mangels v Zucker*, 168 AD3d 1060, 1061 [2019]). Therefore, the Supreme Court properly denied the petition and dismissed the proceeding insofar as asserted against them.

Contrary to the petitioners' contention, the Supreme Court also properly denied the petition and dismissed the proceeding insofar as asserted against the ZBA. "Local zoning boards have broad discretion in considering applications for variances, and judicial review is limited to determining whether the action taken by the board was illegal, arbitrary, or an abuse of discretion" (*Matter of Seaview Assn. of Fire Is., N.Y., Inc. v Town of Brookhaven Bd. of Zoning Appeals*, 228 AD3d 944, 945 [2024] [internal quotation marks omitted]; *see* CPLR 7803 [3]). "Where, as here, a zoning board's determination is made after a public hearing, its determination should be upheld if it has a rational basis and is supported by evidence in the record" (*Matter of Rausman v Zoning Bd. of Appeals of the Town of Ramapo*, 225 AD3d 705, 706 [2024] [internal quotation marks omitted]).

"In determining whether to grant an application for an area variance, a zoning board must engage in a balancing test weighing the benefit to the applicant if the variance is granted . . . against the detriment to the health, safety and welfare of the neighborhood or community by such grant" (*Matter of Seaview Assn. of Fire Is., N.Y., Inc. v Town of Brookhaven Bd. of Zoning Appeals*, 228 AD3d at 945-946 [internal quotation marks omitted]; *see* Town Law § 267-b [3] [b]). In making such a determination, the zoning board shall also consider: "(1) whether an undesirable change will be produced in the character of the neighborhood or a detriment to nearby properties will be created by the granting of the area variance; (2) whether the benefit sought by the applicant can be achieved by some method, feasible for the applicant to pursue, other than an area variance; (3) whether the requested area variance is substantial; (4) whether the proposed variance will have an adverse effect or impact on the physical or environmental conditions in the neighborhood or district; and (5) whether the alleged difficulty was self-created, which consideration shall be relevant to the decision of the board of appeals, but shall not necessarily preclude the granting of the area variance" (Town Law § 267-b [3] [b]; *see Matter of Seaview Assn. of Fire Is., N.Y., Inc. v Town of Brookhaven Bd. of Zoning Appeals*, 228 AD3d at 946).

Here, the record demonstrates that the ZBA engaged in the required balancing test and considered the relevant statutory factors (see *Matter of Seaview Assn. of Fire Is., N.Y., Inc. v Town of Brookhaven Bd. of Zoning Appeals*, 228 AD3d at 946; *Matter of Kami Holding Corp. v Zoning Bd. of Appeals of the Vil. of Westbury*, 223 AD3d 811, 813 [2024]).

Moreover, the ZBA properly considered the requirement set forth in Town Law § 267-b (3) (c) that the ZBA “grant the minimum variance it shall deem necessary and adequate and at the same time preserve and protect the character of the neighborhood and the health, safety, and welfare of the community.” The alternative area variance granted by the ZBA in the determination had a rational basis and was not arbitrary and capricious (see *Matter of Seaview Assn. of Fire Is., N.Y., Inc. v Town of Brookhaven Bd. of Zoning Appeals*, 228 AD3d at 946).

Accordingly, the Supreme Court properly denied the petition and dismissed the proceeding. Duffy, J.P., Ford, Golia and Quirk, JJ., concur.

28 In the Matter of Donika Berani, Appellant, v Alban Berani, Respondent. [— NYS3d —]

Judgments—Res Judicata—Same Claim in Previous Proceeding

In a proceeding pursuant to Family Court Act article 4, the mother appeals from an order of the Family Court, Westchester County (Michelle I. Schauer, J.), dated January 9, 2025. The order denied the mother’s objections to an order of the same court (Rosa Cabanillas-Thompson, S.M.) dated October 1, 2024, which, after a hearing, dismissed the mother’s petition alleging, in effect, that the father willfully violated the child support provisions of the parties’ judgment of divorce and an order of child support.

Ordered that the order dated January 9, 2025, is affirmed, with costs.

In 2017, the parties, who have one child together, were divorced by a judgment of divorce which incorporated but did not merge a stipulation of settlement. The judgment of divorce directed, among other things, that the father would be responsible for 100% of the child’s unreimbursed medical expenses. In orders dated September 16, 2022, and September 15, 2023, the Family Court, inter alia, modified the father’s child support obligations.

The mother filed a petition alleging that the father violated the terms of the judgment of divorce and subsequent child sup-

port orders by failing to pay 100% of the child's health insurance premiums. In an order dated April 17, 2024, the Support Magistrate granted the petition to the extent of awarding the mother arrears for, among other things, the father's share of payments for health insurance premiums made between January 1, 2023, and April 17, 2024, and denied so much of the petition as sought arrears for health insurance premiums prior to January 1, 2023.

In September 2024, the mother filed another petition, alleging, in effect, that the father violated the judgment of divorce and the child support order dated September 16, 2022, by failing to pay 100% of the child's health insurance premiums from 2017 through 2022. In an order dated October 1, 2024, the Support Magistrate dismissed the petition on the ground of res judicata. The mother filed objections to that order. In an order dated January 9, 2025, the Family Court denied the mother's objections. The mother appeals.

Under the doctrine of res judicata, a disposition on the merits bars litigation between the same parties, or those in privity with them, of a cause of action arising out of the same transaction or series of transactions as a cause of action that either was raised or could have been raised in the prior proceeding (see *Matter of Solomon v Solomon*, 231 AD3d 733, 734 [2024]; *Matter of Singer v Windfield*, 125 AD3d 666, 667 [2015]). Here, the Family Court properly determined that the mother was precluded from relitigating the issue of arrears for the child's health insurance premiums from 2017 through 2022 allegedly owed by the father, as the mother sought and failed to prove her entitlement to such relief in the prior proceeding (see *Matter of Solomon v Solomon*, 231 AD3d at 734).

Accordingly, the Family Court properly denied the mother's objections to the order dated October 1, 2024. Connolly, J.P., Christopher, Wan and Quirk, JJ., concur.

29 In the Matter of Yashua Ank Bey El, Petitioner, v Anne Swern, Respondent. [252 NYS3d 302]—

Proceeding against Body or Officer—Mandamus

Proceeding pursuant to CPLR article 78 in the nature of mandamus, inter alia, to compel the respondent, Anne Swern, a Justice of the Supreme Court, Kings County, to sign a proposed order to show cause in an action entitled *Citimortgage, Inc. v Bey El*, pending in that court under index No. 506724/25.

Adjudged that the petition is denied and the proceeding is dismissed on the merits, without costs or disbursements.

The extraordinary remedy of mandamus will lie only to

compel the performance of a ministerial act, and only where there exists a clear legal right to the relief sought (*see Matter of Legal Aid Socy. of Sullivan County v Scheinman*, 53 NY2d 12, 16 [1981]). The petitioner has failed to demonstrate a clear legal right to the relief sought.

The petitioner's remaining contentions are without merit. Dillon, J.P., Ford, Voutsinas and McCormack, JJ., concur.

30 In the Matter of Tiwan Burrus, Respondent, v Aliya Vargas, Appellant. (Proceeding No. 1.) In the Matter of Aliya Vargas, Appellant, v Tiwan Burrus, Respondent. (Proceeding No. 2.) [— NYS3d —]

Parent, Child and Family—Custody—Best Interests of Child—Need for Stability

In related proceedings pursuant to Family Court Act article 6, the mother appeals from an order of the Family Court, Kings County (Jamila Cha-Jua-Lee, Ct. Atty. Ref.), dated January 25, 2024. The order, after a hearing, in effect, granted the father's petition for joint custody of the parties' child to the extent of awarding the parties joint legal custody of the child, with final decision-making authority to the father, and awarding the father residential custody of the child, with parental access to the mother and, in effect, denied the mother's petition for sole custody of the child.

Ordered that the order is affirmed, without costs or disbursements.

The mother and the father, who were never married to each other, are the parents of one child. In 2019, the father filed a petition for joint custody of the child, and in 2022, the mother filed a petition for sole custody of the child. After a hearing, the Family Court, in effect, granted the father's petition to the extent of awarding the parties joint legal custody of the child, with final decision-making authority to the father, and awarding the father residential custody of the child, with parental access to the mother and, in effect, denied the mother's petition. The mother appeals.

"The paramount concern in matters of custody and parental access is the best interests of the child under the totality of the circumstances" (*Matter of Abraham v Banaszek*, 242 AD3d 878, 879 [2025] [internal quotation marks omitted]; *see Eschbach v Eschbach*, 56 NY2d 167, 171 [1982]). "In making an initial child custody determination, the court should consider several factors, including, but not limited to, the quality of the home environment and the parental guidance the custodial parent provides for the child, the ability of each parent to provide for

the child's emotional and intellectual development, the financial status and ability of each parent to provide for the child, the relative fitness of the respective parents, and the effect an award of custody to one parent might have on the child's relationship with the other parent" (*Matter of Grajales v Trotman*, 246 AD3d 915, 916 [2026]; see *Matter of Brathwaite v Lightsey*, 242 AD3d 883,884 [2025]). "Insofar as custody determinations largely turn on assessments of the credibility, character, temperament, and sincerity of the parties, the hearing court's determination should not be disturbed unless it lacks a sound and substantial basis in the record" (*Matter of Bell v Pierre*, 239 AD3d 973, 975 [2025] [internal quotation marks omitted]; see *Matter of Duran v Contreras*, 227 AD3d 1068, 1069-1070 [2024]).

Here, the Family Court's determination that the best interests of the child would be served by awarding the father residential custody and final decision-making authority has a sound and substantial basis in the record and should not be disturbed (see *Matter of Taveras v Aguirre*, 238 AD3d 774, 775 [2025]; *Matter of Scott v Hendy*, 216 AD3d 1099, 1100 [2023]). In reaching its determination, the court credited the testimony of the father and found that although both parents love the child, the mother was not credible with respect to some of the issues pertaining to the best interests of the child (see *Matter of Grajales v Trotman*, 246 AD3d at 916-917, citing *Matter of Vidal v Taneja*, 218 AD3d 594, 595 [2023]).

Moreover, the evidence adduced at the hearing demonstrated, among other things, that the father is better suited to promote stability in the child's life and more likely to foster the mother's relationship with the child (see *Matter of Brathwaite v Lightsey*, 242 AD3d at 885, citing *Matter of Acevedo v Cassidy*, 236 AD3d 645, 647 [2025]). Although a court should be reluctant to separate a child from his or her siblings, here, the child's need for stability outweighs the preference for her to remain with her half-brother (see *id.*, citing *Matter of Clarke v Clarke*, 222 AD3d 751, 753 [2023]).

The remaining contentions either are unpreserved for appellate review or need not be addressed in light of our determination. Dillon, J.P., Ford, Voutsinas and McCormack, JJ., concur.

31 In the Matter of Lillian Gennarelli, Deceased. Mary W. Giaquinto et al., Respondents; Frances Wakefield et al., Appellants. [— NYS3d —]

In a contested probate proceeding, the objectants appeal from a decree of the Surrogate's Court, Kings County (Margarita López Torres, S.), dated September 16, 2020. The decree, upon an order of the same court dated May 7, 2020, inter alia, granting those branches of the petitioners' motion which were for summary judgment dismissing the objections to probate of the decedent's last will and testament based on lack of testamentary capacity and undue influence on the part of the petitioner Joan Theodos, admitted the will to probate.

Ordered that the decree is reversed, on the law, with costs payable by the petitioners personally, that branch of the petitioners' motion which was for summary judgment dismissing the objection to probate of the decedent's last will and testament based on undue influence on the part of the petitioner Joan Theodos is denied, and the order dated May 7, 2020, is modified accordingly.

The petitioners are the proponents of a last will and testament executed by Lillian Gennarelli (hereinafter the decedent). Two of the children of the decedent's brother filed objections to probate of the will, alleging, inter alia, that the decedent lacked testamentary capacity and that the will had been procured by undue influence on the part of the petitioner Joan Theodos. The petitioners moved, among other things, for summary judgment dismissing the objections based on lack of testamentary capacity and undue influence on the part of Theodos. In an order dated May 7, 2020, the Surrogate's Court, inter alia, granted those branches of the petitioners' motion. In a decree dated September 16, 2020, the court admitted the will to probate. The objectants appeal.

"The granting of summary judgment in a contested probate proceeding is rare" (*Matter of Christie*, 170 AD3d 718, 719 [2019]). "While summary judgment may be available in probate proceedings, that remedy is inappropriate in any case where there are material issues of fact" (*Matter of Gobes*, 189 AD3d 1402, 1403 [2020], quoting *Matter of Pollock*, 64 NY2d 1156, 1158 [1985]).

The Surrogate's Court correctly granted that branch of the petitioners' motion which was for summary judgment dismissing the objection based on lack of testamentary capacity. "The proponent of a will has the burden of proving that the testator possessed testamentary capacity and the court must look to the following factors: (1) whether [the testator] understood the nature and consequences of executing a will; (2) whether [the testator] knew the nature and extent of the property she [or he] was disposing of; and (3) whether [the testator] knew those

who would be considered the natural objects of her [or his] bounty and her [or his] relations with them'” (*Matter of Baldino*, 230 AD3d 681, 682 [2024], quoting *Matter of Robbins*, 206 AD3d 739, 740 [2022]). “Testamentary capacity need only be shown at the time the will was executed and physical weakness or senile dementia is not necessarily inconsistent with testamentary capacity” (*id.*; see *Matter of Robbins*, 206 AD3d at 740).

Here, the petitioners established their prima facie entitlement to judgment as a matter of law on the issue of testamentary capacity by submitting, among other things, the deposition testimony of the attorney who prepared the will, who testified that on the day of the execution of the will, he “saw no indication that illness or anything else was in the way” and that he “did not see” any apparent mental infirmities. The attorney also testified that the decedent was “[n]ot weakened mentally” at the time (see *Matter of Armato*, 199 AD3d 999, 1000 [2021]). The petitioners also submitted an affidavit of two witnesses to the signing of the will, who stated that the decedent was “of sound mind, memory and understanding and not under any restraint or in any respect incompetent to make a will” and “was not suffering from any defect of sight, hearing or speech, or from any other physical or mental impairment, which would affect her capacity to make a valid will.” In opposition, the objectants failed to raise a triable issue of fact. Although they submitted an affirmation of a physician who stated that the decedent was diagnosed with conditions that were causing her to experience dementia and confusion, the affirmation presented a speculative opinion as to the decedent’s condition at the time of the signing of the will and did not negate the petitioners’ prima facie showing (see *Matter of Robbins*, 206 AD3d at 740; *Matter of Romano*, 137 AD3d 922, 923 [2016]).

However, the Surrogate’s Court should not have granted that branch of the petitioners’ motion which was for summary judgment dismissing the objection based on undue influence on the part of Theodos. “To invalidate an instrument on the ground of undue influence, there must be evidence that the influence exerted amounted to a moral coercion that restrained independent action and destroyed free agency or that, by importunity that could not be resisted, constrained a person to do that which was against his or her free will and desire, but which he or she was unable to refuse or too weak to resist” (*Crawford v Smith*, 219 AD3d 691, 693 [2023]; see *Matter of Nurse*, 160 AD3d 745, 748 [2018]). “In general, the burden of proving undue influence rests with the party asserting its exis-

tence” (*Crawford v Smith*, 219 AD3d at 693; see *Matter of Nurse*, 160 AD3d at 748). “An inference of undue influence, requiring the beneficiary to explain the circumstances of the bequest, arises when a beneficiary under a will was in a confidential or fiduciary relationship with the testator and was involved in the drafting of the will” (*Matter of Neenan*, 35 AD3d 475, 476 [2006]; see *Matter of Rozof*, 219 AD3d 1428, 1429 [2023]). “The adequacy of the explanation presents a question of fact for the jury” (*Matter of Neenan*, 35 AD3d at 476). The existence of a confidential relationship is also “ordinarily . . . a question of fact” (*Matter of Rozof*, 219 AD3d at 1430).

Here, the record reflects that Theodos was assisting in the management of the decedent’s finances in the years leading up to the execution of the will and that certain provisions of the will were communicated to the decedent’s attorney through Theodos. In addition, Theodos was named as one of the executors of the will and was also named as a beneficiary, receiving a bequest of \$20,000. As such, an inference of undue influence arises (see *id.*; *Matter of Gobes*, 189 AD3d at 1405), and there remain triable issues of fact in that regard (see *Matter of Neenan*, 35 AD3d at 475). Accordingly, the Surrogate’s Court should have denied that branch of the petitioners’ motion which was for summary judgment dismissing the objection based on undue influence on the part of Theodos.

The objectants’ remaining contention need not be considered. Connolly, J.P., Wooten, Taylor and Landicino, JJ., concur.

32 In the *Matter of Itria Ventures, LLC*, Appellant, v *Champion Painting Specialty Services Corp.*, Respondent. [— NYS3d —]—

Creditors’ Suits—Turnover Order—Established as Debtor

In a proceeding pursuant to CPLR article 52 to compel the turnover of property, the petitioner appeals from an order of the Supreme Court, Suffolk County (Joseph Farneti, J.), dated April 3, 2024. The order, insofar as appealed from, denied the petition.

Ordered that the order is reversed insofar as appealed from, on the law, with costs, and the petition is granted.

In July 2022, the petitioner, Itria Ventures, LLC (hereinafter Itria), commenced this turnover proceeding against the respondent, Champion Painting Specialty Services Corp. (hereinafter Champion), pursuant to CPLR 5225 (b), among other things, to direct Champion to turnover to Itria a certain receivable that Champion owed to nonparty SRI Construction, LLC (hereinafter SRI), a judgment debtor of Itria. Itria alleged, inter alia,

that it had obtained a judgment against SRI and that Champion owed SRI a certain sum in the form of an account receivable. In an order dated April 3, 2024, the Supreme Court, among other things, denied the petition. Itria appeals.

“A special proceeding for turnover is the procedural device provided by article 52 for enforcement of a judgment against an asset of the judgment debtor in the possession or custody of a third person; such a third person is known as a garnishee” (*JPMorgan Chase Bank, N.A. v Motorola, Inc.*, 47 AD3d 293, 301 [2007]; see *Taunton Metals of Fla., Inc. v Solutions in Stainless, Inc.*, 234 AD3d 726, 728 [2025]). Where, as here, the asset held by the garnishee is a “debt” owed to the judgment debtor, a proceeding pursuant to CPLR 5227 is the proper procedural device to enforce the underlying judgment (see *id.*; *Vanderbilt Credit Corp. v Chase Manhattan Bank*, 100 AD2d 544, 545 [1984]).

To maintain a proceeding pursuant to CPLR 5227, the judgment creditor must demonstrate that the garnishee “is or will become indebted to the judgment debtor” (*id.*). Upon making such a showing, the court “may require such person to pay to the judgment creditor the debt upon maturity . . . or it may direct that a judgment be entered against such person in favor of the judgment creditor” (*id.*).

Although Itria should have commenced this proceeding pursuant to CPLR 5227 rather than CPLR 5525 since it seeks the turnover of a debt owed by Champion to SRI, the error is not fatal (see *id.* § 103 [c]; *JPMorgan Chase Bank, N.A. v Motorola, Inc.*, 47 AD3d at 303).

Indeed, the Supreme Court should have granted the petition (see *Matter of Terio v Title Ins. Co. of Minn.*, 234 AD2d 305 [1996]; *Allied Plywood Corp. v G.S.W. Mfg.*, 157 AD2d 637 [1990]). Itria submitted evidence which established that SRI was a judgment debtor of Itria, as well as an affidavit of the president of Champion acknowledging that Champion owed a debt to SRI (see CPLR 5227; see e.g. *Gesualdo v Rosales Oil Co., Inc.*, 233 AD3d 755, 757 [2024]). Contrary to the determination of the court, the opposition submitted by nonparty Timothy Coffee, who purported to be a judgment creditor of SRI, failed to raise a triable issue of fact in opposition to Itria’s showing (see CPLR 409 [b]; *Matter of Friends World Coll. v Nicklin*, 249 AD2d 393, 394 [1998]).

Since Itria’s submissions were sufficient to establish that SRI was its judgment debtor and that Champion owed a debt to SRI, the Supreme Court should have granted the petition pursuant to CPLR 5227.

Itria's remaining contentions either are without merit or need not be addressed in light of our determination. Duffy, J.P., Brathwaite Nelson, Warhit and Taylor, JJ., concur.

33 In the Matter of Robert J. Lengyel, Appellant, v Susan A. Lengyel, Respondent. [— NYS3d —]—

Contempt—Civil Contempt—Separation Agreement—Conduct Subsequent to Issuance of Order

In a proceeding pursuant to Family Court Act article 6, the father appeals from an order of the Family Court, Dutchess County (Tracy C. MacKenzie, J.), dated September 19, 2024. The order, without a hearing, dismissed the father's petition to enforce the parental access provisions of an order of the same court dated November 15, 2023, and the parties' separation agreement dated February 24, 2017, and to hold the mother in contempt for failure to comply with certain provisions of the order dated November 15, 2023, and the separation agreement.

Ordered that the order dated September 19, 2024, is affirmed, without costs or disbursements.

The parties are divorced and have one child together, born in 2011. In a separation agreement dated February 24, 2017, which was incorporated but not merged into a judgment of divorce entered November 29, 2017, the parties agreed to share joint legal custody of the child and that the mother would have primary residential custody of the child, with certain parental access to the father. In an order dated November 15, 2023 (hereinafter the November 2023 order), entered on consent of the parties, the Family Court, *inter alia*, modified the judgment of divorce to the extent that it directed parental access between the father and the child "as agreed to by the parties," ordered that the "father shall provide the child with a cell phone . . . so that the . . . father can communicate with the child directly," and that the "father shall be able to speak with the child on Tuesdays, Thursdays and Saturdays, beginning between 6:00 and 6:30 p.m."

Thereafter, in September 2024, the father filed a petition to enforce the parental access provisions of the November 2023 order and the separation agreement, and to hold the mother in contempt for failure to comply with certain provisions of the November 2023 order and the separation agreement. In an order dated September 19, 2024, the Family Court, without a hearing, dismissed the father's petition. The father appeals.

The Family Court, without a hearing, did not err in dismissing that branch of the petition which was to hold the mother in contempt for violating certain provisions of the November 2023

order and the separation agreement. In order to punish a party for civil contempt, “[t]he burden is on the moving party to demonstrate, by clear and convincing evidence, that the accused party violated a clear and unequivocal court order which the accused party knew was in effect, thereby prejudicing a right of another party to the litigation” (*Matter of Jean v Washington*, 71 AD3d 1145, 1146 [2010] [internal quotation marks omitted]; see *Matter of Koska v Koska*, 226 AD3d 780, 781 [2024]). “If the petitioner makes the required showing, the burden shifts to the [respondent] to refute that showing, or to offer evidence of a defense such as an inability to comply with the order” (*Matter of Koska v Koska*, 226 AD3d at 781 [internal quotation marks omitted]). “Further, a hearing is not mandated in every instance where contempt is sought; it need only be conducted if a factual dispute exists which cannot be resolved on the papers alone” (*Matter of Jean v Washington*, 71 AD3d at 1146 [alteration and internal quotation marks omitted]).

Here, the father’s allegations, even if established at an evidentiary hearing, could not afford a basis for finding that the mother violated the November 2023 order, because the father failed to allege any facts or circumstances of the mother’s conduct subsequent to the issuance of that order (see *Matter of Unger v Koren Ha*, 234 AD3d 783, 785 [2025]; *Matter of Chichra v Chichra*, 148 AD3d 883, 885 [2017]). Even assuming that the father adequately alleged a violation of the November 2023 order or the separation agreement, he failed to set forth facts that, if proven, would “rise to the level of deliberate frustration or active interference with the noncustodial parent’s visitation rights” (*Matter of Mazzola v Lee*, 76 AD3d 531, 532 [2010] [internal quotation marks omitted]; see *Matter of Lew v Lew*, 214 AD3d 732, 734 [2023]).

For the same reasons, the Family Court, without a hearing, properly dismissed that branch of the father’s petition which was to enforce the parental access provisions of the November 2023 order and the separation agreement.

The father’s remaining contention is without merit.

Accordingly, the Family Court, without a hearing, properly dismissed the father’s petition to enforce the parental access provisions of the November 2023 order and the separation agreement, and to hold the mother in contempt for failure to comply with certain provisions of the November 2023 order and the separation agreement. Chambers, J.P., Wooten, Wan and Hom, JJ., concur.

34 In the *Matter of Giuseppe Lubrano, Petitioner, v Sharon Bourne-Clarke*. [251 NYS3d 792]—

Proceeding against Body or Officer—Mandamus

Proceeding pursuant to CPLR article 78, inter alia, in effect, in the nature of mandamus to compel the respondent Sharon Bourne-Clarke, a Justice of the Supreme Court, Kings County, to set aside the sale of certain real property, to conduct a hearing pursuant to CPLR 5015, and to appoint a referee pursuant to CPLR 4312, in an underlying civil action entitled *Lubrano v Lubrano*, pending in that court under index No. 550642/20, and application by the petitioner for a waiver of costs, fees, and expenses.

Ordered that the application for a waiver of costs, fees, and expenses is granted to the extent that the filing fee imposed by CPLR 8022 (b) is waived, and the application is otherwise denied as academic; and it is further,

Adjudged that the petition is denied and the proceeding is dismissed on the merits, without costs or disbursements.

The extraordinary remedy of mandamus will lie only to compel the performance of a ministerial act, and only where there exists a clear legal right to the relief sought (*see Matter of Legal Aid Socy. of Sullivan County v Scheinman*, 53 NY2d 12, 16 [1981]).

The petitioner has failed to demonstrate a clear legal right to the relief sought. Genovesi, J.P., Ford, Voutsinas and Golia, JJ., concur.

35 In the Matter of Maria Lynn Manno, Appellant, v Steven Eric Werley, Respondent. [— NYS3d —]

Parent, Child and Family—Custody—New Developments Since Issuance of Order—Best Interests of Child

In related proceedings pursuant to Family Court Act article 6, the mother appeals from an order of the Family Court, Suffolk County (Heather P.S. James, Ct. Atty. Ref.), dated April 25, 2022, as amended April 5, 2024. The order, after a hearing, denied the mother's petition to modify a prior order of the City of Danville Juvenile and Domestic Relations District Court, Commonwealth of Virginia, dated March 8, 2018, so as to award the father certain parental access with the parties' child, and granted the father's petition to modify the order dated March 8, 2018, so as to award him sole legal and physical custody of the child, subject to the mother's parental access.

Ordered that the order dated April 25, 2022, as amended April 5, 2024, is reversed, on the facts and in the exercise of discretion, without costs or disbursements, and the matter is remitted to the Family Court, Kings County, for an expedited

hearing and a new determination of the mother's petition and the father's petition thereafter; and it is further,

Ordered that pending determination of the parties' petitions, or further order of the Family Court, Kings County, the parties shall continue to comply with the terms of the order dated April 25, 2022, as amended April 5, 2024.

New developments since the issuance of the order dated April 25, 2022, as amended April 5, 2024, have been brought to this Court's attention that render the record on appeal insufficient to review whether the Family Court's determination is still in the best interests of the parties' child (*see Matter of Michael B.*, 80 NY2d 299, 318 [1992]; *Haddad v Sassoon*, 237 AD3d 673 [2025]; *Matter of Martynchuk v Vasylkovska*, 223 AD3d 819, 820 [2024]; *Matter of Magana v Delph*, 195 AD3d 720, 721-722 [2021]). Accordingly, we reverse the order dated April 25, 2022, as amended April 5, 2024, and remit the matter to the Family Court, Kings County, for an expedited hearing and a new determination of the petitions that are the subject of this appeal thereafter. Pending determination of the parties' petitions, or further order of the Family Court, the parties shall continue to comply with the terms of the order dated April 25, 2022, as amended April 5, 2024. We express no opinion as to the appropriate determination (*see Matter of Baker v James*, 210 AD3d 676, 678 [2022]; *Matter of Baptiste v Gregoire*, 140 AD3d 746, 748 [2016]). Iannacci, J.P., Dowling, Landicino and Love, JJ., concur.

36 In the Matter of Tavia McKoy, Appellant, v George McKoy, Respondent. [251 NYS3d 786]—

Parent, Child and Family—Family Offense Proceeding—Fair Preponderance of Evidence

In a proceeding pursuant to Family Court Act article 8, the petitioner appeals from an order of the Family Court, Suffolk County (Darlene Jorif-Mangane, Ct. Atty. Ref.), dated December 27, 2024. The order, after hearing, denied the petition, vacated a temporary order of protection, and dismissed the proceeding.

Ordered that the order is affirmed, without costs or disbursements.

In October 2024, the petitioner commenced this family offense proceeding pursuant to Family Court Act article 8 against the respondent, who is the petitioner's uncle, alleging that the respondent had committed, inter alia, the family offenses of harassment in the first degree or second degree, stalking, and disorderly conduct. After a hearing, the Family Court denied the petition, vacated a temporary order of protection, and dismissed the proceeding. The petitioner appeals.

“ ‘In a family offense proceeding, the petitioner has the burden of establishing the offense by a fair preponderance of the evidence’ ” (*Matter of Martinez v Toole*, 239 AD3d 855, 857 [2025], quoting *Matter of Davis v Wright*, 140 AD3d 753, 754 [2016]; see Family Ct Act § 832). “The determination of whether a family offense was committed is a factual issue to be resolved by the Family Court, and its determinations regarding the credibility of witnesses are entitled to great weight on appeal, such that they will not be disturbed unless clearly unsupported by the record” (*Matter of Warren v Brandofino*, 236 AD3d 917, 918 [2025] [internal quotation marks omitted]; see *Matter of Mitchell-George v George*, 234 AD3d 969, 969 [2025]). “Where, as here, ‘the court was presented with sharply conflicting accounts by the parties regarding the subject events, and chose to credit the testimony of one party over that of the other, its determination will not be disturbed unless clearly unsupported by the record’ ” (*Matter of Nunez v Spellin*, 235 AD3d 874, 875-876 [2025] [internal quotation marks omitted], quoting *Matter of Mattis v Walcott-Graham*, 231 AD3d 1156, 1156 [2024]).

Here, the Family Court properly determined that the petitioner failed to establish, by a fair preponderance of the evidence, that the respondent committed any of the alleged family offenses (see *Matter of Warren v Brandofino*, 236 AD3d at 918; *Matter of Mattis v Walcott-Graham*, 231 AD3d at 1156-1157).

Accordingly, the Family Court properly denied the petition, vacated the temporary order of protection, and dismissed the proceeding. Genovesi, J.P., Warhit, Golia and Hom, JJ., concur.

37 In the Matter of Milton P., Respondent, v Lynita G., Appellant. [— NYS3d —]—

Parent, Child and Family—Custody—Modification of Arrangement—Change in Circumstances

In a proceeding pursuant to Family Court Act article 6, the mother appeals from an order of the Family Court, Suffolk County (Victoria Gumbs-Moore, J.), dated August 19, 2024. The order, insofar as appealed from, after a hearing, granted the father’s petition to modify an order of the same court (Heather P.S. James, Ct. Atty. Ref.) dated February 7, 2020, entered upon the parties’ consent, so as to award him sole legal and residential custody of the parties’ two children, with parental access to the mother.

Ordered that the order dated August 19, 2024, is affirmed insofar as appealed from, without costs or disbursements.

The parties, who were never married to each other, are the

parents of two children. While the parties were briefly separated, in an order dated February 7, 2020, the Family Court, upon the parties' consent, awarded "joint custody" of the children to the parties, "with liberal parenting time to each as the parties mutually arrange." Shortly thereafter, the parties reconciled and began residing together again. On June 6, 2021, a physical altercation between the parties occurred in the presence of the children. Child protective proceedings pursuant to Family Court Act article 10 were commenced against both parties, alleging that they engaged in acts of domestic violence, which impaired their ability to properly care for the children. Both parties admitted the allegations of neglect in the child protective petitions. The family offense proceedings, which had been commenced by the father, were resolved with the issuance of mutual orders of protection to each party. In June 2021, the father filed a petition to modify the order dated February 7, 2020, so as to award him sole legal and residential custody of the children, with parental access to the mother. Following a hearing, in an order dated August 19, 2024, the Family Court, among other things, granted the father's petition and awarded him sole legal and residential custody of the parties' two children, with parental access to the mother. The mother appeals.

"In order to modify an existing custody arrangement, there must be a showing of a subsequent change in circumstances such that modification is required to protect the best interests of the child" (*Matter of Watling v Watling*, 236 AD3d 1047, 1047 [2025] [internal quotation marks omitted]; see *Matter of Jones v Jones*, 231 AD3d 829 [2024]). "The required change in circumstances may be found to exist, among other circumstances, where the parties' relationship has deteriorated to a point where there is no meaningful communication or cooperation for the sake of the child[]" (*Matter of Narine v Singh*, 229 AD3d 700, 701 [2024] [internal quotation marks omitted]). "The paramount concern when making such a determination is the best interests of the child under the totality of the circumstances" (*Matter of Pierce v Caputo*, 214 AD3d 877, 878 [2023] [internal quotation marks omitted]; see *Matter of Graffagnino v Esposito*, 223 AD3d 805, 807 [2024]).

"When deciding whether a modification is in a child's best interests, factors to be considered include the quality of the home environment and the parental guidance the custodial parent provides for the child, the ability of each parent to provide for the child's emotional and intellectual development, the financial status and ability of each parent to provide for the child, the relative fitness of the respective parents, and the

effect an award of custody to one parent might have on the child's relationship with the other parent" (*Matter of Smisek v DeSantis*, 239 AD3d 867, 868 [2025] [internal quotation marks omitted]; see *Matter of Martinez v Gaddy*, 223 AD3d 816, 817 [2024]). "Stability and continuity in a child's life are [also] important factors" (*Matter of Olivieri v Olivieri*, 170 AD3d 849, 850 [2019]; see *Matter of Brathwaite v Lightsey*, 242 AD3d 883, 884 [2025]). "In addition, the disruption of relationships between siblings should be avoided in the absence of an overwhelming need to do so" (*Matter of Narine v Singh*, 229 AD3d at 701 [internal quotation marks omitted]). "Moreover, if domestic violence is proved, the court must consider its effects on the child" (*Matter of Acevedo v Cassidy*, 236 AD3d 645, 647 [2025] [internal quotation marks omitted]; see Domestic Relations Law § 240 [1]). "Inasmuch as a court's custody determination is dependent in large part upon its assessment of the witnesses' credibility and upon the character, temperament, and sincerity of the parents, the court's custody determination will not be disturbed if supported by a sound and substantial basis in the record" (*Matter of Turcios v Cordero*, 173 AD3d 1048, 1049 [2019]; see *Matter of Brown v Brown*, 97 AD3d 568, 570 [2012]).

Here, considering, inter alia, the deterioration of the parties' relationship, the Family Court properly determined that a change in circumstances existed to warrant modification of the custody arrangement to protect the best interests of the children (see *Matter of Smisek v DeSantis*, 239 AD3d at 869; *Matter of Llanos v Barrezueta*, 232 AD3d 606, 608-609 [2024]). Moreover, there is a sound and substantial basis in the record for the court's determination to award sole legal and residential custody of the children to the father. Accepting the court's credibility determinations, the evidence adduced at the hearing demonstrated, among other things, that the father is better suited to promote stability in the children's lives, better able to provide for the children's emotional needs, and more likely to foster the other parent's relationship with the children.

The mother's remaining contentions are either unpreserved for appellate review or without merit. Chambers, J.P., Dowling, Wan and McCormack, JJ., concur.

38 In the Matter of Adalila M.R. George L.R., Appellant; Leslie H. et al., Respondents. (Proceeding No. 1.) In the Matter of George W.R. George L.R., Appellant; Leslie H. et al., Respondents. (Proceeding No. 2.) [— NYS3d —]

Agreements

In related proceedings pursuant to Domestic Relations Law § 112-b to enforce the post-adoption contact provisions of judicial surrenders of the subject children, the biological father appeals from an order of the Family Court, Nassau County (Robin M. Kent, J.), dated November 13, 2023. The order, without a hearing, dismissed the biological father's petitions without prejudice for failure to state a cause of action.

Ordered that so much of the appeal as relates to the child Adalila M.R. is dismissed as academic, without costs or disbursements; and it is further,

Ordered that the order is affirmed insofar as reviewed, without costs or disbursements.

In October 2020, the biological father executed separate judicial surrenders for the subject children, Adalila M.R. and George W.R., with post-surrender/post-adoption contact agreements which contained certain conditions. In October 2023, the biological father commenced these related proceedings to enforce the post-adoption contact agreements, alleging that the adoptive parent failed to comply with the agreements. The Family Court, without a hearing, dismissed the biological father's petitions without prejudice for failure to state a cause of action. The biological father appeals.

Initially, issues concerning the child Adalila M.R. are academic, as she is now 18 years old (*see Matter of Yasmine T. [Aeisha G.—Keisha G.]*, 161 AD3d 1179, 1180 [2018]; *Matter of Heidi E. [Tresea F.—Phyllis G.]*, 68 AD3d 1174, 1174 [2009]).

Regarding the child George W.R., the Family Court properly, without a hearing, dismissed the petition without prejudice for failure to state a cause of action. In determining whether to dismiss a petition for failure to state a cause of action, the court must liberally construe the petition, the facts must be accepted as true, and the petitioner should be given the benefit of every favorable inference (*see Matter of Latiff v Latiff*, 236 AD3d 1031, 1031 [2025]; *Matter of Arnold v Arnold*, 119 AD3d 938, 939 [2014]). However, "conclusory allegations—claims consisting of bare legal conclusions with no factual specificity—are insufficient to survive a motion to dismiss" (*Godfrey v Spano*, 13 NY3d 358, 373 [2009]). Here, the petition was conclusory and failed to set forth any factual allegations tending to support the biological father's contention that the adoptive parent violated the post-adoption agreements. Duffy, J.P., Wooten, Love and Quirk, JJ., concur.

39 In the Matter of Tristan S. Administration for Children's Services, Respondent; Stan S., Appellant. [— NYS3d —]

Parent, Child and Family—Abused or Neglected Child—Potential and Imminent Harm—Causal Connection

In a proceeding pursuant to Family Court Act article 10, the father appeals from an order of disposition of the Family Court, Queens County (Emily Ruben, J.), dated January 15, 2025. The order of disposition, insofar as appealed from, was entered upon an order of fact-finding of the same court dated October 15, 2024, made after a fact-finding hearing, finding that the father neglected the subject child.

Ordered that the order of disposition is affirmed insofar as appealed from, without costs or disbursements.

In August 2023, the Administration for Children’s Services (hereinafter ACS) commenced this neglect proceeding pursuant to Family Court Act article 10. ACS alleged that the father had neglected the subject child due to mental illness and was “currently exhibiting bizarre behavior which impair[ed] his ability to care for” the child. After a fact-finding hearing, the Family Court found that the father neglected the child as alleged in the petition.

“In a child neglect proceeding pursuant to Family Court Act article 10, the petitioner must establish by a preponderance of the evidence that the subject child is neglected” (*Matter of Moshae L. [Angela J.]*, 237 AD3d 821, 822-823 [2025] [internal quotation marks omitted]; see *Matter of Samynee L. [Tashae T.]*, 243 AD3d 569, 570 [2025]). “While parental neglect may be based on mental illness, proof of a parent’s mental illness alone will not support a finding of neglect” (*Matter of Nialani T. [Elizabeth B.]*, 164 AD3d 1245, 1246 [2018] [internal quotation marks omitted]; see *Matter of Bethany R. [Bethmarie R.]*, 202 AD3d 690, 692 [2022]). “[S]uch evidence may support a neglect determination ‘when the proof further demonstrates that the parent’s condition creates an imminent risk of physical, mental, or emotional harm to the child’ ” (*Matter of Henry B. [Cynthia M.]*, 180 AD3d 667, 669 [2020], quoting *Matter of Maurice M. [Suzanne H.]*, 158 AD3d 689, 690-691 [2018]; see *Matter of Joseph L. [Cyanne W.]*, 168 AD3d 1055, 1056 [2019]). “A finding [of neglect] may be entered even in the absence of actual harm when a preponderance of the evidence proves that the child’s ‘physical, mental or emotional condition . . . is in imminent danger of becoming impaired as a result of the failure of his [or her] parent . . . to exercise a minimum degree of care’ ” (*Matter of Kiemiya M. [Cassiah M.]*, 137 AD3d 1279, 1279-1280 [2016], quoting Family Ct Act § 1012 [f] [i]; see *Matter of Zaria P. [Sade G.]*, 240 AD3d 699, 701 [2025]; *Matter of Joseph Bruce I. [Joseph A.I.]*, 185 AD3d 930, 932 [2020]).

Here, contrary to the father's contention, the Family Court's finding of neglect was supported by a preponderance of the evidence. The evidence presented at the fact-finding hearing demonstrated a causal connection between the father's mental illness and the risk of potential and imminent harm to the child (see *Matter of Justin Noah O. [Ruth S.]*, 239 AD3d 983, 983-984 [2025]; *Matter of Wynter V. [Felitta V.]*, 230 AD3d 505, 506 [2024]; *Matter of Khaleef M.S.-P. [Khaleeda M.S.]*, 203 AD3d 1160, 1161 [2022]).

Accordingly, the Family Court properly found that the father neglected the child. Genovesi, J.P., Warhit, Golia and Hom, JJ., concur.

40 In the Matter of Malka Schmerler, Respondent, v Simon Schmerler, Appellant. [— NYS3d —]—

**Parent, Child and Family—Order of Protection—Extension—Notice
Judgments—Default Judgment—Vacatur—Reasonable Excuse**

In a proceeding pursuant to Family Court Act article 8, Simon Schmerler appeals from an order of the Family Court, Kings County (Lisa Aschkenasy, Ct. Atty. Ref.), dated January 2, 2024. The order denied Simon Schmerler's motion pursuant to CPLR 5015 (a) to vacate an order of the same court dated December 11, 2023, granting the petitioner's unopposed motion to extend an order of protection of the same court dated August 2, 2018, and directing Simon Schmerler, inter alia, to stay away from the petitioner and the parties' children until and including August 1, 2028.

Ordered that the order dated January 2, 2024, is affirmed, without costs or disbursements.

In 2018, the petitioner filed a family offense petition against Simon Schmerler (hereinafter the appellant). The parties stipulated to have a court attorney referee preside over the matter and to hear and determine "any future petitions and supplemental petitions," as well as any modifications of final orders of protection, that related to the instant matter. Following a hearing, the court attorney referee found that the appellant committed the family offenses of assault in the third degree, harassment in the second degree, and menacing, and issued a five-year order of protection in favor of the petitioner and the parties' children.

As the expiration date approached, the petitioner moved to extend the order of protection. The appellant failed to appear or oppose the motion. In an order dated December 11, 2023, the court attorney referee granted the petitioner's motion and determined that the petitioner had shown good cause to extend

the order of protection for five years. Subsequently, the appellant moved pursuant to CPLR 5015 (a) to vacate the order dated December 11, 2023. In an order dated January 2, 2024, the court attorney referee denied the appellant's motion. This appeal ensued.

Initially, the court attorney referee had the authority to determine this matter, since, contrary to the appellant's contention, the record demonstrates that both parties stipulated to have this matter heard and determined by a court attorney referee (see *Matter of Mahoney v Hughes*, 227 AD3d 908, 909 [2024]; *Matter of Moran v Lane*, 218 AD3d 687, 688 [2023]; *Neumann v Hercz*, 166 AD3d 790, 791 [2018]).

Further, the appellant failed to preserve for appellate review his due process argument concerning the duration of the extension of the order of protection (see *Matter of Deonna E. [Marvell C.]*, 104 AD3d 943, 944 [2013]; *Matter of Vanessa F.*, 9 AD3d 464, 464 [2004]). In any event, the appellant failed to demonstrate that his due process rights were violated. Under the circumstances of this case, the appellant was provided with notice that the petitioner was seeking an extension of the order of protection and was given an opportunity to appear and present testimony and evidence (see *Matter of Herry v Perry*, 239 AD3d 742, 742 [2025]).

"When a defendant seeking to vacate a default judgment raises a jurisdictional objection pursuant to CPLR 5015 (a) (4), the court is required to resolve the jurisdictional question before determining whether it is appropriate to grant a discretionary vacatur of the default under CPLR 5015 (a) (1)" (*Nurse v Marion 502, LLC*, 241 AD3d 1352, 1353 [2025] [internal quotation marks omitted]; see *Tuttnauer USA Co., Ltd. v Russo*, 216 AD3d 846, 846-847 [2023]). Under CPLR 5015 (a) (4), the moving defendant must overcome the presumption of proper service raised by a process server's affidavit of service (see *Quicksilver Capital, LLC v Dixon Fin. Servs., LLC*, 242 AD3d 916, 918 [2025]; *Nurse v Marion 502, LLC*, 241 AD3d at 1353). "[N]o hearing is required where the defendant fails to swear to specific facts to rebut the statements in the process server's affidavits" (*RG Remodeling, Inc. v Greco*, 231 AD3d 757, 758 [2024] [internal quotation marks omitted]; *Matter of Annata M. [Clinton B.]*, 140 AD3d 959, 960 [2016]), and "[b]are and unsubstantiated denials are insufficient to rebut the presumption of service" (*RG Remodeling, Inc. v Greco*, 231 AD3d at 758 [internal quotation marks omitted]). Here, the appellant's bare and unsubstantiated denial of service of the motion to extend the order of protection lacked the factual specific-

ity and detail required to rebut the presumption of proper service (*see Nurse v Marion 502, LLC*, 241 AD3d at 1353; *U.S. Bank N.A. v Plunkett*, 241 AD3d 974, 976 [2025]).

To the extent that the appellant's motion sought vacatur pursuant to CPLR 5015 (a) (1), he was not entitled to such relief, as he failed to set forth a reasonable excuse for his default in opposing the petitioner's motion (*see Matter of Riera v Ayabaca*, 235 AD3d 643, 644 [2025]; *Matter of Harari v Banash*, 228 AD3d 661, 662 [2024]). Since the appellant did not provide a reasonable excuse for his default, we need not determine whether he had a potentially meritorious defense to the petitioner's motion (*see Matter of Harari v Banash*, 228 AD3d at 662; *Matter of Aponte v Jagnarain*, 205 AD3d 800, 802 [2022]).

The appellant's remaining contentions are without merit. LaSalle, P.J., Connolly, Taylor and Goldberg Velazquez, JJ., concur.

41 In the Matter of Martin Soudani, as Temporary Limited Administrator of the Estate of Stewart A. Rosenwasser, Deceased, Appellant, v County of Orange et al., Respondents. [— NYS3d —]

Counties—Defense and Indemnification of Employee—Scope of Employment—Normal Duties

In a proceeding pursuant to CPLR article 78 to review a determination of the respondent Steven M. Neuhaus dated June 16, 2025, determining that the estate of Stewart Rosenwasser is not entitled to defense or indemnification in an action entitled *Soudani v County of Orange*, pending in the United States District Court for the Southern District of New York, under Case No. 25-CV-4320, the petitioner appeals from an order and judgment (one paper) of the Supreme Court, Orange County (Sherri L. Eisenpress, J.), dated September 16, 2025. The order and judgment, in effect, granted the respondents' motion pursuant to CPLR 3211 (a) and 7804 (f) to dismiss the petition, denied the petition, and dismissed the proceeding.

Ordered that the order and judgment is affirmed, with costs.

In September 2024, a federal grand jury indicted Stewart Rosenwasser and Mout'z Soudani (hereinafter Mout'z) on charges, among other things, of bribery and conspiracy to commit bribery, based on allegations that Rosenwasser, while employed as a prosecutor with the Orange County District Attorney's Office (hereinafter the OCDA), had accepted at least \$63,000 in payments from Mout'z in exchange for using Rosenwasser's position with the OCDA, inter alia, to investi-

gate and prosecute Mout'z's sister, Eman Soudani (hereinafter Eman), and her son, Martin Soudani (hereinafter the petitioner, and together with Eman, the claimants), for allegedly stealing money from Mout'z (hereinafter the federal indictment). Rosenwasser died before he was arrested on the charges.

In May 2025, the claimants commenced a federal action against, among others, the County of Orange, the OCDA, and "John Doe," as the administrator of the estate of Rosenwasser (hereinafter the Estate), among other things, to recover damages for civil rights violations pursuant to 42 USC § 1983. Subsequently, the petitioner was appointed as the temporary limited administrator of the Estate.

Thereafter, the petitioner requested that the County defend and indemnify the Estate in the federal action in accordance with Local Law No. 3 of 1998 of the County (hereinafter Local Law 3). In a determination dated June 16, 2025, the County Executive, Steven M. Neuhaus, upon the advice of the County Attorney, determined that the Estate was not entitled to defense and indemnification in the federal action because the acts alleged therein and in the federal indictment were not within the scope of Rosenwasser's public employment or duties.

Subsequently, the petitioner commenced this CPLR article 78 proceeding against the County and Neuhaus to review Neuhaus's determination. The respondents moved pursuant to CPLR 3211 (a) and 7804 (f) to dismiss the petition. In an order and judgment dated September 16, 2025, the Supreme Court, in effect, granted the respondents' motion, denied the petition, and dismissed the proceeding. The petitioner appeals.

As relevant herein, Local Law 3 provides that the County "shall provide for the defense of [a County] employee in any civil action or proceeding in any state or federal court . . . arising out of any alleged act or omission which occurred or is alleged to have occurred while the employee was acting within the scope of his or her public employment or duties" (Local Law 3 § 4 [1]). The issue of whether such an employee's act was "committed within the scope of his [or her] public employment and the discharge of his [or her] duties raises factual questions" (*Matter of Williams v City of New York*, 64 NY2d 800, 802 [1985]). Under Local Law 3, the determination as to whether a County employee was so acting and, thus is entitled to defense and indemnification, is to be made in the first instance by the County Executive for executive branch employees, such as Rosenwasser, and such a "determination may be set aside only if it lacks a factual basis, and in that sense, is arbitrary and capricious" (*Matter of Williams v City of New*

York, 64 NY2d at 802; see *Matter of DiLeonardo v Nassau County Police Officer Indem. Bd.*, 148 AD3d 701, 702 [2017]).

Here, Neuhaus's determination that Rosenwasser was not acting within the scope of his employment or duties with the OCDA in connection with the conduct alleged in the federal action and, thus that the Estate was not entitled to defense and indemnification therein, had a factual basis and was not arbitrary and capricious (see *Matter of DiLeonardo v Nassau County Police Officer Indem. Bd.*, 148 AD3d at 702). In particular, Neuhaus rationally based his determination on the allegations of the complaint in the federal action and in the underlying federal indictment demonstrating that Rosenwasser's actions in investigating and prosecuting Eman and the petitioner were not undertaken as part of Rosenwasser's normal duties as an OCDA prosecutor but rather were undertaken in connection with an illegal bribery scheme carried out with his friend, Mout'z, purely for personal purposes, and which was actively concealed from the OCDA (see *id.*; *Stavitz v City of New York*, 98 AD2d 529, 531 [1984]).

The petitioner's remaining contentions are without merit. LaSalle, P.J., Christopher, Landicino and McCormack, JJ., concur.

42 In the Matter of Lisa Tarallo, Petitioner, v Hyun Chin Kim, in Her Official Capacity as Statutory Pistol Licensing Officer Pursuant to Penal Law § 265.00, Respondent. [251 NYS3d 791]—

Proceeding against Body or Officer—Mandamus

Proceeding pursuant to CPLR article 78 in the nature of mandamus to compel the respondent, Hyun Chin Kim, a Justice of the County Court, Orange County, to issue a determination on the petitioner's application to amend her pistol licence.

Adjudged that the petition is denied and the proceeding is dismissed on the merits, without costs or disbursements.

The extraordinary remedy of mandamus will lie only to compel the performance of a ministerial act, and only where there exists a clear legal right to the relief sought (see *Matter of Legal Aid Socy. of Sullivan County v Scheinman*, 53 NY2d 12, 16 [1981]). The petitioner has failed to demonstrate a clear legal right to the relief sought. Genovesi, J.P., Ford, Voutsinas and Golia, JJ., concur.

43 In the Matter of Brandon Zielazny, Appellant, v Demi Martorano, Respondent. [— NYS3d —]—

Parent, Child and Family—Custody—Modification of Arrangement—Change in Circumstances**Parent, Child and Family—Custody—Parental Alienation**

In a proceeding pursuant to Family Court Act article 6, the father appeals from a corrected order of the Family Court, Suffolk County (Mary E. Porter, J.), dated July 8, 2024. The corrected order, insofar as appealed from, after a hearing, granted the mother's cross-petition to modify a so-ordered stipulation of settlement dated September 26, 2019, so as to award her sole legal and residential custody of the parties' child, denied the father's petition to modify the so-ordered stipulation of settlement so as to award him sole legal and residential custody of the child, and awarded certain parental access to the father.

Ordered that the corrected order is modified, on the facts, (1) by deleting the provision thereof regarding parental access during the summer, and substituting therefor a provision stating, "Each summer the father shall have seven weeks of parental access, commencing on the Saturday of Father's Day weekend and continuing for seven weeks from that date, with the father picking up the child in Florida and the mother picking up the child seven weeks later in New York"; (2) by deleting the provision thereof regarding monthly parental access in Florida, and substituting therefor a provision stating, "The father will have parental access in Florida each month. The father may choose which weekend each month that he will exercise parental access, and must provide no less than one month's notice to the mother of his intention to exercise his parental access on a certain weekend. The father shall pick up the child directly from school on the Friday of the father's parental access weekend, and the mother shall pick up the child at 5:00 p.m. on the Sunday of the father's parental access weekend. The father is responsible for ensuring that the child is present at any extracurricular activity which has been previously scheduled during these weekends"; (3) by deleting the provision thereof regarding parental access on Thanksgiving, Christmas, New Year's Day, and Easter Sunday, and substituting therefor a provision stating, "The father will have parental access for Thanksgiving every year commencing on the Saturday prior to Thanksgiving through the Saturday following Thanksgiving. For Thanksgiving parental access, the father will pick up the child in Florida and the mother will pick up the child in New York. The mother will have the child for Easter Sunday every year. The parties will alternate Christmas Day such that the mother will have parental access on Christmas Day in even numbered years and the father will

have parental access on Christmas Day in odd numbered years”; (4) by deleting the provision thereof regarding parental access during Christmas break, and substituting therefor a provision stating, “In even numbered years, the father shall have parental access with the child from December 26th through the day before school resumes in accordance with the child’s school calendar. In odd numbered years, the father shall have parental access with the child commencing on the last day of school that starts the Christmas break through the day before school resumes in accordance with the child’s school calendar. The father shall pick up the child in Florida at the beginning of his Christmas break parental access and the mother shall pick up the child in New York at the end”; (5) by deleting the provision thereof regarding FaceTime contact, and substituting therefor a provision stating, “The parent who is caring for the child will ensure that the other parent can initiate FaceTime contact with the child once per day, between the hours of 4:00 p.m. through 7:00 p.m., based upon the child’s schedule, with the parent who does not have access initiating said call”; and (6) adding thereto a provision stating, “In the event that the father is unable to exercise his scheduled parental access, the father will be entitled to add those missed days to his summer parenting access in New York. The father shall be permitted to add up to one week of missed time”; as so modified, the corrected order is affirmed insofar as appealed from, without costs or disbursements.

The parties, who were never married to each other, are the parents of one child. Although the parties initially resided together in New York, the mother and the child moved to Florida in 2019, and the father remained in New York. As part of a so-ordered stipulation of settlement dated September 26, 2019, the parties agreed to joint legal and residential custody, whereby the parties exchanged physical custody of the child every two weeks. In December 2020, the father filed a petition to modify the so-ordered stipulation of settlement so as to award him sole legal and residential custody of the child, alleging, inter alia, that the mother had refused to allow him to exercise his parental access rights. The mother filed a cross-petition to modify the so-ordered stipulation of settlement so as to award her sole legal and residential custody, alleging, among other things, that the father was unable to care for the child or to co-parent with the mother. In a corrected order dated July 8, 2024, after a hearing, the Family Court, inter alia, granted the mother’s cross-petition, denied the father’s petition, and set forth a detailed parental access schedule for the father. The father appeals.

To modify an existing court-ordered custody arrangement, there must be a showing of a change in circumstances such that modification is required to protect the best interests of the child (see *Matter of LaPera v Restivo*, 202 AD3d 788, 789 [2022]; *Matter of Gottfried v Gottfried*, 163 AD3d 966, 966 [2018]). The essential consideration in making an award of custody is the best interests of the child (see *Friederwitzer v Friederwitzer*, 55 NY2d 89, 94 [1982]; *Matter of Cardozo v Defreitas*, 87 AD3d 1138, 1138 [2011]). Factors to be considered include, among other things, (1) the original placement of the child, (2) the length of that placement, (3) the child's desires, (4) the relative fitness of the parents, (5) the quality of the home environment, (6) the parental guidance given to the child, (7) the parents' financial status, and (8) the parents' ability to provide for the child's emotional and intellectual development (see *Matter of Gagos v Delsalto*, 213 AD3d 761, 761 [2023]; *Matter of Jones v Leppert*, 75 AD3d 552, 553 [2010]). Since any custody determination necessarily depends to a great extent upon an assessment of the character and credibility of the parties and witnesses, deference is accorded the hearing court's findings, and its findings will not be disturbed unless lacking a sound and substantial basis in the record (see *Matter of Ciardullo v Smith*, 236 AD3d 650, 650-651 [2025]; *Cuccurullo v Cuccurullo*, 21 AD3d 983, 984 [2005]).

Under the circumstances of this case, where the parties reside in different states and the child has reached the age where she must be enrolled in school, in addition to the fact that the parties are unable to communicate and cooperate with each other in order to share custody of the child, the Family Court properly determined that a change in circumstances existed (see *Matter of Gold v Khalifa*, 223 AD3d 803, 805 [2024]; *Matter of Klotz v O'Connor*, 124 AD3d 662, 662-663 [2015]). The court's determination to award the mother sole legal and residential custody of the child was supported by a sound and substantial basis in the record (see *Matter of Vizqueta v Wiley*, 226 AD3d 797, 799 [2024]; *Matter of Gayle v Muir*, 211 AD3d 942, 944 [2022]). In support of that award, the evidence established that the parties' relationship had deteriorated to the point where they could not communicate and engage in joint decision-making concerning the child, that the mother was more involved in the child's needs on a day-to-day basis, and that the mother has been the child's primary caregiver (see *Matter of Ciardullo v Smith*, 236 AD3d at 651; *Matter of Llanos v Barrezqueta*, 232 AD3d 606, 608 [2024]).

The father contends that he should have been awarded sole

legal and residential custody of the child because the mother alienated the child from him. Although the Family Court properly determined that it was in the child's best interests to award the mother sole legal and residential custody of the child, the record reflects that the mother's past behavior did verge on parental alienation, but did not rise to a level that would serve to change the custody determination. To be clear, "one parent's alienation of a child from the other parent is an act inconsistent with the best interests of the child" (*Matter of Shepherd v Mirukaj*, 235 AD3d 769, 771 [2025]; see *Matter of Burke v Squires*, 202 AD3d 784, 785-786 [2022]) that may result in a "change in circumstances such that modification is necessary to ensure the best interests of the child" (*Matter of Doroski v Ashton*, 99 AD3d 902, 903 [2012]; see *Bobinski v Bobinski*, 9 AD3d 441, 441 [2004]).

The father has requested that certain portions of the parental access schedule be modified. "The paramount concern in matters of custody and parental access is the best interests of the child under the totality of the circumstances" (*Matter of Samake v Sy*, 244 AD3d 1212, 1213 [2025] [internal quotation marks omitted]). We modify the parental access schedule in accordance herewith in the best interests of the child (see *Matter of Samake v Sy*, 244 AD3d at 1213). Duffy, J.P., Wooten, Landicino and Quirk, JJ., concur.

44 New Penn Financial, LLC, Respondent, v Macky Dancy, Appellant, et al., Defendants. [— NYS3d —]

Parties—Substitution of Parties—Interest in Action

In an action to foreclose a mortgage, the defendant Macky Dancy appeals from an order of the Supreme Court, Nassau County (David P. Sullivan, J.), entered June 7, 2023. The order granted the plaintiff's motion pursuant to CPLR 4314 to appoint a successor referee and for leave to amend the caption to substitute U.S. Bank Trust National Association, not in its individual capacity but solely as owner trustee for RCF 2 Acquisition Trust, as the plaintiff.

Ordered that the order is modified, on the law and in the exercise of discretion, by deleting the provision thereof granting that branch of the plaintiff's motion which was for leave to amend the caption to substitute U.S. Bank Trust National Association, not in its individual capacity but solely as owner trustee for RCF 2 Acquisition Trust, as the plaintiff, and substituting therefor a provision denying that branch of the motion; as so modified, the order is affirmed, without costs or disbursements.

The plaintiff's predecessor in interest commenced this action against the defendant Macky Dancy (hereinafter the defendant), among others, to foreclose a mortgage on certain residential property located in Nassau County. The defendant did not appear or answer the complaint. In an order dated June 27, 2018, the Supreme Court, inter alia, appointed a referee to compute the amount due on the mortgage loan and amended the caption to substitute the plaintiff in place of the plaintiff's predecessor in interest.

Thereafter, the plaintiff moved pursuant to CPLR 4314 to appoint a successor referee and for leave to amend the caption to substitute U.S. Bank Trust National Association, not in its individual capacity but solely as owner trustee for RCF 2 Acquisition Trust (hereinafter U.S. Bank), as the plaintiff. In an order entered June 7, 2023, the Supreme Court granted the plaintiff's motion. The defendant appeals.

Under the circumstances presented, the Supreme Court properly granted that branch of the plaintiff's motion which was to appoint a successor referee (*see id.*; *Associates First Capital Corp. v Roth*, 226 AD3d 636 [2024]).

CPLR 1018 provides that "[u]pon any transfer of interest, the action may be continued by or against the original parties unless the court directs the person to whom the interest is transferred to be substituted or joined in the action." "The determination to substitute or join a party pursuant to CPLR 1018 is within the discretion of the trial court" (*NationsCredit Home Equity Servs. v Anderson*, 16 AD3d 563, 564 [2005]; *see GRP Loan, LLC v Taylor*, 95 AD3d 1172, 1174 [2012]). Here, the plaintiff failed to demonstrate that U.S. Bank had an interest in this action, and therefore, the Supreme Court improvidently exercised its discretion in granting that branch of the plaintiff's motion which was for leave to amend the caption to substitute U.S. Bank as the plaintiff (*see U.S. Bank N.A. v Medina*, 230 AD3d 1371, 1377 [2024]; *Citimortgage, Inc. v Bredehorn*, 160 AD3d 803, 804 [2018]; *Citicorp Mtge. v Adams*, 153 AD3d 779, 780 [2017]).

The parties' remaining contentions are either without merit or not properly before this Court. Brathwaite Nelson, J.P., Ford, Dowling and Goldberg Velazquez, JJ., concur.

45 The People of the State of New York, Respondent, v Andre Alberto, Appellant. [252 NYS3d 285]—

Crimes—Unlawful Search and Seizure—Pursuit of Defendant—Reasonable Suspicion of Criminal Activity

Appeal by the defendant from a judgment of the Supreme

Court, Kings County (John T. Hecht, J.), rendered October 26, 2022, convicting him of criminal possession of a weapon in the second degree, upon a jury verdict, and imposing sentence. The appeal brings up for review the denial, after a hearing (Jill Konviser, J.), of that branch of the defendant's omnibus motion which was to suppress physical evidence.

Ordered that the judgment is reversed, on the law, that branch of the defendant's omnibus motion which was to suppress physical evidence is granted, the indictment is dismissed insofar as asserted against the defendant, and the matter is remitted to the Supreme Court, Kings County, for further proceedings consistent with CPL 160.50.

According to testimony elicited at a suppression hearing from Sergeant Michael Hain, on October 12, 2017, at around 12:30 p.m., he and certain detectives, who were not in uniform, were canvassing the area of a housing development in Brooklyn for witnesses and video surveillance footage pertinent to a homicide that had occurred at approximately 3:45 a.m. Around that time, Hain observed a "group of civilians" chasing an individual who would later be identified as the defendant, who was running away, and heard a female voice say "that's him, he's getting away, grab him." Hain testified that when the group caught up to the defendant, a female individual "was engaged in some sort of physical altercation with [the defendant]," which Hain described as "tussling, pulling back and forth at each other." Hain indicated that he then "tried to apprehend the [defendant] that was running, break up the fight, at which point, the [defendant] slipped out of" a jacket or "hoody" he was wearing and ran away. Hain stated that he chased after the defendant with the assistance of a detective, "who was able to apprehend the [defendant]," and "[w]e went to the ground" and "were fighting for his hands, to get him rear cuffed." Hain then heard the detective yell that the defendant had a gun. Hain indicated that they handcuffed the defendant, rolled the defendant over onto his side, and Hain "felt what appeared to be the butt of a gun" by the defendant's waist. Hain removed the object which he observed to be a firearm wrapped inside of a bandana.

At the close of the hearing, the Supreme Court found, among other things, that Hain had reasonable suspicion to detain and pursue the defendant, and the court denied that branch of the defendant's omnibus motion which was to suppress the firearm recovered from his person.

Following a jury trial, the defendant was convicted of criminal possession of a weapon in the second degree.

“‘On a motion to suppress physical evidence, the People bear the burden of going forward to establish the legality of police conduct in the first instance’” (*People v Johnson*, 243 AD3d 679, 680 [2025], quoting *People v Rhames*, 196 AD3d 510, 511-512 [2021]). “‘In order to justify police pursuit, the officers must have reasonable suspicion that a crime has been, is being, or is about to be committed’” (*People v Sidbury*, 237 AD3d 975, 976 [2025] [internal quotation marks omitted], quoting *People v Leon*, 222 AD3d 998, 999 [2023]). “Reasonable suspicion exists where there is a ‘quantum of knowledge sufficient to induce an ordinarily prudent and cautious man [or woman] under the circumstances to believe criminal activity is at hand’” (*People v Leon*, 222 AD3d at 999, quoting *People v Cantor*, 36 NY2d 106, 112-113 [1975]). “‘A suspect’s flight alone or in conjunction with equivocal circumstances that might suggest a police request for information is insufficient to justify pursuit’” (*People v Sidbury*, 237 AD3d at 976 [internal quotation marks omitted], quoting *People v Leon*, 222 AD3d at 999). “However, a defendant’s flight plus ‘other specific circumstances indicating that the suspect may be engaged in criminal activity, may give rise to reasonable suspicion, the necessary predicate for police pursuit’” (*People v Sidbury*, 237 AD3d at 976 [internal quotation marks omitted], quoting *People v Ravenell*, 175 AD3d 1437, 1439 [2019]).

Here, the People failed to meet their burden of establishing the legality of the pursuit of the defendant, as the police lacked reasonable suspicion that the defendant had committed, was committing, or was about to commit a crime (*see People v Ravenell*, 175 AD3d at 1439). Neither Hain’s observation of the defendant running away from a “group of civilians” chasing him, nor the female voice saying “that’s him, he’s getting away, grab him,” without reference to any specific acts, were sufficient to confer reasonable suspicion that the defendant was engaged in criminal activity, as opposed to the defendant being the victim of criminal activity or having no connection to any criminal activity (*see People v Gomez*, 205 AD3d 1049, 1050 [2022]; *People v Reyes*, 69 AD3d 523, 527 [2010]). Hain acknowledged that “I wasn’t sure exactly what was going on at the time,” and that the group could have been chasing the defendant “for anything.” Further, Hain’s vague testimony that when the group caught up to the defendant, he observed the defendant and a female individual “engaged in some sort of physical altercation,” which he described as “tussling, pulling back and forth at each other,” was insufficient, absent any details, to satisfy the People’s burden of establishing reasonable suspicion that the defendant was engaged in criminal

activity. Hain acknowledged that “I don’t know if [the defendant] was defending himself,” and he did not testify that the defendant ever struck the female individual or engaged in any conduct constituting an assault or other criminal activity. Therefore, it cannot be determined from Hain’s testimony elicited at the hearing whether the defendant was merely trying to pull away from the female individual to continue running away after she and the group caught up to him.

Thus, Hain’s observations did not constitute specific circumstances indicative of criminal activity so as to establish the reasonable suspicion necessary to lawfully pursue the defendant, even when coupled with the defendant’s flight (*see People v Leon*, 222 AD3d at 1000). The record reflects that Hain was not in uniform and did not identify himself as a police officer or make any instruction with which the defendant refused to comply prior to pursuing the defendant (*cf. People v Sidbury*, 237 AD3d 975 [2025]). Thus, the defendant had no way of knowing that he was fleeing from the police, as opposed to members of the group chasing him. Since the police lacked reasonable suspicion to pursue the defendant, the pursuit was unlawful, and the discovery of the firearm after the defendant was brought to the ground by the police was precipitated by the illegality and not attenuated from it (*see People v Ravenell*, 175 AD3d at 1439).

Accordingly, the Supreme Court should have granted that branch of the defendant’s omnibus motion which was to suppress the firearm. Without this evidence, the defendant’s conviction of criminal possession of a weapon in the second degree was not supported by legally sufficient evidence to establish his guilt of that count beyond a reasonable doubt. Accordingly, the count of the indictment charging the defendant with that offense must be dismissed (*see People v Vazquez*, 211 AD3d 1052, 1054 [2022]). Further, since the jury acquitted the defendant of the only count in the indictment charged against him not pertaining to possession of the firearm, the indictment must be dismissed insofar as asserted against the defendant, and the matter remitted to the Supreme Court, Kings County, for the purpose of entering an order in its discretion pursuant to CPL 160.50 (*see People v Austin*, 203 AD3d 732, 738 [2022]).

In light of our determination, we need not reach the defendant’s remaining contentions. Brathwaite Nelson, J.P., Wooten, Taylor and Goldberg Velazquez, JJ., concur.

46 The People of the State of New York, Respondent, v Christopher Alvarado, Appellant. [251 NYS3d 781]—Appeal by the defendant, as limited by his motion, from a sentence of the

County Court, Nassau County (Teresa K. Corrigan, J.), imposed October 8, 2024, upon his plea of guilty, on the ground that the sentence was excessive.

Ordered that the sentence is affirmed.

The sentence imposed was not excessive (*see People v Suitte*, 90 AD2d 80 [1982]). Duffy, J.P., Genovesi, Ford, Taylor and McCormack, JJ., concur.

47 The People of the State of New York, Respondent, v Santiago A. Andujar, Appellant. [251 NYS3d 779]—

Crimes—Appeal—Waiver of Right to Appeal

Appeal by the defendant from a judgment of the County Court, Dutchess County (Jessica Segal, J.), rendered July 15, 2021, convicting him of predatory sexual assault against a child, upon his plea of guilty, and imposing sentence.

Ordered that the judgment is affirmed.

The defendant was convicted, upon his plea of guilty, of predatory sexual assault against a child (Penal Law § 130.96).

The record demonstrates that the defendant knowingly, voluntarily, and intelligently waived his right to appeal (*see People v Bolton*, 235 AD3d 995 [2025]; *People v Young*, 225 AD3d 903 [2024]). Appellate review of the defendant's contentions regarding the factual sufficiency of the indictment, which are nonjurisdictional, was forfeited by his plea of guilty and, in any event, is foreclosed by his valid waiver of his right to appeal (*see People v Griffin*, 173 AD3d 1203, 1205 [2019]).

The defendant's valid waiver of his right to appeal precludes appellate review of his contention that the sentence imposed was excessive (*see People v Lopez*, 6 NY3d 248, 256 [2006]). Duffy, J.P., Wooten, Taylor and Hom, JJ., concur.

48 The People of the State of New York, Respondent, v Dejanay Canteen, Also Known as King Canteen, Appellant. [251 NYS3d 788]—

Crimes—Appeal—Waiver of Right to Appeal

Appeal by the defendant, as limited by his motion, from a sentence of the Supreme Court, Richmond County (Alexander Jeong, J.), imposed May 16, 2022, upon his plea of guilty, on the ground that the sentence was excessive.

Ordered that the sentence is affirmed.

The record demonstrates that the defendant knowingly, voluntarily, and intelligently waived his right to appeal (*see People v Thomas*, 34 NY3d 545 [2019]; *People v Lopez*, 6 NY3d 248

[2006]). The defendant's valid waiver of his right to appeal precludes appellate review of his contention that the sentence imposed was excessive (*see People v Lopez*, 6 NY3d at 255).

Connolly, J.P., Christopher, Voutsinas, Love and Goldberg Velazquez, JJ., concur.

49 The People of the State of New York, Appellant, v Coria David, Respondent. The People of the State of New York, Appellant, v Jose Luis Rivera, Respondent. [252 NYS3d 276]—

Crimes—Unlawful Search and Seizure—Standing

Crimes—Unlawful Search and Seizure—Search Incident to Arrest—Observation Prior to Search

Crimes—Unlawful Search and Seizure—Exigency Requirement—Circumstances Suggesting Presence of Weapon

Appeal by the People from an order of the Supreme Court, Queens County (David J. Kirschner, J.), dated March 21, 2024. The order, after a hearing, granted those branches of the defendants' separate omnibus motions which were to suppress physical evidence.

Ordered that the order is reversed, on the law, and those branches of the defendants' separate omnibus motions which were to suppress physical evidence are denied.

The defendants, Coria David and Jose Luis Rivera, were charged with various offenses, including criminal possession of a weapon in the second degree, after police officers recovered a loaded firearm from a vehicle that David had been driving and in which Rivera was a passenger. Police officers also recovered a firearm and stun gun from a fanny pack worn by Rivera. In separate omnibus motions, the defendants moved, inter alia, to suppress physical evidence as the fruits of an unlawful seizure.

At a suppression hearing, Andy Peralta, a police officer, testified that, on February 15, 2023, at approximately 4:30 p.m., he, along with his partners, received a radio transmission concerning the location of a vehicle that had been involved in a gunpoint robbery earlier that day. The vehicle's location had been identified by a license plate reader. The radio transmission described the vehicle as a black Honda Accord with a Pennsylvania license plate number and directed the officers to 147th Street and Seventh Avenue in Queens. The officers arrived at that location within approximately five minutes and observed a black Honda Accord parked there with its engine running. Peralta did not observe any other black Honda Accords in that vicinity. He testified that the vehicle's windows were excessively tinted and the officers could not see inside the vehicle. The vehicle was boxed in by two police vehicles, and the officers approached the vehicle with their guns drawn.

Body-worn camera video footage of the encounter, which was admitted into evidence at the hearing, depicted the officers approaching the vehicle and a police officer initially instructing the occupants of the vehicle not to move, then repeatedly directing them to get out of the vehicle. Peralta testified that the occupants of the vehicle failed to comply and attempted to drive away, but the vehicle struck a vehicle parked behind it. The police then broke the front driver's and passenger's windows of the vehicle.

The body-worn camera video showed the police opening the driver's side door, removing David from the driver's seat, and laying him face down on the ground. A police officer then reopened the driver's side door and directed Rivera, who was still seated in the passenger seat, to get out of the vehicle, while another officer simultaneously removed Rivera from the vehicle. The driver's side door remained open thereafter, and an officer observed in plain view a firearm in the driver's side door compartment and announced its discovery to his fellow officers. The body-worn camera video reflected that, after the police discovered the firearm in the vehicle, an officer placed a white fanny pack on top of the vehicle. Peralta testified that the police had cut the fanny pack from Rivera's chest to remove it and that a firearm and a "taser" were recovered from the fanny pack.

After the hearing, in an order dated March 21, 2024, the Supreme Court granted those branches of the defendants' separate omnibus motions which were to suppress physical evidence, determining, among other things, that the police officers unlawfully "detain[ed] and seiz[ed] [the defendants] before ever observing any firearms." The People appeal.

As an initial matter, the People contend that the defendants lacked standing to challenge the search of the vehicle because it was stolen (*see People v Strunkey*, 202 AD2d 610, 611 [1994]). However, the issue of whether the defendants had standing to challenge the search of the vehicle's interior has no bearing on the defendants' right to contest their detention and arrests as an unreasonable seizure of their persons and to seek suppression of the evidence recovered as the fruits of an allegedly illegal arrest (*see People v May*, 81 NY2d 725, 727 [1992]; *People v Millan*, 69 NY2d 514, 520-521, 520 n 6 [1987]; *People v Voner*, 74 AD3d 1371, 1373 [2010]; *People v Gittens*, 110 AD2d 908 [1985]). Further, the defendants had standing to challenge the recovery of the firearm from the vehicle, as the People do not dispute that the charges related to that firearm were based solely on the statutory presumption (*see Penal Law* § 265.15;

People v Millan, 69 NY2d at 519-520; *People v Rivera*, 127 AD3d 595, 596 [2015]), and the record reveals no other basis for attributing possession of that weapon to the defendants (*cf. People v Cheatham*, 54 AD3d 297, 300 [2008]).

Turning to the merits, contrary to the Supreme Court's determination, the People met their burden of establishing the legality of the police conduct. "On a motion to suppress physical evidence, the People bear the burden of going forward to establish the legality of police conduct in the first instance" (*People v Hernandez*, 40 AD3d 777, 778 [2007]; *see People v Dubuissou*, 206 AD3d 757, 758 [2022]). "The defendant, however, bears the ultimate burden of proving, by a preponderance of the credible evidence, that the evidence should not be used against him [or her]" (*People v Knight*, 205 AD3d 928, 929 [2022] [internal quotation marks omitted]; *see People v Berrios*, 28 NY2d 361, 367 [1971]).

In *People v De Bour* (40 NY2d 210 [1976]), the Court of Appeals established a graduated four-level test for evaluating street encounters initiated by the police (*see People v Moore*, 6 NY3d 496, 498 [2006]). "[L]evel one permits a police officer to request information from an individual and merely requires that the request be supported by an objective, credible reason, not necessarily indicative of criminality; level two, the common-law right of inquiry, permits a somewhat greater intrusion and requires a founded suspicion that criminal activity is afoot; level three authorizes an officer to forcibly stop and detain an individual, and requires a reasonable suspicion that the particular individual was involved in a felony or misdemeanor; level four, arrest, requires probable cause to believe that the person to be arrested has committed a crime" (*id.* at 498-499; *see People v De Bour*, 40 NY2d at 223; *People v Dubuissou*, 206 AD3d at 758). "Reasonable suspicion has been defined as 'that quantum of knowledge sufficient to induce an ordinarily prudent and cautious [person] under the circumstances to believe criminal activity is at hand'" (*People v Bowers*, 148 AD3d 1042, 1043 [2017], quoting *People v Martinez*, 80 NY2d 444, 448 [1992]).

Here, the police officers had reasonable suspicion to stop the vehicle based upon the fact that the description of the vehicle matched that of a vehicle that had been involved in an armed robbery earlier that day, and the vehicle's location had been detected by a license plate reader approximately five minutes prior to the stop (*see People v Daily*, 194 AD3d 1068, 1069 [2021]; *People v Torres*, 167 AD3d 665, 666 [2018]). Moreover, the actions of the police officers in drawing their guns and

ordering the defendants out of the vehicle were justified under the circumstances as appropriate measures to ensure their safety (see *People v Crawford*, 110 AD3d 916, 917 [2013]; *People v Argyris*, 99 AD3d 808, 810 [2012], *affd* 24 NY3d 1138 [2014]; *People v Bedoya*, 190 AD2d 812 [1993]). Additionally, when the defendants failed to cooperate with the officers' instructions, the officers acted appropriately in breaking the vehicle's "excessive[ly] . . . tint[ed]" front windows for their own safety and then in removing the defendants from the vehicle and placing them in handcuffs (see *People v Allen*, 73 NY2d 378, 379-380 [1989]; *People v Zubidi*, 233 AD3d 55, 63 [2024], *affd* — NY3d —, 2026 NY Slip Op 00964 [2026]; *People v Martinez*, 147 AD3d 642, 643 [2017]; *People v Smith*, 125 AD3d 897, 898 [2015]). The police thereafter had probable cause to arrest the defendants once the officer observed a firearm in plain view in the compartment of the driver's side door of the vehicle (see *People v Fleming*, 65 AD3d 702, 704 [2009]).

Moreover, the subsequent search of Rivera's fanny pack was justified as a search incident to a lawful arrest (see *People v Smith*, 59 NY2d 454 [1983]). Contrary to Rivera's contention, the People sufficiently demonstrated that the police discovered the firearm in the vehicle before finding the weapons in Rivera's fanny pack. The body-worn camera video demonstrates that an officer observed, and immediately announced to all of the officers at the scene, the discovery of the firearm in the vehicle's driver side door before the search of Rivera's fanny pack, which Rivera acknowledges occurred "[a]fter the fanny pack was cut from his body." Rivera's acknowledgment corroborates what is seen in the body-worn camera video, that is, an officer observes and announces the firearm in the vehicle before Rivera's fanny pack is held up and placed on the vehicle's roof. Contrary to Rivera's contention, Peralta did not testify that the firearm in the fanny pack was found first. Although Peralta made reference to the firearm found in the vehicle as "a second firearm," that was based on the order in which he was questioned about the recovery of the firearms. Peralta was asked about the recovery of the weapons from Rivera's fanny pack first and was later questioned about the firearm found inside the vehicle, which he then referred to as "a second firearm."

Further, contrary to the position of our colleague in the dissent, the People demonstrated the presence of exigent circumstances justifying the search of Rivera's fanny pack. "Under the State Constitution, to justify a warrantless search incident to arrest, the People must satisfy two separate requirements"

(*People v Jimenez*, 22 NY3d 717, 721 [2014]; see *People v Mosquito*, 197 AD3d 504, 505 [2021]). “The first imposes spatial and temporal limitations to ensure that the search is ‘not significantly divorced in time or place from the arrest’ ” (*People v Jimenez*, 22 NY3d at 721, quoting *People v Smith*, 59 NY2d at 458). “The second, and equally important, predicate requires the People to demonstrate the presence of exigent circumstances” (*id.* at 722; see *People v Mosquito*, 197 AD3d at 505).

The Court of Appeals has identified two interests underlying the exigency requirement, namely, “the safety of the public and the arresting officer; and the protection of evidence from destruction or concealment” (*People v Gokey*, 60 NY2d 309, 312 [1983]; see *People v Jimenez*, 22 NY3d at 722; *People v Hernandez*, 40 AD3d at 779). “While an officer need not affirmatively testify as to safety concerns to establish exigency, such apprehension must be objectively reasonable” (*People v Jimenez*, 22 NY3d at 723).

Our dissenting colleague maintains that the People failed to demonstrate exigent circumstances because the police had no reasonable belief that the fanny pack contained a weapon, relying on the fact that the radio transmission did not specify the location of the gunpoint robbery or how much time elapsed since the robbery reportedly occurred and did not include a description of the suspects. We respectfully disagree. The police were notified that a vehicle matching the description of the subject vehicle was involved earlier the same day in a gunpoint robbery in Brooklyn. Additionally, after the vehicle was boxed in by police vehicles, the occupants tried to escape the scene in the vehicle and continually refused the officer’s directives to lower the heavily tinted car windows or exit the vehicle.

Moreover, the Court of Appeals has made clear that the requisite exigency for a warrantless search can be based on the crime for which there is probable cause to arrest, as well as other circumstances suggesting the presence of a weapon (see *id.* at 722). Here, there was probable cause to arrest Rivera based upon the recovery of a firearm from the vehicle in which the gunpoint robbery suspects reportedly had fled. Further, the fanny pack, which Rivera had been wearing across his chest, had not been reduced to the exclusive control of the police and was clearly of sufficient size to hold a handgun (see *People v Smith*, 59 NY2d at 459 [upholding the warrantless search of the defendant’s briefcase where he was arrested and handcuffed for jumping a turnstile, was seen to be wearing a bullet-proof vest, and the briefcase was of a sufficient size to contain a weapon]; *People v Johnson*, 226 AD3d 521, 521-522 [2024])

[search of a bag was justified incident to the defendant's arrest, inter alia, where the bag was located two feet away from the defendant, who was handcuffed, and the defendant had been sought in connection with an earlier gunpoint rape and robbery]; *People v Velez*, 154 AD3d 527, 528 [2017] [search of the handcuffed defendant's wallet was proper where the defendant had been arrested for robbery, "a violent crime," and the police had already recovered one razor blade from the defendant]).

Further, contrary to the dissent's assertion, Peralta's testimony established that cocaine was properly recovered from David as part of a lawful stationhouse inspection of objects on the defendant's person (see *People v Perel*, 34 NY2d 462, 468 [1974]; *People v Lawrence*, 180 AD3d 1070, 1071 [2020]; *People v Goode*, 176 AD3d 629, 629 [2019]).

Rivera's remaining contentions are without merit.

Accordingly, the defendants failed to meet their ultimate burden of establishing that the police conduct was unlawful. Therefore, the Supreme Court should have denied those branches of the defendants' separate omnibus motions which were to suppress physical evidence. Iannacci, J.P., Warhit and Landicino, JJ., concur.

Christopher, J., concurs in part and dissents in part, and votes to modify the order, on the law, by deleting the provision thereof granting those branches of the defendants' separate omnibus motions which were to suppress physical evidence recovered from the subject vehicle, and substituting therefor a provision denying those branches of the defendants' separate omnibus motions, and, as so modified, to affirm the order, with the following memorandum: I agree with my colleagues in the majority that the police officers reasonably stopped the defendants, removed the defendants from the vehicle, and placed them in handcuffs for the officers' own safety. Therefore, I agree with my colleagues in the majority that the Supreme Court should have denied those branches of the defendants' separate omnibus motions which were to suppress physical evidence recovered from the subject vehicle. However, I respectfully dissent, in part, because I believe that the warrantless searches of Jose Luis Rivera's fanny pack and the defendants' pockets were not justified. Accordingly, I conclude that the court properly granted those branches of the defendants' separate omnibus motions which were to suppress the physical evidence contained in the fanny pack and the defendants' pockets.

"The exclusionary rule generally bars from trial all 'physical, tangible materials obtained either during or as a direct result

of an unlawful invasion’ ” (*People v Millan*, 69 NY2d 514, 521 [1987], quoting *Wong Sun v United States*, 371 US 471, 485 [1963]). “The exclusionary rule is not aimed at safeguarding the truth-seeking process nor is its underlying purpose to redress any injury to the defendant’s privacy. It is a judicially created remedy intended as a means of discouraging police misconduct’ ” (*People v Marcial*, 211 AD3d 98, 104 [2022], quoting *People v Castillo*, 80 NY2d 578, 583 [1992]).

“‘All warrantless searches presumptively are unreasonable per se,’ and, thus, ‘[w]here a warrant has not been obtained, it is the People who have the burden of overcoming’ this presumption of unreasonableness” (*People v Jimenez*, 22 NY3d 717, 721 [2014], quoting *People v Hodge*, 44 NY2d 553, 557 [1978]). Under the United States Constitution, “[a] custodial arrest of a suspect based on probable cause is a reasonable intrusion under the Fourth Amendment; that intrusion being lawful, a search incident to the arrest requires no additional justification” (*United States v Robinson*, 414 US 218, 235 [1973]). However, the New York Constitution “require[s] that the reasonableness of each search or seizure be determined on the basis of the facts and circumstances of the particular case” (*People v Smith*, 59 NY2d 454, 457 [1983]). The propriety of a court’s decision to grant or deny a defendant’s suppression motion must be determined based upon the evidence before the suppression court (*see People v Wellington*, 84 AD3d 984, 985 [2011]; *People v Fleming*, 65 AD3d 702, 703 [2009]).

“Under the State Constitution, to justify a warrantless search incident to arrest, the People must satisfy two separate requirements” (*People v Jimenez*, 22 NY3d at 721). “The first imposes spatial and temporal limitations to ensure that the search is ‘not significantly divorced in time or place from the arrest’ ” (*id.*, quoting *People v Smith*, 59 NY2d at 458). “The second, and equally important, predicate requires the People to demonstrate the presence of exigent circumstances” (*id.*; *see People v Gokey*, 60 NY2d 309, 313 [1983]). “Exigent circumstances may be established by a showing that the search was necessary to ensure the safety of the public or the arresting officer, or that it was necessary to prevent the destruction or concealment of evidence” (*People v Houston*, 143 AD3d 737, 739 [2016]; *see People v Jimenez*, 22 NY3d at 722). “The crime for which there is probable cause to make the arrest may itself provide the requisite exigency” (*People v Jimenez*, 22 NY3d at 722). “Exigency may also derive from circumstances other than the nature of the offense” (*id.*). In either case, “[e]xigency must be affirmatively demonstrated” (*id.*; *see People v Mabry*, 37 NY3d 933, 934 [2021]).

Here, the People failed to demonstrate the presence of exigent circumstances justifying the warrantless search of Rivera's fanny pack (see *People v Mabry*, 37 NY3d at 934; *People v Lewis*, 242 AD3d 1116, 1121 [2025]; *People v Houston*, 143 AD3d at 739). The body-worn camera video footage of a police lieutenant demonstrates that, at the moment Andy Peralta, a police officer, found the firearm in the driver's side map compartment of the vehicle, another officer was placing the fanny pack on the roof of the vehicle after the fanny pack had been removed from Rivera's person out of view.

The record contains no evidence that the police reasonably believed that the fanny pack contained a weapon at the time it was searched (see *People v Jimenez*, 22 NY3d at 724; cf. *People v Alvarado*, 126 AD3d 803, 805 [2015]). The fact that the police were responding to a report of a gunpoint robbery was inadequate to establish that the police reasonably suspected that Rivera was armed and dangerous at the time of the stop, as Peralta's testimony describing the radio transmission did not specify the location of the reported "gunpoint robbery" except that it was "in a different borough," did not specify how much time had elapsed since the robbery reportedly occurred, and did not include a description of the robbery suspects (cf. *People v Mabry*, 184 AD3d 867, 869 [2020], rev'd 37 NY3d 933 [2021]; *People v Velez*, 154 AD3d 527, 528 [2017]). Furthermore, Peralta was not aware of any iCard for Rivera's arrest (cf. *People v Johnson*, 226 AD3d 521, 521 [2024]).

Inasmuch as the only reason offered for cutting the fanny pack from Rivera's chest area was that the police could not otherwise remove the fanny pack without uncuffing Rivera's hands, the record does not contain evidence supporting a determination that the fanny pack was in Rivera's immediate control or grabbable area (see *People v Mabry*, 184 AD3d at 874 [Leventhal, J., dissenting]; cf. *People v Johnson*, 226 AD3d at 521), that the search of the fanny pack was, in effect, simultaneous with the handcuffing of Rivera (cf. *People v Smith*, 59 NY2d at 459), or that the police had not obtained exclusive control of the fanny pack (cf. *People v Boone*, 233 AD3d 623, 625 [2024]). Indeed, the lieutenant's body-worn camera video footage demonstrates that the lieutenant and Peralta, the sole witness at the suppression hearing, were on the driver's side of the vehicle while two or more officers arrested Rivera out of view on the passenger's side of the vehicle.

Finally, Peralta's conclusory testimony that cash and alleged narcotics were removed from the defendants' pockets during the booking process was inadequate to establish that the search

of the defendants' pockets was reasonable (*see People v Costan*, 197 AD3d 716, 723 [2021]; *People v Houston*, 143 AD3d at 739). Peralta's testimony did not identify who removed the property from the defendants' pockets and did not specify whether he personally observed the search or whether the defendants were being held in police custody (*cf. People v Perel*, 34 NY2d 462, 468 [1974]).

Accordingly, I believe the Supreme Court properly granted those branches of the defendants' separate omnibus motions which were to suppress the physical evidence that was obtained by an unlawful search of their persons.

50 The People of the State of New York, Respondent, v Dandre Fields, Appellant. [253 NYS3d 728]—

Crimes—Appeal—Waiver of Right to Appeal—Acknowledgment of Understanding

Crimes—Possession of Weapon—Constitutional Challenge to Statute

Appeal by the defendant from a judgment of the Supreme Court, Kings County (Dineen A. Riviezzo, J.), rendered November 15, 2022, convicting him of attempted criminal possession of a weapon in the second degree, upon his plea of guilty, and imposing sentence.

Ordered that the judgment is affirmed.

The defendant was charged with, inter alia, criminal possession of a weapon in the second degree. After that branch of his motion which was to suppress physical evidence was denied, the defendant entered a plea agreement pursuant to which he waived his right to appeal.

Under the totality of the circumstances, the record demonstrates that the defendant knowingly, voluntarily, and intelligently waived his right to appeal (*see People v Thomas*, 34 NY3d 545 [2019]; *People v Lopez*, 6 NY3d 248 [2006]). Although it would have been better practice for the Supreme Court to discuss with the defendant the waiver of his appellate rights before obtaining an admission of guilt (*see People v Callejo*, 237 AD3d 1218, 1218 [2025]; *People v White*, 234 AD3d 884, 884 [2025]), the defendant acknowledged that an appeal waiver was a condition of the plea agreement prior to the entry of his plea of guilty and admission of guilt. Furthermore, the defendant acknowledged that he had discussed the appeal waiver with his attorney, as well as executed a written waiver of his right to appeal. Thus, it cannot be said that the defendant “received no material benefit from his appeal waiver” or that the appeal waiver “was a gratuitous, after-the-fact additional demand asserted after the bargain had already been struck”

(*People v White*, 234 AD3d at 884-885 [internal quotation marks omitted]). Moreover, contrary to the defendant's contention, the court adequately explained and the defendant acknowledged that he understood the nature of the right to appeal and the consequences of waiving that right, and the court did not mischaracterize the nature or scope of the waiver (see *People v Morao*, 238 AD3d 1175, 1175 [2025]; *People v Sobers*, 235 AD3d 908, 909 [2025]). Additionally, the written appeal waiver signed by the defendant adequately supplemented the oral colloquy (see *People v Morao*, 238 AD3d at 1175; *People v Hendricks*, 224 AD3d 705, 706 [2024]). Under the circumstances presented, including, among other things, the exemplary explanation of the right to appeal provided to the defendant, the court's delay in explaining the appeal waiver until after the defendant's factual allocation of the crime did not render the appeal waiver invalid (see *People v Callejo*, 237 AD3d at 1218-1219).

The defendant's valid waiver of his right to appeal precludes appellate review of his challenge to the Supreme Court's suppression determination (see *People v Mincy*, 240 AD3d 615, 616 [2025]; *People v Callejo*, 237 AD3d at 1219). However, contrary to the People's contention, the defendant's appeal waiver does not preclude appellate review of his contention that Penal Law §§ 265.03 (3), 265.01-b (1), and 265.01 (1) were unconstitutional under *New York State Rifle & Pistol Assn., Inc. v Bruen* (597 US 1 [2022]), and the defendant does not lack standing to assert this claim (see *People v Johnson*, — NY3d —, 2025 NY Slip Op 06528 [2025]). Nevertheless, the defendant's contention that those statutes are unconstitutional is without merit. The *Bruen* decision had no impact on the constitutionality of New York State's criminal possession of a weapon statutes (see *People v Johnson*, — NY3d —, 2025 NY Slip Op 06528 [2025]; *People v Mitchell*, 244 AD3d 1005 [2025]). Dillon, J.P., Genovesi, Golia and Hom, JJ., concur.

51 The People of the State of New York, Respondent, v Joseph Flores, Appellant. [251 NYS3d 785]—

Crimes—Appeal—Waiver of Right to Appeal—Facial Constitutional Challenge

Appeal by the defendant from a judgment of the Supreme Court, Richmond County (Lisa Grey, J.), rendered June 8, 2023, convicting him of attempted robbery in the third degree, upon his plea of guilty, and imposing sentence.

Ordered that the judgment is affirmed.

The record demonstrates that the defendant knowingly, voluntarily, and intelligently waived his right to appeal (see *People v Lopez*, 6 NY3d 248, 257 [2006]; *People v Hidalgo*, 243 AD3d

677 [2025]). The defendant's valid waiver of his right to appeal precludes appellate review of his challenges to the procedure used to adjudicate him a second felony offender (*see People v Simpson*, 244 AD3d 762 [2025]).

To the extent the defendant contends that New York's predicate felony offender statutes are facially unconstitutional, that contention is not precluded by the appeal waiver (*see People v Johnson*, — NY3d —, 2025 NY Slip Op 06528 [2025]; *People v Smith*, 244 AD3d 1144 [2025]). However, that contention is unpreserved for appellate review (*see* CPL 470.05 [2]), and we decline to reach it in the exercise of our interest of justice jurisdiction (*see People v Smith*, 244 AD3d 1144 [2025]).

The defendant's valid waiver of his right to appeal precludes appellate review of his contention that the sentence imposed was excessive (*see People v Montano*, 235 AD3d 1003 [2025]). Barros, J.P., Wan, McCormack and Hom, JJ., concur.

52 The People of the State of New York, Plaintiff, v Daniel Floresarteaga, Defendant. [251 NYS3d 792]—Application by the defendant for a writ of error coram nobis seeking leave to file a late notice of appeal from a judgment of the County Court, Westchester County, rendered September 15, 2022.

Ordered that the application is denied.

The defendant has not established his entitlement to the relief requested (*see People v Syville*, 15 NY3d 391 [2010]). Chambers, J.P., Dowling, Wan and Ventura, JJ., concur.

53 The People of the State of New York, Respondent, v Donte J. Floyd, Appellant. [253 NYS3d 730]—

Crimes—Verdict—Sufficiency of Evidence—Criminal Possession of Weapon

Appeal by the defendant from a judgment of the Supreme Court, Queens County (Evelyn L. Braun, J.), rendered June 18, 2020, convicting him of criminal possession of a weapon in the second degree (two counts), after a nonjury trial, and imposing sentence.

Ordered that the judgment is affirmed.

On February 6, 2019, a shooting allegedly occurred on 148th Street and 115th Avenue in Queens. Surveillance cameras captured videos of the incident in which a suspect exits from the back of a vehicle, points what appears to be a gun in the direction of a group of individuals, and reenters the vehicle, which drives off. No bullets or fragments were collected at the scene. The following day, the defendant was stopped driving a vehicle matching the characteristics of the one captured in the surveillance footage. At a nonjury trial, the evidence against

the defendant consisted of, inter alia, surveillance camera footage, witness testimony regarding the sound of gunshots, and photographs of a damaged van. Following the trial, the Supreme Court found the defendant guilty of two counts of criminal possession of a weapon in the second degree. The defendant appeals.

“A person is guilty of criminal possession of a weapon in the second degree when,” as relevant here, such person “possesses a loaded firearm” with “intent to use the same unlawfully against another” (Penal Law § 265.03 [1] [b]) or “possesses any loaded firearm,” except if “such possession takes place in such person’s home or place of business” (*id.* § 265.03 [3]). The People must establish that the firearm was (i) operable, meaning capable of discharging live ammunition, and (ii) loaded with live ammunition (*see id.* §§ 265.03 [1] [b]; [3]; 265.00 [15]; *People v Williams*, 94 AD3d 779, 780 [2012]; *People v Mathieu*, 83 AD3d 735, 736 [2011]). Where there is no gun or ballistics evidence recovered, those elements may be proved circumstantially through witness testimony and surrounding circumstances (*see People v Samba*, 97 AD3d 411, 414 [2012]).

Viewing the evidence in the light most favorable to the prosecution (*see People v Contes*, 60 NY2d 620, 621 [1983]), we find that it was legally sufficient to establish, beyond a reasonable doubt, the defendant’s guilt of criminal possession of a weapon in the second degree (*see People v Boyd*, 151 AD3d 641, 642 [2017]; *People v Samba*, 97 AD3d at 414-415; *People v Ciola*, 136 AD2d 557 [1988]).

Contrary to the People’s contention, the defendant’s contention that the People’s evidence failed to establish the defendant’s identity as the perpetrator of the alleged crimes beyond a reasonable doubt was preserved for appellate review (*see CPL 470.05 [2]*; *People v Feingold*, 7 NY3d 288, 290 [2006]). Nonetheless, viewing the evidence in the light most favorable to the prosecution, we find that it was legally sufficient to establish the defendant’s identity as the perpetrator of the crimes beyond a reasonable doubt (*see People v Patterson*, 237 AD3d 859, 859-860 [2025]; *People v Saunders*, 220 AD3d 812, 812-813 [2023]).

The defendant’s contention that his convictions were against the weight of the evidence is without merit. The defendant’s further contentions in point three of his brief, relating to, inter alia, his fundamental right to be present at sentencing, and point four of his brief, regarding his sentence as a second violent felony offender, are unpreserved for appellate review and, in any event, without merit. The defendant’s remaining conten-

tion, regarding ineffective assistance of counsel, is based on matter dehors the record and, therefore, cannot be reviewed on direct appeal. Genovesi, J.P., Warhit, Golia and Hom, JJ., concur.

54 The People of the State of New York, Respondent, v Wesley Foster, Appellant. [251 NYS3d 780]—

Crimes—Right to Counsel—Withdrawal

Appeal by the defendant from a judgment of the Supreme Court, Kings County (Dineen Riviezzo, J.), rendered March 3, 2022, convicting him of robbery in the third degree, upon his plea of guilty, and imposing sentence. Assigned counsel has submitted a brief in accordance with *Anders v California* (386 US 738 [1967]), in which she moves for leave to withdraw as counsel for the appellant.

Ordered that the judgment is affirmed.

We are satisfied with the sufficiency of the brief filed by the defendant's assigned counsel pursuant to *Anders v California* (386 US 738 [1967]), and, upon an independent review of the record, we conclude that there are no nonfrivolous issues which could be raised on appeal. Counsel's application for leave to withdraw as counsel is, therefore, granted (*see id.*; *Matter of Giovanni S. [Jasmin A.]*, 89 AD3d 252 [2011]). Barros, J.P., Chambers, Taylor and Goldberg Velazquez, JJ., concur.

55 The People of the State of New York, Respondent, v Alexander Franco, Appellant. [251 NYS3d 785]—Appeal by the defendant, as limited by his motion, from a sentence of the Supreme Court, Kings County (Rhonda Z. Tomlinson, J.), imposed December 8, 2023, upon his plea of guilty, on the ground that the sentence was excessive.

Ordered that the sentence is affirmed.

The sentence imposed was not excessive (*see People v Suitte*, 90 AD2d 80 [1982]). Dillon, J.P., Wooten, Wan and Golia, JJ., concur.

56 The People of the State of New York, Respondent, v Reggie Frank, Appellant. [251 NYS3d 781]—Appeal by the defendant, as limited by his motion, from a resentence of the Supreme Court, Kings County (Raymond L. Rodriguez, J.), imposed December 13, 2024, after remittitur from this Court for resentencing (*see People v Frank*, 232 AD3d 621 [2024]), on the ground that the resentence was excessive.

Ordered that the resentence is affirmed.

The resentence imposed was not excessive (*see People v*

Suitte, 90 AD2d 80 [1982]). Barros, J.P., Chambers, Dowling, Landicino and Hom, JJ., concur.

57 The People of the State of New York, Respondent, v Johnathan D. Gore, Appellant. [251 NYS3d 789]—Appeal by the defendant, as limited by his motion, from a sentence of the Supreme Court, Kings County (Donald Leo, J.), imposed March 29, 2024, upon his plea of guilty, on the ground that the sentence was excessive.

Ordered that the sentence is affirmed.

The sentence imposed was not excessive (*see People v Suitte*, 90 AD2d 80 [1982]). Duffy, J.P., Chambers, Dowling, Landicino and Hom, JJ., concur.

58 The People of the State of New York, Respondent, v Denzel L., Appellant. [— NYS3d —]—

Crimes—Possession of Weapon—Constitutional Challenge to Statute
Crimes—Sentence—Probation—Conditions

Appeals by the defendant from (1) a judgment of the Supreme Court, Kings County (Heidi Cesare, J.), rendered November 22, 2022, adjudicating him a youthful offender, upon his plea of guilty to criminal possession of a firearm under Indictment No. 73245/21, and imposing sentence, and (2) a judgment of the same court rendered November 22, 2022, adjudicating him a youthful offender, upon his plea of guilty to criminal possession of a weapon in the second degree under Indictment No. 73501/21, and imposing sentence.

Ordered that the judgments are affirmed.

The defendant's contention that Penal Law §§ 265.03 (3), 265.01-b (1), and 265.01 (1) and Administrative Code of the City of New York § 10-131 (i) (3) are unconstitutional in light of the decision of the United States Supreme Court in *New York State Rifle & Pistol Assn., Inc. v Bruen* (597 US 1 [2022]), and that the indictment was thus defective, is unpreserved for appellate review, since he failed to raise a constitutional challenge before the Supreme Court (*see People v Cabrera*, 41 NY3d 35, 42 [2023]; *People v Thompson*, 239 AD3d 774, 774 [2025]). In any event, the defendant's contention is without merit. The statutory scheme is not invalid on its face (*see People v Johnson*, — NY3d —, 2025 NY Slip Op 06528 [2025]), and “[t]he *Bruen* decision had no impact on the constitutionality of New York State’s criminal possession of a weapon statutes” (*People v Thompson*, 239 AD3d at 774-775; *see People v Emmanuel D.*, 238 AD3d 1068, 1069 [2025]).

As part of the sentences of probation imposed on the defend-

ant, the Supreme Court imposed conditions of probation, including prohibiting him from possessing or purchasing a gun (hereinafter Condition No. 11) and requiring him to consent to a search by a probation officer of his person, vehicle, or place of abode (hereinafter Condition No. 28).

“Generally, the conditions of probation ‘shall be such as the court, in its discretion, deems reasonably necessary to insure that the defendant will lead a law-abiding life or to assist him [or her] to do so’ (Penal Law § 65.10 [1])” (*People v Gibson*, 244 AD3d 751, 752 [2025]). “In addition to specific conditions enumerated in the statute, the court may, in its discretion, impose ‘any other conditions reasonably related to [the defendant’s] rehabilitation’ ([Penal Law] § 65.10 [2] [1]) and ‘any other reasonable condition as the court shall determine to be necessary or appropriate to ameliorate the conduct which gave rise to the offense or to prevent the incarceration of the defendant’ (*id.* § 65.10 [5])” (*id.*). “Therefore, sentencing courts may require a defendant to consent to searches by his or her probation officer for weapons, illegal drugs, or other contraband so long as the condition is ‘individually tailored in relation to the offense’ and ‘the defendant’s particular circumstances, including his or her background, history, and proclivities’ ” (*id.*, quoting *People v Mantilla*, 236 AD3d 925, 926 [2025]).

Here, the offenses of which the defendant was convicted involved the possession of weapons. Condition No. 11 and Condition No. 28 were properly imposed as they were individually tailored in relation to the underlying offenses of criminal possession of a firearm and criminal possession of a weapon in the second degree and were therefore reasonably related to the defendant’s rehabilitation or necessary to ensure that the defendant will lead a law-abiding life (*see People v Grandstand*, 236 AD3d 817, 818 [2025]; *People v Rogers*, 235 AD3d 781 [2025]).

The sentences imposed were not excessive (*see People v Suitte*, 90 AD2d 80 [1982]).

Barros, J.P., Brathwaite Nelson, Warhit and Goldberg Velazquez, JJ., concur.

59 The People of the State of New York, Respondent, v Michael McCutchen, Appellant. [253 NYS3d 272]—

Crimes—Right to Speedy Trial—Delay in Excess of Six Months—Excludable Days

Crimes—Right to Speedy Trial—Due Diligence—Belated Disclosures

Crimes—Sentence—Second Felony Offender

Appeal by the defendant from a judgment of the County

Court, Rockland County (Kevin F. Russo, J.), rendered July 3, 2024, convicting him of criminal contempt in the first degree, resisting arrest, and obstructing governmental administration in the second degree, after a nonjury trial, and imposing sentence.

Ordered that the judgment is modified, on the law, by vacating the sentence imposed; as so modified, the judgment is affirmed, and the matter is remitted to the County Court, Rockland County, for resentencing in accordance herewith.

On July 1, 2023, the defendant was arraigned on a felony complaint. The defendant was subsequently charged in an indictment with, *inter alia*, criminal contempt in the first degree (Penal Law § 215.51 [c]), resisting arrest (*id.* § 205.30), and obstructing governmental administration in the second degree (*id.* § 195.05). The People filed a certificate of compliance (hereinafter COC) and a statement of readiness (hereinafter SOR) on January 19, 2024, and filed a supplemental COC on February 21, 2024.

The defendant moved pursuant to CPL 30.30 to dismiss the indictment on the grounds that he was deprived of his statutory right to a speedy trial and that the initial COC was invalid and the SOR was illusory. The People opposed the motion. In an order entered April 8, 2024, the County Court denied the defendant's motion.

The defendant was convicted, after a nonjury trial, of criminal contempt in the first degree, resisting arrest, and obstructing governmental administration in the second degree, and was sentenced as a second felony offender.

Contrary to the defendant's contention, the County Court properly denied his motion pursuant to CPL 30.30 to dismiss the indictment. "CPL 30.30 require[s] that the People be ready for trial within specific time periods that vary according to the level of offense charged" (*People v Blue*, 42 NY3d 584, 596 [2024], quoting *People v Bay*, 41 NY3d 200, 207 [2023]). Where, as here, a defendant is charged with a felony, the People must announce readiness for trial within six months of the commencement of the action (*see* CPL 30.30 [1] [a]; *People v Blue*, 42 NY3d at 596; *People v Taback*, 216 AD3d 673, 674 [2023]; *People v Perkins*, 175 AD3d 1327, 1327 [2019]). "A defendant seeking dismissal of the indictment on speedy trial grounds under CPL 30.30 meets his or her initial burden on the motion simply by alleging that the People failed to declare readiness within the statutorily prescribed period" (*People v Perkins*, 175 AD3d at 1327). "[O]nce the defendant has shown the existence of a delay greater than six months, the burden of proving

that certain periods within that time should be excluded falls upon the People’ ” (*id.*, quoting *People v Berkowitz*, 50 NY2d 333, 349 [1980]).

Here, the defendant sustained his initial burden on the motion by alleging that a period of delay in excess of six months had elapsed since the date that he was arraigned on the felony complaint. However, in opposition, the People demonstrated that certain days within that time period were excludable on the grounds, *inter alia*, that the parties were preparing and filing pretrial motions and the motions were under consideration by the court (*see* CPL 30.30 [4] [a]; *People v Rodriguez*, 224 AD3d 783, 783 [2024]; *People v Perkins*, 175 AD3d at 1327).

Moreover, the People’s initial COC was proper and the SOR was not illusory. “When a defendant moves pursuant to CPL 30.30 to dismiss an indictment ‘on the ground that the People failed to exercise due diligence and therefore improperly filed a COC, the People bear the burden of establishing that they did, in fact, exercise due diligence and made reasonable inquiries prior to filing the initial COC despite a belated or missing disclosure’ ” (*People v Hespino Barros*, 245 AD3d 826, 828 [2026], quoting *People v Bay*, 41 NY3d at 213). “Due diligence ‘is a familiar and flexible standard that requires the People to make reasonable efforts to comply with statutory directives’ ” (*People v McMahon*, 237 AD3d 746, 750 [2025] [internal quotation marks omitted], quoting *People v Bay*, 41 NY3d at 211). “Although the relevant factors for assessing due diligence may vary from case to case, courts should generally consider, among other things, [1] the efforts made by the prosecution and the prosecutor’s office to comply with the statutory requirements, [2] the volume of discovery provided and outstanding, [3] the complexity of the case, [4] how obvious any missing material would likely have been to a prosecutor exercising due diligence, [5] the explanation for any discovery lapse, and [6] the People’s response when apprised of any missing discovery’ ” (*id.*, quoting *People v Bay*, 41 NY3d at 212).

Here, the People’s belated disclosures that accompanied the supplemental COC were made in good faith and with due diligence, were minimal, were not related to testifying witnesses, and were voluntarily provided to the defense once the People were made aware of the existence of the undisclosed materials (*see* *People v Henderson*, 237 AD3d 853, 854 [2025]; *People ex rel. Nieves v Maginley-Liddie*, 232 AD3d 568, 570 [2024]; *People v Macaluso*, 230 AD3d 1158, 1160 [2024]).

Accordingly, the County Court correctly determined that the total time chargeable to the People was less than the six-month

time period provided by CPL 30.30 (1) (a), and inasmuch as the People's initial COC was proper, and the SOR was not illusory, the court properly denied the defendant's motion pursuant to CPL 30.30 to dismiss the indictment on the ground that he was deprived of his statutory right to a speedy trial.

The defendant's challenge to the legal sufficiency of the evidence is unpreserved for appellate review, as defense counsel made only a general motion for a trial order of dismissal, which failed to specify any particular error (*see* CPL 470.05 [2]; *People v Hawkins*, 11 NY3d 484, 492 [2008]). In any event, viewing the evidence in the light most favorable to the prosecution (*see People v Contes*, 60 NY2d 620, 621 [1983]), we find that it was legally sufficient to establish the defendant's guilt beyond a reasonable doubt (*see People v Ford*, 11 NY3d 875, 878 [2008]). Moreover, in fulfilling our responsibility to conduct an independent review of the weight of the evidence (*see* CPL 470.15 [5]; *People v Danielson*, 9 NY3d 342, 349 [2007]), we nevertheless accord great deference to the factfinder's opportunity to view the witnesses, hear the testimony, and observe demeanor (*see People v Mateo*, 2 NY3d 383, 410 [2004]; *People v Bleakley*, 69 NY2d 490, 495 [1987]). Upon reviewing the record here, we are satisfied that the verdict of guilt was not against the weight of the evidence (*see People v Danielson*, 9 NY3d at 348-349; *People v Romero*, 7 NY3d 633 [2006]).

However, the County Court erred in sentencing the defendant as a second felony offender without adjudicating him as such in compliance with the procedural requirements of CPL 400.21, or any showing that the defendant was given notice and an opportunity to be heard (*see People v Marshall*, 223 AD3d 756, 757 [2024]; *People v Smith*, 127 AD3d 790, 791 [2015]). Contrary to the People's contention, the defendant's claim here is not subject to the rule of preservation because the court did not advise the defendant that he would be sentenced as a second felony offender and he had no opportunity to object to the deficiency of the proceeding (*see People v Marshall*, 223 AD3d at 757).

Accordingly, we remit the matter to the County Court, Rockland County, for resentencing in accordance with the mandates of CPL 400.21. Dillon, J.P., Ford, Voutsinas and McCormack, JJ., concur.

60 The People of the State of New York, Respondent, v Evelio Mendez, Appellant. [251 NYS3d 788]—

Crimes—Appeal—Waiver of Right to Appeal—Mischaracterization of Waiver

Appeal by the defendant from a judgment of the County

Court, Rockland County (Anne B. Bianchi, J.), rendered June 18, 2024, convicting him of course of sexual conduct against a child in the first degree, upon his plea of guilty, and imposing sentence.

Ordered that the judgment is affirmed.

Contrary to the People's contention, the defendant's purported waiver of the right to appeal was invalid. The County Court's terse oral colloquy mischaracterized the nature of the appeal waiver as an absolute bar to the taking of a direct appeal by stating only that it was a waiver of the "right to appeal your conviction and sentence" (*see People v Thomas*, 34 NY3d 545 [2019]; *People v Muhammad*, 231 AD3d 868, 869 [2024]). Accordingly, the purported waiver does not preclude appellate review of the defendant's excessive sentence claim (*see People v Lawrence*, 227 AD3d 829, 829 [2024]; *People v Richards*, 224 AD3d 782, 783 [2024]).

Nonetheless, the sentence imposed was not excessive (*see People v Suitte*, 90 AD2d 80 [1982]). Genovesi, J.P., Ford, Voutsinas and Golia, JJ., concur.

61 The People of the State of New York, Respondent, v Anthony Mercer, Appellant. [— NYS3d —]

Crimes—Sentence—Postrelease Supervision—Notification to Sentencing Court

Appeal by the defendant from a resentence of the Supreme Court, Kings County (Carolyn Demarest, J.), imposed September 24, 2015, upon his convictions of assault in the first degree, reckless endangerment in the first degree, sodomy in the first degree, sodomy in the third degree, criminal solicitation in the fourth degree, and perjury in the first degree, upon a jury verdict, the resentence being a period of postrelease supervision in addition to a determinate term of imprisonment previously imposed on June 16, 2003.

Ordered that the resentence is affirmed.

Following his convictions, after a jury trial, of assault in the first degree, sodomy in the first degree and related charges, the defendant was sentenced, as a second felony offender, to a minimum aggregate term of imprisonment of 28½ years. The judgment of conviction was subsequently affirmed on appeal (*see People v Mercer*, 17 AD3d 607 [2005]).

By letter dated May 24, 2012, the Department of Corrections and Community Supervision (hereinafter DOCCS) notified the Supreme Court that the defendant was a "designated person" under Correction Law § 601-d and that a mandatory period of

postrelease supervision should have been included as part of his original sentence (hereinafter the DOCCS notification). Justice Carolyn Demarest, who presided over the defendant's trial and sentencing proceedings, did not receive the DOCCS notification until on or about March 25, 2015. Upon Justice Demarest's receipt of the DOCCS notification, within a period of approximately one month, the court forwarded the DOCCS notification to the People, determined that the defendant was no longer represented by the attorney who had represented him at trial, assigned the defendant new counsel, and calendared the matter for resentencing. The defendant appeared before the court for resentencing on September 24, 2015, approximately six months after Justice Demarest first received the DOCCS notification, at which time he was resentenced to a five-year period of postrelease supervision, to follow the term of imprisonment.

On appeal, the defendant contends, inter alia, that the Supreme Court's imposition of a period of postrelease supervision was unlawful because the requirements of Correction Law § 601-d (2) and (4) were not complied with in a timely manner. Correction Law § 601-d (2) requires DOCCS to notify the sentencing court that a defendant is a "designated person" for whom a period of postrelease supervision should have been imposed at the time of original sentencing. DOCCS "must 'make notification of that fact to the court that sentenced such person, and to the inmate or releasee'" (*People v Velez*, 19 NY3d 642, 646 [2012], quoting Correction Law § 601-d [2]). "The court, when it receives the notification, 'shall promptly seek to obtain sentencing minutes, plea minutes and any other records and shall . . . conduct any reconstruction proceedings that may be necessary,'" then issue a written determination and order on the matter within a 40-day period of time (*id.*, quoting Correction Law § 601-d [4] [b]; see § 601-d [4] [d]).

Here, though DOCCS sent the DOCCS notification to the Supreme Court in May 2012, the record provides no indication that Justice Demarest was made aware of the DOCCS notification at any time prior to March 25, 2015. Moreover, the Court of Appeals has held that a failure to comply with the time requirements designated within Correction Law § 601-d (4) does not constitute a jurisdictional defect that deprives the court of its authority to correct an illegal sentence and impose a period of postrelease supervision (see *People v Velez*, 19 NY3d at 647-648). Considering the unusual circumstances presented here, we find that the delay in resentencing was permissible, as nothing suggests that it was willfully caused by the People

or resulted in prejudice to the defendant (*see id.* at 649; *People v Herbert*, 135 AD3d 659 [2016]; *People v Comfort*, 121 AD3d 1132, 1133-1134 [2014]). We note that the defendant was resentenced long before the expiration of his original sentence (*cf. People v Velez*, 19 NY3d at 649-650; *People v Williams*, 14 NY3d 198, 217 [2010]), and “his resentencing to a term including the statutorily required period of postrelease supervision did not violate the double jeopardy or due process clauses of the United States Constitution” (*People v Fox*, 104 AD3d 789, 789-790 [2013]). Accordingly, the defendant was properly resentenced to a period of postrelease supervision (*see generally People v Lingle*, 16 NY3d 621, 632-633 [2011]).

The defendant’s remaining contentions are without merit. Connolly, J.P., Ford, Voutsinas and Love, JJ., concur.

62 The People of the State of New York, Respondent, v Julio Peralta, Appellant. [— NYS3d —]—

Crimes—Appeal—Waiver of Right to Appeal

Crimes—Appeal—Preservation of Issue for Review—Rare Case Exception

Appeals by the defendant from two judgments of the Supreme Court, Nassau County (Terence P. Murphy, J.), both rendered June 23, 2022, convicting him of attempted criminal possession of a controlled substance in the fifth degree under Superior Court information No. 1423/21 and criminal possession of a controlled substance in the fourth degree under Superior Court information No. 71211/22, upon his pleas of guilty, and imposing sentences.

Ordered that the judgments are affirmed.

Contrary to the People’s contention, the defendant’s purported waivers of his right to appeal, in both circumstances, were invalid. The Supreme Court’s terse oral colloquies failed to establish that the defendant understood the nature of the rights he was waiving and the rights he retained (*see e.g. People v Taj W.*, 235 AD3d 1016 [2025]) and were not supplemented by written waiver forms, which might have cured the deficiencies in the court’s colloquies (*People v Vilmont*, 216 AD3d 1113 [2023]).

The defendant’s contention concerning his plea of guilty to criminal possession of a controlled substance in the fourth degree is unpreserved for appellate review, since the defendant did not move to vacate his plea or otherwise raise this issue before the Supreme Court (*see CPL 470.05 [2]*; *People v Peralta*, 171 AD3d 948, 948 [2019]; *People v Kovalsky*, 166 AD3d 900, 901 [2018]; *People v Ramos*, 164 AD3d 922, 922 [2018]). Moreover, “the ‘rare case’ exception to the preservation requirement

does not apply here because the defendant's allocution did not cast significant doubt on his guilt, negate an essential element of the crime, or call into question the voluntariness of his plea" (*People v Ramos*, 164 AD3d at 922-923, quoting *People v Lopez*, 71 NY2d 662, 666 [1988]). In any event, the record establishes that the defendant's plea of guilty was knowing, voluntary, and intelligent (*see People v Ospina*, 175 AD3d 513 [2019]).

The defendant's contention that the Supreme Court improvidently exercised its discretion in sentencing him to an enhanced sentence on his plea to attempted criminal possession of a controlled substance in the fifth degree following his arrest, prior to sentencing, for, inter alia, criminal possession of a controlled substance in the fourth degree is unpreserved for appellate review (*see People v Trent*, 243 AD3d 687, 687 [2025]; *People v Perkins*, 169 AD3d 936, 937 [2019]) and, in any event, without merit. The defendant was advised of the maximum sentence that could be imposed upon his failure to comply with the conditions of the plea agreement (*People v Perkins*, 169 AD3d at 937).

Contrary to the defendant's contentions, the sentences imposed were not excessive (*see People v Suitte*, 90 AD2d 80 [1982]). Dillon, J.P., Ford, Voutsinas and McCormack, JJ., concur.

63 The People of the State of New York, Respondent, v Reynaldo Reyes, Appellant. [— NYS3d —]

Crimes—Right to Counsel—Effective Representation—Conflict of Interest

Appeals by the defendant from (1) a judgment of the Supreme Court, Nassau County (Helene F. Gugerty, J.), rendered August 31, 2023, convicting him of robbery in the first degree, robbery in the third degree, petit larceny, and resisting arrest, upon a jury verdict, and imposing sentence, and (2) a resentence of the same court imposed December 11, 2023.

Ordered that the judgment is modified, on the law, by vacating the convictions of robbery in the third degree and petit larceny, vacating the sentence imposed upon the conviction of petit larceny and the resentence, and dismissing those counts of the indictment; as so modified, the judgment is affirmed; and it is further,

Ordered that the appeal from the resentence is dismissed as academic in light of our determination on the appeal from the judgment.

On August 31, 2023, the defendant was sentenced, as a persistent violent felony offender, on his convictions of robbery in

the first degree, robbery in the third degree, petit larceny, and resisting arrest. On December 11, 2023, the Supreme Court resentence the defendant as a discretionary persistent felony offender on his conviction of robbery in the third degree.

Both the Federal and New York State Constitutions “guarantee a criminal defendant legal representation that is ‘reasonably competent, conflict-free and singlemindedly devoted to the client’s best interests’” (*People v Payton*, 22 NY3d 1011, 1013 [2013], quoting *People v Harris*, 99 NY2d 202, 209 [2002]; see *People v Arevalo*, 224 AD3d 768, 769 [2024]). “Cases addressing the effect of a lawyer’s conflict of interest on a defendant’s right to the effective assistance of counsel differentiate between actual and potential conflicts” (*People v Arevalo*, 224 AD3d at 769; see *People v Brown*, 33 NY3d 983, 987 [2019]). “‘An actual conflict exists if an attorney simultaneously represents clients whose interests are opposed and, in such situations, reversal is required if the defendant does not waive the actual conflict’” (*People v Arevalo*, 224 AD3d at 769, quoting *People v Sanchez*, 21 NY3d 216, 223 [2013]).

“By contrast, a potential conflict that is not waived by the defendant ‘requires reversal only if it operates on or affects the defense—i.e., the nature of the attorney-client relationship or underlying circumstances bear a substantial relation to the conduct of the defense’” (*id.*). “‘The requirement that a potential conflict have affected, or operated on, or borne a substantial relation to the conduct of the defense—three formulations of the same principle—is not a requirement that the defendant show specific prejudice’” (*id.*). “‘Nevertheless, it is the defendant’s heavy burden to show that a potential conflict actually operated on the defense’” (*id.* at 769-770, quoting *People v Sanchez*, 21 NY3d at 223; see *People v Brown*, 33 NY3d at 987).

Here, trial counsel did not represent a codefendant or a prosecution witness whose interests actually conflicted with the defendant’s interests (see *People v Prescott*, 21 NY3d 925, 927-928 [2013]; *People v Solomon*, 20 NY3d 91, 95-97 [2012]; *People v Ortiz*, 76 NY2d 652, 656 [1990]; *People v Arevalo*, 224 AD3d at 769). Moreover, the defendant failed to meet the heavy burden to show that a potential conflict actually affected or operated on the conduct of the defense (see *People v Smart*, 96 NY2d 793, 795 [2001]; *People v Arevalo*, 224 AD3d at 769-770; *People v Beckerman*, 215 AD3d 881, 882 [2023]; *People v Argentina*, 27 AD3d 569, 570 [2006]; cf. *People v Ortiz*, 76 NY2d at 657). Accordingly, the defendant was not deprived of the effective assistance of counsel.

As the People concede, the defendant's convictions of robbery in the third degree and petit larceny are both lesser included offenses of robbery in the first degree (*see* CPL 300.40 [3] [b]; *People v Case*, 221 AD3d 728, 729-730 [2023]; *People v Lowery*, 127 AD3d 1109, 1110 [2015]). Accordingly, we vacate the convictions of robbery in the third degree and petit larceny and the sentence imposed upon the conviction of petit larceny and the resentence and dismiss those counts of the indictment (*see People v Case*, 221 AD3d at 729-730; *People v Joseph*, 204 AD3d 694, 695 [2022]).

In light of our determination, the defendant's contention regarding the resentence need not be reached. LaSalle, P.J., Chambers, Wooten and Voutsinas, JJ., concur.

64 The People of the State of New York, Respondent, v Dequan Robinson, Appellant. [251 NYS3d 787]—

Crimes—Sentence—Second Violent Felony Offender

Appeal by the defendant from a judgment of the Supreme Court, Kings County (Phyllis Chu, J.), rendered September 26, 2023, convicting him of attempted criminal possession of a weapon in the second degree, upon his plea of guilty, and imposing sentence.

Ordered that the judgment is affirmed.

Contrary to the defendant's contention, he was properly sentenced as a second violent felony offender (*see* Penal Law § 70.04). The defendant's vague allegations during the plea proceeding were insufficient to warrant a hearing on whether his prior conviction was unconstitutionally obtained (*see* CPL 400.15 [4]; *People v Konstantinides*, 14 NY3d 1, 15 [2009]; *People v Armstrong*, 210 AD3d 900, 901 [2022]).

The defendant's contention that his sentence as a second violent felony offender is unconstitutional in light of *Erlinger v United States* (602 US 821 [2024]) and *Apprendi v New Jersey* (530 US 466 [2000]) is unpreserved for appellate review (*see* CPL 470.05 [2]; *People v Rosen*, 96 NY2d 329, 335 [2001]; *People v Munoz*, 237 AD3d 1110, 1111 [2025]). We decline to review it in the exercise of our interest of justice jurisdiction (*see People v Austin*, 242 AD3d 763, 764 [2025]; *People v Munoz*, 237 AD3d at 1111). Duffy, J.P., Warhit, Ventura and Ottley, JJ., concur.

65 The People of the State of New York, Respondent, v Chadd Williams, Appellant. [253 NYS3d 732]—

Crimes—Evidence—Preservation of Material
Crimes—Witnesses—Failure to Call Witness

Appeal by the defendant from a judgment of the County Court, Nassau County (Tammy S. Robbins, J.), rendered September 9, 2024, convicting him of criminal contempt in the first degree, criminal contempt in the second degree, and harassment in the second degree, upon a jury verdict, and imposing sentence.

Ordered that the judgment is modified, on the law, by vacating the conviction of criminal contempt in the second degree and the sentence imposed thereon, and dismissing that count of the indictment; as so modified, the judgment is affirmed.

As the People correctly concede, the defendant's conviction of criminal contempt in the second degree must be vacated since that count is a lesser included offense of the crime of criminal contempt in the first degree (*see* CPL 300.40 [3] [b]; Penal Law §§ 215.51, 215.50; *People v Miller*, 6 NY3d 295, 300 [2006]; *People v Saenger*, 202 AD3d 1001 [2022], *mod* 39 NY3d 433 [2023]; *People v Mingo*, 66 AD3d 1043, 1045 [2009]).

The defendant's contention that the County Court should have suppressed the defendant's statements to law enforcement officials is academic because the statements were not introduced at trial (*see People v Lester*, 208 AD3d 684, 685 [2022]; *People v Joseph*, 97 AD3d 838, 839 [2012]; *People v Carlucci*, 80 AD3d 621 [2011]).

Moreover, the defendant failed to preserve for appellate review his contention that alleged investigatory failures of the police, along with the People's failure to call certain witnesses at trial, deprived him of his right to a fair trial (*see* CPL 470.05; *People v Balls*, 69 NY2d 641, 642 [1986]; *People v Charleston*, 56 NY2d 886, 887 [1982]). In any event, the loss of notes taken by a police officer regarding a conversation he had with the complainant and another individual did not constitute reversible error. "The police do not have a duty to preserve all material that might be of conceivable evidentiary significance" (*People v Scattareggia*, 152 AD2d 679, 679 [1989]; *see People v Haupt*, 71 NY2d 929, 931 [1988]), and the content of the conversation was, in any event, largely captured on the officer's body-worn camera, which was made available to the defense. Defense counsel also extensively cross-examined the officer on the absence of the notes, commented on the issue during summation, and attempted to use the absence to the defendant's advantage by obtaining an adverse inference charge (*see People v Scattareggia*, 152 AD2d at 680), and the defendant waived any claim that the adverse inference charge as given was insufficient (*see People v Whalen*, 59 NY2d 273, 280 [1983]).

Additionally, the People's failure to call the complainant and investigating detective as witnesses at trial did not inherently deprive the defendant of a fair trial, as "[i]t is not incumbent upon the prosecution 'to call at trial every witness to a crime or to make a complete and detailed accounting to the defense of all law enforcement investigatory work'" (*People v Buckler*, 39 NY2d 895, 897 [1976], quoting *People v Stridiron*, 33 NY2d 287, 292 [1973]). In any event, there was no evidence that either the complainant or the lead detective would have been expected to provide material, noncumulative testimony favorable to the defense, such that an unfavorable inference could have been drawn from these witnesses' failure to testify at trial (see *People v Savinon*, 100 NY2d 192, 197 [2003]; *People v Gonzalez*, 68 NY2d 424, 427 [1986]). Finally, the defendant's contention that the police should have obtained surveillance footage of the incident in question is speculative and may not be reviewed on the record before us (see *People v Dixon*, 138 AD3d 1016, 1017 [2016]).

The defendant's remaining contentions are without merit. Genovesi, J.P., Warhit, Golia and Hom, JJ., concur.

66 Jill Romero, Appellant, v State of New York, Respondent.
[— NYS3d —]

State—Claim against State—Notice of Intention to File Claim—"Time When" Statement

In a claim to recover damages for personal injuries, the claimant appeals from an order of the Court of Claims (Carmen Victoria St. George, J.), dated November 13, 2024. The order granted the defendant's motion for summary judgment dismissing the claim.

Ordered that the order is reversed, on the law, with costs, and the defendant's motion for summary judgment dismissing the claim is denied.

In March 2020, the claimant commenced this claim against the defendant to recover damages for personal injuries that she allegedly sustained as a result of a motor vehicle accident involving a vehicle owned by the defendant. The defendant interposed an answer in which it asserted, as an affirmative defense, that the Court of Claims lacked subject matter jurisdiction because the claimant failed to comply with the pleading requirements of Court of Claims Act § 11 (b). Following discovery and the filing of a note of issue, the defendant moved for summary judgment dismissing the claim for lack of subject matter jurisdiction based on the claimant's failure to comply with Court of Claims Act § 11 (b). The claimant opposed the

motion. In an order dated November 13, 2024, the Court of Claims granted the defendant's motion.

Court of Claims Act § 11 (b) provides, inter alia, that “[t]he claim shall state the time when and place where such claim arose, the nature of same, the items of damage or injuries claimed to have been sustained and, except in an action to recover damages for personal injury, [among other things,] the total sum claimed” (see *Ferro v State of New York*, 241 AD3d 1440 [2025]; *Sacher v State of New York*, 211 AD3d 867, 873 [2022]). The failure to satisfy any of the requirements of Court of Claims Act § 11 (b) is a jurisdictional defect mandating dismissal of the claim (see *Kolnacki v State of New York*, 8 NY3d 277, 281 [2007]; *Martinez v State of New York*, 215 AD3d 815, 816 [2023]). “While Court of Claims Act § 11 (b) does not require absolute exactness, it requires a statement made with sufficient definiteness to enable the State to be able to investigate the claim promptly and to ascertain its liability under the circumstances” (*Martinez v State of New York*, 215 AD3d at 816 [internal quotation marks omitted]). “The determination whether a claimant’s statement of the ‘time when’ the claim arose is sufficiently definite to enable the State to investigate and ascertain its liability under the circumstances is a sui generis determination depending upon the nature of the claim and specificity of allegations set forth in the claim” (*Meyer v State of New York*, 213 AD3d 753, 755 [2023]).

Here, the claimant’s statement of the “time when” the claim arose, which set forth the exact date of the accident, was sufficiently definite to enable the defendant to investigate and ascertain its liability under the circumstances (see *Williams v State of New York*, 238 AD3d 963, 964 [2025]).

Accordingly, the Court of Claims should have denied the defendant’s motion for summary judgment dismissing the claim. Duffy, J.P., Dowling, Hom and Quirk, JJ., concur.

67 Shadia Sands, Individually and as Proposed Administrator of the Estate of D’Aja Robinson, Deceased, Appellant, v City of New York et al., Respondents. [— NYS3d —]

Municipal Corporations—Tort Liability—Governmental Function

In an action to recover damages for negligence, the plaintiff appeals from an order of the Supreme Court, Queens County (Chereé A. Buggs, J.), dated February 15, 2024. The order granted the defendants’ motion for summary judgment dismissing the complaint and to strike certain allegations asserted in the plaintiff’s bill of particulars.

Ordered that the order is affirmed, with costs.

The plaintiff commenced this action against the defendants alleging, inter alia, that in connection with a shooting in Queens in which the plaintiff's decedent was killed when an assailant fired shots that penetrated a bus, the bus driver was negligent in failing to "take reasonable and proper steps to protect the passengers of his bus," leading to the decedent's death. Following the joinder of issue, the defendants moved for summary judgment dismissing the complaint and to strike certain allegations asserted in the plaintiff's bill of particulars. The plaintiff opposed the motion. In an order dated February 15, 2024, the Supreme Court granted the defendants' motion. The plaintiff appeals.

"When a negligence claim is asserted against a municipality, the first issue for a court to decide is whether the municipal entity was engaged in a proprietary function or acted in a governmental capacity at the time the claim arose" (*Hershkovitz v Brown*, 234 AD3d 946, 947 [2025] [internal quotation marks omitted]; see *Marino v City of New York*, 223 AD3d 888, 889 [2024]). "This is so because, if the action challenged in the litigation is governmental, the existence of a special duty is an element of the plaintiff's negligence cause of action" (*Ferreira v City of Binghamton*, 38 NY3d 298, 308 [2022], quoting *Connolly v Long Is. Power Auth.*, 30 NY3d 719, 727 [2018]). "Where the public entity serves a dual proprietary and governmental role, the analysis involves determining where, along the spectrum of proprietary and governmental functions, the defendant's alleged negligence falls" (*Strassburger v Unicarriers Ams. Corps.*, 225 AD3d 921, 923 [2024] [internal quotation marks omitted]; see *Kadymir v New York City Tr. Auth.*, 55 AD3d 549, 551 [2008]). "In light of the fact that the varied functions of a governmental entity can be interspersed with both governmental and proprietary elements, the determination of the primary capacity under which a governmental agency was acting turns solely on the specific acts or omissions claimed to have caused the injury" (*Strassburger v Unicarriers Ams. Corps.*, 225 AD3d at 924 [internal quotation marks omitted]; see *Kadymir v New York City Tr. Auth.*, 55 AD3d at 552).

Here, the defendants established, prima facie, that the bus driver was exercising a governmental function in the course of his employment as a bus driver with the New York City Transit Authority, and that no special relationship existed between the defendants and the decedent (see *Weiner v Metropolitan Transp. Auth.*, 55 NY2d 175, 181 [1982]; *New York City Tr. Auth. v Transport Workers Union of Am., AFL-CIO*, 35 AD3d 73, 75 [2006]). In opposition, the plaintiff failed to raise a tri-

able issue of fact (*see Adams v Suffolk County*, 234 AD3d 1, 6 [2024]; *see also Applewhite v Accuhealth, Inc.*, 21 NY3d 420, 430 [2013]; *cf. Crosland v New York City Tr. Auth.*, 68 NY2d 165, 170 [1986]).

The plaintiff's remaining contention is without merit. Duffy, J.P., Ford, Golia and Quirk, JJ., concur.

68 Emery Vlasaty, Appellant, v State of New York, Respondent. [— NYS3d —]

Torts—Spoliation of Evidence—Obligation to Preserve—Culpable State of Mind

In a claim, inter alia, to recover damages for negligent supervision, the claimant appeals from a judgment of the Court of Claims (Richard E. Sise, J.), dated February 10, 2025. The judgment, upon a decision of the same court dated January 10, 2025, made after a nonjury trial, is in favor of the defendant and against the claimant dismissing the claim.

Ordered that the judgment is affirmed, with costs.

In October 2019, the claimant commenced this claim against the defendant, State of New York, pursuant to the Child Victims Act (*see* CPLR 214-g), inter alia, to recover damages for negligent supervision. In the complaint, the claimant alleged that in 1967, he was a patient at Creedmoor Psychiatric Center (hereinafter Creedmoor) when he was sexually and physically assaulted by a male orderly while being escorted between his ward and another building through an underground tunnel. After a nonjury trial, the Court of Claims issued a decision denying the claimant's application for an adverse inference against the State for spoliation of evidence and finding that the claimant failed to establish by a preponderance of the credible evidence his claim. Thereafter, the court issued a judgment, upon the decision, in favor of the State and against the claimant dismissing the claim. The claimant appeals.

The claimant's contention, in effect, that the judgment should be reversed based on the Court of Claims' denial of his application for an adverse inference is without merit. "Under the common-law doctrine of spoliation, when a party negligently loses or intentionally destroys key evidence, the responsible party may be sanctioned" (*Dagro Assoc. II, LLC v Chevron U.S.A., Inc.*, 206 AD3d 793, 794 [2022] [internal quotation marks omitted]; *see* CPLR 3126). "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 mind, and that the destroyed evidence was rel-

evant to the party's claim or defense such that the trier of fact could find that the evidence would support that claim or defense" (*Dorman v Luva of NY, LLC*, 243 AD3d 632, 635 [2025] [internal quotation marks omitted]; see *Dagro Assoc. II, LLC v Chevron U.S.A., Inc.*, 206 AD3d at 794). "A culpable state of mind for purposes of a spoliation sanction includes ordinary negligence" (*Dagro Assoc. II, LLC v Chevron U.S.A., Inc.*, 206 AD3d at 795 [internal quotation marks omitted]). "However, in 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" (*Gordon v Field*, 234 AD3d 823, 824 [2025] [alteration and internal quotation marks omitted]; see *Aponte v Clove Lakes Health Care & Rehabilitation Ctr., Inc.*, 153 AD3d 593, 594 [2017]).

Here, contrary to the State's contention, the claimant demonstrated that the State had an obligation to preserve the claimant's medical records. The claimant introduced evidence at trial that the New York State Office of Mental Health (hereinafter OMH) has an internal policy to maintain patient records in perpetuity. Although the minimum standards promulgated by the New York State Department of Health only required the State to maintain the records until approximately 1977 (see 10 NYCRR 405.10 [a] [4]), OMH imposed a higher duty upon itself and therefore was obligated to preserve the claimant's records at the time of their destruction (*cf. Openheimer v City of New York*, 193 AD3d 957, 958 [2021]; *Luzuriaga v FDR Servs. Corp.*, 189 AD3d 817, 817 [2020]). However, the claimant failed to demonstrate that the State negligently destroyed his medical records. The records were destroyed, with the approval of OMH, because they posed a health hazard due to water damage and vermin infestation. Moreover, the records were destroyed in or around 2002, approximately 17 years before the claimant commenced this action. Therefore, although the State had an obligation to preserve the claimant's records, the State did not have a culpable mind in destroying the records, because it did not have a notice of a specific claim or pending litigation and the documents were destroyed in good faith and pursuant to its normal business practices (see *Gordon v Field*, 234 AD3d at 824-825; *Aponte v Clove Lakes Health Care & Rehabilitation Ctr., Inc.*, 153 AD3d at 594).

In light of our determination, the parties' remaining contentions need not be reached.

Accordingly, we affirm the judgment. Barros, J.P., Wan, McCormack and Hom, JJ., concur.

69 Wells Fargo Bank, N.A., Appellant, v Sharon Costa, Respondent, et al., Defendants. [— NYS3d —]—

Limitation of Actions—Six-Year Statute of Limitations—Mortgage Foreclosure—Acceleration of Debt in Prior Action

In an action to foreclose a mortgage, the plaintiff appeals from an order of the Supreme Court, Queens County (Mojgan Cohanim Lancman, J.), entered October 15, 2024. The order, insofar as appealed from, granted the motion of the defendant Sharon Costa for summary judgment dismissing the complaint insofar as asserted against her.

Ordered that the order is affirmed insofar as appealed from, with costs.

In December 2007, the plaintiff commenced an action against certain defendants, including Josephine Chandler, an individual that the plaintiff alleged had executed a certain note, to foreclose a mortgage encumbering certain real property located in Queens (hereinafter the 2007 action). In an order dated April 3, 2009, the Supreme Court granted the plaintiff's motion, inter alia, to voluntarily discontinue the 2007 action. In November 2009, the plaintiff commenced a second action against certain defendants, including Chandler, to foreclose the mortgage (hereinafter the 2009 action). Subsequently, the plaintiff moved for leave to serve a supplemental summons and amended complaint naming Chandler's heirs as defendants in Chandler's place. By order dated January 16, 2010, the court granted the motion and appointed a guardian ad litem for Chandler's heirs. Thereafter, by stipulation dated March 19, 2015, the plaintiff and the guardian ad litem agreed to discontinue the 2009 action.

In December 2017, the plaintiff commenced this action against, among others, the defendant Sharon Costa and Chandler's unknown heirs to foreclose the mortgage. In January 2024, Costa moved for summary judgment dismissing the complaint insofar as asserted against her as time-barred, among other grounds. The plaintiff opposed the motion. In an order entered October 15, 2024, the Supreme Court, inter alia, granted Costa's motion. The plaintiff appeals.

An action to foreclose a mortgage is governed by a six-year statute of limitations (*see* CPLR 213 [4]; *Lubonty v U.S. Bank N.A.*, 34 NY3d 250, 261 [2019]; *U.S. Bank N.A. v Medianik*, 223 AD3d 935, 937 [2024]). “[E]ven if a mortgage is payable in installments, once a mortgage debt is accelerated, the entire amount is due and the Statute of Limitations begins to run on the entire debt” (*BHMPW Funding, LLC v Lloyd-Lewis*, 194

AD3d 780, 782 [2021] [internal quotation marks omitted]; see *U.S. Bank N.A. v Medianik*, 223 AD3d at 937). “Acceleration occurs, inter alia, by the commencement of a foreclosure action wherein the [holder of the note] elects in the complaint to call due the entire amount secured by the mortgage” (*GMAT Legal Title Trust 2014-1 v Kator*, 213 AD3d 915, 916 [2023]; see *U.S. Bank N.A. v Medianik*, 223 AD3d at 937).

Here, in support of her motion, Costa established that the six-year statute of limitations began to run, at the latest, in November 2009, when the plaintiff commenced the 2009 action and elected in the complaint to call due the entire amount secured by the mortgage (see *HSBC Bank USA, N.A. v Corrales*, 224 AD3d 816, 818 [2024]). Insofar as the plaintiff concedes that this action was not commenced until December 2017, more than six years after the statute of limitations began to run, Costa established, prima facie, that this action was time-barred (see CPLR 213 [4]; *U.S. Bank N.A. v Outlaw*, 217 AD3d 721, 722-723 [2023]).

In opposition, the plaintiff failed to raise a triable issue of fact as to the timeliness of this action. Contrary to the plaintiff’s contention, Chandler’s death prior to the commencement of the 2009 action did not “revoke or invalidate, or otherwise destroy, [the lender’s] express invocation of the contractual election to accelerate the debt” (*Wilson 3 Corp. v Deutsche Bank Natl. Trust Co.*, 219 AD3d 870, 871 [2023] [internal quotation marks omitted]; see *Trento 67, LLC v OneWest Bank, N.A.*, 230 AD3d 1, 4 [2024]; *Wells Fargo Bank, N.A. v Torres*, 187 AD3d 825 [2020]).

The plaintiff’s remaining contentions are either without merit (see *Deutsche Bank Natl. Trust Co. v Dagrín*, 233 AD3d 1065 [2024]; *97 Lyman Ave., LLC v MTGLQ Invs., L.P.*, 233 AD3d 1038 [2024]) or improperly raised for the first time on appeal. Duffy, J.P., Ford, Golia and Quirk, JJ., concur.

70 Rhonda Wilber, Appellant, v Elliot J. Borgen et al., Respondents. [— NYS3d —]

**Pleading—Complaint—Motion to Dismiss—Evidentiary Showing in Support
Physicians and Surgeons—Lack of Informed Consent—Proximate Cause of
Injury**

In an action, inter alia, to recover damages for medical malpractice and lack of informed consent, the plaintiff appeals from a judgment of the Supreme Court, Kings County (Ellen M. Spodek, J.), dated October 23, 2020. The judgment, upon an order of the same court dated November 1, 2019, denying the plaintiff’s motion for leave to enter a default judgment against

the defendants Saurabh S. Thakar and Maimonides Nursing Staff, and granting those defendants' cross-motion pursuant to CPLR 3211 (a) to dismiss the amended complaint insofar as asserted against them, and upon an order of the same court dated August 31, 2020, granting the motion of the defendants Elliot J. Borgen and Maimonides Medical Center pursuant to CPLR 3211 (a) (7) to dismiss the amended complaint insofar as asserted against them, is in favor of the defendants and against the plaintiff dismissing the amended complaint.

Ordered that the judgment is modified, on the law, by deleting the provision thereof dismissing the causes of action alleging medical malpractice and lack of informed consent insofar as asserted against the defendants Elliot J. Borgen and Maimonides Medical Center; as so modified, the judgment is affirmed, with one bill of costs to the plaintiff payable by the defendants Elliot J. Borgen and Maimonides Medical Center, and one bill of costs to the defendants Saurabh S. Thakar and Maimonides Nursing Staff payable by the plaintiff, that branch of the motion of the defendants Elliot J. Borgen and Maimonides Medical Center which was pursuant to CPLR 3211 (a) (7) to dismiss the causes of action alleging medical malpractice and lack of informed consent insofar as asserted against them is denied, the order dated August 31, 2020, is modified accordingly, the causes of action alleging medical malpractice and lack of informed consent insofar as asserted against the defendants Elliot J. Borgen and Maimonides Medical Center are reinstated, and the matter is remitted to the Supreme Court, Kings County, for severance of those causes of action and further proceedings on those causes of action.

In April 2017, the plaintiff was admitted to the defendant Maimonides Medical Center (hereinafter the hospital) and underwent a coronary angiography performed by the defendant Elliot J. Borgen. In April 2019, the plaintiff commenced this action, inter alia, to recover damages for medical malpractice and lack of informed consent. Borgen and the hospital moved pursuant to CPLR 3211 (a) (7) to dismiss the amended complaint insofar as asserted against them. Thereafter, the plaintiff moved for leave to enter a default judgment against the defendants Saurabh S. Thakar and Maimonides Nursing Staff. Thakar and Maimonides Nursing Staff cross-moved pursuant to CPLR 3211 (a) to dismiss the amended complaint insofar as asserted against them for lack of personal jurisdiction, among other grounds. In an order dated November 1, 2019, the Supreme Court denied the plaintiff's motion for leave to enter a default judgment against Thakar and Maimonides

Nursing Staff and granted the cross-motion of Thakar and Maimonides Nursing Staff pursuant to CPLR 3211 (a) to dismiss the amended complaint insofar as asserted against them. In an order dated August 31, 2020, the court granted the motion of Borgen and the hospital pursuant to CPLR 3211 (a) (7) to dismiss the amended complaint insofar as asserted against them. Thereafter, the court issued a judgment, upon the orders, in favor of the defendants and against the plaintiff dismissing the amended complaint. The plaintiff appeals.

“On a motion to dismiss pursuant to CPLR 3211 (a) (7), the complaint is to be afforded a liberal construction, the facts alleged are presumed to be true, the plaintiff is afforded the benefit of every favorable inference, and the court is to determine only whether the facts as alleged fit within any cognizable legal theory” (*Lara v S&J Operational, LLC*, 237 AD3d 1186, 1187 [2025] [internal quotation marks omitted]; see *Leon v Martinez*, 84 NY2d 83, 87-88 [1994]). “Whether a plaintiff can ultimately establish its allegations is not part of the calculus in determining a motion to dismiss” (*EBC I, Inc. v Goldman, Sachs & Co.*, 5 NY3d 11, 19 [2005]; see *Kaufman v Kaufman*, 206 AD3d 805, 806 [2022]). “[O]n a motion made pursuant to CPLR 3211 (a) (7), the burden never shifts to the nonmoving party to rebut a defense asserted by the moving party” (*Sokol v Leader*, 74 AD3d 1180, 1181 [2010]; see *Gonnelly v Newburgh Operations, LLC*, 236 AD3d 866, 868 [2025]).

“A court is, of course, permitted to consider evidentiary material submitted by a defendant in support of a motion to dismiss pursuant to CPLR 3211 (a) (7)” (*Sokol v Leader*, 74 AD3d at 1181, citing CPLR 3211 [c]). However, while CPLR 3211 permits a plaintiff to submit affidavits, it does not oblige one to do so on penalty of dismissal (see *Rovello v Orofino Realty Co.*, 40 NY2d 633, 635 [1976]; *Sokol v Leader*, 74 AD3d at 1181). “Unless the motion is converted into one for summary judgment pursuant to CPLR 3211 (c), affidavits may be received for a limited purpose only, serving normally to remedy defects in the complaint, and such affidavits are not to be examined for the purpose of determining whether there is evidentiary support for the pleading” (*Sokol v Leader*, 74 AD3d at 1181 [internal quotation marks omitted]). “If the court considers evidentiary material, the criterion then becomes ‘whether the proponent of the pleading has a cause of action, not whether he [or she] has stated one’” (*id.* at 1181-1182, quoting *Guggenheimer v Ginzburg*, 43 NY2d 268, 275 [1977]).

Here, the Supreme Court improperly granted the motion of Borgen and the hospital pursuant to CPLR 3211 (a) (7) to

dismiss the amended complaint insofar as asserted against them based on the plaintiff's failure to comply with the court's earlier directive "to provide an affidavit from a physician attesting [to] the merits of her claims." The burden does not shift to the nonmoving party on a motion pursuant to CPLR 3211 (a) (7). A plaintiff need not make an evidentiary showing in support of the complaint in order to defeat such a motion and will not be penalized for failure to do so (*see Sokol v Leader*, 74 AD3d at 1181). Here, where the motion was not converted into one for summary judgment, the plaintiff had no obligation to provide an affidavit from an expert to support the allegations in the amended complaint in order to defeat the motion of Borgen and the hospital (*see generally id.* at 1182).

"The essential elements of medical malpractice are (1) a deviation or departure from accepted medical practice, and (2) evidence that such departure was a proximate cause of injury" (*Williams v Levine*, 238 AD3d 960, 960-961 [2025] [internal quotation marks omitted], quoting *Kunwar v Northwell Health*, 229 AD3d 528, 532 [2024]; *see Dray v Staten Is. Univ. Hosp.*, 160 AD3d 614, 618 [2018]). "To establish a cause of action to recover damages based on lack of informed consent, a plaintiff must prove (1) that the person providing the professional treatment failed to disclose alternatives thereto and failed to inform the patient of reasonably foreseeable risks associated with the treatment, and the alternatives, that a reasonable medical practitioner would have disclosed in the same circumstances, (2) that a reasonably prudent patient in the same position would not have undergone the treatment if he or she had been fully informed, and (3) that the lack of informed consent is a proximate cause of the injury" (*Williams v Levine*, 238 AD3d at 962 [internal quotation marks omitted], quoting *Ciceron v Gulmatico*, 220 AD3d 732, 735 [2023]; *see Orphan v Pilnik*, 15 NY3d 907, 908 [2010]). Here, accepting the allegations in the amended complaint as true and according the plaintiff the benefit of every possible favorable inference, the amended complaint sufficiently stated causes of action alleging medical malpractice and lack of informed consent insofar as asserted against Borgen and the hospital (*see CPLR 3211 [a] [7]; see generally Williams v Levine*, 238 AD3d at 962). Accordingly, the Supreme Court should have denied that branch of the motion of Borgen and the hospital which was pursuant to CPLR 3211 (a) (7) to dismiss the causes of action alleging medical malpractice and lack of informed consent insofar as asserted against them.

The Supreme Court properly denied the plaintiff's motion for

leave to enter a default judgment against Thakar and Maimonides Nursing Staff, and properly granted the cross-motion of those defendants pursuant to CPLR 3211 (a) to dismiss the amended complaint insofar as asserted against them. The court failed to obtain personal jurisdiction over Thakar due to improper service (*see id.* § 308 [2], [3]; *Silvering v Sunrise Family Med., P.C.*, 161 AD3d 1021, 1022 [2018]; *Aurora Loan Servs., LLC v Gaines*, 104 AD3d 885, 887 [2013]), and Maimonides Nursing Staff is not a legal entity amenable to suit (*see RKJW1 Doe v Watchtower Bible & Tract Socy. of N.Y., Inc.*, 232 AD3d 637, 638 [2024]; *Chestnut v United Methodist Church*, 230 AD3d 182, 197 [2024]).

The parties' remaining contentions are without merit. Genovesi, J.P., Brathwaite Nelson, Dowling and Hom, JJ., concur.

(April 6, 2026)

1 The People of the State of New York ex rel. Joseph L. Calixte, Jr., Petitioner, v Nassau County District Attorney et al., Respondents. [252 NYS3d 302]—

Habeas Corpus—When Remedy Appropriate

Writ of habeas corpus in the nature of an application to release Joseph L. Calixte, Jr., upon his own recognizance or, in the alternative, to set reasonable bail upon Nassau County indictment No. 70090/2017.

Adjudged that the writ is dismissed, without costs or disbursements.

The determination of the Supreme Court, Nassau County, did not violate “constitutional or statutory standards” (*People ex rel. Klein v Krueger*, 25 NY2d 497, 499 [1969]; *see People ex rel. Rosenthal v Wolfson*, 48 NY2d 230 [1979]). Chambers, J.P., Voutsinas, Landicino and Love, JJ., concur.

(April 8, 2026)

1 Susanne Aberbach-Marolda, Esq., Respondent, et al., Plaintiff, v Daniel Cherner, Appellant. [252 NYS3d 301]—

Appeal—Matters Appealable

In an action, inter alia, to recover damages for breach of contract, the defendant appeals from an order of the Supreme Court, Westchester County (Joan B. Lefkowitz, J.), dated April

30, 2018. The order, insofar as appealed from, denied those branches of the defendant's motion which were to compel the plaintiff Susanne Aberbach-Marolda to provide authorizations for Internet providers to release certain emails, to pay the fees and costs associated with her deposition, to provide a sworn statement detailing all claims made on her malpractice insurance policy over a certain period of time, and to produce certain bank and telephone records, granted that branch of the defendant's motion which was to compel the plaintiff Susanne Aberbach-Marolda to appear for a new deposition only to the extent of directing her to appear for a deposition limited to certain lines of inquiry, and granted that branch of the motion of the plaintiff Susanne Aberbach-Marolda and Doris T. Friedman which was to preclude the defendant from introducing at trial video recordings of the deposition of the plaintiff Susanne Aberbach-Marolda. Justice Ford has been substituted for former Justice Zayas (*see* 22 NYCRR 1250.1 [b]).

Ordered that the appeal is dismissed, without costs or disbursements.

The appeal from the order must be dismissed because the portion of the order which, in effect, seeks rulings on an examination before trial is not appealable as of right (*see Cruz v Roman Catholic Church for Most Holy Trinity*, 222 AD2d 395 [1995]), and the right of direct appeal from the remaining portions of the order terminated with the entry of the judgment in the action (*see Matter of Aho*, 39 NY2d 241, 248 [1976]). The issues raised on the appeal from the order are brought up for review and have been considered on the appeal from the judgment (*see* CPLR 5501 [a] [1]; *Matter of Aho*, 39 NY2d at 248; *Aberbach-Marolda v Cherner*, 248 AD3d 851 [2026] [decided herewith]). Dillon, J.P., Barros, Wooten and Ford, JJ., concur.

2 Susanne Aberbach-Marolda, Esq., Respondent, et al., Plaintiff, v Daniel Cherner, Appellant. [251 NYS3d 782]—

Appeal—Matters Appealable

In an action, inter alia, to recover damages for breach of contract, the defendant appeals from an order of the Supreme Court, Westchester County (Joan B. Lefkowitz, J.), dated December 17, 2018. The order, insofar as appealed from, denied those branches of the defendant's motion which were to compel the plaintiff Susanne-Aberbach Marolda to provide authorizations for Internet providers to release certain emails, to appear for a new deposition and to pay the fees and costs associated with her deposition, to provide a sworn statement detailing all

claims made on her malpractice insurance policy over a certain period of time, and to produce certain telephone records. Justice Ford has been substituted for former Justice Zayas (*see* 22 NYCRR 1250.1 [b]).

Ordered that the appeal is dismissed, without costs or disbursements.

The appeal from the order must be dismissed because the portion of the order which, in effect, seeks rulings on an examination before trial is not appealable as of right (*see Cruz v Roman Catholic Church for Most Holy Trinity*, 222 AD2d 395 [1995]), and the right of direct appeal from the remaining portions of the order terminated with the entry of the judgment in the action (*see Matter of Aho*, 39 NY2d 241, 248 [1976]). The issues raised on the appeal from the order are brought up for review and have been considered on the appeal from the judgment (*see* CPLR 5501 [a] [1]; *Matter of Aho*, 39 NY2d at 248; *Aberbach-Marolda v Cherner*, 248 AD3d 851 [2026] [decided herewith]). Dillon, J.P., Barros, Wooten and Ford, JJ., concur.

3 Susanne Aberbach-Marolda, Esq., Respondent, et al., Plaintiff, v Daniel Cherner, Appellant. [252 NYS3d 288]—In an action, inter alia, to recover damages for breach of contract, the defendant appeals from an order of the Supreme Court, Westchester County (Joan B. Lefkowitz, J.), dated February 26, 2019. The order, insofar as appealed from, denied the defendant's motion for summary judgment on his counterclaims. Justice Ford has been substituted for former Justice Zayas (*see* 22 NYCRR 1250.1 [b]).

Ordered that the appeal is dismissed, without costs or disbursements.

The appeal from the order must be dismissed because the right of direct appeal therefrom terminated with the entry of the judgment in the action (*see Matter of Aho*, 39 NY2d 241, 248 [1976]). Dillon, J.P., Barros, Wooten and Ford, JJ., concur.

4 Susanne Aberbach-Marolda, Esq., Respondent, et al., Plaintiff, v Daniel Cherner, Appellant. [252 NYS3d 291]—

Appeal—Matters Appealable

In an action, inter alia, to recover damages for breach of contract, the defendant appeals from an order of the Supreme Court, Westchester County (Joan B. Lefkowitz, J.), dated March 6, 2019. The order denied the defendant's motion to vacate the note of issue and trial readiness order. Justice Ford has been substituted for former Justice Zayas (*see* 22 NYCRR 1250.1 [b]).

Ordered that the appeal is dismissed, without costs or disbursements.

The appeal from the order must be dismissed because the right of direct appeal therefrom terminated with the entry of the judgment in the action (*see Matter of Aho*, 39 NY2d 241, 248 [1976]). The issues raised on the appeal from the order are brought up for review and have been considered on the appeal from the judgment (*see* CPLR 5501 [a] [1]; *Matter of Aho*, 39 NY2d at 248; *Aberbach-Marolda v Cherner*, 248 AD3d 851 [2026] [decided herewith]). Dillon, J.P., Barros, Wooten and Ford, JJ., concur.

5 Susanne Aberbach-Marolda, Esq., Respondent, et al., Plaintiff, v Daniel Cherner, Appellant. [— NYS3d —]

Disclosure—Supervision of Disclosure—Method of Discovery—Request for Authorization to Release Records

Pleading—Amendment—Late Motion—Reasonable Excuse

Attorney and Client—Compensation—Judgment as Matter of Law—Entry of Bills into Evidence

In an action, inter alia, to recover damages for breach of contract, the defendant appeals from a judgment of the Supreme Court, Westchester County (William J. Giacomo, J.), dated August 13, 2019. The judgment, (1) upon an order of the same court (Joan B. Lefkowitz, J.) dated April 30, 2018, inter alia, denying those branches of the defendant's motion which were to compel the plaintiff Susanne Aberbach-Marolda to provide authorizations for Internet providers to release certain emails, to pay the fees and costs associated with her deposition, to provide a sworn statement detailing all claims made on her malpractice insurance policy over a certain period of time, and to produce certain bank and telephone records, granting that branch of the defendant's motion which was to compel the plaintiff Susanne Aberbach-Marolda to appear for a new deposition only to the extent of directing her to appear for a deposition limited to certain lines of inquiry, and granting that branch of the motion of the plaintiff Susanne Aberbach-Marolda and Doris T. Friedman which was to preclude the defendant from introducing at trial video recordings of the deposition of the plaintiff Susanne Aberbach-Marolda, (2) upon an order of the same court (Joan B. Lefkowitz, J.) dated December 17, 2018, inter alia, denying those branches of the defendant's motion which were to compel the plaintiff Susanne-Aberbach Marolda to provide authorizations for Internet providers to release certain emails, to appear for a new deposition and to pay the fees and costs associated with her deposition, to provide a sworn statement detailing all claims made on her malprac-

tice insurance policy over a certain period of time, and to produce certain telephone records, (3) upon an order of the same court (Joan B. Lefkowitz, J.) dated March 6, 2019, denying the defendant's motion to vacate the note of issue and trial readiness order, and (4) upon a jury verdict, is in favor of the plaintiff Susanne Aberbach-Marolda and against the defendant in the principal sum of \$56,148.98 and, in effect, dismissed the defendant's counterclaims. Justice Ford has been substituted for former Justice Zayas (*see* 22 NYCRR 1250.1 [b]).

Ordered that the judgment is affirmed, with costs.

This appeal stems from a fee dispute. In September 2013, the defendant retained the plaintiff Susanne Aberbach-Marolda to represent him in a matrimonial action. At the same time, with the knowledge and consent of the defendant, Doris T. Friedman became of counsel to Aberbach-Marolda on the matrimonial action. The representation of the defendant by Aberbach-Marolda and Friedman included a multiday nonjury trial on the issues of equitable distribution and culminated in a judgment of divorce entered January 21, 2016 (*see Ospina-Cherner v Cherner*, 178 AD3d 1059 [2019]). In June 2016, Aberbach-Marolda and Friedman commenced this action against the defendant, inter alia, to recover damages for breach of contract, alleging that the defendant had not paid the majority of his attorneys' fees. The defendant interposed an answer containing 35 counterclaims, including counterclaims to recover damages for legal malpractice.

After court conferences were conducted in October and December 2017, the defendant moved, among other things, to compel Aberbach-Marolda to provide authorizations for Internet providers to release certain emails, to appear for a new deposition and to pay the fees and costs associated with her deposition, to provide a sworn statement detailing all claims made on her malpractice insurance policy over a certain period of time, and to produce certain bank and telephone records. Aberbach-Marolda and Friedman moved, inter alia, to preclude the defendant from introducing at trial video recordings of Aberbach-Marolda's deposition. In an order dated April 30, 2018, the Supreme Court, among other things, granted that branch of the motion of Aberbach-Marolda and Friedman which was to preclude the defendant from introducing at trial video recordings of Aberbach-Marolda's deposition, granted that branch of the defendant's motion which was to compel Aberbach-Marolda to appear for a new deposition to the extent of directing her to appear for a deposition limited to certain lines of inquiry, and denied those branches of the defendant's

motion which were to compel Aberbach-Marolda to provide authorizations for Internet providers to release certain emails, to pay the fees and costs associated with her deposition, to provide a sworn statement detailing all claims made on her malpractice insurance policy over a certain period of time, and to produce certain bank and telephone records.

In September 2018, the defendant moved for leave to amend his counterclaims. In an order dated October 30, 2018, the Supreme Court denied the motion. Subsequently, the court denied the defendant's motion for leave to renew and reargue his prior motion for leave to amend his counterclaims.

In November 2018, the defendant moved, *inter alia*, to compel Aberbach-Marolda to provide authorizations for Internet providers to release certain emails, to appear for a new deposition and to pay the fees and costs associated with her deposition, to provide a sworn statement detailing all claims made on her malpractice insurance policy over a certain period of time, and to produce certain telephone records. In an order dated December 17, 2018, the Supreme Court, among other things, denied those branches of the motion.

In January 2019, the defendant moved for summary judgment on his counterclaims. Shortly thereafter, the defendant moved to vacate the note of issue and trial readiness order, contending that discovery was not yet completed because he had not received the discovery requested in previous orders. In an order dated February 26, 2019, the Supreme Court, *inter alia*, denied the defendant's motion for summary judgment on his counterclaims. In an order dated March 6, 2019, the court denied the defendant's motion to vacate the note of issue and trial readiness order as both procedurally defective and without merit.

The action proceeded to a jury trial. At the close of Aberbach-Marolda and Friedman's case, the defendant moved pursuant to CPLR 4401 for judgment as a matter of law dismissing the complaint. The Supreme Court granted that branch of the motion which was for judgment as a matter of law dismissing the complaint insofar as asserted by Friedman and, in effect, denied that branch of the motion which was for judgment as a matter of law dismissing the complaint insofar as asserted by Aberbach-Marolda. The court also granted Friedman's motion for judgment as a matter of law dismissing the counterclaims insofar as asserted against her. Thereafter, the jury returned a verdict, among other things, finding that Aberbach-Marolda performed all of the services she agreed to perform for the defendant and that the defendant failed to pay the sum of

\$56,148.98 to Aberbach-Marolda for her services. The jury further found that Aberbach-Marolda did not commit legal malpractice. The court issued a judgment dated August 13, 2019, in favor of Aberbach-Marolda and against the defendant in the principal sum of \$56,148.98 and, in effect, dismissing the defendant's counterclaims. The defendant appeals.

Contrary to the defendant's contention, the Supreme Court did not improvidently exercise its discretion in denying that branch of his motion which was to compel Aberbach-Marolda to provide authorizations for Internet providers to release certain emails. "Disclosure in civil actions is generally governed by CPLR 3101 (a), which provides that '[t]here shall be full disclosure of all matter material and necessary in the prosecution or defense of an action'" (*Abedin v Osorio*, 188 AD3d 764, 766 [2020]). "At the same time, however, the principle of full disclosure does not give a party the right to uncontrolled and unfettered disclosure. It is incumbent on the party seeking disclosure to demonstrate that the method of discovery sought will result in the disclosure of relevant evidence or is reasonably calculated to lead to the discovery of information bearing on the claims" (*Mendives v Curcio*, 174 AD3d 796, 797 [2019] [citations and internal quotation marks omitted]). "The supervision of disclosure and the setting of reasonable terms and conditions therefor rests within the sound discretion of the trial court and, absent an improvident exercise of that discretion, its determination will not be disturbed'" (*Berkowitz v 29 Woodmere Blvd. Owners', Inc.*, 135 AD3d 798, 799 [2016], quoting *Mattocks v White Motor Corp.*, 258 AD2d 628, 629 [1999]). Here, the court directed that Aberbach-Marolda and Friedman tender an affirmation attesting that they produced all of the responsive correspondence in their possession and that any further correspondence that had not been provided would be precluded at trial. Further, the correspondence requested was also sent to the defendant's email address, meaning that he could have retrieved this correspondence from his own account. Accordingly, as the defendant failed to show how his request for authorization to release certain emails was reasonably calculated to lead to the discovery of information bearing on the causes of action, we perceive no reason to disturb the court's determination to deny this request.

The Supreme Court providently exercised its discretion in granting that branch of the defendant's motion which was to compel Aberbach-Marolda to appear for a new deposition only to the extent of directing her to appear for a new deposition on 12 specific lines of inquiry. To the extent that the defendant

requested an additional deposition beyond what was directed, his request was without merit. Further, the court did not improvidently exercise its discretion in denying that branch of the defendant's motion which was to compel Aberbach-Marolda pay the fees and costs associated with her first deposition, as she neither left the deposition early nor refused to answer clear questions (*cf. O'Neill v Ho*, 28 AD3d 626 [2006]).

Furthermore, the Supreme Court did not err in granting that branch of the motion of Aberbach-Marolda and Friedman which was to preclude the defendant from introducing at trial video recordings of Aberbach-Marolda's deposition. Pursuant to a compliance conference order dated December 20, 2017, Aberbach-Marolda's deposition was scheduled to be conducted in New York on February 2, 2018, and pursuant to a stipulation of the parties, if Aberbach-Marolda's deposition continued after that date, it would be continued by video while she was in South Carolina. One day prior to Aberbach-Marolda's deposition in New York, the defendant's attorneys sent a fax to Aberbach-Marolda confirming that the deposition would be videotaped, without including any information regarding the videotape operator. Aberbach-Marolda and Friedman objected to the video deposition but ultimately participated.

Section 202.15 of the Uniform Rules for the New York State Trial Courts requires that "[e]very notice or subpoena for the taking of a videotaped deposition shall state that it is to be videotaped and the name and address of the videotape operator and of the operator's employer, if any" (22 NYCRR 202.15 [c]). CPLR 3107 requires a party desiring to take the deposition of another person to give each party 20 days' notice. The interplay between 22 NYCRR 202.15 (c) and CPLR 3107 requires that a videotaped deposition must be properly noticed at least 20 days prior. As the defendant's deposition notice was procedurally improper, the Supreme Court did not err in precluding the introduction at trial of video recordings of Aberbach-Marolda's deposition (*see id.* § 3103 [c]).

The Supreme Court providently exercised its discretion in denying that branch of the defendant's motion which was to compel Aberbach-Marolda to provide a sworn statement detailing all claims made on her malpractice insurance policy during the time that she represented him. Such a statement would have no probative value in this case, where it is undisputed that Aberbach-Marolda's malpractice insurance policy lapsed in September 2014, well prior to the defendant's claims.

The Supreme Court also providently exercised its discretion in denying that branch of the defendant's motion which was to

compel Aberbach-Marolda to produce certain bank and telephone records. The defendant does not deny that Aberbach-Marolda and Friedman had produced documents in response to his request for bank records, and there is no indication in the record that there were any requests outstanding in this regard. As for Aberbach-Marolda's telephone records, the defendant's motion provided little explanation as to why these records are relevant to his case. Under the circumstances, where the court was "actively involved in managing the case and [was] intimately familiar with the particularities of the matter," there is no basis in this record to disturb the determination that the defendant's request for Aberbach-Marolda's telephone records amounted to nothing more than a fishing expedition (*Auerbach v Klein*, 30 AD3d 451, 452 [2006]).

The Supreme Court properly denied the defendant's motion to vacate the note of issue and trial readiness order. "A statement in a certificate of readiness to the effect that all pretrial discovery has been completed is a 'material fact' within the meaning of 22 NYCRR 202.21 (e), and where that statement is incorrect, the note of issue should be vacated" (*Jablonsky v Nerlich*, 189 AD3d 1561, 1563 [2020]). "However, '[t]o vacate [a] note of issue, discovery requests must be legitimate and pending,' and 'not resolved or contrived'" (*id.*, quoting *Ireland v GEICO Corp.*, 2 AD3d 917, 918 [2003]). Here, at the time of the defendant's motion to vacate, he had already moved to compel the discovery that he claimed was incomplete, twice, and those motions had been determined. Therefore, the defendant failed to prove that there were any legitimate and pending outstanding discovery requests necessary to vacate the note of issue and trial readiness order.

The Supreme Court providently exercised its discretion in denying the defendant's motion for leave to amend his counterclaims. "Leave to amend a pleading should be freely given (*see* CPLR 3025 [b]), provided the amendment is not palpably insufficient, does not prejudice or surprise the opposing party, and is not patently devoid of merit" (*Douglas Elliman, LLC v Bergere*, 98 AD3d 642, 643 [2012] [internal quotation marks omitted], quoting *Clark v Clark*, 93 AD3d 812, 816 [2012]). "In exercising its discretion, the court should consider how long the party seeking the amendment was aware of the facts upon which the motion was predicated [and] whether a reasonable excuse for the delay was offered" (*Yong Soon Oh v Hua Jin*, 124 AD3d 639, 640 [2015], quoting *Cohen v Ho*, 38 AD3d 705, 706 [2007]). Further, CPLR 3025 (b) requires that "any motion to amend or supplement pleadings shall be ac-

accompanied by the proposed amended or supplemental pleading clearly showing the changes or additions to be made to the pleading.” Here, the defendant provided no excuse as to why he waited nine months, and after discovery and depositions were complete, to seek leave to amend his counterclaims. At that point in the litigation, amending the counterclaims would have been prejudicial to Aberbach-Marolda and Friedman by delaying the trial and requiring additional discovery. Moreover, the defendant’s proposed amended counterclaims failed to clearly show the changes or additions to be made to the pleadings (*see Panagouloupoulos v Carlos Ortiz Jr. MD, P.C.*, 194 AD3d 728, 729 [2021]; *Mendoza v Enchante Accessories, Inc.*, 185 AD3d 675, 679 [2020]).

The Supreme Court properly limited the testimony at trial of the defendant’s expert witness. “To state a cause of action to recover damages for legal malpractice, a plaintiff must allege: (1) that the attorney failed to exercise the ordinary reasonable skill and knowledge commonly possessed by a member of the legal profession; and (2) that the attorney’s breach of the duty proximately caused the plaintiff actual and ascertainable damages’ ” (*Katsoris v Bodnar & Milone, LLP*, 186 AD3d 1504, 1505 [2020], quoting *Dempster v Liotti*, 86 AD3d 169, 176 [2011]). “Expert evidence generally is required if the basis for judging the adequacy of professional service is not within the ordinary experience of the fact finder” (*Zasso v Maher*, 226 AD2d 366, 367 [1996] [citations omitted]). However, bare legal opinion and conclusory statements by experts are insufficient to raise a triable issue of fact (*see Brady v Bisogno & Meyerson*, 32 AD3d 410 [2006]; *Caires v Siben & Siben*, 2 AD3d 383 [2003]). Further, “[e]xpert opinion as to a legal conclusion is impermissible” (*Colon v Rent-A-Center*, 276 AD2d 58, 61 [2000]). Here, the defendant’s expert could not testify as to whether the defendant’s pendente lite motion in the underlying matrimonial action would have been granted if the circumstances were different, as such testimony necessarily would have been speculative and conclusory. Furthermore, it would have been impermissible for the defendant’s expert to opine as to whether Aberbach-Marolda substantially complied with 22 NYCRR 1400.2 and 1400.3, as that determination calls for a legal conclusion based upon the factual findings of the jury.

Contrary to the defendant’s contention, the Supreme Court properly, in effect, denied that branch of his motion which was pursuant to CPLR 4401 for judgment as a matter of law dismissing the complaint insofar as asserted by Aberbach-Marolda. CPLR 4401 states that “[a]ny party may move for

judgment with respect to a cause of action or issue upon the ground that the moving party is entitled to judgment as a matter of law, after the close of the evidence presented by an opposing party with respect to such cause of action or issue, or at any time on the basis of admissions.” “A motion for judgment as a matter of law pursuant to CPLR 4401 . . . may be granted only when the trial court determines that, upon the evidence presented, there is no valid line of reasoning and permissible inferences which could possibly lead rational persons to the conclusion reached by the jury upon the evidence presented at trial, and no rational process by which the jury could find in favor of the nonmoving party” (*Rumford v Singh*, 130 AD3d 1002, 1003-1004 [2015], quoting *Tapia v Dattco, Inc.*, 32 AD3d 842, 844 [2006]). “In determining such a motion, the court must consider the facts in a light most favorable to the nonmoving party, which must be afforded every inference that may properly be drawn from the facts presented” (*Ippolito v Consolidated Edison of N.Y., Inc.*, 177 AD3d 715, 717 [2019]).

According to the defendant, he was entitled to judgment as a matter of law because (1) Aberbach-Marolda was precluded from offering almost all of her claimed bills, (2) Aberbach-Marolda did not admit or seek to admit emails proving when her bills were sent, (3) Aberbach-Marolda’s retainer agreement and statement of client’s rights and responsibilities did not include all of the necessary clauses, and (4) Aberbach-Marolda’s billing entries lacked sufficient itemization. However, Aberbach-Marolda was not precluded from offering her bills, which were attached to the complaint and accessible to the defendant from the commencement of the action. Aberbach-Marolda was neither required to admit the emails indicating when the bills were sent nor legally required to keep these emails (*see* Rules of Prof Conduct [22 NYCRR 1200.0] rule 1.15). Further, the determination of whether there was substantial compliance with 22 NYCRR 1400.2 and 1400.3, as well as whether the bills were sufficiently itemized, were factual issues within the purview of the jury.

The defendant’s contention that the Supreme Court erred in its charge to the jury is without merit, as the court’s instructions adequately conveyed the sum and substance of the applicable law to be charged (*see Kelly v New York City Health & Hosps. Corp.*, 194 AD3d 1032 [2021]). The verdict sheet and the court’s responses to the jury’s questions were also proper.

The defendant seeks review of so much of the order dated February 26, 2019, as denied his motion for summary judgment on his counterclaims. We address the issue of review-

ability sua sponte because it is jurisdictional in nature (*see Dyszkiewicz v City of New York*, 218 AD3d 546, 547 [2023]). The portion of the order dated February 26, 2019, denying the defendant’s motion for summary judgment on his counterclaims did not necessarily affect the judgment and, therefore, cannot be reviewed on the appeal from the judgment (*see* CPLR 5501 [a] [1]; *Bonczar v American Multi-Cinema, Inc.*, 38 NY3d 1023, 1025-1026 [2022]; *Early, LLC v India St. Props., LLC*, 237 AD3d 1049, 1051 [2025]). The order did not “necessarily remove[] [those] legal issue[s] from the case so that there was no further opportunity during the litigation” for the parties to address them (*Bonczar v American Multi-Cinema, Inc.*, 38 NY3d at 1026 [internal quotation marks omitted]). Rather, those issues were left undecided, and the parties had an opportunity to and did litigate them at trial (*see id.*).

The defendant’s remaining contentions are either without merit or not properly before this Court. Dillon, J.P., Barros, Wooten and Ford, JJ., concur.

6 Ardent Harmony Fund, Inc., Appellant, v BDO Trinity Ltd., Doing Business as BDO Trinidad & Tobago, Respondent.
[— NYS3d —]

Courts—Jurisdiction—Long-Arm Jurisdiction—Substantial Relationship between Claim and Transactions in New York

In an action, inter alia, to recover damages for accounting malpractice, the plaintiff appeals from an order of the Supreme Court, Nassau County (Timothy S. Driscoll, J.), entered September 15, 2021. The order granted the defendant’s renewed motion pursuant to CPLR 3211 (a) to dismiss the complaint.

Ordered that the order is affirmed, with costs.

The plaintiff is a mutual fund domiciled in the Cayman Islands. In 2014 and 2015, the plaintiff engaged the services of nonparty BDO Cayman Ltd. (hereinafter BDO Cayman), also based in the Cayman Islands, to conduct audits of the plaintiff’s financial statements for the financial years ending December 31, 2013, and December 31, 2014, respectively. BDO Cayman delegated certain work in connection with those audits to the defendant, BDO Trinity Ltd., doing business as BDO Trinidad & Tobago, a company existing under the laws of Trinidad & Tobago, with its principal place of business in Trinidad & Tobago. In November 2019, the plaintiff commenced this action, inter alia, to recover damages for accounting malpractice, alleging that the defendant was negligent in connection with those audits by failing to uncover an alleged fraud perpetrated

by New York-based credit advisors with whom the plaintiff had invested the bulk of its assets.

In February 2020, the defendant moved pursuant to CPLR 3211 (a) to dismiss the complaint on the ground, among others, that the Supreme Court lacked personal jurisdiction over the defendant. In an order dated July 6, 2020, the court denied the defendant's motion with leave to renew upon the completion of jurisdictional discovery. Following jurisdictional discovery, the defendant renewed its motion. In an order entered September 15, 2021, the court granted the defendant's renewed motion pursuant to CPLR 3211 (a) to dismiss the complaint on the ground that the court lacked personal jurisdiction over the defendant. The plaintiff appeals.

"The ultimate burden of proving a basis for personal jurisdiction rests with the party asserting jurisdiction" (*Fanelli v Latman*, 202 AD3d 758, 759 [2022]). Thus, where a defendant has moved pursuant to CPLR 3211 (a) (8) to dismiss the complaint for lack of personal jurisdiction, "the plaintiff bears the burden of coming forward with sufficient evidence to prove jurisdiction" (*Aybar v Aybar*, 169 AD3d 137, 142 [2019], *affd* 37 NY3d 274 [2021]; *see Fischbarg v Doucet*, 9 NY3d 375, 381 n 5 [2007]).

"Specific jurisdiction over a defendant is obtained through New York's long-arm statute, CPLR 302" (*Fanelli v Latman*, 202 AD3d at 759). CPLR 302 (a) (1) provides, in relevant part, that "a court may exercise personal jurisdiction over any non-domiciliary . . . who in person or through an agent . . . transacts any business within the state or contracts anywhere to supply goods or services in the state." "The CPLR 302 (a) (1) jurisdictional inquiry is twofold: under the first prong the defendant must have conducted sufficient activities to have transacted business in the state, and under the second prong, the claims must arise from the transactions" (*Rushaid v Pictet & Cie*, 28 NY3d 316, 323 [2016]).

"When assessing whether there is personal jurisdiction over a defendant pursuant to the 'transacts any business' clause of New York's long-arm statute, courts must ask whether *what the defendant did in New York* constitutes a sufficient 'transaction' to satisfy the statute" (*State of New York v Vayu, Inc.*, 39 NY3d 330, 332 [2023] [internal quotation marks omitted]). "This inquiry requires the court to determine, based on the facts before it, whether the defendant's acts in the state were purposeful, that is, whether they were 'volitional acts by which the non-domiciliary avail[ed] itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws'" (*Greenfader v Chicago Sch. of*

Professional Psychology, 222 AD3d 845, 847 [2023], quoting *State of New York v Vayu, Inc.*, 39 NY3d at 332).

“To satisfy the second prong, the statute requires an ‘articulable nexus’ or ‘substantial relationship’ between the cause of action sued upon, or an element thereof, and the defendants’ business transactions in New York” (*Aybar v US Tires & Wheels of Queens, LLC*, 211 AD3d 40, 48 [2022], quoting *D&R Global Selections, S.L. v Bodega Olegario Falcon Pineiro*, 29 NY3d 292, 298 [2017]; see *Lowy v Chalkable, LLC*, 186 AD3d 590, 592 [2020]). “While this inquiry is relatively permissive, there must be a ‘relatedness between the transaction and the legal claim such that the latter is not completely unmoored from the former’ ” (*id.*, quoting *Licci v Lebanese Can. Bank, SAL*, 20 NY3d 327, 339 [2012]; see *Rushaid v Pictet & Cie*, 28 NY3d at 329). Jurisdiction under CPLR 302 (a) (1) “is proper even though the defendant never enters New York, so long as the defendant’s activities here were purposeful and there is a substantial relationship between the transaction and the claim asserted” (*Fischbarg v Doucet*, 9 NY3d at 380 [internal quotation marks omitted]).

Here, accepting as true the allegations set forth in the complaint and in opposition to the defendant’s renewed motion, and according the plaintiff the benefit of every favorable inference (see *Nick v Schneider*, 150 AD3d 1250, 1251 [2017]), the plaintiff failed to make a prima facie showing that the defendant was subject to personal jurisdiction in New York (see *Law Off. of Cary Scott Goldinger, P.C. v Deluca*, 219 AD3d 598, 600 [2023]; *Bloomgarden v Lanza*, 143 AD3d 850, 851 [2016]). The complaint alleged that the plaintiff, a Cayman Island fund, hired a Cayman Islands-based auditor to conduct audits of its financial statements, and that the Cayman Islands auditor delegated certain work to the defendant, which is based in Trinidad & Tobago. Jurisdictional discovery established that all of the defendant’s employees are based in Trinidad & Tobago, that all work performed by the defendant in connection with the audits took place in Trinidad & Tobago, and that the defendant’s employees never traveled to New York in connection with the audits. The defendant’s only connection to New York consisted of phone calls and approximately 60 emails with the New York-based credit advisors with whom the plaintiff’s funds were invested. These incidental communications, undertaken by the defendant merely because the credit advisors were domiciled in New York, are insufficient to establish personal jurisdiction over the defendant pursuant to CPLR 302 (a) (1) (see *Musial v Donohue*, 225 AD3d 1164, 1165 [2024];

Bloomgarden v Lanza, 143 AD3d at 852; *CRT Invs., Ltd. v BDO Seidman, LLP*, 85 AD3d 470, 471 [2011]).

The plaintiff's remaining contentions either are without merit or need not be reached in light of our determination.

Brathwaite Nelson, J.P., Ford, Dowling and Goldberg Velazquez, JJ., concur.

7 Ash Development, LLC, Appellant, v Fidelity National Title Insurance Company, Respondent. [— NYS3d —]

Insurance—Duty to Defend and Indemnify—Scope of Risks Undertaken by Insurer—Exception

Declaratory Judgments—When Remedy Available

In an action, inter alia, to recover damages for breach of contract and for a judgment declaring that the defendant is obligated to defend and indemnify the plaintiff in an underlying action entitled *Merling v Ash Dev., LLC*, commenced in the Supreme Court, Queens County, under index No. 719085/18, and to reimburse the plaintiff for attorneys' fees incurred in an underlying action entitled *Ash Dev., LLC v Merling*, commenced in the Supreme Court, Queens County, under index No. 717088/20, the plaintiff appeals from (1) an order of the Supreme Court, Nassau County (Timothy S. Driscoll, J.), dated October 19, 2023, (2) a judgment of the same court entered November 16, 2023, and (3) an order of the same court entered August 27, 2024. The order dated October 19, 2023, granted the defendant's converted motion for summary judgment dismissing the complaint and, in effect, with respect to the fourth cause of action, and denied that branch of the plaintiff's cross-motion which was for summary judgment on the fourth cause of action. The judgment, upon the order dated October 19, 2023, is in favor of the defendant and against the plaintiff dismissing the complaint. The order entered August 27, 2024, insofar as appealed from, upon reargument, adhered to the determination granting the defendant's converted motion and denied that branch of the plaintiff's motion which was for leave to renew its opposition to the defendant's converted motion.

Ordered that the appeal from the order dated October 19, 2023, is dismissed; and it is further,

Ordered that the judgment is modified, on the law, by deleting the provision thereof dismissing the fourth cause of action, and adding thereto a provision declaring that the defendant is not obligated to defend and indemnify the plaintiff in an underlying action entitled *Merling v Ash Dev., LLC*, commenced in the Supreme Court, Queens County, under index No. 719085/18, and to reimburse the plaintiff for attorneys'

fees incurred in an underlying action entitled *Ash Dev., LLC v Merling*, commenced in the Supreme Court, Queens County, under index No. 717088/20; as so modified, the judgment is affirmed; and it is further,

Ordered that the order entered August 27, 2024, is affirmed insofar as appealed from; and it is further,

Ordered that one bill of costs is awarded to the defendant.

The appeal from the order dated October 19, 2023, must be dismissed because the right of direct appeal therefrom terminated with the entry of the judgment in the action (*see Matter of Aho*, 39 NY2d 241, 248 [1976]). The issues raised on the appeal from the order dated October 19, 2023, are brought up for review and have been considered on the appeal from the judgment (*see* CPLR 5501 [a] [1]; *Matter of Aho*, 39 NY2d at 248).

The plaintiff commenced this action against the defendant, inter alia, to recover damages for breach of contract and for a judgment declaring that the defendant is obligated to defend and indemnify the plaintiff in an underlying adverse possession action commenced against the plaintiff (hereinafter the adverse possession action) and to reimburse the plaintiff for attorneys' fees incurred in an easement action commenced by the plaintiff (hereinafter the easement action). The defendant moved pursuant to CPLR 3211 (a) (7) to dismiss the complaint, and the plaintiff cross-moved to convert the defendant's motion to a motion for summary judgment and for summary judgment on the fourth cause of action, which sought a judgment declaring that the defendant is obligated to defend and indemnify the plaintiff in the adverse possession action and to reimburse the plaintiff for attorneys' fees incurred in the easement action. In an order dated July 6, 2023, the Supreme Court granted that branch of the plaintiff's cross-motion which was to convert the defendant's motion to a motion for summary judgment. Following additional submissions by the parties, in an order dated October 19, 2023, the court granted the defendant's converted motion for summary judgment dismissing the complaint and, in effect, with respect to the fourth cause of action, and denied that branch of the plaintiff's cross-motion which was for summary judgment on the fourth cause of action. The court thereafter issued a judgment, upon the order dated October 19, 2023, in favor of the defendant and against the plaintiff dismissing the complaint.

Thereafter, the plaintiff moved for leave to reargue and renew its opposition to the defendant's converted motion. In an order entered August 27, 2024, the Supreme Court granted re-

argument and, upon reargument, adhered to the determination granting the defendant's converted motion, and denied that branch of the plaintiff's motion which was for leave to renew. The plaintiff appeals.

“‘Since the title insurer's liability to its insured is based, in essence, on contract law, that liability is governed and limited by the agreements, terms, conditions, and provisions contained in the title insurance policy’” (*Melamed v First Am. Tit. Ins. Co.*, 190 AD3d 724, 725 [2021], quoting *A. Gugliotta Dev., Inc. v First Am. Tit. Ins. Co. of N.Y.*, 112 AD3d 559, 560 [2013]; see *Pierot v Chicago Tit. Ins. Co.*, 202 AD3d 1010, 1011 [2022]). “An exclusion from coverage must be specific and clear in order to be enforced, and an ambiguity in an exclusionary clause must be construed most strongly against the insurer” (*Melamed v First Am. Tit. Ins. Co.*, 190 AD3d at 725 [internal quotation marks omitted]; see *Pierot v Chicago Tit. Ins. Co.*, 202 AD3d at 1011).

“‘Where an insurance policy includes the insurer's promise to defend the insured against specified claims as well as to indemnify for actual liability, the insurer's duty to furnish a defense is broader than its obligation to indemnify’” (*Melamed v First Am. Tit. Ins. Co.*, 190 AD3d at 726, quoting *Seaboard Sur. Co. v Gillette Co.*, 64 NY2d 304, 310 [1984]). “The duty to defend arises whenever the allegations in a complaint against the insured fall within the scope of the risks undertaken by the insurer, regardless of how false or groundless those allegations might be” (*id.* [internal quotation marks omitted]). “The duty is not contingent on the insurer's ultimate duty to indemnify should the insured be found liable, nor is it material that the complaint against the insured asserts additional claims which fall outside the policy's general coverage or within its exclusory provisions” (*id.* [internal quotation marks omitted]). “Rather, the duty of the insurer to defend the insured rests solely on whether the complaint alleges any facts or grounds which bring the action within the protection purchased” (*id.* [internal quotation marks omitted]; see *Long Is. Rail Rd. Co. v New York Mar. & Gen. Ins. Co.*, 198 AD3d 888, 890 [2021]). “However, an insurer can be relieved of its duty to defend if it establishes as a matter of law that there is no possible factual or legal basis on which it might eventually be obligated to indemnify its insured under any policy provision” (*Allstate Ins. Co. v Zuk*, 78 NY2d 41, 45 [1991]; see *Francis v D & W Saratoga, Inc.*, 49 AD3d 597, 598 [2008]).

Here, the Supreme Court properly determined that the defendant is not required to defend and indemnify the plaintiff in

the adverse possession action. The title insurance policy included an exception for claims arising from the rights of persons in possession (see *Melamed v First Am. Tit. Ins. Co.*, 190 AD3d at 726-727; *Herbil Holding Co. v Commonwealth Land Tit. Ins. Co.*, 183 AD2d 219, 228 [1992]). Contrary to the plaintiff's contention, there was no other reasonable interpretation of this exception to the policy (see *Seaboard Sur. Co. v Gillette Co.*, 64 NY2d at 311; *Melamed v First Am. Tit. Ins. Co.*, 190 AD3d at 726).

Additionally, under the circumstances, there is no basis to disturb the Supreme Court's determination that there was no conflict of interest that would require the defendant to pay attorneys' fees incurred by the plaintiff after the plaintiff retained private counsel not approved by the defendant in the easement action (see *Findlay v Chicago Title Ins. Co.*, 2022 Il App [1st] 210889, ¶¶ 47-52, 215 NE3d 1006, 1018-1019 [2022]).

However, the Supreme Court erred in dismissing the cause of action for declaratory relief merely because the plaintiff "[was] not entitled to the declaration" that it sought (*Lanza v Wagner*, 11 NY2d 317, 334 [1962]; see *200 Genesee St. Corp. v City of Utica*, 6 NY3d 761, 762 [2005]). Since this is, in part, a declaratory judgment action, the judgment should have included a provision declaring that the defendant is not obligated to defend and indemnify the plaintiff in the adverse possession action and to reimburse the plaintiff for attorneys' fees incurred in the easement action (see *Elgin Realty, Inc. v Klein*, 109 AD3d 785, 787 [2013]; *Serrano v Republic Ins.*, 48 AD3d 665, 666 [2008]).

The plaintiff's remaining contention is without merit. Duffy, J.P., Ford, Golia and Quirk, JJ., concur.

8 Shaleta Balram, Appellant, v Shaikh S. Fiyazuddeen, Respondent. [— NYS3d —]

Release—Scope of Release—Language of Release—Claim to Recover for Personal Injuries
 Release—Scope of Release—Motion to Dismiss

In an action to recover damages for personal injuries, the plaintiff appeals from a judgment of the Supreme Court, Queens County (Frederick D.R. Sampson, J.), entered January 12, 2024. The judgment, upon an order of the same court entered January 5, 2024, inter alia, granting that branch of the defendant's motion which was for summary judgment dismissing the complaint, is in favor of the defendant and against the plaintiff dismissing the complaint.

Ordered that the judgment is reversed, on the law, with costs,

the complaint is reinstated, the order entered January 5, 2024, is vacated, and the matter is remitted to the Supreme Court, Queens County, for a new determination of the defendant's motion in accordance herewith.

On December 26, 2018, the plaintiff, who rented a house in Queens from the defendant, allegedly was injured when she tripped and fell on a staircase inside the house. In June 2020, the plaintiff commenced this action to recover damages for personal injuries against the defendant. Thereafter, the defendant moved for summary judgment dismissing the complaint or, in the alternative, pursuant to CPLR 3211 (a) to dismiss the complaint. In support of the motion, the defendant argued, among other things, that the action was barred by a release in a stipulation of settlement (hereinafter the release) executed by the parties in a prior action brought by the plaintiff against the defendant for specific performance of a contract to purchase the property (hereinafter the specific performance action). The release provided that the plaintiff discharged the defendant from, inter alia, any liability or claims that the plaintiff had or may have "relating to the claims in the above-referenced lawsuit."

In an order entered January 5, 2024, the Supreme Court granted that branch of the defendant's motion which was for summary judgment dismissing the complaint based upon the release. The court did not address the other grounds raised by the defendant in support of that branch of his motion which was for summary judgment dismissing the complaint and, in effect, denied, as academic, that branch of the defendant's motion which was pursuant to CPLR 3211 (a) to dismiss the complaint. On January 12, 2024, the court entered a judgment in favor of the defendant and against the plaintiff dismissing the complaint. The plaintiff appeals.

"A valid release constitutes a complete bar to an action on a claim which is the subject of the release" (*Anthony v Firehock*, 225 AD3d 655, 656 [2024] [internal quotation marks omitted], quoting *Centro Empresarial Cempresa S.A. v América Móvil, S.A.B. de C.V.*, 17 NY3d 269, 276 [2011]). "In order to be entitled to dismissal of an action based upon a release, the movant must show that the release was intended to cover the subject action or claim" (*Mazzurco v PII Sam, LLC*, 153 AD3d 1341, 1342 [2017], quoting *Choudhry v Five Star Contr. Cos., Inc.*, 52 AD3d 763, 764 [2008]). "The meaning and coverage of a release necessarily depends upon the controversy being settled and upon the purpose for which the release was given" (*Chiapponi v North Shore Univ. Hosp.*, 164 AD3d 463, 465 [2018]).

“While a broad general release will be given effect regardless of the parties’ unexpressed intentions, such ‘release may not be read to cover matters which the parties did not intend to cover’ ” (*id.*, quoting *Gale v Citicorp*, 278 AD2d 197, 197 [2000]). “If the recitals in the release appear to limit the release to only certain claims, demands, or obligations, the release will operate only as to those matters” (*Mazzurco v PII Sam, LLC*, 153 AD3d at 1342).

Here, the defendant failed to establish, *prima facie*, that the release was intended to preclude the plaintiff from recovering for any claims to recover for personal injuries based on an accident at the subject property, as the language of the release was specifically limited to liability “relating to the claims in the [specific performance action]” (*see Chiappone v North Shore Univ. Hosp.*, 164 AD3d at 465; *Apfel v Prestia*, 41 AD3d 520, 521 [2007]; *Rotondi v Drewes*, 31 AD3d 734, 736 [2006]). Accordingly, the defendant was not entitled to summary judgment dismissing the complaint based upon the release, without regard to the sufficiency of the opposition papers on that issue (*see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851 [1985]).

In light of our determination, that branch of the defendant’s motion which was pursuant to CPLR 3211 (a) to dismiss the complaint, and the remaining grounds raised by the defendant in support of that branch of his motion which was for summary judgment dismissing the complaint, are no longer academic. Although the Supreme Court did not address whether the defendant was entitled to dismissal of the complaint pursuant to CPLR 3211 (a) (5) based on the release, we deem it appropriate to do so in the interest of judicial economy (*see B&H Flooring, LLC v Folger*, 228 AD3d 809, 812 [2024]). On a motion pursuant to CPLR 3211 (a) (5) to dismiss the complaint based on a release, “[a] defendant bears the initial burden of establishing that he or she has been released from any claims” (*Burgos v New York Presbyt. Hosp.*, 155 AD3d 598, 600 [2017]). Here, the defendant failed to satisfy this burden (*see id.*; *Mazzurco v PII Sam, LLC*, 153 AD3d at 1342).

The Supreme Court did not reach the remaining grounds raised by the defendant in support of his motion for summary judgment dismissing the complaint or, in the alternative, pursuant to CPLR 3211 (a) to dismiss the complaint. We reverse the judgment and remit the matter to the Supreme Court, Queens County, for a new determination of the motion after considering those grounds (*see Villaver v Paglinawan*, 230 AD3d 533, 535-536 [2024]). Connolly, J.P., Wooten, Taylor and Landicino, JJ., concur.

9 Jean Dufort Baptichon, Appellant, v Nicolas Sablonde S., Defendant, and Santander Consumer USA, Inc., Respondent. [— NYS3d —]

Replevin—Order of Seizure—Lien Priority

In an action to recover damages for breach of a loan agreement and for an order of seizure pursuant to CPLR 7102 of a motor vehicle that served as collateral for the loan, the plaintiff appeals from an order of the Supreme Court, Nassau County (Randy Sue Marber, J.), entered September 3, 2024. The order, in effect, granted the motion of the defendant Santander Consumer USA, Inc., pursuant to CPLR 7102 for an order of seizure.

Ordered that the order is affirmed, with costs.

In February 2021, the defendant Nicolas Sablonde S. (hereinafter Nicolas) purchased a vehicle. On February 11, 2021, she executed a retail installment contract with the seller of the vehicle to finance its purchase. The retail installment contract was assigned to the defendant Santander Consumer USA, Inc. (hereinafter Santander). Nicolas failed to pay the installments due in April 2022 and thereafter, and she went into default.

Meanwhile, on December 8, 2021, Nicolas borrowed the sum of \$10,000 from the plaintiff, with the vehicle as collateral. The plaintiff alleges that pursuant to an oral agreement, Nicolas agreed that if she defaulted in repaying the loan, the plaintiff would charge her storage fees for the vehicle in the amount of \$75 per day.

In March 2022 Nicolas defaulted in repaying the loan from the plaintiff, and the plaintiff commenced this action. In May 2023, the plaintiff moved to recover storage fees for the vehicle in the amount of \$61,425.

In response, Santander moved pursuant to CPLR 7102 for an order of seizure. The plaintiff in opposition asserted, among other things, that he had a superior lien for storage costs.

In an order entered September 3, 2024, the Supreme Court, in effect, granted Santander's motion pursuant to CPLR 7102 for an order of seizure. The plaintiff appeals.

Santander established that it was entitled to an order of seizure (*see Southeast Fin., LLC v Broadway Towing, Inc.*, 117 AD3d 715 [2014]). The plaintiff's assertion that he had a lien for storage costs of the vehicle, which had priority over Santander's lien (*see Motor Discount Corp. v Scappy & Peck Auto Body*, 12 NY2d 227, 229 [1963]), is without merit, since there was no indication that the plaintiff performed work on the vehicle, that the location where the vehicle was stored was

a duly registered motor vehicle repair shop (*see Matter of National Union Fire Ins. Co. of Pittsburgh, Pa. v Eland Motor Car Co.*, 85 NY2d 725, 730 [1995]), or that the storage fees were assessed at a reasonable prevailing rate (*see Matter of Ally Fin., Inc. v All County Towing & Recovery*, 166 AD3d 1442 [2018]).

The plaintiff's remaining contentions are without merit (*see Taveras v Incorporated Vil. of Freeport*, 225 AD3d 822, 823 [2024]; *Matter of State of New York v Boutelle*, 85 AD3d 1607 [2011]; *Matter of Frederick Y.*, 199 AD2d 887, 888 [1993]; *Filler v Motta*, 45 Misc 3d 41 [App Term, 2d Dept, 2d, 11th & 13th Jud Dists 2014]). Barros, J.P., Wooten, Love and Quirk, JJ., concur.

10 Chittra Benjamin, Appellant-Respondent, v LaSalle Bank, N.A., Respondent, and U.S. Bank, National Association, Respondent-Appellant, et al., Defendant. [— NYS3d —]—

Limitation of Actions—Six-Year Statute of Limitations—Mortgage Foreclosure—Acceleration of Debt in Prior Action

Limitation of Actions—Commencement of Action after Termination of Prior Action—Mortgage Foreclosure—Six-Month Savings Provision

Judgments—Default Judgment—Reasonable Excuse for Delay

In an action pursuant to RPAPL 1501 (4) to cancel and discharge of record a mortgage, the plaintiff appeals, and the defendant U.S. Bank, National Association cross-appeals, from an order of the Supreme Court, Queens County (Robert I. Caloras, J.), entered July 25, 2019. The order, insofar as appealed from, granted that branch of the motion of the defendant U.S. Bank, National Association which was pursuant to CPLR 3211 (a) (7) to dismiss the amended complaint insofar as asserted against it by the plaintiff, denied that branch of the cross-motion of the plaintiff and David Benjamin which was for leave to enter a default judgment against the defendant LaSalle Bank, N.A., and granted that branch of the cross-motion of the defendant LaSalle Bank, N.A., which was pursuant to CPLR 3211 (a) (7) to dismiss the amended complaint insofar as asserted against it. The order, insofar as cross-appealed from, denied that branch of the motion of the defendant U.S. Bank, National Association which was pursuant to CPLR 3211 (a) (7) to dismiss the amended complaint insofar as asserted against it by David Benjamin.

Ordered that the order is reversed insofar as appealed from, on the law, that branch of the motion of the defendant U.S. Bank, National Association which was pursuant to CPLR 3211 (a) (7) to dismiss the amended complaint insofar as asserted against it by the plaintiff is denied, that branch of the cross-

motion of the plaintiff and David Benjamin which was for leave to enter a default judgment against the defendant LaSalle Bank, N.A., is granted, and that branch of the cross-motion of the defendant LaSalle Bank, N.A., which was pursuant to CPLR 3211 (a) (7) to dismiss the amended complaint insofar as asserted against it is denied; and it is further,

Ordered that the order is affirmed insofar as cross-appealed from; and it is further,

Ordered that one bill of costs is awarded to the plaintiff payable by the defendants U.S. Bank, National Association and LaSalle Bank, N.A.

On May 25, 2007, David Benjamin (hereinafter the decedent) executed a note in the sum of \$594,000, which was secured by a mortgage executed by the decedent and the plaintiff, Chittra Benjamin (hereinafter Chittra and, together with the decedent, the Benjamins), on certain residential property located in South Ozone Park. In December 2008, the mortgage and note were assigned to LaSalle Bank, N.A. (hereinafter LaSalle).

On January 8, 2009, LaSalle commenced an action (hereinafter the 2009 action) against the Benjamins, among others, to foreclose the mortgage. The decedent interposed an answer, but Chittra did not. In a decision dated September 9, 2009, the Supreme Court, among other things, determined that LaSalle's motion, inter alia, for summary judgment on the complaint insofar as asserted against the decedent, to strike the decedent's answer, and for an order of reference should be granted. On September 17, 2014, LaSalle's successor in interest assigned the mortgage to U.S. Bank, National Association (hereinafter U.S. Bank). In an order entered December 15, 2015 (hereinafter the December 2015 order), the court, among other things, vacated the decision dated September 9, 2009, in effect, granted that branch of the Benjamins' motion which was pursuant to CPLR 3215 to dismiss the complaint insofar as asserted against Chittra as abandoned, and thereupon, directed dismissal of the complaint in its entirety on the ground that Chittra was a necessary party. In a decision and order dated September 12, 2018, this Court affirmed the December 2015 order (see *LaSalle Bank N.A. v Benjamin*, 164 AD3d 1223 [2018]).

On October 3, 2018, the Benjamins commenced this action against LaSalle pursuant to RPAPL 1501 (4) to cancel and discharge of record the mortgage. LaSalle interposed an answer dated December 5, 2018. Thereafter, the Benjamins served a supplemental summons and amended verified complaint dated December 18, 2018, adding U.S. Bank and another party as defendants.

In January 2019, U.S. Bank moved pursuant to CPLR 3211 (a) (7) to dismiss the amended complaint insofar as asserted against it, arguing, *inter alia*, that it was entitled to the benefit of the six-month savings provision under CPLR 205 (a) to commence a new mortgage foreclosure action. The Benjamins opposed the motion and cross-moved, among other things, for leave to enter a default judgment against LaSalle. Thereafter, LaSalle cross-moved, *inter alia*, pursuant to CPLR 3211 (a) (7) to dismiss the amended complaint insofar as asserted against it. The Benjamins opposed LaSalle's motion. In an order entered July 25, 2019, the Supreme Court, among other things, (1) granted that branch of U.S. Bank's motion which was pursuant to CPLR 3211 (a) (7) to dismiss the amended complaint insofar as asserted against it by Chittra, (2) denied that branch of U.S. Bank's motion which was pursuant to CPLR 3211 (a) (7) to dismiss the amended complaint insofar as asserted against it by the decedent, (3) denied that branch of the Benjamins' cross-motion which was for leave to enter a default judgment against LaSalle, and (4) granted that branch of LaSalle's cross-motion which was pursuant to CPLR 3211 (a) (7) to dismiss the amended complaint insofar as asserted against it. The Benjamins appealed, and U.S. Bank cross-appealed. During the pendency of the appeal, the decedent died, and Chittra, as administrator of the decedent's estate, was substituted for the decedent.

"Pursuant to RPAPL 1501 (4), a person having an estate or interest in real property subject to a mortgage may maintain an action to secure the cancellation and discharge of the encumbrance, and to adjudge the estate or interest free of it, if the applicable statute of limitations for commencing a foreclosure action has expired" (97 *Lyman Ave., LLC v MTGLQ Invs., L.P.*, 233 AD3d 1038, 1041 [2024] [internal quotation marks omitted]; *see Collins v Bank of N.Y. Mellon*, 227 AD3d 948, 950 [2024]). An action to foreclose a mortgage is subject to a six-year statute of limitations (*see* CPLR 213 [4]). "Where the mortgage debt is accelerated, the entire balance of the debt accrues and the statute of limitations begins to run on the full amount due" (*Citibank, N.A. v Horan*, 230 AD3d 1216, 1217 [2024]). An acceleration of a mortgage debt can occur "when a creditor commences an action to foreclose upon a note and mortgage and seeks, in the complaint, payment of the full balance due" (*Milone v US Bank N.A.*, 164 AD3d 145, 152 [2018]; *see 97 Lyman Ave., LLC v MTGLQ Invs., L.P.*, 233 AD3d at 1041; *Citibank, N.A. v Horan*, 230 AD3d at 1217; *Collins v Bank of N.Y. Mellon*, 227 AD3d at 950).

"On a motion to dismiss a complaint pursuant to CPLR 3211

(a) (7) for failure to state a cause of action, the complaint is to be afforded a liberal construction, the facts alleged are presumed to be true, the plaintiff is afforded the benefit of every favorable inference, and the court is to determine only whether the facts as alleged fit within any cognizable legal theory” (*Martinez v NYC Health & Hosps. Corp.*, 223 AD3d 731, 732 [2024] [internal quotation marks omitted]; see *Weill v East Sunset Park Realty, LLC*, 101 AD3d 859, 859 [2012]). “Where evidentiary material is submitted and considered on a motion to dismiss a complaint pursuant to CPLR 3211 (a) (7), and the motion is not converted into one for summary judgment, the question becomes whether the plaintiff has a cause of action, not whether the plaintiff has stated one, and unless it has been shown that a material fact as claimed by the plaintiff to be one is not a fact at all and unless it can be said that no significant dispute exists regarding it, dismissal should not eventuate” (*Nyari v Onefater*, 171 AD3d 936, 937 [2019] [internal quotation marks omitted]; see *Truesource, LLC v Niemeyer*, 223 AD3d 694, 695 [2024]).

Here, the 2009 action was commenced on January 8, 2009, and LaSalle elected in the complaint to “declare the balance of the principal indebtedness immediately due and payable.” The 2009 action terminated on September 12, 2018, when this Court affirmed the December 2015 order directing dismissal of the 2009 action (see *U.S. Bank N.A. v Coleman*, 215 AD3d 780, 782 [2023]). When this action pursuant to RPAPL 1501 (4) to cancel and discharge of record the mortgage was commenced on October 3, 2018, more than six years had elapsed since the debt was accelerated. On February 7, 2019, within six months of the termination of the 2009 action, U.S. Bank commenced an action (hereinafter the 2019 action) against the Benjamins, and another defendant, inter alia, to foreclose the mortgage.

Contrary to U.S. Bank’s contention, it is not entitled to the benefit of the six-month savings provision under CPLR 205 (a) to commence a new mortgage foreclosure action, because the Foreclosure Abuse Prevention Act (FAPA) (L 2022, ch 821 [eff Dec. 30, 2022]) replaced the savings provision of CPLR 205 (a) with CPLR 205-a in actions upon instruments described in CPLR 213 (4) (see *id.* § 205 [c]; *Wells Fargo Bank, N.A. v Brandt*, 230 AD3d 623, 625 [2024]). U.S. Bank’s contentions that FAPA and, more specifically, CPLR 205-a do not apply retroactively are without merit (see *Deutsche Bank Natl. Trust Co. v Vista Holding, LLC*, 239 AD3d 830 [2025]; *97 Lyman Ave., LLC v MTGLQ Invs., L.P.*, 233 AD3d at 1042). Contrary to U.S. Bank’s contention, the retroactive application of FAPA does not violate

the Due Process Clause of either the United States Constitution or the New York State Constitution (*see Deutsche Bank Natl. Trust Co. v Feurtado*, 241 AD3d 499 [2025]; *Deutsche Bank Natl. Trust Co. v Dagrín*, 233 AD3d 1065, 1069 [2024]; 97 *Lyman Ave., LLC v MTGLQ Invs., L.P.*, 233 AD3d at 1039-1042).

As relevant here, under CPLR 205-a (a), “[i]f an action upon an instrument described under [CPLR 213 (4)] is timely commenced and is terminated in any manner other than . . . a dismissal of the complaint for any form of neglect, including, but not limited to those specified in [CPLR 3215], the original plaintiff, or, if the original plaintiff dies and the cause of action survives, his or her executor or administrator, may commence a new action upon the same transaction or occurrence or series of transactions or occurrences within six months following the termination” (*U.S. Bank Trust, N.A. v Giangrande*, 229 AD3d 834, 836 [2024] [internal quotation marks omitted]). Thus, under CPLR 205-a, a mortgage foreclosure plaintiff “may not take advantage of the six-month savings provision if the prior action was dismissed pursuant to CPLR 3215” (*Deutsche Bank Natl. Trust Co. v Feurtado*, 241 AD3d at 501). Additionally, CPLR 205-a (a) (1) provides that “a successor in interest or an assignee of the original plaintiff shall not be permitted to commence the new action, unless pleading and proving that such assignee is acting on behalf of the original plaintiff.”

Here, U.S. Bank was not the original plaintiff in the 2009 action and it has neither pleaded nor proved that it is acting on behalf of the original plaintiff. Accordingly, U.S. Bank failed to demonstrate that it is entitled to the benefit of the six-month savings provision of CPLR 205-a to commence a new mortgage foreclosure action against either Chittra or the decedent (*see Johnson v Cascade Funding Mtge. Trust 2017-1*, 220 AD3d 929, 932 [2023]).

Moreover, U.S. Bank is not entitled to the benefit of CPLR 205-a with respect to a cause of action to foreclose the mortgage insofar as asserted against Chittra for the additional reason that the complaint insofar as asserted against Chittra in the 2009 action was dismissed pursuant to CPLR 3215 (*see id.* § 205-a [a]; *Collins v Bank of N.Y. Mellon*, 227 AD3d at 951; *LaSalle Bank N.A. v Benjamin*, 164 AD3d 1223 [2018]).

Accordingly, the Supreme Court properly denied that branch of U.S. Bank’s motion which was pursuant to CPLR 3211 (a) (7) to dismiss the amended complaint insofar as asserted against it by the decedent. However, the court should have denied that branch of the motion which was pursuant to CPLR

3211 (a) (7) to dismiss the amended complaint insofar as asserted against it by Chittra (*see Collins v Bank of N.Y. Mellon*, 227 AD3d at 951; *see generally Guggenheimer v Ginzburg*, 43 NY2d 268, 275 [1977]).

The Supreme Court should have denied that branch of LaSalle's cross-motion which was pursuant to CPLR 3211 (a) (7) to dismiss the amended complaint insofar as asserted against it. LaSalle's contention that it was not a proper party to this action because it no longer existed after 2007 is contradicted by the record, including by LaSalle's own assertions in prosecuting the 2009 action to foreclose the mortgage (*see LaSalle Bank N.A. v Benjamin*, 164 AD3d 1223 [2018]) and by the fact that LaSalle answered the original complaint in this action.

The Supreme Court should have granted that branch of the Benjamins' cross-motion which was for leave to enter a default judgment against LaSalle. On a motion pursuant to CPLR 3215 for leave to enter a default judgment, a plaintiff is required to submit proof of service of the summons and complaint, "proof of the facts constituting the claim," and proof of the defendant's default in answering or appearing (*id.* § 3215 [f]; *see Pemberton v Montoya*, 216 AD3d 988, 989 [2023]; *Roy v 81E98th KH Gym, LLC*, 142 AD3d 985, 985 [2016]; *Fried v Jacob Holding, Inc.*, 110 AD3d 56, 59 [2013]). "To demonstrate 'the facts constituting the claim' the movant need only submit sufficient proof to enable a court to determine that 'a viable cause of action exists' " (*Fried v Jacob Holding, Inc.*, 110 AD3d at 59-60, quoting *Woodson v Mendon Leasing Corp.*, 100 NY2d 62, 70-71 [2003]; *see Roy v 81E98th KH Gym, LLC*, 142 AD3d at 985). A verified complaint "may be used as the affidavit of the facts constituting the claim" where it contains "evidentiary facts from one with personal knowledge" (*Pemberton v Montoya*, 216 AD3d at 990). Once the plaintiff has made such a showing, the defendant, in order to avoid entry of a default judgment, "must show either that there was no default, or that [the defendant] has a reasonable excuse for its delay and a potentially meritorious defense" (*Fried v Jacob Holding, Inc.*, 110 AD3d at 60; *see Atlantic Cas. Ins. Co. v RJNJ Servs., Inc.*, 89 AD3d 649, 651 [2011]). Here, the Benjamins made the requisite showing and, in opposition, LaSalle failed to demonstrate either that there was no default or that it had a reasonable excuse for its delay and a potentially meritorious defense.

U.S. Bank's remaining contention is without merit. Dillon, J.P., Chambers, Wan and McCormack, JJ., concur. [**Prior Case History: 2019 NY Slip Op 32579(U).**]

11 Tatyana Bianco, Respondent, v New York City Health & Hospitals Corporation, Appellant, et al., Defendants. [— NYS3d —]—

Disclosure—Penalty for Failure to Disclose—Preclusion of Evidence—Willful and Contumacious Conduct

In an action, inter alia, to recover damages for medical malpractice, the defendant New York City Health & Hospitals Corporation appeals from an order of the Supreme Court, Kings County (Lawrence Knipel, J.), dated November 30, 2021. The order, insofar as appealed from, granted the plaintiff's motion pursuant to CPLR 3126 to impose sanctions on the defendant New York City Health & Hospitals Corporation to the extent of precluding that defendant from offering certain video surveillance evidence at trial.

Ordered that the order is reversed insofar as appealed from, on the law, with costs, and the plaintiff's motion pursuant to CPLR 3126 to impose sanctions on the defendant New York City Health & Hospitals Corporation is denied.

In this action, inter alia, to recover damages for medical malpractice, the plaintiff moved pursuant to CPLR 3126 to impose sanctions on the defendant New York City Health & Hospitals Corporation (hereinafter the defendant) for its delay in producing certain video surveillance evidence. In an order dated November 30, 2021, the Supreme Court, among other things, granted the plaintiff's motion to the extent of precluding the defendant from introducing certain video surveillance evidence at trial. The defendant appeals.

"[T]he Supreme Court 'has broad discretion in supervising disclosure and in resolving discovery disputes'" (*Pizzo v Lustig*, 216 AD3d 38, 44 [2023], quoting *HSBC Bank USA, N.A. v Oscar*, 161 AD3d 1055, 1057 [2018]). "CPLR 3126 permits a court to impose discovery sanctions which include, but are not limited to, the preclusion of evidence, where a party refuses to obey an order for disclosure or willfully and contumaciously fails to disclose information which the court finds ought to have been disclosed" (*id.*; see CPLR 3126; *Wolf v Flowers*, 122 AD3d 728, 728-729 [2014]). However, "[s]ince public policy strongly favors the resolution of cases on their merits" (*Gregorian v New York Life Ins. Co.*, 211 AD3d 706, 709 [2022]), "[b]efore a court invokes the drastic remedy of . . . precluding evidence, there must be a clear showing that the failure to comply with court-ordered discovery was willful and contumacious" (*Zakhidov v Boulevard Tenants Corp.*, 96 AD3d 737, 739 [2012]; see *Gregorian v New York Life Ins. Co.*, 211 AD3d at 709). "Willful and contumacious conduct may be inferred from

a party's conduct, such as by the repeated failure to comply with court-ordered discovery coupled with an inadequate explanation for the failure to comply, or a failure to comply with court-ordered discovery over an extended period of time" (*Pizzo v Lustig*, 216 AD3d at 45; see *Perez v Tedesco*, 214 AD3d 1010, 1012 [2023]; *255 Butler Assoc., LLC v 255 Butler, LLC*, 208 AD3d 831, 834 [2022]). Moreover, although the nature and degree of the penalty to be imposed pursuant to CPLR 3126 rests within the sound discretion of the trial court, "the Appellate Division may substitute its own discretion for that of the trial court in such matters, even in the absence of an abuse of that discretion" (*Mirabile v Kuwayama*, 231 AD3d 822, 823-824 [2024] [internal quotation marks omitted]).

Here, the record does not support an inference that the defendant's delay in producing certain video surveillance evidence was willful and contumacious (see e.g. *Conciatori v Port Auth. of N.Y. & N.J.*, 46 AD3d 501, 504 [2007]). Accordingly, the plaintiff's motion pursuant to CPLR 3126 to impose sanctions on the defendant should have been denied.

The plaintiff's remaining contention is not properly before this Court. Chambers, J.P., Dowling, McCormack and Quirk, JJ., concur.

12 Tatyana Bianco, Appellant, v New York City Health & Hospitals Corporation, Respondent, et al., Defendants. [—NYS3d —]

Hospitals—Malpractice—Expert Opinion—Reliance upon Disputed Facts

In an action, inter alia, to recover damages for medical malpractice, the plaintiff appeals from (1) an order of the Supreme Court, Kings County (Pamela L. Fisher, J.), dated January 17, 2023, and (2) an order of the same court dated April 12, 2023. The order dated January 17, 2023, insofar as appealed from, granted that branch of the motion of the defendant New York City Health & Hospitals Corporation which was for summary judgment dismissing the complaint insofar as asserted against it and denied those branches of the plaintiff's cross-motion which were for summary judgment on the issue of liability on the causes of action alleging false imprisonment, assault, and battery. The order dated April 12, 2023, denied the plaintiff's motion for leave to reargue her opposition to that branch of the motion of the defendant New York City Health & Hospitals Corporation which was for summary judgment dismissing the complaint insofar as asserted against it and her cross-motion for summary judgment on the issue of liability.

Ordered that the appeal from the order dated April 12, 2023,

is dismissed, without costs or disbursements, as no appeal lies from an order denying reargument; and it is further,

Ordered that the order dated January 17, 2023, is modified, on the law, by deleting the provision thereof granting that branch of the motion of the defendant New York City Health & Hospitals Corporation which was for summary judgment dismissing the complaint insofar as asserted against it, and substituting therefor a provision denying that branch of the motion; as so modified, the order is affirmed insofar as appealed from, without costs or disbursements.

In October 2017, the plaintiff commenced this action against, among others, the defendant New York City Health & Hospitals Corporation (hereinafter the defendant), inter alia, to recover damages for medical malpractice, false imprisonment, assault, and battery, based primarily upon allegations that she was wrongfully detained and medicated at Coney Island Hospital (hereinafter the hospital) when she attempted to leave the hospital against medical advice. The defendant moved, among other things, for summary judgment dismissing the complaint insofar as asserted against it, and the plaintiff cross-moved for summary judgment on the issue of liability. In an order dated January 17, 2023, the Supreme Court, inter alia, granted that branch of the defendant's motion which was for summary judgment dismissing the complaint insofar as asserted against it and denied those branches of the plaintiff's cross-motion which were for summary judgment on the issue of liability on the causes of action alleging false imprisonment, assault, and battery. The plaintiff appeals.

The Supreme Court erred in granting that branch of the defendant's motion which was for summary judgment dismissing the complaint insofar as asserted against it. "The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact" (*K.J. v City of New York*, 156 AD3d 611, 613 [2017]). "This burden may be satisfied only by the defendant's affirmative demonstration of the merit of the defense, rather than merely by reliance on gaps in the plaintiff[s] case" (*id.*, quoting *Shafi v Motta*, 73 AD3d 729, 730 [2010]). "A defendant moving for summary judgment in a medical malpractice action must demonstrate the absence of any material issues of fact (see *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]) with respect to at least one of the elements of a cause of action alleging medical malpractice: (1) whether the [defendant] deviated or departed from accepted community

standards of practice, or (2) [whether] such a departure was a proximate cause of the plaintiff's injuries' " (*Russell v Garafalo*, 189 AD3d 1100, 1101 [2020], quoting *Rosenthal v Alexander*, 180 AD3d 826, 827 [2020]; see *Stukas v Streiter*, 83 AD3d 18, 23 [2011]). "In order to sustain this prima facie burden, the defendant must address and rebut any specific allegations of malpractice set forth in the plaintiff's complaint and bill of particulars" (*Martinez v Orange Regional Med. Ctr.*, 203 AD3d 910, 912 [2022] [internal quotation marks omitted]). " 'Once a defendant makes a prima facie showing, the burden shifts to the plaintiff to demonstrate the existence of a triable issue of fact as to the elements on which the defendant met the prima facie burden' " (*Kielb v Bascara*, 217 AD3d 756, 757 [2023] [internal quotation marks omitted], quoting *Clarke v New York City Health & Hosps.*, 210 AD3d 631, 632 [2022]; see *Stukas v Streiter*, 83 AD3d at 24).

Here, viewing the evidence in the light most favorable to the plaintiff (see *Stukas v Streiter*, 83 AD3d at 22), the defendant failed to eliminate all triable issues of fact as to whether its employees departed from accepted standards of community practice in treating the plaintiff at the hospital or whether such departure was a proximate cause of the plaintiff's injuries (see *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d at 853). Among other deficiencies, the opinions of the defendant's medical experts were conclusory and relied upon disputed facts in the record (see *Reiss v Sayegh*, 123 AD3d 787, 789 [2014]; *Plato v Guneratne*, 54 AD3d 741, 742 [2008]). Moreover, the defendant failed to make an affirmative demonstration of its entitlement to summary judgment dismissing the remaining causes of action insofar as asserted against it (see *K.J. v City of New York*, 156 AD3d at 613; *Shafi v Motta*, 73 AD3d at 730). Accordingly, the Supreme Court should have denied that branch of the defendant's motion which was for summary judgment dismissing the complaint insofar as asserted against it, without regard to the sufficiency of the plaintiff's opposition papers (see *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]).

However, contrary to the plaintiff's contention, the Supreme Court properly denied those branches of her cross-motion which were for summary judgment on the issue of liability on the causes of action alleging false imprisonment, assault, and battery. The evidence submitted by the plaintiff in support of these branches of her cross-motion was conclusory and similarly relied upon disputed facts in the record (see *id.*). Accordingly, the court properly denied these branches of the plaintiff's cross-motion, without regard to the sufficiency of the defendant's opposition papers (see *id.*).

The parties' remaining contentions either need not be reached in light of our determination or are not properly before this Court. Chambers, J.P., Dowling, McCormack and Quirk, JJ., concur.

13 Dana Carafello, Appellant, v Anthony Ruvo, D.O., Respondent, et al., Defendants. [253 NYS3d 277]—

Physicians and Surgeons—Malpractice—Departure from Applicable Standard of Care—Expert Affidavits

In an action to recover damages for medical malpractice, the plaintiff appeals from an order of the Supreme Court, Orange County (Maria S. Vazquez-Doles, J.), dated February 11, 2021. The order granted the motion of the defendant Anthony Ruvo for summary judgment dismissing the complaint insofar as asserted against him.

Ordered that the order is reversed, on the law, with costs, and the motion of the defendant Anthony Ruvo for summary judgment dismissing the complaint insofar as asserted against him is denied.

The plaintiff commenced this action to recover damages for medical malpractice against the defendant Anthony Ruvo (hereinafter the defendant), among others. The plaintiff alleged that the defendant deviated from accepted medical practice in failing to diagnose a transected tendon in her right ring finger, causing permanent limitations to the mobility of her right hand. The defendant moved for summary judgment dismissing the complaint insofar as asserted against him. In an order dated February 11, 2021, the Supreme Court granted the defendant's motion. The plaintiff appeals.

"The essential elements of medical malpractice are (1) a deviation or departure from accepted medical practice, and (2) evidence that such departure was a proximate cause of injury" (*Avgi v Policha*, 232 AD3d 838, 839 [2024] [internal quotation marks omitted]; see *Murray v Central Is. Healthcare*, 205 AD3d 1036, 1037 [2022]). " 'In moving for summary judgment dismissing a cause of action alleging medical malpractice, a defendant must establish, prima facie, that there was no departure or deviation from the accepted standard of care or that such departure or deviation was not a proximate cause of any injury to the plaintiff' " (*Daniels v Pisarenko*, 222 AD3d 831, 832 [2023], quoting *Attia v Klebanov*, 192 AD3d 650, 651 [2021]). However, "[a] defendant's expert's affidavit or affirmation that merely recount[s] the treatment rendered and opine[s] in a conclusory manner that such treatment did not represent a departure from good and accepted medical practice is insuf-

ficient to meet this burden” (*Martinez v Orange Regional Med. Ctr.*, 203 AD3d 910, 912 [2022] [internal quotation marks omitted]).

Here, the defendant failed to establish, *prima facie*, that he did not depart from the applicable standard of care in treating the plaintiff or that any such departure did not proximately cause the plaintiff’s injuries (*see Badescu v Lewis*, 235 AD3d 613, 614 [2025]). The expert affidavits submitted by the defendant in support of his motion failed to address specific allegations of negligence asserted by the plaintiff, including whether the defendant departed from the accepted standard of care in examining the injury, failing to properly diagnose the transected tendon suffered by the plaintiff, and failing to recommend immediate consultation with a surgeon to repair the tendon, as well as whether such departures proximately caused the plaintiff’s continued injuries. Instead, the experts merely described the treatment rendered, improperly assumed the truth of certain facts disputed by the plaintiff (*see Stiso v Berlin*, 176 AD3d 888, 890 [2019]), and concluded, based on those assumptions, that the examination and treatment did not represent a departure from good and accepted medical practice (*see Martinez v Orange Regional Med. Ctr.*, 203 AD3d at 912).

Accordingly, the Supreme Court should have denied the defendant’s motion for summary judgment dismissing the complaint insofar as asserted against him, without regard to the sufficiency of the opposition papers (*see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). Connolly, J.P., Chambers, Voutsinas and Goldberg Velazquez, JJ., concur.

14 Raymond Carroll, Respondent, v South Nassau Communities Hospital et al., Appellants, et al., Defendants. [252 NYS3d 289]—

Appeal—Matters Appealable

In an action to recover damages for medical malpractice, the defendant South Nassau Communities Hospital appeals, and the defendant Diana Kontonotas separately appeals, from (1) an order of the Supreme Court, Nassau County (Roy S. Mahon, J.), entered August 12, 2020, and (2) an order of the same court entered January 15, 2021. The order entered August 12, 2020, insofar as appealed from, upon renewal, adhered to a prior determination in an order of the same court entered February 19, 2020, denying those branches of those defendants’ separate motions which were pursuant to CPLR 3211 (a) (5) to dismiss the complaint insofar as asserted against each of them. The order entered January 15, 2021, insofar as appealed from, upon

reargument, adhered to the determination in the order entered August 12, 2020, made upon renewal, adhering to the prior determination in the order entered February 19, 2020, denying those branches of those defendants' separate motions which were pursuant to CPLR 3211 (a) (5) to dismiss the complaint insofar as asserted against each of them.

Ordered that the appeals from the order entered August 12, 2020, are dismissed, without costs or disbursements, as that order was superseded by the order entered January 15, 2021, made upon reargument; and it is further,

Ordered that the appeals from the order entered January 15, 2021, are dismissed, without costs or disbursements.

The appeals from the order entered January 15, 2021, must be dismissed because the right of direct appeal therefrom terminated with the entry of a judgment in the action (*see Matter of Aho*, 39 NY2d 241 [1976]). The issues raised on the appeals from the order entered January 15, 2021, are brought up for review and have been considered on the appeals from the judgment (*see* CPLR 5501 [a] [1]; *Carroll v South Nassau Communities Hosp.*, 248 AD3d 881 [2026] [decided herewith]). Iannacci, J.P., Genovesi, Landicino and Love, JJ., concur.

15 Raymond Carroll, Respondent, v South Nassau Communities Hospital et al., Appellants, et al., Defendants. [—NYS3d —]—

Release—Scope of Release—Language of Release
Hospitals—Malpractice—Departure from Good and Acceptable Standards
Trial—Verdict—Setting Verdict Aside

In an action to recover damages for medical malpractice, the defendant South Nassau Communities Hospital appeals from a judgment of the Supreme Court, Nassau County (Roy S. Mahon, J.), dated May 4, 2022, and the defendant Diana Kontonotas separately appeals from (1) the judgment, (2) an order of the same court (Catherine Rizzo, J.) entered October 26, 2022, (3) an order of the same court (Catherine Rizzo, J.) entered April 13, 2023, and (4) an order of the same court (Catherine Rizzo, J.) entered June 14, 2023. The judgment insofar as separately appealed from by the defendant South Nassau Communities Hospital and the defendant Diana Kontonotas, upon an order of the same court (Roy S. Mahon, J.) entered January 15, 2021, inter alia, upon reargument, adhering to a prior determination in an order of the same court (Roy S. Mahon, J.) entered August 12, 2020, made upon renewal, adhering to a prior determination in an order entered

February 19, 2020, denying those branches of those defendants' separate motions which were pursuant to CPLR 3211 (a) (5) to dismiss the complaint insofar as asserted against each of them, and upon a jury verdict, is in favor of the plaintiff and against the defendant South Nassau Communities Hospital and the defendant Diana Kontonotas in the total sum of \$1,913,685.83. The order entered October 26, 2022, denied the motion of the defendant Diana Kontonotas pursuant to CPLR 4404 (a) to set aside the jury verdict and for judgment as a matter of law dismissing the complaint insofar as asserted against her, or, in the alternative, to set aside the jury verdict as contrary to the weight of the evidence and for a new trial, or, in the alternative, to set aside, as contrary to the weight of the evidence and as excessive, the jury verdict on the issue of damages. The order entered April 13, 2023, insofar as appealed from, upon reargument, adhered to the prior determination in the order entered October 26, 2022, denying the motion of the defendant Diana Kontonotas pursuant to CPLR 4404 (a) to set aside the jury verdict and for judgment as a matter of law dismissing the complaint insofar as asserted against her, or, in the alternative, to set aside the jury verdict as contrary to the weight of the evidence and for a new trial, or, in the alternative, to set aside, as contrary to the weight of the evidence and as excessive, the jury verdict on the issue of damages. The order entered June 14, 2023, insofar as appealed from, denied that branch of the motion of the defendant Diana Kontonotas which was pursuant to CPLR 2601 for leave to deposit money in the amount of the judgment into court. The notice of appeal of the defendant South Nassau Communities Hospital from the order entered January 15, 2021, is also deemed to be a notice of appeal from the judgment (*see* CPLR 5501 [a]).

Ordered that the judgment is affirmed insofar as appealed from; and it is further,

Ordered that the appeal from the order entered October 26, 2022, is dismissed, as that order was superseded by the order entered April 13, 2023, made upon reargument; and it is further,

Ordered that the orders entered April 13, 2023, and June 14, 2023, are affirmed insofar as appealed from; and it is further,

Ordered that one bill of costs is awarded to the plaintiff.

The plaintiff arrived by ambulance at the emergency department of the defendant South Nassau Communities Hospital (hereinafter the hospital) on the morning of September 26, 2012, complaining of, among other things, headache, nausea, and vomiting. He was initially seen by a triage nurse, who

noted that he had slurred speech. The plaintiff was then treated by the defendant Diana Kontonotas, an emergency medicine doctor. Kontonotas conducted a neurological examination of the plaintiff and ordered a CT scan of the plaintiff's head, which did not show any abnormalities. In the afternoon, Kontonotas conducted another neurological examination. Kontonotas did not order a neurology consult. Kontonotas diagnosed the plaintiff with gastritis and discharged him. Two days later, the plaintiff was admitted to the hospital and required a ventriculostomy and craniectomy as a result of a posterior inferior cerebellar artery stroke. The plaintiff sustained permanent neurological damage from the stroke.

The plaintiff commenced this action against the hospital and Kontonotas, among others, to recover damages for medical malpractice. The hospital and Kontonotas separately moved, *inter alia*, pursuant to CPLR 3211 (a) (5) to dismiss the complaint insofar as asserted against each of them on the ground that, pursuant to a settlement, a release given by the plaintiff to the defendants Sydney S. Yoon and Radisphere National Radiology Group, P.C. (hereinafter Radisphere), the parties responsible for interpreting the CT scan of the plaintiff's head conducted on September 26, 2012, also released the plaintiff's causes of action against the hospital and Kontonotas. In an order entered January 15, 2021, the Supreme Court, among other things, upon reargument, adhered to a prior determination in an order entered August 12, 2020, made upon renewal, adhering to a prior determination in an order entered February 19, 2020, denying those branches of the separate motions.

This action then proceeded to a jury trial. After the trial, the jury returned a verdict in favor of the plaintiff and against the hospital and Kontonotas, finding that Kontonotas was negligent in failing to order a neurology consult and that this negligence was a proximate cause of the plaintiff's injuries. The jury awarded the plaintiff damages for past lost earnings in the sum of \$730,000, future lost earnings in the sum of \$320,000, past pain and suffering in the sum of \$800,000, and future pain and suffering in the sum of \$700,000. A judgment was entered in favor of the plaintiff and against the hospital and Kontonotas in the total sum of \$1,913,685.83.

Kontonotas moved pursuant to CPLR 4404 (a) to set aside the jury verdict and for judgment as a matter of law dismissing the complaint insofar as asserted against her, or, in the alternative, to set aside the jury verdict as contrary to the weight of the evidence and for a new trial, or, in the alterna-

tive, to set aside, as contrary to the weight of the evidence and as excessive, the jury verdict on the issue of damages. In an order entered April 13, 2023, the Supreme Court, *inter alia*, upon reargument, adhered to a prior determination denying the motion. Kontonotas also moved, among other things, pursuant to CPLR 2601 for leave to deposit money in the amount of the judgment into court. In an order entered June 14, 2023, the court, *inter alia*, denied that branch of the motion. These appeals ensued.

The Supreme Court properly denied the separate motions of the hospital and Kontonotas which were pursuant to CPLR 3211 (a) (5) to dismiss the complaint insofar as asserted against each of them on the basis of the release given by the plaintiff to Yoon and Radisphere. Pursuant to General Obligations Law § 15-108 (a), “[w]hen a release . . . is given to one of two or more persons liable or claimed to be liable in tort for the same injury . . . it does not discharge any of the other tortfeasors from liability for the injury . . . unless its terms expressly so provide.” However, “[t]he statute does not require that every discharged party be specifically named or identified” (*Fiakpoe v Middlesworth*, 118 AD3d 743, 745 [2014]; *see Wells v Shearson Lehman/American Express*, 72 NY2d 11, 21-22 [1988]). “A release which is clear and unambiguous will be fully enforced according to the plain language of the release” (*Hoffmann v Horn*, 157 AD3d 871, 873 [2018]; *see Koufakis v Siglag*, 85 AD3d 872, 873-874 [2011]).

Here, the release clearly and unambiguously applied to the causes of action against Yoon and Radisphere, as well as their employers, partners, coworkers, employees, agents, servants, and assigns. Contrary to their contentions, the hospital and Kontonotas did not establish that Kontonotas and Yoon, who had different employers, were coworkers, that Radisphere and Yoon were the hospital’s partners, or that any other basis existed for concluding that the release applied to the plaintiff’s causes of action against the hospital and Kontonotas. Accordingly, the Supreme Court properly determined that the plaintiff’s causes of action against the hospital and Kontonotas were not barred by the release given to Yoon and Radisphere (*see Hoffmann v Horn*, 157 AD3d at 873).

“In order to establish the liability of a physician for medical malpractice, a plaintiff must prove that the physician deviated or departed from accepted community standards of practice, and that such departure was a proximate cause of the plaintiff’s injuries” (*Velasquez v Ruiz*, 203 AD3d 786, 788 [2022]; *see Stewart v New York Hosp. Queens*, 214 AD3d 919, 920 [2023]).

“Establishing proximate cause in medical malpractice cases requires a plaintiff to present sufficient medical evidence from which a reasonable person might conclude that it was more probable than not that the defendant’s departure was a substantial factor in causing the plaintiff’s injury” (*Velasquez v Ruiz*, 203 AD3d 786, 788 [2022] [internal quotation marks omitted]; see *Shouldis v Strange*, 227 AD3d 743, 745 [2024]).

“A motion pursuant to CPLR 4404 (a) to set aside a jury verdict and for judgment as a matter of law will be granted where there is simply no valid line of reasoning and permissible inferences which could possibly lead rational persons to the conclusion reached by the jury on the basis of the evidence presented at trial” (*Velasquez v Ruiz*, 203 AD3d 786, 788 [2022] [alteration and internal quotation marks omitted]; see *Osorio v New York City Health & Hosps. Corp.*, 211 AD3d 842, 845 [2022]).

Here, the plaintiff’s evidence at trial was legally sufficient to establish departures from good and accepted standards of medical practice and that the departures were a proximate cause of the plaintiff’s injuries. The plaintiff presented medical evidence from which a reasonable juror could conclude that Kontonotas departed from good and accepted standards of medical practice by failing to order a neurology consult in light of the plaintiff’s symptoms and risk factors and that it was more probable than not that Kontonotas’s conduct diminished the plaintiff’s chance of a better outcome by depriving him of the opportunity to receive monitoring and certain treatment in the hospital starting on September 26, 2012 (see *Chicoine v Mendola*, 233 AD3d 841, 844 [2024]; *Shouldis v Strange*, 227 AD3d at 745; *Velasquez v Ruiz*, 203 AD3d at 788).

Further, a jury verdict may not be set aside as contrary to the weight of the evidence unless the evidence preponderates so heavily in the moving party’s favor that it “could not have been reached on any fair interpretation of the evidence” (*Lolik v Big V Supermarkets*, 86 NY2d 744, 746 [1995] [internal quotation marks omitted]; see *Velasquez v Ruiz*, 203 AD3d 786, 789 [2022]). “The jury’s resolution of the credibility of conflicting expert witnesses is entitled to great weight, as it is the jury that had the opportunity to observe and hear the experts” (*Reitzel v Hale*, 128 AD3d 1045, 1045 [2015]; see *Velasquez v Ruiz*, 203 AD3d at 789). Here, the jury’s findings that Kontonotas departed from good and accepted medical practice and that the departures were a substantial factor in causing injury to the plaintiff were based upon a fair interpretation of the evidence and, thus, were not contrary to the weight of the evidence (see *Chicoine v Mendola*, 233 AD3d at 844).

Moreover, the jury's verdict that the plaintiff was entitled to an award of damages for past and future lost earnings was supported by legally sufficient evidence and was not contrary to the weight of the evidence. The jury reasonably could have concluded, based on the evidence regarding the plaintiff's prior employment, his educational background, and the medical evidence regarding the nature and extent of his injuries, that the plaintiff was totally disabled and that, therefore, the projections of his earnings by his economist were properly based on an assumption that he was totally disabled (*see Kowalsky v County of Suffolk*, 139 AD3d 906, 907-908 [2016]; *Janda v Michael Rienzi Trust*, 78 AD3d 899, 901 [2010]; *cf. Harris v City of New York*, 2 AD3d 782, 784 [2003]).

The damages awarded for past and future pain and suffering did not deviate materially from what would be reasonable compensation (*see Chicoine v Mendola*, 233 AD3d at 844).

The parties' remaining contentions either are without merit or need not be reached in light of our determination. Iannacci, J.P., Genovesi, Landicino and Love, JJ., concur.

16 Joseph Cinquemani, Appellant, v Money Source, Inc., Respondent. [— NYS3d —]—

Limitation of Actions—Six-Year Statute of Limitations—Declaratory Judgment Action—Bona Fide, Justiciable Controversy

In an action for declaratory relief, the plaintiff appeals from an order of the Supreme Court, Suffolk County (Jerry Garguilo, J.), dated January 11, 2024. The order granted the defendant's motion pursuant to CPLR 3211 (a) to dismiss the complaint.

Ordered that the order is reversed, on the law, with costs, and the defendant's motion pursuant to CPLR 3211 (a) to dismiss the complaint is denied.

In May 2023, the plaintiff commenced this action for a judgment declaring that he was an 8% equity owner of the defendant. The plaintiff alleged, inter alia, that he invested \$200,000 in the defendant in 2008 in exchange for his ownership interest, but that in 2017, the defendant, through its counsel, repudiated his ownership claim.

The defendant moved pursuant to CPLR 3211 (a) to dismiss the complaint on the ground, among others, that it was time-barred. In an order dated January 11, 2024, the Supreme Court granted the defendant's motion. The court determined that the defendant demonstrated that the cause of action in the complaint was, in effect, one alleging breach of contract. The court further determined that such a cause of action accrued in 2008, and that the statute of limitations on that cause of action

expired before the commencement of this action. The plaintiff appeals.

“To dismiss a cause of action pursuant to CPLR 3211 (a) (5) on the ground that it is barred by the statute of limitations, ‘the defendant bears the initial burden of establishing, prima facie, that the time within which to sue has expired’ ” (*Creative Rest., Inc. v Dyckman Plumbing & Heating, Inc.*, 184 AD3d 803, 804 [2020], quoting *Bronstein v Omega Constr. Group, Inc.*, 138 AD3d 906, 908 [2016]). “The burden then shifts to the plaintiff to aver evidentiary facts establishing that his or her cause of action falls within an exception to the statute of limitations, or raising a question of fact as to whether such an exception applies, or as to whether the cause of action was interposed within the applicable statute of limitations” (*Morrow v Vibration Mountings & Controls, Inc.*, 223 AD3d 736, 738 [2024] [internal quotation marks omitted]; see *Kogut v Village of Chestnut Ridge*, 214 AD3d 777, 778-779 [2023]; *Klein v Deutsch*, 193 AD3d 707, 709 [2021]).

A declaratory judgment action “is peculiarly different from the actions listed in article 2 [of the CPLR] and [their] assigned limitation periods, in that the latter actions seeking coercive relief are described . . . by reference to the gravamen of the claim or the status of the defendant party. No such description attaches generically to actions for declaratory relief” (*Solnick v Whalen*, 49 NY2d 224, 229 [1980]; see *Hoehmann v Town of Clarkstown*, 216 AD3d 865, 868 [2023], *affd* 40 NY3d 1 [2023]). “In order to determine the [s]tatute of [l]imitations applicable to a particular declaratory judgment action, the court must ‘examine the substance of that action to identify the relationship out of which the claim arises and the relief sought’ ” (*Matter of Save the Pine Bush v City of Albany*, 70 NY2d 193, 202 [1987], quoting *Solnick v Whalen*, 49 NY2d at 229; see *Village of Islandia v County of Suffolk*, 162 AD3d 715, 716 [2018]). “If the court determines that the underlying dispute can be or could have been resolved through a form of action or proceeding for which a specific limitation period is statutorily provided, that limitation period governs the declaratory judgment action” (*Matter of Save the Pine Bush v City of Albany*, 70 NY2d at 202; see *Matter of Dandomar Co., LLC v Town of Pleasant Val. Town Bd.*, 86 AD3d 83, 90 [2011]). However, if “ ‘no other form of proceeding exists for the resolution of the claims tendered in the declaratory judgment action, the six-year limitation of CPLR 213 [1] will then be applicable’ ” (*Saratoga County Chamber of Commerce v Pataki*, 100 NY2d 801, 815 [2003], quoting *Solnick v Whalen*, 49 NY2d at 230).

“An action for declaratory relief accrues when there is a bona fide, justiciable controversy between the parties” (*Anson v Incorporated Vil. of Freeport*, 193 AD3d 799, 801 [2021]; see CPLR 3001; *Zwarycz v Marnia Constr., Inc.*, 102 AD3d 774, 776 [2013]). “A dispute matures into a justiciable controversy when a plaintiff receives direct, definitive notice that the defendant is repudiating his or her rights” (*Anson v Incorporated Vil. of Freeport*, 193 AD3d at 801 [internal quotation marks omitted]; see *Zwarycz v Marnia Constr., Inc.*, 193 AD3d at 776).

Here, contrary to the defendant’s contention, the allegations in the complaint did not establish that the plaintiff’s cause of action accrued in 2008, since the allegations did not establish that there was “a bona fide, justiciable controversy between the parties” at that time (*Anson v Incorporated Vil. of Freeport*, 193 AD3d at 801; see CPLR 3001; *Zwarycz v Marnia Constr., Inc.*, 102 AD3d at 776). The applicable six-year statute of limitations did not begin to run until the plaintiff received definitive notice repudiating his interest in the defendant (see *Mehdizadeh v Mehbisar, Inc.*, 173 AD3d 851, 852 [2019]; *Wasay v Alvi*, 148 AD3d 1089, 1090 [2017]). The defendant failed to establish that it definitively repudiated the plaintiff’s alleged interest in it prior to 2017—six years before the commencement of this action (see CPLR 213 [1]; *Lurie v Lurie*, 226 AD3d 997, 999 [2024]; *Zwarycz v Marnia Constr., Inc.*, 102 AD3d at 776). Accordingly, the Supreme Court erred in granting the defendant’s motion pursuant to CPLR 3211 (a) to dismiss the complaint as time-barred. Barros, J.P., Wooten, Taylor and McCormack, JJ., concur.

17 Citibank, N.A., Respondent, v Yanling Wu, Also Known as Cristal Wu, et al., Appellants, et al., Defendants. [— NYS3d —]—

Mortgages—Foreclosure—Compliance with RPAPL 1304—Individual Mailing of Notices

In an action to foreclose a mortgage, the defendants Yanling Wu and Perry Sing appeal from (1) a decision of the Supreme Court, Queens County (Denis Butler, J.), entered March 27, 2024, and (2) an order of the same court (Claudia Lanzetta, J.) entered June 26, 2024. The order, insofar as appealed from, upon the decision, granted those branches of the plaintiff’s motion which were for summary judgment on the complaint insofar as asserted against the defendants Yanling Wu and Perry Sing, to strike their answer, and for an order of reference and denied those defendants’ cross-motion for summary judgment dismissing the complaint insofar as asserted against them.

Ordered that the appeal from the decision is dismissed, as no appeal lies from a decision (*JPMorgan Chase Bank, N.A. v Nellis*, 183 AD3d 583 [2020]); and it is further,

Ordered that the order is reversed insofar as appealed from, on the law, those branches of the plaintiff's motion which were for summary judgment on the complaint insofar as asserted against the defendants Yanling Wu and Perry Sing, to strike their answer, and for an order of reference are denied, and those defendants' cross-motion for summary judgment dismissing the complaint insofar as asserted against them is granted; and it is further,

Ordered that one bill of costs is awarded to the defendants Yanling Wu and Perry Sing.

On December 13, 2006, the defendant Yanling Wu executed a note in the sum of \$580,000, which was secured by a mortgage executed by Wu and the defendant Perry Sing (hereinafter together the defendants) on certain real property located in Bayside. In August 2016, the plaintiff commenced this action against the defendants, among others, to foreclose the mortgage. The defendants interposed an answer. On a prior appeal, this Court reversed an order and judgment of foreclosure and sale, denied those branches of the plaintiff's prior motion which was for summary judgment on the complaint insofar as asserted against the defendants, to strike their answer, and for an order of reference, and denied the plaintiff's separate prior motion to confirm a referee's report and for a judgment of foreclosure and sale on the ground that, although the plaintiff had demonstrated, *prima facie*, its standing and compliance with RPAPL 1303, it had failed to sustain its initial burden of demonstrating that the defendants defaulted in the repayment of the note (*see Citibank, N.A. v Yanling Wu*, 199 AD3d 48 [2021]).

Thereafter, in October 2023, the plaintiff moved, *inter alia*, for summary judgment on the complaint insofar as asserted against the defendants, to strike their answer, and for an order of reference. The defendants opposed the motion and cross-moved for summary judgment dismissing the complaint insofar as asserted against them on the ground that the plaintiff failed to comply with RPAPL 1304. The plaintiff opposed the cross-motion. In an order entered June 26, 2024, upon a decision entered March 27, 2024, the Supreme Court, among other things, granted those branches of the plaintiff's motion and denied the defendants' cross-motion. The defendants appeal.

RPAPL 1304 (1) provides that "at least ninety days before a lender, an assignee or a mortgage loan servicer commences legal action against the borrower, . . . including mortgage

foreclosure, such lender, assignee or mortgage loan servicer shall give notice to the borrower.” “Strict compliance with RPAPL 1304 notice to the borrower or borrowers is a condition precedent to the commencement of a foreclosure action” (*Citibank, N.A. v Conti-Scheurer*, 172 AD3d 17, 20 [2019]; see *HSBC Bank USA, N.A. v Stein*, 241 AD3d 661 [2025]).

Contrary to the plaintiff’s contention, the defendants did not waive the defense of failure to comply with RPAPL 1304, as “‘failure to comply with RPAPL 1304 is a defense that may be raised at any time prior to the entry of judgment of foreclosure and sale’” (*Citimortgage, Inc. v Dente*, 200 AD3d 1025, 1027 [2021], quoting *U.S. Bank N.A. v Krakoff*, 199 AD3d 859, 862 [2021]). Here, the defense was raised before the entry of a judgment of foreclosure and sale (see *U.S. Bank N.A. v Valencia*, 219 AD3d 890, 892 [2023]; *U.S. Bank N.A. v Krakoff*, 199 AD3d at 862). In opposition to the defendants’ prima facie showing that the plaintiff failed to strictly comply with the service requirements of RPAPL 1304, the plaintiff failed to raise a triable issue of fact. Although the plaintiff demonstrated that RPAPL 1304 notices were mailed to the defendants, the plaintiff failed to show that it sent RPAPL 1304 notices addressed individually to each of the defendants as required by the statute (see *HSBC Bank USA, N.A. v Stein*, 241 AD3d 661 [2025]; *Deutsche Bank Natl. Trust Co. v Loayza*, 204 AD3d 753, 755 [2022]). Accordingly, the Supreme Court should have denied those branches of the plaintiff’s motion which were for summary judgment on the complaint insofar as asserted against the defendants, to strike their answer, and for an order of reference and granted the defendants’ cross-motion for summary judgment dismissing the complaint insofar as asserted against them (see *Capital One, N.A. v Hunter*, 236 AD3d 980, 982 [2025]).

The parties’ remaining contentions either are without merit or need not be reached in light of our determination. Duffy, J.P., Ford, Golia and Quirk, JJ., concur.

18 Deutsche Bank National Trust Company, Respondent, v Susan M. Arrigo, Also Known as Susan Arrigo, Appellant, et al. Defendants. [— NYS3d —]

Mortgages—Foreclosure—Compliance with RPAPL 1304—Proof of Compliance

Banks and Banking—Loans—High-Cost Home Loan—Points and Fees Exceeding Five Percent of Loan Amount

In an action to foreclose a mortgage, the defendant Susan M. Arrigo, individually and as administrator of the estate of Michael E. Arrigo, appeals from an order of the Supreme Court,

Suffolk County (Howard H. Heckman, Jr., J.), dated August 17, 2020. The order, insofar as appealed from, granted those branches of the plaintiff's motion which were for summary judgment on the complaint insofar as asserted against Michael E. Arrigo, to strike his answer and third, fourth, and fifth affirmative defenses, alleging noncompliance with RPAPL 1304 and 1306 and Banking Law § 6-1, respectively, and for an order of reference, denied that branch of Michael E. Arrigo's cross-motion which was for summary judgment dismissing the complaint insofar as asserted against him, and made certain statements regarding the applicability of CPLR 205 (a).

Ordered that the appeal by the defendant Susan M. Arrigo, individually, is dismissed, as that defendant is not aggrieved by the order appealed from (*see* CPLR 5511; *Mixon v TBV, Inc.*, 76 AD3d 144, 156-157 [2010]); and it is further,

Ordered that the appeal by the defendant Susan M. Arrigo, as administrator of the estate of Michael E. Arrigo, from so much of the order as made certain statements regarding the applicability of CPLR 205 (a) is dismissed, as that defendant is not aggrieved by that portion of the order appealed from (*see* CPLR 5511); and it is further,

Ordered that the order is modified, on the law, by deleting the provision thereof granting those branches of the plaintiff's motion which were for summary judgment on the complaint insofar as asserted against Michael E. Arrigo, to strike his answer and fifth affirmative defense, alleging noncompliance with Banking Law § 6-1, and for an order of reference, and substituting therefor a provision denying those branches of the motion; as so modified, the order is affirmed insofar as reviewed on the appeal by the defendant Susan M. Arrigo, as administrator of the estate of Michael E. Arrigo; and it is further,

Ordered that one bill of costs is awarded to the defendant Susan M. Arrigo, as administrator of the estate of Michael E. Arrigo.

In October 2006, the defendant Susan M. Arrigo (hereinafter the defendant) and Michael E. Arrigo (hereinafter the decedent) executed a note in the sum of \$296,000. The note was secured by a mortgage on certain real property located in Bay Shore (hereinafter the premises). In 2015, the plaintiff commenced this action to foreclose the mortgage. The plaintiff moved, *inter alia*, for summary judgment on the complaint insofar as asserted against the decedent, to strike his answer and third, fourth, and fifth affirmative defenses, alleging noncompliance with RPAPL 1304 and 1306 and Banking Law § 6-1, respectively, and for an order of reference. The decedent opposed the

motion and cross-moved, among other things, for summary judgment dismissing the complaint insofar as asserted against him for failure to comply with RPAPL 1304 and 1306 and Banking Law § 6-l. In an order dated August 17, 2020, the Supreme Court, inter alia, granted those branches of the plaintiff's motion and denied that branch of the decedent's cross-motion. The decedent and the defendant appealed. During the pendency of the appeal, the decedent died, and the defendant, as administrator of the decedent's estate, was substituted for the decedent.

"[P]roper service of RPAPL 1304 notice on the borrower or borrowers is a condition precedent to the commencement of a residential foreclosure action" (*U.S. Bank Trust, N.A. v Mohammed*, 197 AD3d 1205, 1207 [2021] [internal quotation marks omitted]). RPAPL 1304 requires that the notice be sent by registered or certified mail, and also by first-class mail, to the last known address of the borrower (*see id.* § 1304 [2]). A plaintiff can establish proof of the requisite mailing by submitting domestic return receipts, proof of a standard office procedure designed to ensure that the notices are properly addressed and mailed, or an affidavit from someone with personal knowledge that the mailing of the RPAPL 1304 notice actually happened (*see Citibank, N.A. v Conti-Scheurer*, 172 AD3d 17, 20-21 [2019]).

Contrary to the defendant's contention, the Supreme Court correctly determined that the plaintiff established, prima facie, its compliance with RPAPL 1304. In support of its motion, the plaintiff submitted an affidavit of Benjamin Verdooren, who was employed as a senior loan analyst for Ocwen Financial Corporation, which has as its indirect subsidiary Ocwen Loan Servicing, LLC, the plaintiff's loan servicer (hereinafter the loan servicer). Verdooren, whose job duties included reviewing the loan servicer's "correspondence to and from borrowers," attested that he had personal knowledge and training as to how the loan servicer's servicing records were created and maintained and that he was familiar with the loan servicer's "office practices and procedures, which ensure that mailed items are properly addressed and mailed by registered or certified and first class mail." Additionally, Verdooren confirmed that the "servicing records" of a prior loan servicer "were merged and incorporated into Ocwen's business records and verified in accordance with Ocwen's policies and procedures." Papers received from other entities "may be admitted into evidence if the recipient can establish personal knowledge of the maker's business practices and procedures, or establish that the rec-

ords provided by the maker were incorporated into the recipient's own records and routinely relied upon by the recipient in its own business" (*Bank of N.Y. Mellon v Gordon*, 171 AD3d 197, 209 [2019]).

Attached to Verdooren's affidavit was a copy of an RPAPL 1304 notice dated November 13, 2014, which had been mailed to the decedent at the premises, along with envelopes reflecting mailing by both certified and first-class mail and a United States Postal Service certified mail receipt for the notice that was signed by the defendant. The tracking number on the signed certified mail receipt matches the tracking number on the certified mail envelope. This evidence was sufficient to establish, prima facie, that the plaintiff complied with RPAPL 1304 (see *Citibank, N.A. v Conti-Scheurer*, 172 AD3d at 20-21). In opposition, the decedent failed to raise a triable issue of fact. The decedent's simple denial of receipt of the RPAPL 1304 notice in an affidavit, notwithstanding the defendant's signature on the certified mail receipt, was insufficient to raise a triable issue of fact. Therefore, the Supreme Court properly granted that branch of the plaintiff's motion which was to strike the decedent's third affirmative defense, alleging noncompliance with RPAPL 1304. For the same reason, the decedent was not entitled to summary judgment dismissing the complaint insofar as asserted against him for failure to comply with RPAPL 1304 (see *Citibank, N.A. v Conti-Scheurer*, 172 AD3d at 20-21).

Contrary to the defendant's contention, the Supreme Court correctly determined that the plaintiff established, prima facie, that it complied with RPAPL 1306 "by submitting a copy of a proof of filing statement from the New York State Department of Financial Services" (*U.S. Bank Trust, N.A. v Chiramannil*, 205 AD3d 966, 968 [2022]; see *Wilmington Sav. Fund Socy., FSB v Hershkowitz*, 189 AD3d 1126, 1128 [2020]). In opposition, the decedent failed to raise a triable issue of fact. Therefore, the court properly granted that branch of the plaintiff's motion which was to strike the decedent's fourth affirmative defense, alleging noncompliance with RPAPL 1306. For the same reason, the decedent was not entitled to summary judgment dismissing the complaint insofar as asserted against him for failure to comply with RPAPL 1306.

However, contrary to the Supreme Court's determination, the plaintiff failed to establish, prima facie, that it complied with Banking Law § 6-l, which contains certain protections against predatory lending. The decedent's fifth affirmative defense, alleging noncompliance with Banking Law § 6-l, was

not barred by any statute of limitations. Although a private action against a lender or mortgage broker pursuant to Banking Law § 6-1 “must be commenced within six years of origination of the high-cost home loan” (*id.* § 6-1 [6]), in a foreclosure action by an assignee, the borrower may assert “any claims in recoupment and defenses to payment under [Banking Law § 6-1] and with respect to the loan, *without time limitations*, that the borrower could assert against the original lender” (*id.* § 6-1 [13] [emphasis added]).

The plaintiff did not otherwise establish that it complied with Banking Law § 6-1. Under Banking Law § 6-1 (1) (d), a “high-cost home loan” is defined as “a home loan in which the terms of the loan exceed one or more of the thresholds as defined in” Banking Law § 6-1 (1) (g). Under Banking Law § 6-1 (1) (g) (ii), the threshold is met when, as relevant here, the total points and fees exceed five percent of the total loan amount. Here, there are triable issues of fact as to whether the total points and fees exceeded five percent of the total loan amount (*see id.* § 6-1 [1] [f], [g]; *Goshen Mtge., LLC v Gierl*, 180 AD3d 651, 654 [2020]). Accordingly, the Supreme Court should have denied those branches of the plaintiff’s motion which were for summary judgment on the complaint insofar as asserted against the decedent, to strike his answer and fifth affirmative defense, alleging noncompliance with Banking Law § 6-1, and for an order of reference. For the same reason, the decedent was not entitled to summary judgment dismissing the complaint insofar as asserted against him for failure to comply with Banking Law § 6-1.

Finally, the defendant is not aggrieved by the Supreme Court’s statements regarding the applicability of CPLR 205 (a), as those statements constitute dicta (*see Laffey v Laffey Fine Homes Intl., LLC*, 192 AD3d 878, 881 [2021]). “That a decision ‘may contain language or reasoning which . . . parties deem adverse to their interests does not furnish them with a basis for standing to take an appeal’” (*Naula v Utokilen, LLC*, 180 AD3d 1058, 1060 [2020], quoting *Pennsylvania Gen. Ins. Co. v Austin Powder Co.*, 68 NY2d 465, 472-473 [1986]). LaSalle, P.J., Genovesi, Christopher and Love, JJ., concur.

19 Deutsche Bank National Trust Company, Respondent, v Alan Palma, as Trustee of the Tatiana Palma Trust, et al., Defendants. IPA Asset Management, LLC, Nonparty Appellant. [— NYS3d —]—

Dismissal and Nonsuit—Failure to Enter Default Judgment within One Year—
Waiver of Right

Dismissal and Nonsuit—Failure to Enter Default Judgment within One Year—

Reasonable Excuse for Delay

In an action, inter alia, to foreclose a mortgage, nonparty IPA Asset Management, LLC, appeals from an order of the Supreme Court, Suffolk County (Christopher Modelewski, J.), dated February 21, 2024. The order denied the motion of nonparty IPA Asset Management, LLC, pursuant to CPLR 3215 (c) to dismiss the complaint insofar as asserted against the defendants Alan Palma and Tatiana Palma as abandoned.

Ordered that the order is reversed, on the law, with costs, and the motion of nonparty IPA Asset Management, LLC, pursuant to CPLR 3215 (c) to dismiss the complaint insofar as asserted against the defendants Alan Palma and Tatiana Palma as abandoned is granted.

In December 2006, Luis Palma (hereinafter the borrower) executed a note with the plaintiff's predecessor in interest, which was secured by a mortgage on certain real property located in Smithtown (hereinafter the premises). In 2008, the borrower transferred his interest in the premises to the defendants Alan Palma and Tatiana Palma (hereinafter the Palma defendants), as trustees of the Tatiana Palma Trust. Shortly thereafter, the borrower died.

In 2010, the plaintiff commenced this action, inter alia, to foreclose the mortgage against, among others, the Palma defendants and the defendant Board of Directors of Hidden Ponds Homeowners Association, Inc. (hereinafter the HOA), by filing a summons, complaint, and notice of pendency. The Palma defendants were served in May 2010 but never appeared in the action. In July 2014, the plaintiff made a request for judicial intervention, after which a settlement conference was held in September 2014. The HOA filed a notice of appearance on March 17, 2016.

In a separate foreclosure action, the HOA foreclosed on a lien it held on the premises. The HOA's separate foreclosure action culminated in the transfer of the premises to the HOA via a referee's deed dated May 3, 2016. By deed dated May 16, 2017, the HOA conveyed its interest in the premises to IPA Asset Management, LLC (hereinafter IPA).

In November 2023, IPA moved pursuant to CPLR 3215 (c) to dismiss the complaint insofar as asserted against the Palma defendants as abandoned. In an order dated February 21, 2024, the Supreme Court denied the motion. IPA appeals.

Contrary to the Supreme Court's determination, the HOA did not waive its right to move pursuant to CPLR 3215 (c) to dismiss the complaint insofar as asserted against the Palma

defendants. “A waiver is the voluntary abandonment or relinquishment of a known right” (*Jeppaul Garage Corp. v Presbyterian Hosp. in City of N.Y.*, 61 NY2d 442, 446 [1984]; see *VRA Family L.P. v Salon Mgt. USA, LLC*, 183 AD3d 614, 615 [2020]). Here, the HOA filed a notice of appearance before it had acquired the Palma defendants’ interest in the premises and, thus, before it had obtained the right to defend their interests in this action (see generally CPLR 1021). Thus, the HOA could not have voluntarily abandoned or relinquished a right that did not exist at the time (see *CIT Group/Consumer Fin., Inc. v Kaiser*, 206 AD3d 791, 793 [2022]).

In light of the foregoing, and contrary to the plaintiff’s contention, the Supreme Court should have considered the merits of the motion of IPA, as successor in interest to the Palma defendants, notwithstanding its failure to request substitution for the Palma defendants (see *Wells Fargo Bank, NA v McKenzie*, 183 AD3d 574, 575 [2020]). Under the circumstances presented and in the interest of judicial economy, it is appropriate to address the motion on the merits, rather than remitting the matter to the Supreme Court to do so (see *Wells Fargo Bank, N.A. v Robinson-John*, 220 AD3d 974, 976-977 [2023]; *Wells Fargo Bank, NA v McKenzie*, 183 AD3d at 575-576).

“If the plaintiff fails to take proceedings for the entry of judgment within one year after the default, the court shall not enter judgment but shall dismiss the complaint as abandoned, without costs, upon its own initiative or on motion, unless sufficient cause is shown why the complaint should not be dismissed” (CPLR 3215 [c]). “To establish sufficient cause, the party opposing dismissal must demonstrate that it had a reasonable excuse for the delay in taking proceedings for entry of a default judgment and that it has a potentially meritorious action” (*Deutsche Bank Trust Co. Ams. v Smith*, 211 AD3d 1012, 1013 [2022] [internal quotation marks omitted]; see *HSBC Bank USA, N.A. v Whaley*, 197 AD3d 1245, 1247 [2021]).

Here, it is undisputed that the plaintiff did not take any steps to initiate proceedings for the entry of a default judgment against the Palma defendants within one year of their default. Contrary to the plaintiff’s contention, its submissions failed to establish a reasonable excuse for the delay in taking any steps to secure a default judgment against the Palma defendants, who were known to the plaintiff at the time this action was commenced (see *Wells Fargo Bank, N.A. v Jackson*, 208 AD3d 613, 614 [2022]; *Deutsche Bank Natl. Trust Co. v Charles*, 186 AD3d 454, 457 [2020]).

In light of the plaintiff's failure to articulate a reasonable excuse for the delay, we need not reach the issue of whether the plaintiff demonstrated that it had a potentially meritorious cause of action (*see Wells Fargo Bank, N.A. v Jackson*, 208 AD3d at 614; *HSBC Bank USA, N.A. v Slone*, 174 AD3d 866, 868 [2019]).

Accordingly, the Supreme Court should have granted IPA's motion pursuant to CPLR 3215 (c) to dismiss the complaint insofar as asserted against the Palma defendants as abandoned (*see Wells Fargo Bank, N.A. v Jackson*, 208 AD3d at 614). Connelly, J.P., Chambers, Landicino and Golia, JJ., concur. [**Prior Case History: 82 Misc 3d 1234(A), 2024 NY Slip Op 50472(U).**]

20 Glenda Ortega Diaz et al., Respondents, v Jhedrian Logistics Corp. et al., Defendants, and Jose Arce, Appellant. [252 NYS3d 292]—

Motor Vehicles—Injuries to Passengers—Fault

In an action to recover damages for personal injuries, the defendant Jose Arce appeals from an order of the Supreme Court, Queens County (Laurentina S. McKetney Butler, J.), dated September 16, 2024. The order denied that defendant's motion for summary judgment dismissing the complaint insofar as asserted against him.

Ordered that the order is reversed, on the law, with costs, and the motion of the defendant Jose Arce for summary judgment dismissing the complaint insofar as asserted against him is granted.

The plaintiffs commenced this action to recover damages for personal injuries that they allegedly sustained in a motor vehicle accident. At the time of the accident, the plaintiffs were passengers in a vehicle operated by the defendant Jose Arce (hereinafter the defendant) that allegedly was struck in the rear by a vehicle owned by the defendant Jhedrian Logistics Corp. (hereinafter Jhedrian). Thereafter, the defendant moved for summary judgment dismissing the complaint insofar as asserted against him. In an order dated September 16, 2024, the Supreme Court denied the defendant's motion. The defendant appeals.

"A defendant moving for summary judgment in a negligence action has the burden of establishing, *prima facie*, that he or she was not at fault in the happening of the subject accident" (*Boulos v Lerner-Harrington*, 124 AD3d 709, 709 [2015]).

Here, the defendant established his *prima facie* entitlement

to judgment as a matter of law dismissing the complaint insofar as asserted against him. In support of his motion, the defendant submitted an affidavit demonstrating that he was not at fault in the happening of the accident (*see Witonsky v New York City Tr. Auth.*, 145 AD3d 938, 939 [2016]; *Service v McCoy*, 131 AD3d 1038, 1039 [2015]). In opposition, the plaintiffs failed to raise a triable issue of fact. The plaintiffs did not submit an affidavit or other evidentiary material to rebut the defendant's prima facie showing, and they failed to demonstrate that the motion was premature (*see CPLR 3212 [f]*; *Forte v City of New York*, 237 AD3d 1164, 1165 [2025]; *Fieldman v Bambi Assoc., Inc.*, 231 AD3d 790, 791 [2024]).

Accordingly, the Supreme Court should have granted the defendant's motion for summary judgment dismissing the complaint insofar as asserted against him. LaSalle, P.J., Connelly, Ventura and Goldberg Velazquez, JJ., concur.

21 Four RH Corp., Appellant v R&N Realty Holding, Inc., et al., Defendants, and BAC Home Loans Servicing, LP, Respondent. [— NYS3d —]

Contracts—Breach or Performance of Contract—Partial Performance—Purpose of Payment

In an action to foreclose a mortgage, the plaintiff appeals from (1) an order of the Supreme Court, Queens County (Allan B. Weiss, J.), dated January 25, 2021, and (2) an order and judgment (one paper) of the same court, also dated January 25, 2021. The order, insofar as appealed from, granted those branches of the motion of Bank of America, N.A., successor by merger to the defendant BAC Home Loans Servicing, LP, which were to confirm a referee's report dated January 22, 2020, made after a nonjury trial, recommending dismissal of the complaint insofar as asserted against that defendant, and for summary judgment on that defendant's first counterclaim pursuant to RPAPL article 15 for a judgment declaring that its mortgage on the subject property is superior to a mortgage on the property held by the plaintiff. The order and judgment, insofar as appealed from, granted the same relief to that defendant and is in favor of that defendant and against the plaintiff dismissing the complaint insofar as asserted against that defendant and declaring that the defendant's mortgage on the property has priority over the plaintiff's mortgage on the property.

Ordered that the appeal from the order is dismissed; and it is further,

Ordered that the order and judgment is reversed insofar as appealed from, on the law and the facts, those branches of the

motion of Bank of America, N.A., successor by merger to the defendant BAC Home Loans Servicing, LP, which were to confirm the referee's report dated January 22, 2020, and for summary judgment on that defendant's first counterclaim pursuant to RPAPL article 15 for a judgment declaring that its mortgage on the subject property is superior to the mortgage on the property held by the plaintiff are denied, the complaint is reinstated insofar as asserted against that defendant, the order is modified accordingly, so much of the order and judgment as, in effect, dismissed that defendant's second counterclaim as academic is vacated, that defendant's second counterclaim is reinstated, and the matter is remitted to the Supreme Court, Queens County, for further proceedings consistent herewith; and it is further,

Ordered that one bill of costs is awarded to the plaintiff.

The appeal from the order must be dismissed because the right of direct appeal therefrom terminated with the entry of the order and judgment in the action (*see Matter of Aho*, 39 NY2d 241, 248 [1976]). The issues raised on the appeal from the order are brought up for review and have been considered on the appeal from the order and judgment (*see* CPLR 5501 [a] [1]; *Matter of Aho*, 39 NY2d at 248).

In March 2005, R&N Realty Holding, Inc. (hereinafter R&N), took title to the subject property. In July 2005, R&N's president, Raymon McAdam, executed a note in favor of Greenpoint Mortgage Funding, Inc., in the principal sum of \$412,500, which was secured by a first mortgage on the subject property (hereinafter the Greenpoint mortgage). In January 2007, R&N, by McAdam, executed a second note in favor of the plaintiff in the principal sum of \$100,000, which was secured by a second mortgage on the subject property.

On February 23, 2009 (hereinafter the February 2009 closing), R&N conveyed the subject property to Lise Afoy, who placed a third mortgage on the subject property in favor of Professional Mortgage Bankers Corp., in the principal sum of \$492,470. That mortgage ultimately was assigned to the defendant BAC Home Loans Servicing, LP (hereinafter the defendant). \$371,500 of those proceeds were used to satisfy the Greenpoint mortgage, which rendered the plaintiff's second mortgage on the subject property a first mortgage.

In 2010, the plaintiff commenced the instant action to foreclose its mortgage. In 2013, the defendant interposed an amended verified answer asserting, among other things, two counterclaims, (1) pursuant to RPAPL article 15 for a judgment declaring that the defendant's mortgage lien had priority

over the plaintiff's mortgage lien with regard to the subject property or (2), in the alternative, for equitable subrogation. The defendant did not plead the existence of a subordination agreement.

After a nonjury trial before a court attorney referee, the referee recommended, inter alia, that the complaint be dismissed insofar as asserted against the defendant, that a judgment be entered in favor of the defendant declaring its mortgage superior to all other mortgages, and that the plaintiff be found in breach of an agreement to subordinate its mortgage lien to the defendant's mortgage lien. Subsequently, the Supreme Court issued an order and an order and judgment incorporating those recommendations. The order and judgment also, in effect, dismissed the defendant's second counterclaim as academic. The plaintiff appeals.

According to the defendant, at the February 2009 closing, the plaintiff's counsel, Benzion Frankel, agreed that in exchange for \$22,000, the plaintiff would subordinate its mortgage lien to the defendant's mortgage lien. A paper check payable to Benzion Frankel "as atty" for \$22,000, which was among the February 2009 closing documents, with the word "Afoy" in the memo line was admitted into evidence at the trial. The evidence adduced at the trial also included a payoff letter from Benzion Frankel dated February 15, 2009, which stated that \$123,162.50 was due on the mortgage, including \$22,812.50 for interest.

At the trial, Elliot Frankel, who testified for the plaintiff, acknowledged that the plaintiff received a \$22,000 payment at the February 2009 closing, but claimed that payment was for interest owed to the plaintiff and as an incentive for the plaintiff to refrain from commencing an action to foreclose its mortgage. McAdam testified, in relevant part, that he contacted Elliot Frankel prior to the February 2009 closing to request that the plaintiff subordinate its mortgage lien to second position in exchange for \$22,000, which would be credited to principal.

A HUD-1 settlement statement, section 505, states "[p]ayoff of second mortgage loan, Benzion Frankel as atty \$22,000.00" (emphasis added).

A representative of the title closer testified that as a result of a conversation with Benzion Frankel, the plaintiff agreed to accept \$22,000 to subordinate its mortgage lien to the defendant's mortgage lien and the \$22,000 payment was not a repayment of interest. However, in a prior affidavit, the representative claimed that the \$22,000 was a "buy down" of the mortgage.

Afoy's attorney averred that to the best of her recollection, "R&N and Legend negotiated a short payoff" of the plaintiff's mortgage, and from the proceeds, "\$22,000.00 was sent via wire transfer to Benzion Frankel PC Atty Trust Acct," which was consistent with section 505 of the HUD-1 settlement statement titled "[p]layoff of second mortgage loan," which indicates that \$22,000 was paid to Benzion Frankel "as atty."

The Supreme Court determined that, despite the failure to comply with the Statute of Frauds, "[n]othing contained in [General Obligations Law § 5-703] abridges the powers of courts of equity to compel the specific performance of agreements in cases of part performance" (*Toobian v Golzad*, 193 AD3d 778, 780 [2021], quoting *Korman v Corbett*, 183 AD3d 608, 610 [2020]; see General Obligations Law § 5-703 [4]).

However, "[a] party who relies on the part performance exception must demonstrate that his or her actions are 'unequivocally referable' to the oral agreement which he or she seeks to establish" (*Toobian v Golzad*, 193 AD3d at 780, citing *Messner Vetere Berger McNamee Schmetterer Euro RSCG v Aegis Group*, 93 NY2d 229, 235 [1999]). " 'Unequivocally referable' conduct is conduct which is inconsistent with any other explanation" (*id.*, quoting *Barretti v Detore*, 95 AD3d 803, 806 [2012]). " 'It is insufficient that the oral agreement gives significance to plaintiff's actions. Rather, the actions alone must be unintelligible or at least extraordinary, explainable only with reference to the oral agreement' " (*Gendler v Guendler*, 174 AD3d 507, 509 [2019], quoting *Alayoff v Alayoff*, 112 AD3d 564, 566 [2013]).

Here, the record presents several explanations for the \$22,000 payment, i.e., (1) a "short payoff" of the mortgage, (2) the payment of back interest, to give the parties additional time to satisfy the mortgage, or (3) the payment of consideration on a new contract, in this case, a subordination agreement, the existence or terms of which were not referred to in writing at the February 2009 closing. Under the circumstances, there may have been no meeting of the minds, and the parties had different opinions as to the purpose of the \$22,000. In any event, the payment of the \$22,000 is not unequivocally referable to a subordination agreement.

However, since the defendant's second counterclaim sounding in equitable subrogation was dismissed as academic, we remit the matter to the Supreme Court, Queens County, for further proceedings consistent herewith. Barros, J.P., Wooten, Love and Quirk, JJ., concur.

22 Savita Gupta, Individully and as Administrator of the Estate of Reginald Tewari, Deceased, Appellant, v Long Island

Jewish Medical Center et al., Respondents, et al., Defendants.
[— NYS3d —]

Hospitals—Malpractice—Departure from Accepted Standards of Care—Expert Affidavit

Limitation of Actions—Medical Malpractice—Derivative Loss of Services Claim—Relation Back Doctrine

In an action, inter alia, to recover damages for medical malpractice, etc., the plaintiff appeals from an order of the Supreme Court, Queens County (Peter J. O'Donoghue, J.), entered May 5, 2021. The order, insofar as appealed from, granted those branches of the motion of the defendants Long Island Jewish Medical Center, Elizabeth A. Brothers, Brendan A. Berry, Mityanand Ramnarine, Danielle Conforti, and Gyaneswari Kotha which were for summary judgment dismissing the causes of action alleging medical malpractice, wrongful death, and loss of services insofar as asserted against them.

Ordered that the order is modified, on the law, by deleting the provision thereof granting those branches of the motion of the defendants Long Island Jewish Medical Center, Elizabeth A. Brothers, Brendan A. Berry, Mityanand Ramnarine, Danielle Conforti, and Gyaneswari Kotha which were for summary judgment dismissing the causes of action alleging medical malpractice and wrongful death insofar as asserted against them, and substituting therefor a provision denying those branches of the motion; as so modified, the order is affirmed insofar as appealed from, with costs to the plaintiff.

In September 2016, the Public Administrator of Queens County (hereinafter the Public Administrator), in his capacity as the administrator of the estate of Reginald Tewari (hereinafter the decedent), commenced this action against, among others, the defendants Long Island Jewish Medical Center (hereinafter LIJMC), Elizabeth A. Brothers, Brendan A. Berry, Mityanand Ramnarine, Danielle Conforti, and Gyaneswari Kotha (hereinafter collectively the defendants), inter alia, to recover damages for medical malpractice and wrongful death that the Public Administrator alleged arose out of the decedent's treatment and care at LIJMC in October 2014. After Savita Gupta (hereinafter the plaintiff) was substituted as the administrator of the decedent's estate, she served a supplemental summons and amended complaint dated November 15, 2019, among other things, adding a derivative cause of action on her behalf for loss of services. The defendants separately answered and asserted, inter alia, the affirmative defense of the statute of limitations.

The defendants moved for summary judgment dismissing

the complaint insofar as asserted against them. In an order entered May 5, 2021, the Supreme Court, *inter alia*, granted those branches of the defendants' motion which were for summary judgment dismissing the causes of action alleging medical malpractice, wrongful death, and loss of services insofar as asserted against them. The plaintiff appeals.

The requisite elements of proof in a medical malpractice action are a deviation or departure from accepted community standards of practice and evidence that such departure was a proximate cause of injury or damage. On a motion for summary judgment, a defendant must make a *prima facie* showing that there was no departure from good and accepted medical practice or that the plaintiff was not injured thereby (*see Hiegel v Orange Regional Med. Ctr.*, 219 AD3d 910, 913 [2023]; *Bhuiyan v Germain*, 211 AD3d 667, 668 [2022]). To sustain this burden, the defendant must address and rebut any specific allegations of malpractice set forth in the plaintiff's bill of particulars (*see Barnaman v Bishop Hucles Episcopal Nursing Home*, 213 AD3d 896, 898 [2023]; *Hackett v Bybordi*, 212 AD3d 598 [2023]). "In opposition, the plaintiff must demonstrate the existence of a triable issue of fact as to the elements on which the defendant has met his or her initial burden" (*Bowe v Brooklyn United Methodist Church Home*, 150 AD3d 1067, 1068 [2017]). "The purpose of a bill of particulars is to amplify pleadings, limit proof, and prevent surprise at trial, not to provide evidentiary material" (*Toth v Bloshinsky*, 39 AD3d 848, 849 [2007]).

On appeal, the plaintiff does not challenge the Supreme Court's determination that the defendants met their *prima facie* burden of showing that there was no departure from good and accepted medical practice or that the decedent was not injured thereby (*see Hiegel v Orange Regional Med. Ctr.*, 219 AD3d at 913). However, in opposition, the affirmation of the plaintiff's expert in emergency medicine was sufficient to raise triable issues of fact as to whether the defendants departed from accepted standards of care and whether such departures were a proximate cause of the decedent's injuries and death. Contrary to the defendants' contention, the plaintiff did not raise new theories of liability in opposition to the defendants' motion for summary judgment (*see Rich v Donnenfeld*, 191 AD3d 909, 910 [2021]; *Toth v Bloshinsky*, 39 AD3d at 849).

Accordingly, the Supreme Court should have denied those branches of the defendants' motion which were for summary judgment dismissing the causes of action alleging medical malpractice and wrongful death insofar as asserted against them.

The Supreme Court properly granted that branch of the defendants' motion which was for summary judgment dismissing the cause of action alleging loss of services insofar as asserted against them, albeit for reasons different than those relied upon by the court. This cause of action, which is limited to the period prior to the decedent's death (*see Liff v Schildkrout*, 49 NY2d 622, 632 [1980]), is a derivative one (*see id.*) and, thus, is governed by the same period of limitations that controls the underlying cause of action, i.e., 2½ years for medical malpractice (*see Maxson v Delaware, Lackawanna & W. R.R. Co.*, 112 NY 559 [1889]; *Rothfarb v Brookdale Hosp.*, 139 AD2d 720, 722 [1988]). The plaintiff did not interpose her derivative cause of action until the statute of limitations on the underlying cause of action alleging medical malpractice had expired (*see* CPLR 214-a). Because the original complaint did not give the defendants notice that a claim for loss of services would be asserted, the derivative cause of action does not relate back to the time when the action was originally commenced and is time-barred (*see id.* § 203 [f]; *Lucido v Vitolo*, 251 AD2d 383, 384 [1998]; *Clausell v Ullman*, 141 AD2d 690, 691 [1988]).

The parties' remaining contentions are without merit. Duffy, J.P., Ford, Golia and Quirk, JJ., concur.

23 Howard N. Hellman, Appellant, v Village of Upper Nyack, Respondent. [— NYS3d —]—

Municipal Corporations—Notice of Claim—Late Notice—Accrual of Tortious Interference of Contract Action

In an action, inter alia, to recover damages for tortious interference with contract, the plaintiff appeals from an order of the Supreme Court, Rockland County (Sherri L. Eisenpress, J.), dated October 8, 2020. The order, insofar as appealed from, granted the defendant's motion for summary judgment dismissing the complaint, and denied that branch of the plaintiff's motion which was for summary judgment on the issue of liability.

Ordered that the order is affirmed insofar as appealed from, with costs.

In May 2017, the plaintiff entered into a contract to purchase certain real property located in Upper Nyack (hereinafter the contract of sale). The plaintiff alleges that the defendant, the Village of Upper Nyack, induced the seller to breach the contract of sale by offering to purchase the property at a higher price and that the seller breached the contract of sale by failing to close at a time-of-the-essence closing scheduled for October 31, 2017. On or about November 2, 2017, the plaintiff commenced an action against the seller, alleging that the seller

had breached the contract of sale by failing to close on October 31, 2017. That action settled and was discontinued pursuant to a stipulation of discontinuance dated February 28, 2018.

The plaintiff served a notice of claim dated April 18, 2018, on the Village, alleging that it had tortiously interfered with the contract of sale. The plaintiff subsequently commenced this action against the Village, inter alia, to recover damages for tortious interference with contract. The Village moved for summary judgment dismissing the complaint on the ground, among other things, that the notice of claim was not timely served. The plaintiff moved, inter alia, for summary judgment on the issue of liability. The Supreme Court, among other things, granted the Village's motion and denied that branch of the plaintiff's motion. The plaintiff appeals.

Pursuant to General Municipal Law § 50-e (1) (a), a party seeking to sue a public corporation must serve a notice of claim on the prospective defendant within 90 days after the claim arises (see *Matter of Newcomb v Middle Country Cent. Sch. Dist.*, 28 NY3d 455, 460 [2016]; *Matter of DeGarmo v City of New York*, 237 AD3d 1092, 1093 [2025]). With respect to a cause of action alleging tortious interference with contract, "accrual occurs when the claim becomes enforceable, i.e., when all elements of the tort can be truthfully alleged in a complaint" (*Kronos, Inc. v AVX Corp.*, 81 NY2d 90, 94 [1993]). Here, under the plaintiff's allegations, all elements of the tort could be truthfully alleged on October 31, 2017, when the seller breached the contract of sale by failing to close on the time-of-the-essence closing date and the plaintiff sustained damages due to the Village's tortious conduct (see *id.*; *Spinap Corp. v Cafagno*, 302 AD2d 588, 588 [2003]; *Bib Constr. Co. v City of Poughkeepsie*, 273 AD2d 186, 187 [2000]). Contrary to the plaintiff's contention, the cause of action alleging tortious interference with contract did not accrue several months later, on February 28, 2018, when the action he brought against the seller was discontinued (see *Kronos, Inc. v AVX Corp.*, 81 NY2d at 94). Thus, the notice of claim dated April 18, 2018, was untimely, since it was served more than 90 days after the claim arose (see General Municipal Law § 50-e [1] [a]).

Accordingly, the Supreme Court properly granted the Village's motion for summary judgment dismissing the complaint and denied that branch of the plaintiff's motion which was for summary judgment on the issue of liability (see *McErlean v City of Long Beach*, 230 AD3d 670, 670-671 [2024]).

The plaintiff's remaining contentions either are without merit or need not be reached in light of our determination.

Brathwaite Nelson, J.P., Ford, Dowling and Goldberg Velazquez, JJ., concur.

24 Stephanie Kelly-Newhouse et al., Appellants, v Chase Meadows Farm, LLC, et al., Respondents. [— NYS3d —]

Appeal—Records and Briefs on Appeal—Appendix Method—Omissions from Appendix

In an action to recover damages for personal injuries, etc., the plaintiffs appeal from (1) an order of the Supreme Court, Westchester County (Joan B. Lefkowitz, J.), dated July 8, 2021, (2) an order of the same court (Charles D. Wood, J.) dated September 28, 2021, and (3) an order of the same court (Joan B. Lefkowitz, J.) dated October 12, 2021. The order dated September 28, 2021, insofar as appealed from, granted the motion of the defendant Peter Martini & Associates, LLC, for summary judgment dismissing the complaint insofar as asserted against it and those branches of the separate motions of the defendants Chase Meadows Farm, LLC, and Rhiannon, LLC, which were for summary judgment dismissing the complaint insofar as asserted against each of them.

Ordered that the appeals from the orders dated July 8, 2021, and October 12, 2021, are dismissed as abandoned; and it is further,

Ordered that the appeal from the order dated September 28, 2021, is dismissed; and it is further,

Ordered that one bill of costs is awarded to the defendants.

The appeals from the orders dated July 8, 2021, and October 12, 2021, must be dismissed as abandoned, as the plaintiffs do not request modification or reversal of any portion of those orders in their brief (*see Matter of Dahan*, 231 AD3d 945, 947 [2024]).

The plaintiff Stephanie Kelly-Newhouse (hereinafter the injured plaintiff) allegedly was injured while riding her horse on property owned by the defendant Chase Meadows Farm, LLC (hereinafter Chase Meadows), and leased by the defendant Rhiannon, LLC (hereinafter Rhiannon). The injured plaintiff, and her husband suing derivatively, commenced this action against Chase Meadows, Rhiannon, and the defendant Peter Martini & Associates, LLC (hereinafter Martini).

Martini moved for summary judgment dismissing the complaint insofar as asserted against it. Chase Meadows and Rhiannon separately moved, inter alia, for summary judgment dismissing the complaint insofar as asserted against each of them. In an order dated September 28, 2021, the Supreme

Court, among other things, granted Martini's motion and those branches of the separate motions of Chase Meadows and Rhianon. The plaintiffs appeal.

"[A]n appellant who perfects an appeal using the appendix method must file an appendix that contains all the relevant portions of the record to enable the court to render an informed decision on the merits of the appeal" (*Trimarco v Data Treasury Corp.*, 146 AD3d 1004, 1006 [2017]; see *Matter of Prince*, 238 AD3d 1046, 1046 [2025]; *Ravasio v La Pata*, 216 AD3d 686, 686 [2023]). "The appendix shall contain those portions of the record necessary to permit the court to fully consider the issues which will be raised by the appellant and the respondent, including material excerpts from transcripts of testimony[,] . . . papers in connection with a motion, and critical exhibits'" (*Matter of Prince*, 238 AD3d at 1047 [citations and internal quotation marks omitted], quoting *Diana v DeLisa*, 151 AD3d 806, 808 [2017]; see 22 NYCRR 1250.7 [d] [1] [i]-[vi]). Further, "[e]xcerpts from the transcripts 'must not be misleading or unintelligible by reason of incompleteness or lack of surrounding context'" (*Diana v DeLisa*, 151 AD3d at 808, quoting 22 NYCRR former 670.10.2 [c] [1] [v]). "'An appellate court should not be subjected to the task of untangling and mastering the facts from an inadequate and incoherent appendix'" (*Diana v DeLisa*, 151 AD3d at 808-809, quoting *Lo Gerfo v Lo Gerfo*, 30 AD2d 156, 157 [1968]; see *Matter of Prince*, 283 AD3d at 1047).

Here, the plaintiffs omitted from the appendix, among other things, material excerpts from transcripts of deposition testimony and each of the defendants' papers in connection with the separate motions which were the subject of the order appealed from (see *Matter of Prince*, 238 AD3d at 1047; *Ravasio v La Pata*, 216 AD3d at 687; *Trimarco v Data Treasury Corp.*, 146 AD3d at 1006). "These omissions inhibit the court's ability to render an informed decision on the merits of the appeal" (*Skalska v Grubeki*, 201 AD3d 764, 765 [2022] [internal quotations marks omitted]). Accordingly, as the plaintiffs have failed to provide this Court with an adequate appendix, we dismiss the appeal from the order dated September 28, 2021.

Brathwaite Nelson, J.P., Ford, Dowling and Goldberg Velazquez, JJ., concur.

25 Kristina Latta, Individually and as Administrator of the Estate of Jonathan Latta, Deceased, Appellant, v City MD et al., Respondents, et al., Defendants. [253 NYS3d 279]—

In a consolidated action, inter alia, to recover damages for medical malpractice, etc., the plaintiff appeals from an order of the Supreme Court, Richmond County (Charles M. Troia, J.), dated June 21, 2021. The order, insofar as appealed from, granted the motion of the defendants City MD, City Medical Group, PLLC, City Medical of Staten Island, PLLC, City Practice Group of New York, LLC, and Rex Waggoner, Jr., for summary judgment dismissing the complaint insofar as asserted against them.

Ordered that the order is affirmed insofar as appealed from, with costs.

On March 3, 2016, Jonathan Latta (hereinafter the decedent) presented at the defendant City MD with complaints of shortness of breath and cough with sputum for three days. At approximately 11:22 a.m., the decedent was seen by the defendant Rex Waggoner, Jr., who, among other things, took the decedent's medical history, which included a history of blood clots. Waggoner then, among other things, ordered a D-dimer blood test to rule out the presence of blood clots. At approximately 6:07 p.m., City MD received the results of the blood test, which showed that the decedent's D-dimer level was elevated. Minutes later, Waggoner called the decedent and directed him to go immediately to an emergency room. The decedent died at a hospital on March 5, 2016.

Thereafter, the plaintiff commenced separate actions, which were later consolidated, against City MD, Waggoner, and the defendants City Medical Group, PLLC, City Medical of Staten Island, PLLC, and City Practice Group of New York, LLC (hereinafter collectively the defendants), among others, inter alia, to recover damages for medical malpractice, alleging that the decedent's death was a result of Waggoner's failure to immediately send the decedent to a hospital for appropriate testing. After the completion of discovery, the defendants moved for summary judgment dismissing the complaint insofar as asserted against them. In an order dated June 21, 2021, the Supreme Court, among other things, granted the defendants' motion. The plaintiff appeals.

"The essential elements of medical malpractice are (1) a deviation or departure from accepted medical practice, and (2) evidence that such departure was a proximate cause of injury" (*Avgi v Policha*, 232 AD3d 838, 839 [2024] [internal quotation marks omitted]; see *Stukas v Streiter*, 83 AD3d 18, 23 [2011]). "In moving for summary judgment dismissing a cause of action alleging medical malpractice, a defendant must establish, prima facie, that there was no departure or deviation from the

accepted standard of care or that such departure or deviation was not a proximate cause of any injury to the plaintiff” (*Attia v Klebanov*, 192 AD3d 650, 651 [2021]). “Once a defendant has made such a showing, the burden shifts to the plaintiff to demonstrate the existence of a triable issue of fact as to the elements on which the defendant met the prima facie burden” (*Piazza v NYU Hosps. Ctr.*, 208 AD3d 525, 526 [2022]). “To rebut the defendant’s prima facie showing, a plaintiff must submit an expert opinion that specifically addresses the defense expert’s allegations” (*Pirri-Logan v Pearl*, 192 AD3d 1149, 1150 [2021]).

Here, the defendants established their prima facie entitlement to judgment as a matter of law by submitting a transcript of Waggoner’s deposition testimony and an affirmation of an expert physician, which established that Waggoner did not depart from good and accepted medical practice in the care and treatment of the decedent (*see Ortiz v Wyckoff Hgts. Med. Ctr.*, 149 AD3d 1093, 1094-1095 [2017]; *Stukas v Streiter*, 83 AD3d at 30-31). In opposition, the plaintiff failed to raise a triable issue of fact (*see Homan v David Seinfeld, M.D., PLLC*, 164 AD3d 1147, 1148 [2018]; *Ortiz v Wyckoff Hgts. Med. Ctr.*, 149 AD3d at 1095). Iannacci, J.P., Chambers, Wan and Taylor, JJ., concur.

26 In the Matter of Betsy Barton, Appellant, v New York City Employees’ Retirement System et al., Respondents. [— NYS3d —]

Contempt—Civil Contempt—Compliance with Mandate in Judgment

In a proceeding pursuant to CPLR article 78 to review a determination of the Board of Trustees of the New York City Employees’ Retirement System dated December 9, 2014, which denied the petitioner’s application for disability retirement benefits, the petitioner appeals from an order of the Supreme Court, Kings County (Patria Frias-Colón, J.), dated March 5, 2024. The order denied the petitioner’s motion to hold the respondents in civil contempt.

Ordered that the order is affirmed, with costs.

In a prior proceeding pursuant to CPLR article 78, the petitioner challenged a determination of the Board of Trustees of the New York City Employees’ Retirement System (hereinafter the Board of Trustees), which, upon the recommendation of the Medical Board of the New York City Employees’ Retirement System (hereinafter the Medical Board) dated January 13, 2013, denied the petitioner’s application for disability retirement benefits. In a judgment dated May 23, 2014, the Supreme Court granted the petition and vacated the determi-

nation of the Board of Trustees, finding that the Medical Board failed to present credible evidence in support of its conclusion that the petitioner was not disabled. The matter was remitted, and the Board of Trustees, upon the recommendation of the Medical Board, again denied the petitioner's application for disability retirement benefits in a determination dated December 9, 2014.

The petitioner commenced this proceeding pursuant to CPLR article 78 to review the determination of the Board of Trustees dated December 9, 2014. In a judgment dated August 2, 2016 (hereinafter the August 2016 judgment), the Supreme Court granted the petition, vacated the determination of the Board of Trustees, and remanded the matter, ordering the Board of Trustees to make new findings. Upon remand, the Medical Board, after considering new evidence and a physical examination of the petitioner, again recommended denying the petitioner's application for disability retirement benefits. The Board of Trustees adopted the Medical Board's recommendation and denied the petitioner's application.

In January 2023, the petitioner moved to hold the respondents in civil contempt for failure to comply with, *inter alia*, the August 2016 judgment. In an order dated March 5, 2024, the Supreme Court denied the motion. The petitioner appeals.

"A motion to punish a party for civil contempt is addressed to the sound discretion of the court" (*Bauman v Bauman*, 208 AD3d 624, 625 [2022] [internal quotation marks omitted]; see *Shemtov v Shemtov*, 153 AD3d 1295, 1295 [2017]). To prevail on a civil contempt motion, the movant "must establish by clear and convincing evidence (1) that a lawful order or judgment of the court was in effect, clearly expressing an unequivocal mandate, (2) the appearance, with reasonable certainty, that the order or judgment was disobeyed, (3) that the party to be held in contempt had knowledge of the court's order or judgment, and (4) prejudice to the right of a party to the litigation" (*Cover v Cover*, 173 AD3d 970, 971 [2019]; see *Matter of Binong Xu v Sullivan*, 155 AD3d 1031, 1032 [2017]). "Once the moving party makes this showing, the burden shifts to the alleged contemnor to refute the movant's showing, or to offer evidence of a defense, such as an inability to comply with the order" (*Latterman v Latterman*, 174 AD3d 518, 519 [2019]; see *El-Dehdan v El-Dehdan*, 26 NY3d 19, 35 [2015]).

Here, the Supreme Court providently exercised its discretion in denying the petitioner's motion to hold the respondents in civil contempt. The August 2016 judgment contained a mandate stating that "[u]pon remand the Board of Trustees is ordered to

make new findings not inconsistent with this decision,” but the Board of Trustees complied with its responsibilities. The Medical Board issued a written recommendation that included a lengthy discussion of new evidence and the reasoning for its recommendation. The Board of Trustees adopted that recommendation, and the respondents thus complied with the mandate in the August 2016 judgment (*see Matter of Cassidy v New York State Bd. of Parole*, 140 AD3d 953, 955 [2016]).

The petitioner’s remaining contentions are without merit. Dillon, J.P., Warhit, Landicino and Hom, JJ., concur.

27 In the Matter of Mark Curatolo, Appellant, v Daniel Donahue, as Under-Sheriff of the Sheriff’s Department, et al., Respondents. [252 NYS3d 290]—

Civil Service—Appointment and Promotion—Correction Officer—Temporary Assignment as Investigator

In a proceeding pursuant to CPLR article 78 to review a determination of the respondent Daniel Donahue, as Under-Sheriff of the Sheriff’s Department, dated November 14, 2019, which denied the petitioner’s request to be designated an investigator in the Nassau County Sheriff’s Department pursuant to Civil Service Law § 58 (4), the petitioner appeals from a judgment of the Supreme Court, Nassau County (Helen Voutsinas, J.), dated March 20, 2022. The judgment, after a nonjury trial pursuant to CPLR 7804 (h), denied the petition and dismissed the proceeding.

Ordered that the judgment is affirmed, without costs or disbursements.

The petitioner has been employed as a correction sergeant with the respondent Nassau County Sheriff’s Department since 2017. In November 2019, the petitioner requested to be designated an investigator pursuant to Civil Service Law § 58 (4). In a determination dated November 14, 2019, the respondent Daniel Donahue, as Under-Sheriff of the Sheriff’s Department, denied the petitioner’s request. Thereafter, the petitioner commenced this proceeding pursuant to CPLR article 78 to annul the determination. In a judgment dated March 20, 2022, the Supreme Court, after a nonjury trial pursuant to CPLR 7804 (h), denied the petition and dismissed the proceeding. The petitioner appeals.

The Supreme Court properly denied the petition and dismissed the proceeding. Civil Service Law § 58 (4) (b) (ii) (former [c] [ii]) provides, in relevant part, that “any person who has received permanent appointment to the position of . . . correction officer of any rank . . . and is temporarily assigned

to perform the duties of detective or investigator shall, whenever such assignment . . . exceeds eighteen months, be permanently designated as a detective or investigator” (see *Matter of Wood v Irving*, 85 NY2d 238, 242 [1995]; *Matter of Calabrese v Commissioner of Police of City of Yonkers*, 282 AD2d 457, 457 [2001]). Here, the petitioner was not entitled to be designated an investigator pursuant to Civil Service Law § 58 (4) because he was not temporarily assigned to perform the duties of an investigator in his position as correction sergeant (see *Matter of Cieslinski v Cassino*, 282 AD2d 457, 458 [2001]; *Matter of Calabrese v Commissioner of Police of City of Yonkers*, 282 AD2d at 457).

The petitioner’s remaining contentions are without merit. Iannacci, J.P., Brathwaite Nelson, Dowling and Golia, JJ., concur.

28 In the Matter of Hudson Ridge Wellness Center, Inc., et al., Respondents, v Zoning Board of Appeals of the Town of Cortlandt, Respondent. Citizens for Responsible Hudson Institute Site Development, Inc., Nonparty Appellant. [— NYS3d —]—

Parties—Intervention—Real and Substantial Interest—Zoning Board Determination

In a proceeding pursuant to CPLR article 78 to review a determination of the Zoning Board of Appeals of the Town of Cortlandt dated January 15, 2020, which, after a hearing, in effect, confirmed determinations of the Town of Cortlandt Director of Code Enforcement dated March 21, 2019, and May 16, 2019, that the petitioners’ proposed project is not a hospital within the meaning of the Town Code of the Town of Cortlandt, nonparty Citizens for Responsible Hudson Institute Site Development, Inc., appeals from a judgment of the Supreme Court, Westchester County (Susan Cacace, J.), dated September 24, 2020. The judgment granted the petition, annulled the determination dated January 15, 2020, and remitted the matter to the Zoning Board of Appeals of the Town of Cortlandt for the issuance of a determination that the petitioners’ proposed project is a hospital within the meaning of the Town Code of the Town of Cortlandt.

Ordered that the judgment is affirmed, with costs.

The petitioners sought to develop seven existing buildings on property located in a residential zoning district in the Town of Cortlandt into a short-term residential treatment program for individuals with a substance use disorder. In determinations dated March 21, 2019, and May 16, 2019, the Town’s Director

of Code Enforcement determined that the petitioners' proposed project is not a hospital within the meaning of the Town Code of the Town of Cortlandt (hereinafter the Town Code). Such a determination would require the petitioners to acquire a use variance or a zoning amendment, as opposed to an area variance, to develop their proposed facility. In a determination dated January 15, 2020, the Zoning Board of Appeals of the Town of Cortlandt (hereinafter the ZBA), after a hearing, in effect, confirmed the determinations of the Director of Code Enforcement that the petitioners' proposed project is not a hospital within the meaning of the Town Code.

Thereafter, the petitioners commenced this proceeding pursuant to CPLR article 78 to annul the ZBA's determination. Citizens for Responsible Hudson Institute Site Development, Inc. (hereinafter CRHISD), moved for leave to intervene in the proceeding as a respondent. In an order dated May 26, 2020, the Supreme Court denied CRHISD's motion. CRHISD then moved for leave to reargue its prior motion for leave to intervene in the proceeding. In an order dated July 28, 2020, the court granted reargument and, upon reargument, adhered to the determination denying CRHISD's motion for leave to intervene in the proceeding. Subsequently, the court issued a judgment dated September 24, 2020, granting the petition, annulling the ZBA's determination, and remitting the matter to the ZBA for the issuance of a determination that the petitioners' proposed project is a hospital within the meaning of the Town Code. CRHISD appeals.

CRHISD failed to demonstrate its entitlement to intervene in the proceeding. CPLR 7802 (d) provides that in a proceeding pursuant to CPLR article 78, the court "may allow other interested persons to intervene." "As CPLR 7802 (d) grants the court broader power to allow intervention than is provided pursuant to CPLR 1012 or 1013 in an action, intervention should generally be permitted where the intervenor has a real and substantial interest in the outcome of the proceedings" (*Matter of Connectivity Sys., LLC v Zoning Bd. of Appeals of the Town of Ramapo*, 227 AD3d 984, 985 [2024]; see *Leonard v Planning Bd. of Town of Union Vale*, 136 AD3d 866, 868 [2016]; *Matter of Bernstein v Feiner*, 43 AD3d 1161, 1162 [2007]; *County of Westchester v Department of Health of State of N.Y.*, 229 AD2d 460, 461 [1996]). "However, 'when deciding whether to grant such a request, a court may properly balance the benefit to be gained by intervention, and the extent to which the proposed intervenor may be harmed if it is refused, against other factors, such as the degree to which the proposed intervention will delay

and unduly complicate the litigation' ” (*Matter of Connectivity Sys., LLC v Zoning Bd. of Appeals of the Town of Ramapo*, 227 AD3d at 986, quoting *Matter of Pier v Board of Assessment Review of Town of Niskayuna*, 209 AD2d 788, 789 [1994]; see *Osman v Sternberg*, 168 AD2d 490, 490-491 [1990]).

Here, these factors weighed against permitting CRHISD to intervene. The interests asserted by CRHISD were environmental, aesthetic, and quality-of-life concerns regarding the petitioners' intended use of the property. However, the sole issue in the proceeding was whether the ZBA's determination, in effect, confirming the determinations of the Director of Code Enforcement that the petitioners' proposed project is not a hospital for zoning purposes under the Town Code, was arbitrary and capricious. Thus, CRHISD failed to show that it has a real and substantial interest in the outcome of the proceeding. Moreover, permitting CRHISD to intervene at this stage of the proceeding would cause undue delay and prejudice to the petitioners. Accordingly, the Supreme Court providently exercised its discretion in denying CRHISD's motion for leave to intervene in the proceeding (see *Leonard v Planning Bd. of Town of Union Vale*, 136 AD3d at 868; *Matter of Patterson Materials Corp. v Zagata*, 237 AD2d 365, 366 [1997]).

The parties' remaining contentions either need not be reached in light of our determination or are without merit.

Barros, J.P., Christopher, Warhit and Voutsinas, JJ., concur.

Appeal from a judgment of the Supreme Court, Westchester County, dated September 24, 2020. Motion by the petitioners-respondents, inter alia, to dismiss the appeal from the judgment on the ground that the appeal has been rendered academic. By decision and order on motion of this Court dated March 17, 2021, that branch of the motion was held in abeyance and referred to the panel of Justices hearing the appeal for determination upon the argument or submission thereof.

Upon the papers filed in support of the motion and the papers filed in opposition thereto, and upon the argument of the appeal, it is

Ordered that the branch of the motion which is to dismiss the appeal from the judgment on the ground that the appeal has been rendered academic is denied. Barros, J.P., Christopher, Warhit and Voutsinas, JJ., concur.

29 In the Matter of Nathaniel Jackson, Petitioner, v John T. Hecht et al., Respondents. [252 NYS3d 303]—

Proceeding against Body or Officer—Mandamus

Proceeding pursuant to CPLR article 78, inter alia, in effect, in the nature of mandamus to compel the respondent John T. Hecht, an Acting Justice of the Supreme Court, Kings County, to dismiss the indictment in an action entitled *People v Jackson*, commenced in that court under indictment No. 70651/22, and application by the petitioner for a waiver of costs, fees, and expenses.

Ordered that the application for a waiver of costs, fees, and expenses is granted to the extent that the filing fee imposed by CPLR 8022 (b) is waived, and the application is otherwise denied as academic; and it is further,

Adjudged that the petition is denied and the proceeding is dismissed on the merits, without costs or disbursements.

The extraordinary remedy of mandamus will lie only to compel the performance of a ministerial act, and only where there exists a clear legal right to the relief sought (*see Matter of Legal Aid Socy. of Sullivan County v Scheinman*, 53 NY2d 12, 16 [1981]). The petitioner has failed to demonstrate a clear legal right to the relief sought. Duffy, J.P., Christopher, Landicino and Quirk, JJ., concur.

30 In the Matter of Nathaniel Jackson, Petitioner, v John T. Hecht et al., Respondents. [251 NYS3d 793]—

Proceeding against Body or Officer—Mandamus

Proceeding pursuant to CPLR article 78, inter alia, in effect, in the nature of mandamus to compel the respondent John T. Hecht, an Acting Justice of the Supreme Court, Kings County, to dismiss the indictment in an action entitled *People v Jackson*, commenced in that court under indictment No. 73295/23, and application by the petitioner for a waiver of costs, fees, and expenses.

Ordered that the application for a waiver of costs, fees, and expenses is granted to the extent that the filing fee imposed by CPLR 8022 (b) is waived, and the application is otherwise denied as academic; and it is further,

Adjudged that the petition is denied and the proceeding is dismissed on the merits, without costs or disbursements.

The extraordinary remedy of mandamus will lie only to compel the performance of a ministerial act, and only where there exists a clear legal right to the relief sought (*see Matter of Legal Aid Socy. of Sullivan County v Scheinman*, 53 NY2d 12, 16 [1981]). The petitioner has failed to demonstrate a clear legal right to the relief sought. Duffy, J.P., Christopher, Landicino and Quirk, JJ., concur.

31 In the Matter of Chary M.L. New Alternatives for Children, Inc., Respondent; Zachary R., Appellant, et al., Respondent. (Proceeding No. 1.) In the Matter of Jun L. New Alternatives for Children, Inc., Respondent; Zachary R., Appellant, et al., Respondent. (Proceeding No. 2.) [— NYS3d —]

Parent, Child and Family—Termination of Parental Rights—Abandonment—Contact for Six-Month Period Prior to Petition

Parent, Child and Family—Termination of Parental Rights—Permanent Neglect—Agency's Diligent Efforts

In related proceedings pursuant to Social Services Law § 384-b, the mother appeals from two orders of fact-finding and disposition of the Family Court, Richmond County (Peter F. DeLizzo, J.) (one as to each child), both dated March 13, 2024. The orders of fact-finding and disposition, insofar as appealed from, after fact-finding and dispositional hearings, found that the mother abandoned and permanently neglected the subject children, terminated her parental rights, and transferred guardianship and custody of the subject children to the petitioner and the Commissioner of Social Services of the City of New York for the purpose of adoption.

Ordered that the orders of fact-finding and disposition are affirmed insofar as appealed from, without costs of disbursements.

The petitioner commenced these proceedings pursuant to Social Services Law § 384-b, *inter alia*, to terminate the mother's parental rights to the subject children on the grounds of abandonment and permanent neglect. Following fact-finding and dispositional hearings, the Family Court, among other things, found that the mother abandoned and permanently neglected the children, terminated her parental rights, and transferred guardianship and custody of the children to the petitioner and the Commissioner of Social Services of the City of New York for the purpose of adoption. The mother appeals.

Termination of parental rights based on a finding of abandonment requires clear and convincing evidence (*see* Social Services Law § 384-b [3] [g] [i]; *Matter of Annette B.*, 4 NY3d 509, 514 [2005]) that for the six-month period immediately prior to the filing of the petition (*see* Social Services Law § 384-b [4] [b]), the parent “evinces an intent to forego his or her parental rights and obligations as manifested by his or her failure to visit the child and communicate with the child or agency, although able to do so and not prevented or discouraged from doing so by the agency. In the absence of evidence to the contrary, such ability to visit and communicate shall be presumed” (Social Services Law § 384-b [5] [a]; *see Matter of Julius P.*, 63 NY2d 477, 481 [1984]).

Here, clear and convincing evidence at the fact-finding hearing supports the Family Court's finding of abandonment. The evidence established that the mother had no contact with the petitioner or the children during the six months immediately preceding the filing of the petitions on September 5, 2022, and that the petitioner did nothing to prevent or discourage the mother from contacting them (see *Matter of Abel J.R.* [*Michael S.*], 207 AD3d 727, 728 [2022]; *Matter of Nyshawn R.V.S.* [*Erica M.V.*], 145 AD3d 902, 902-903 [2016]). The mother's incarceration did not relieve her of the responsibility to communicate with the petitioner or the children (see *Matter of Annette B.*, 4 NY3d at 514; *Matter of Samantha L.S.* [*Daniel S.*], 134 AD3d 1128, 1129 [2015]), and she failed to satisfy her burden of establishing that she suffered from a severe hardship that so permeated her life that attempts at communication were not feasible (see *Matter of J.F.* [*Yves A.*], 158 AD3d 798, 799 [2018]; *Matter of Keymani R.J.* [*Shakima J.*], 95 AD3d 1213, 1213 [2012]).

Clear and convincing evidence (see Social Services Law § 384-b [3] [g] [i]) at the fact-finding hearing also supports the finding of permanent neglect (see *id.* § 384-b [7] [a]). When determining whether to grant a petition alleging permanent neglect, "the court must evaluate as a threshold matter whether the agency has exercised diligent efforts to encourage and strengthen the parental relationship" (*Matter of Sheila G.*, 61 NY2d 368, 381 [1984]), including consultation and cooperation with the parent to develop a service plan and making suitable arrangements for visitation (see Social Services Law § 384-b [7] [f]). However, "evidence of diligent efforts by an agency to encourage and strengthen the parental relationship shall not be required when . . . [t]he parent has failed for a period of six months to keep the agency apprised of his or her location" (*id.* § 384-b [7] [e] [i]). Here, the petitioner was excused from demonstrating diligent efforts by the mother's failure to inform the petitioner of her whereabouts for a period of at least six months (see *Matter of Riyanna N.F.* [*Crystal M.S.—Angelina F.*], 170 AD3d 1009, 1010 [2019]; *Matter of George R.* [*Samatha M.*], 162 AD3d 1041, 1042 [2018]), notwithstanding her incarceration for a portion of the relevant period (see *Matter of Jamel Raheem B.* [*Vernice B.*], 89 AD3d 933, 934 [2011]).

The Family Court properly declined to grant a suspended judgment, which is not a permissible disposition after a finding of abandonment (see *Matter of King-Osiris A.T.* [*Isis S.*], 224 AD3d 839, 841 [2024]), and properly concluded that it is in the

best interests of the children (*see* Family Ct Act § 631) to terminate the mother's parental rights and to transfer guardianship and custody of the children to the petitioner and the Commissioner of Social Services of the City of New York for the purpose of adoption (*see Matter of Kaiden L. [Kdaya R.]*, 168 AD3d 846, 847 [2019]; *Matter of Tymel P. [Tyrone P.]*, 157 AD3d 699, 700 [2018]; *Matter of Christina M.A.R. [Megan M.R.]*, 154 AD3d 690, 691 [2017]). Dillon, J.P., Brathwaite Nelson, Love and McCormack, JJ., concur.

32 In the Matter of Frank M. Zita C., Appellant; Tara M.M., Respondent. [— NYS3d —]—

Incapacitated and Intellectually or Developmentally Disabled Persons—Guardian for Personal Needs or Property Management—Removal—Just Cause

In a proceeding pursuant to the Mental Hygiene Law article 81, Zita C., the wife of Frank M., an incapacitated person, appeals from a judgment of the Supreme Court, Dutchess County (Michael G. Hayes, J.), dated July 29, 2024. The judgment, insofar as appealed from, upon a decision dated May 31, 2024, made after a hearing, granted that branch of the petition of Tara M.M. which was to remove Zita C. as guardian of the person and property of Frank M. and appointed a successor guardian.

Ordered that the judgment is reversed insofar as appealed from, on the facts and in the exercise of discretion, with costs, and that branch of the petition which was to remove Zita C. as guardian of the person and property of Frank M. is denied.

In January 2023, the petitioner, Tara M.M., the daughter of Frank M. (hereinafter the incapacitated person), filed a petition, inter alia, to remove Zita C., the wife of the incapacitated person (hereinafter the wife), as guardian of his person and property. The petitioner alleged that the wife's health had deteriorated and that she can no longer appreciate the incapacitated person's needs nor appropriately act as his guardian. In 1987, the incapacitated person had suffered traumatic brain injury in a vehicular accident which, among other things, left him partially paralyzed and unable to manage his personal and financial affairs. In 1988, the wife was made the incapacitated person's conservator and in 2005, she became his guardian. In December 2022, the wife was temporarily hospitalized, which precipitated the petition, inter alia, to remove her as guardian of the person and property of the incapacitated person. In a judgment dated July 29, 2024, upon a decision dated May 31, 2024, made after a hearing, the Supreme Court,

among other things, granted that branch of the petition and identified a successor guardian and the powers of his office. The wife appeals.

The determination “to remove a guardian of the person and property of an incapacitated person pursuant to the Mental Hygiene Law is addressed to the sound discretion of the Supreme Court” (*Matter of Agam S.B.-L. [Janna W.—Richard P.]*, 198 AD3d 962, 963 [2021]; see *Matter of Ida M. [Gino M.—Buonincontri]*, 171 AD3d 1069 [2019]). The “overarching concern remains the best interest of the incapacitated person” (*Matter of Agam S.B.-L. [Janna W.—Richard P.]*, 198 AD3d at 963 [internal quotation marks omitted]; see *Matter of Helen S. [Falero]*, 130 AD3d 834 [2015]). “A guardian may be removed pursuant to Mental Hygiene Law § 81.35 when the guardian fails to comply with an order, is guilty of misconduct, or for any other cause which to the court shall appear just” (*Matter of Carmen H. [Thomas H.—Grace H.]*, 90 AD3d 1049, 1049 [2011] [internal quotation marks omitted]; see *Matter of Helen S. [Falero]*, 130 AD3d at 834).

Here, the Supreme Court improvidently exercised its discretion in removing the wife as guardian of the person and property of the incapacitated person (see Mental Hygiene Law § 81.35). The wife’s temporary medical crisis that had precipitated the petition was resolved, and the petitioner failed to demonstrate that any of the wife’s actions regarding the incapacitated person’s care were a just cause for removal (see *Matter of Agam S.B.-L. [Janna W.—Richard P.]*, 198 AD3d at 963; cf. Mental Hygiene Law §§ 81.20, 81.22; *Matter of Helen S. [Falero]*, 130 AD3d at 834). Dillon, J.P., Chambers, Wan and Love, JJ., concur.

33 In the Matter of Caia N. Administration for Children’s Services, Respondent; Terri N., Appellant. (Proceeding No. 1.) In the Matter of Harriet N., Respondent, v Terri N., Appellant, Administration for Children’s Services, Respondent, et al., Respondent. (Proceeding No. 2.) [— NYS3d —]

Actions—Frivolous Actions—Vexatious Litigation—Same Relief Based on Same Allegations

In a proceeding pursuant to Family Court Act article 10, and a related proceeding pursuant to Family Court Act article 6, the mother appeals from (1) an order of the Family Court, Kings County (Melody Glover, J.), dated August 23, 2022, and (2) an order of the same court dated January 6, 2023. The order dated August 23, 2022, enjoined the mother from filing any additional motions without leave of court. The order dated

January 6, 2023, enjoined the mother from filing any petitions or motions without leave of court.

Ordered that the orders are affirmed, without costs or disbursements.

The Administration for Children's Services (hereinafter the agency) filed a petition alleging that the mother neglected the subject child. After a fact-finding hearing, in an order dated May 23, 2023, the Family Court dismissed the neglect petition, finding that the agency failed to establish that the mother neglected the child (hereinafter the dismissal order). The agency and the child separately appealed from the dismissal order. In a decision and order dated October 23, 2024, this Court reversed the dismissal order and reinstated the petition, found that the mother neglected the child, and remitted the matter to the Family Court for a dispositional hearing and a determination thereafter (*see Matter of Caia N. [Terri N.]*, 231 AD3d 1033 [2024]).

In an order dated August 23, 2022, the Family Court enjoined the mother from filing any additional motions without leave of court. In an order dated January 6, 2023, the court enjoined the mother from filing any petitions or motions without leave of court. The mother appeals from both orders.

The Family Court providently exercised its discretion in precluding the mother from filing any additional motions or petitions without leave of court. While public policy generally mandates free access to the courts, a party may forfeit that right if that party abuses the judicial process by engaging in meritless litigation motivated by spite or ill will (*see Matter of Unger v Koren Ha*, 234 AD3d 783, 785 [2025]; *Matter of Freyer v Macruari*, 234 AD3d 755, 758 [2025]). Here, the record reflects that the mother abused the judicial process through vexatious litigation (*see Matter of Isaac S. [Miriam S.]*, 178 AD3d 829, 830 [2019]; *Scholar v Timinsky*, 87 AD3d 577, 579 [2011]). The mother has brought multiple applications seeking the same relief based on the same allegations (*see Matter of Ram v Estate of Hershowitz*, 149 AD3d 959, 960 [2017]; *Matter of Manwani v Manwani*, 286 AD2d 767, 768 [2001]). Under the circumstances presented, the court providently exercised its discretion in prohibiting the mother from filing any further petitions without prior court approval (*see Matter of Unger v Koren Ha*, 234 AD3d at 785-786).

The mother's remaining contention is not properly before this Court on appeal. Genovesi, J.P., Warhit, Golia and Hom, JJ., concur.

34 In the Matter Gael B.P. Administration for Children's Services, Respondent; Angel B.M., Appellant. (Proceeding No.

- 1.) In the Matter Kimberly B.P. Administration for Children's Services, Respondent; Angel B.M., Appellant. (Proceeding No. 2.) [— NYS3d —]

Parent, Child and Family—Abused or Neglected Child—Domestic Violence in Child's Presence

Parent, Child and Family—Abused or Neglected Child—Corroboration of Child's Out-of-Court Statement

Parent, Child and Family—Abused or Neglected Child—Derivative Neglect

In related proceedings pursuant to Family Court Act article 10, the father appeals from (1) an order of fact-finding of the Family Court, Kings County (Ilana Gruebel, J.), dated February 3, 2025, and (2) an order of disposition of the same court dated March 4, 2025. The order of fact-finding, after a fact-finding hearing, found that the father neglected the child Kimberly B.P. and derivatively neglected the child Gael B.P. The order of disposition, insofar as appealed from, was entered upon the order of fact-finding.

Ordered that the appeal from the order of fact-finding is dismissed, without costs or disbursements, as the order of fact-finding was superseded by the order of disposition and is brought up for review on the appeal from the order of disposition; and it is further,

Ordered that the order of disposition is affirmed insofar as appealed from, without costs or disbursements.

The petitioner commenced these related proceedings pursuant to Family Court Act article 10 alleging, inter alia, that the father neglected the child Kimberly B.P. and derivatively neglected the child Gael B.P., by committing an act of domestic violence against the children's mother in Kimberly B.P.'s presence, while the mother was six months pregnant with Gael B.P. After a fact-finding hearing, the Family Court determined that the father neglected Kimberly B.P. and derivatively neglected Gael B.P. The father appeals.

"The appeal from the order of fact-finding must be dismissed because the order of fact-finding was superseded by the order of disposition. The issues raised on the appeal from the order of fact-finding are brought up for review on the appeal from the order of disposition" (*Matter of Tyjon R. [Felicia R.]*, 240 AD3d 702, 703 [2025] [internal quotation marks omitted]; see *Matter of Samynee L. [Tashae T.]*, 243 AD3d 569 [2025]).

"A finding of neglect is proper where a preponderance of the evidence establishes that the child's physical, mental, or emotional condition was impaired or was in danger of becoming impaired by the parent's commission of an act, or acts, of domestic violence in the child's presence" (*Matter of Kyng T.B.*

[*Theodore B.*], 234 AD3d 682, 683 [2025] [internal quotation marks omitted]; see Family Ct Act § 1012 [f]). “Even a single act of domestic violence, either in the presence of a child or within the hearing of a child, may be sufficient for a neglect finding” (*Matter of Manuel G., Jr.* [*Manuel G.*], 246 AD3d 1086, 1087 [2026] [internal quotation marks omitted]; see *Matter of Nina P.* [*Giga P.*], 180 AD3d 1047, 1047 [2020]). “Furthermore, impairment or imminent danger of physical impairment should also be inferred from the subject children’s proximity to violence directed against a family member, even absent evidence that they were aware of or emotionally impacted by the violence” (*Matter of Najaie C.* [*Niger C.*], 173 AD3d 1011, 1012 [2019] [internal quotation marks omitted]; see *Matter of Xierra N.* [*Lewis N.*], 226 AD3d 790, 790-791 [2024]).

“In neglect proceedings, unsworn out-of-court statements of the children may be received and, if properly corroborated, will support a finding of abuse or neglect” (*Matter of Mariliz G.* [*Jamie G.*], 207 AD3d 627, 629 [2022] [alterations and internal quotation marks omitted]). The child’s statements may be corroborated by “[a]ny other evidence tending to support” their reliability (Family Ct Act § 1046 [a] [vi]; see *Matter of Nicole V.*, 71 NY2d 112, 117-118 [1987]). “[T]he Family Court has considerable discretion to decide whether the child’s out-of-court statements describing incidents of abuse or neglect have, in fact, been reliably corroborated and whether the record as a whole supports a finding of abuse” or neglect (*Matter of Janiyah S.* [*Pedro H.*], 226 AD3d 909, 911 [2024] [internal quotation marks omitted]; see *Matter of Nicole V.*, 71 NY2d at 119). “Where the Family Court is primarily confronted with issues of credibility, its factual findings must be accorded considerable deference on appeal” (*Matter of Janiyah S.* [*Pedro H.*], 226 AD3d at 911; see *Matter of Nyla S.* [*Jason B.*], 224 AD3d 691, 692 [2024]).

Here, the Family Court properly determined that the petitioner established by a preponderance of the evidence that the father neglected Kimberly B.P. by his commission of an act of domestic violence against the mother in the child’s presence (see *Matter of Manuel G., Jr.* [*Manuel G.*], 246 AD3d at 1087; *Matter of Melanie I.A.* [*Tammeswhar A.*], 235 AD3d 743, 743-744 [2025]; *Matter of Joseph M.H.* [*Frederick H.*], 227 AD3d 996, 997 [2024]). Among other things, the evidence presented at the fact-finding hearing demonstrated that Kimberly B.P. had been present during an argument between her parents and that during the argument the father punched the mother, who was then approximately six months pregnant, causing the mother to vomit.

Contrary to the father's contention, Kimberly B.P.'s out-of-court statements were sufficiently corroborated by the testimony of a caseworker that Kimberly B.P.'s demeanor changed and she became sad as she described the domestic violence incident (see *Matter of Alajah H. [Brian H.]*, 234 AD3d 759, 761 [2025]; *Matter of Jada W. [Fanatay W.]*, 219 AD3d 732, 740 [2023]), as well as the father's testimony about the series of events leading up to the incident (see *Matter of Alajah H. [Brian H.]*, 234 AD3d at 761; *Matter of Nina P. [Giga P.]*, 180 AD3d at 1048).

Additionally, the Family Court's determination that the father derivatively neglected Gael B. P. was supported by a preponderance of the evidence (see *Matter of Remi R.C.G. [Michael M.]*, 237 AD3d 701, 702 [2025]; *Matter of Davena A. [Christopher A.]*, 232 AD3d 595, 597 [2024]). The father's neglect of Kimberly B.P. demonstrated a "flawed notion[] of parental responsibility" and was a "generally reliable indicator[]" that the father would "place his . . . other children at substantial risk of harm" (*Matter of Naima E. [Daryl M.]*, 227 AD3d 901, 903 [2024] [internal quotation marks omitted]; see *Matter of Alexander S. [Gabriel H.]*, 224 AD3d 907, 911 [2024]).

The father's remaining contentions either are without merit or need not be reached in light of our determination. Dillon, J.P., Brathwaite Nelson, Love and McCormack, JJ., concur.

35 In the Matter of Lori Rezza, Respondent, v Joseph O. Gebron, Appellant. [— NYS3d —]—

Parent, Child and Family—Support—Willful Violation of Order—Determination of Sanction

In a proceeding pursuant to Family Court Act article 4, the father appeals from an order of the Family Court, Kings County (Marjorie R. Steinberg, J.), dated June 14, 2024. The order, insofar as appealed from, denied the father's objections to so much of an amended order of disposition of the same court (Gabriella F. Richman, S.M.) dated May 3, 2024, as, after a hearing, found that the father willfully violated a prior order of child support and a provision of a stipulation of settlement incorporated but not merged into the parties' judgment of divorce, and directed that he be placed on probation.

Ordered that the order is affirmed insofar as appealed from, without costs or disbursements.

The parties are the parents of two children and were divorced by a judgment dated June 29, 2016, which incorporated but did not merge a stipulation of settlement dated May 4, 2016 (hereinafter the stipulation). Pursuant to the stipulation, the par-

ties agreed to “divide equally the costs” of add-on expenses, including educational, medical, child-care, and other major expenses. In an order dated October 16, 2018 (hereinafter the child support order), the Family Court, upon the parties’ consent, inter alia, directed the father to pay child support in the sum of \$2,500 per month. All other provisions of the stipulation, including the division of add-on expenses, remained in effect.

In July 2023, the mother filed a petition alleging that the father willfully failed to make payments for child support and add-on expenses. After a hearing, in an amended order of disposition dated May 3, 2024, the Support Magistrate, among other things, found that the father willfully violated the child support order and the stipulation provision regarding add-on expenses, and directed that he be placed on probation. The father filed objections, inter alia, to those portions of the amended order of disposition. In an order dated June 14, 2024, the Family Court, among other things, denied those objections. The father appeals.

“At a hearing pursuant to Family Court Act § 454 to determine whether a respondent has willfully failed to obey [a] lawful order of support, the burden is on the petitioner to establish that the respondent willfully violated the terms of the [order] by failing to pay the required support” (*Matter of Martinez v Lauretano*, 240 AD3d 597, 598 [2025] [internal quotation marks omitted]; see *Matter of Nestor v Nestor*, 236 AD3d 794, 795 [2025]). Evidence that the respondent failed to pay child support as ordered constitutes prima facie evidence of a willful violation (see Family Ct Act § 454 [3] [a]; *Matter of Martinez v Lauretano*, 240 AD3d at 598). “Once this showing has been made, the burden shifts to the respondent to present competent, credible evidence of his or her financial inability to comply” (*Matter of Nestor v Nestor*, 236 AD3d at 795 [internal quotation marks omitted]). “Great deference should be given to the credibility determinations of the Support Magistrate, who is in the best position to assess the credibility of the witnesses” (*Matter of Martinez v Lauretano*, 240 AD3d at 598-599).

Here, the father’s failure to pay child support and add-on expenses as ordered constituted prima facie evidence of a willful violation, and the father failed to meet his burden of offering competent, credible evidence of his inability to make the required payments (see *Matter of Pifferrer v Barrera*, 236 AD3d 1044, 1045 [2025]; *Matter of Melendez v Osborne*, 236 AD3d 658, 660 [2025]).

“Furthermore, where, as here, a willful violation . . . is

found, the determination as to the appropriate sanction lies within the Family Court's discretion" (see *Matter of Gioia v Gioia*, 204 AD3d 912, 914 [2022] [internal quotation marks omitted]). Contrary to the father's contention, placing him on probation was not an improvident exercise of discretion (see Family Ct Act § 454 [3] [c]; *Matter of Greenwald v Greenwald*, 172 AD3d 860, 861 [2019]).

Accordingly, the Family Court properly denied the father's objections to so much of the amended order of disposition as found that he willfully violated the child support order and the stipulation provision regarding add-on expenses, and directed that he be placed on probation. Iannacci, J.P., Dowling, Landicino and Love, JJ., concur.

36 In the Matter of Jaclyn Annette Rinaldi, Respondent, v Terence C. Mullen, Appellant. [— NYS3d —]—

Parent, Child and Family—Custody—Relocation of Child—Best Interests

In a proceeding pursuant to Family Court Act article 6, the father appeals from an order of the Family Court, Suffolk County (James W. Malone, J.), dated March 29, 2024. The order, insofar as appealed from, after a hearing, granted that branch of the mother's petition which was to modify an order of the same court dated May 25, 2022, so as to permit the mother to relocate with the parties' children to Florida, and directed that the father's parental access schedule be determined as "mutually agree[d]" by the parties.

Ordered that the order dated March 29, 2024, is affirmed insofar as appealed from, without costs or disbursements.

The parties, who were never married to each other, are the parents of two children. Pursuant to a stipulation entered in October 2018 (hereinafter the 2018 stipulation), the mother was awarded residential custody of the children. The parties modified the 2018 stipulation in August 2019, so as to, inter alia, give the mother final decision-making authority with respect to the children's medical and educational needs. In an order dated May 25, 2022, entered on the parties' consent, the Family Court, among other things, continued joint legal custody of the children with residential custody to the mother. In November 2022, the mother petitioned, inter alia, to modify that order so as to permit her to relocate with the children to Florida. In an order dated March 29, 2024, the court, after a hearing, among other things, granted that branch of the mother's petition. The father appeals.

A parent seeking to relocate with a child bears the burden of establishing by a preponderance of the evidence that the

proposed move would be in the child's best interests (*see Matter of Weekes v Martin-Weekes*, 242 AD3d 761, 762 [2025]; *Quinn v Quinn*, 134 AD3d 688, 689 [2015]). In determining whether a proposed move is in a child's best interests, courts are "free to consider and give appropriate weight to all of the factors that may be relevant to the determination" (*Matter of Tropea v Tropea*, 87 NY2d 727, 740 [1996]; *see Matter of Mackey v Reaves*, 246 AD3d 808, 809-810 [2026]). Among the relevant factors are "each parent's reasons for seeking or opposing the move, the quality of the relationships between the child and the custodial and noncustodial parents, the impact of the move on the quantity and quality of the child's future contact with the noncustodial parent, the degree to which the custodial parent's and child's life may be enhanced economically, emotionally and educationally by the move, and the feasibility of preserving the relationship between the noncustodial parent and child through suitable visitation arrangements" (*Matter of Tropea v Tropea*, 87 NY2d at 740-741). "While not necessarily determinative, the child's expressed preference is some indication of what is in his or her best interests, and, in weighing that factor, a court must consider the age and maturity of the child" (*Weekes v Martin-Weekes*, 242 AD3d at 762-763, quoting *Matter of Fortune v Jasmin*, 232 AD3d 601, 603 [2024]). "Inasmuch as [t]he weighing of these various factors requires an evaluation of the testimony, character, and sincerity of all the parties involved, the court's determinations are entitled to deference and its decision will be upheld if supported by a sound and substantial basis in the record" (*Morelli v Morelli*, 235 AD3d 636, 637 [2025] [citation and internal quotation marks omitted]).

Here, the Family Court's determination that the best interests of the children would be served by permitting the mother to relocate with the children to Florida has a sound and substantial basis in the record, and, under the circumstances of this case, we see no basis to disturb the court's determination.

The parties' remaining contentions are without merit. Duffy, J.P., Christopher, Landicino and Quirk, JJ., concur.

37 In the Matter of Rye Ridge Park, LLC, et al., Appellants, v Village of Rye Brook et al., Respondents. [— NYS3d —]

**Proceeding against Body or Officer—Mandamus—Duty-Bound Acts
Administrative Law—Judicial Review—Determination of Governmental
Entity**

In a proceeding pursuant to CPLR article 78, inter alia, in the nature of mandamus to compel the respondents to accept a

payment in lieu of parkland and return a letter of credit, the petitioners appeal from an order of the Supreme Court, Westchester County (Melissa A. Loehr, J.), dated April 5, 2021. The order, in effect, denied the petition, and thereupon converted the proceeding to an action to recover damages for breach of contract.

Ordered that on the Court's own motion, the notice of appeal is deemed to be an application for leave to appeal from the order, and leave to appeal is granted (*see* CPLR 5701 [c]); and it is further,

Ordered that the order is affirmed; and it is further,

Ordered that one bill of costs is awarded to the respondents.

The petitioners commenced this CPLR article 78 proceeding against the respondents, Village of Rye Brook, Village of Rye Brook Board of Trustees, Village of Rye Brook Village Administrator, and Village of Rye Brook Village Treasurer (hereinafter collectively the Village respondents), *inter alia*, in the nature of mandamus to compel them to accept a monetary payment pursuant to a 2016 resolution adopted by the Village in lieu of parkland and return a letter of credit. In an order dated April 5, 2021, the Supreme Court, in effect, denied the petition, and thereupon converted the proceeding to an action to recover damages for breach of contract. The petitioners appeal.

Contrary to the petitioners' contentions, they were not entitled to mandamus relief to compel the Village respondents to accept a payment in lieu of parkland and to release the letter of credit. "[T]he remedy of mandamus is available to compel a governmental entity or officer to perform a ministerial duty, but does not lie to compel an act which involves an exercise of judgment or discretion" (*Matter of Brusco v Braun*, 84 NY2d 674, 679 [1994]; *see Matter of Town of Riverhead v County of Suffolk*, 237 AD3d 944, 945-946 [2025]). Thus, mandamus is available only to enforce a clear legal right where the public official has failed to perform a duty enjoined by law (*see New York Civ. Liberties Union v State of New York*, 4 NY3d 175, 184 [2005]; *Matter of Town of Riverhead v County of Suffolk*, 237 AD3d at 946). Discretionary acts involve the exercise of reasoned judgment which could typically produce different acceptable results, whereas a ministerial act envisions direct adherence to a governing rule or standard with a compulsory result (*see Alliance to End Chickens as Kaporos v New York City Police Dept.*, 32 NY3d 1091, 1093 [2018]; *Matter of Santman v Satterthwaite*, 238 AD3d 1156, 1159 [2025]). Thus, mandamus may be employed to compel acts that officials are duty-bound to perform (*see Matter of Santman v Satterthwaite*,

238 AD3d at 1159; *Matter of Gonzalez v Village of Port Chester*, 109 AD3d 614, 615 [2013]). Here, the Village respondents were not duty-bound to accept the petitioners' payment in lieu of parkland. The determination as to whether the park was constructed, and therefore whether the Village respondents were obligated to accept a payment in lieu of parkland, was a discretionary determination to be made by the Village respondents.

In a CPLR article 78 proceeding to review a determination of a governmental entity made without an evidentiary hearing, the standard of review is whether the determination was made in violation of lawful procedure, was affected by an error of law, or was arbitrary and capricious or an abuse of discretion (see *Matter of Smith v New York City Fire Dept.*, 239 AD3d 870, 872 [2025]; *Matter of Achille v Laveman*, 224 AD3d 744, 746 [2024]). "An action is arbitrary and capricious when it is taken without sound basis in reason or regard to the facts" (*Matter of Peckham v Calogero*, 12 NY3d 424, 431 [2009]). If the determination has a rational basis, it will be sustained, even if a different result would not be unreasonable (see *Matter of LL 410 E. 78th St. LLC v Division of Hous. & Community Renewal*, 44 NY3d 232, 237 [2025]; *Matter of Ward v City of Long Beach*, 20 NY3d 1042, 1043 [2013]). Judicial review is limited to whether the determination was arbitrary and capricious or without a rational basis in the administrative record, and once it has been determined that an agency's conclusion has a sound basis in reason, the judicial function is at an end (see *Matter of Achille v Laveman*, 224 AD3d at 746; *Matter of Woodson v Town of Riverhead*, 203 AD3d 935, 937 [2022]). Here, the Village respondents' actions had a rational basis and was not arbitrary or capricious, since the park had been substantially built and the required remediation had not been completed.

The petitioners' remaining contention is without merit.

Accordingly, there is no basis to disturb the determination of the Supreme Court. Duffy, J.P., Wooten, Hom and Goldberg Velazquez, JJ., concur.

38 In the *Matter of Tyrone Sanchez, Respondent, v Maria Irizarry, Appellant*. (Proceeding No. 1.) In the *Matter of Maria Irizarry, Appellant, v Tyrone Sanchez, Respondent*. (Proceeding No. 2.) [— NYS3d —]

Parent, Child and Family—Custody—Standing of Grandparent—Extraordinary Circumstances

In related proceedings pursuant to Family Court Act article 6, the maternal grandmother appeals from (1) an amended or-

der of the Family Court, Kings County (Robert A. Markoff, J.), dated October 28, 2024, and (2) an amended order of the same court dated December 11, 2024. The amended order dated October 28, 2024, insofar as appealed from, without a hearing, granted that branch of the father's motion which was for summary judgment on his petition to modify a prior order of the same court (Jacqueline D. Williams, J.) dated February 1, 2023, so as to award him sole legal and physical custody of the subject child. The amended order dated December 11, 2024, upon the amended order dated October 28, 2024, granted the father's petition and awarded him sole legal and physical custody of the subject child.

Ordered that the appeal from the amended order dated October 28, 2024, is dismissed, without costs or disbursements, as that order was superseded by the amended order dated December 11, 2024; and it is further,

Ordered that the amended order dated December 11, 2024, is affirmed, without costs or disbursements.

In February 2023, the father and the maternal grandparents (hereinafter the grandparents) of the subject child consented to an order awarding the grandparents sole physical custody of the child and awarding the grandparents and the father joint legal custody of the child, due to the mother's mental health struggles. Following the mother's death in July 2023, the father and the maternal grandmother (hereinafter the grandmother) both filed petitions to modify an order dated February 1, 2023, so as to grant each of them sole legal and physical custody of the child.

The father moved, *inter alia*, for summary judgment on his petition and dismissing the grandmother's petition based on lack of standing. In an amended order dated October 28, 2024, the Family Court, among other things, granted that branch of the father's motion which was for summary judgment on his petition. The court also determined that in light of the mother's death, the grandmother's custody petition should be deemed a petition for visitation, and directed the parties to appear for a fact-finding hearing on the issue of visitation. In an amended order dated December 11, 2024, the court granted the father's petition and awarded him sole legal and physical custody of the subject child. The grandmother appeals.

"Pursuant to Domestic Relations Law § 72 (2) (a), a grandparent has standing to seek custody of a child where the grandparent demonstrates the existence of extraordinary circumstances, such as 'surrender, abandonment, persisting neglect, unfitness, and unfortunate or involuntary disruption of custody over an

extended period of time or other like extraordinary circumstances’ ” (*Matter of Smith v Dixon*, 214 AD3d 889, 890 [2023] [citation omitted], quoting *Matter of Bennett v Jeffreys*, 40 NY2d 543, 544, 546 [1976]). “The nonparent bears the burden of proving the existence of such extraordinary circumstances, and only if the nonparent meets this burden does the court determine whether the best interests of the child warrant awarding custody to the nonparent” (*id.*; see *Matter of Seltzer v Patterson*, 193 AD3d 1057, 1058 [2021]; *Matter of Sellers v Brown*, 155 AD3d 1047, 1048 [2017]). “For once it is found that the parent is fit, and has neither abandoned, surrendered, nor otherwise forfeited parental rights, the inquiry ends and the natural parent may not be deprived the custody of his or her child” (*Matter of Male Infant L.*, 61 NY2d 420, 427 [1984]; see *Matter of Bennett v Jeffreys*, 40 NY2d at 549).

Here, the father demonstrated, *prima facie*, that the grandmother lacked standing to petition for custody of the child. The father’s sworn allegations demonstrated that he retained care and control of the child throughout the period wherein he shared custody with the grandparents, and the grandmother’s conclusory petition failed to sufficiently allege an extended disruption in custody or the existence of another extraordinary circumstance (see *Matter of Smith v Dixon*, 214 AD3d at 890; *Matter of Smith v Cooks*, 148 AD3d 814, 815 [2017]; cf. *Matter of Dawn A.P.-T. v Sherwyn R.*, 243 AD3d 573, 574 [2025]).

In opposition, the grandmother failed to raise a triable issue of fact. The affirmation of the grandmother’s attorney was not based upon personal knowledge (see *Zuckerman v City of New York*, 49 NY2d 557, 563 [1980]; *Matter of Hope P. [Stephanie B.]*, 149 AD3d 947, 948-949 [2017]) and, in any event, even if it were based on personal knowledge, failed to raise a triable issue of fact as to whether an extended disruption in the father’s custody of the child had occurred (see *Matter of Male Infant L.*, 61 NY2d at 428; *Matter of Sellers v Brown*, 155 AD3d at 1049; cf. *Matter of Suarez v Williams*, 26 NY3d 440, 451-452 [2015]).

Contrary to the grandmother’s contention, “[a] hearing to determine the issue of standing is not necessary where there are no triable issues of fact raised in the papers submitted” (*Matter of Schmitt v Troche*, 155 AD3d 739, 740 [2017] [internal quotation marks omitted]; see *Matter of Smith v Dixon*, 214 AD3d at 890).

Accordingly, the Family Court properly granted that branch of the father’s motion which was for summary judgment on his petition, granted his petition, and awarded him sole legal and physical custody of the child (see *Matter of Male Infant L.*, 61

NY2d at 430). Dillon, J.P., Brathwaite Nelson, Wan and Hom, JJ., concur.

39 In the Matter of Michael Stecker, Appellant, v New York State Unified Court System-Office of Court Administration, Respondent. [252 NYS3d 293]—Proceeding pursuant to CPLR article 78 to review a determination of the New York State Office of Court Administration dated July 13, 2022, which proceeding was transferred to this Court pursuant to CPLR 7804 (g) by order of the Supreme Court, Suffolk County (Joseph A. Santorelli, J.), dated December 19, 2022, and appeal by the petitioner from the same order. Justice Goldberg Velazquez has been substituted for former Justice Miller (*see* 22 NYCRR 1250.1 [b]).

Ordered that the appeal is dismissed (*see* CPLR 5701 [b]; 7804 [g]); and it is further,

Adjudged that the proceeding is dismissed as academic; and it is further,

Ordered that one bill of costs is awarded to the respondent.

The proceeding has been rendered academic in light of the revised determination dated March 15, 2023, which superseded the determination dated July 13, 2022 (*see Matter of Stecker v New York State Unified Ct. Sys.-Off. of Ct. Admin.*, 248 AD3d 931 [2026] [decided herewith]). Barros, J.P., Iannacci, Voutsinas and Goldberg Velazquez, JJ., concur.

40 In the Matter of Michael Stecker, Appellant, v New York State Unified Court System-Office of Court Administration, Respondent. [— NYS3d —]—

Administrative Law—Judicial Review—Finding of Misconduct

Administrative Law—Judicial Review—Termination of Employment

Proceeding pursuant to CPLR article 78 to review a revised determination of the New York State Office of Court Administration dated March 15, 2023, which adopted the report and recommendations of a hearing officer dated June 27, 2022, made after a hearing, finding that the petitioner was guilty of misconduct, and terminated the petitioner's employment as a court officer, which proceeding was transferred to this Court pursuant to CPLR 7804 (g) by order of the Supreme Court, Suffolk County (Joseph A. Santorelli, J.), dated October 18, 2023, and appeal by the petitioner from the same order. Justice Goldberg Velazquez has been substituted for former Justice Miller (*see* 22 NYCRR 1250.1 [b]).

Ordered that the appeal is dismissed (*see* CPLR 5701 [b]; 7804 [g]); and it is further,

Adjudged that the revised determination is confirmed, the petition is denied, and the proceeding is dismissed on the merits; and it is further,

Ordered that one bill of costs is awarded to the respondent.

The petitioner was employed as a court officer by the New York State Unified Court System (hereinafter UCS) for approximately 14 years. On or about December 21, 2021, the New York State Office of Court Administration (hereinafter OCA) filed a notice of charges against the petitioner, alleging, in one charge, that he had engaged in specified acts of misconduct when, between January 28, 2021, and March 27, 2021, he shared 26 posts on Facebook that featured biased and discriminatory language and images. The petitioner denied the charge.

In March 2022, a disciplinary hearing was held. At the conclusion of the hearing, a hearing officer issued a report and recommendations dated June 27, 2022, finding the petitioner guilty of each specified act of misconduct and recommending that the petitioner's employment be terminated. In a determination dated July 13, 2022, Deputy Chief Administrative Judge Norman St. George adopted the hearing officer's report and recommendations and terminated the petitioner's employment. Thereafter, on March 15, 2023, Deputy Chief Administrative Judge St. George issued a revised determination in which he again adopted the hearing officer's report and recommendations and terminated the petitioner's employment. The petitioner commenced this proceeding pursuant to CPLR article 78 to review the revised determination, and the Supreme Court transferred the proceeding to this Court pursuant to CPLR 7804 (g).

In a proceeding pursuant to CPLR article 78, "[j]udicial review of an administrative determination made after a hearing required by law, and at which evidence was taken, is limited to whether that determination is supported by substantial evidence" (*Matter of Afolayan v Industrial Bd. of Appeals*, 229 AD3d 698, 699 [2024] [internal quotation marks omitted]; see CPLR 7803 [4]). "Substantial evidence is such relevant proof as a reasonable mind may accept as adequate to support a conclusion or ultimate fact" (*Matter of World Motors, Inc. v Dugan*, 226 AD3d 1037, 1039 [2024] [internal quotation marks omitted]). This is a "minimal standard, demanding only that a given inference is reasonable and plausible, not necessarily the most probable, and where substantial evidence exists, the reviewing court may not substitute its judgment for that of the agency, even if the court would have decided the matter differ-

ently” (*Matter of Linksman v New York State Dept. of Motor Vehs.*, 218 AD3d 685, 686 [2023] [alteration and internal quotation marks omitted]).

Here, the finding that the petitioner committed misconduct was supported by substantial evidence. OCA demonstrated that the biased nature of the petitioner’s comments, which were connected to a public Facebook profile that identified him as a Sergeant with UCS, violated the internal rules and regulations, as well as the ethical codes, of UCS (*see* 22 NYCRR 50.1 [II] [C]). Further, given the public facing nature of the petitioner’s position in a system that requires fairness and equality, the administrative record supports the conclusion that the bias illustrated by the petitioner’s posts negatively impacted UCS’s ability to maintain neutrality and serve vulnerable populations.

Contrary to the petitioner’s contentions, the revised determination did not violate his First Amendment right to free speech, as OCA met its burden of establishing that discipline arising out of the petitioner’s protected activity was justified (*see Matter of Santer v Board of Educ. of E. Meadow Union Free Sch. Dist.*, 23 NY3d 251, 263-265 [2014]). Nor did the revised determination violate the petitioner’s First Amendment right to the free exercise of religion, because the prohibition on discriminatory speech was neutral with respect to religion and generally applicable to all UCS employees (*see C.F. v New York City Dept. of Health & Mental Hygiene*, 191 AD3d 52, 76 [2020]).

“Judicial review of an administrative penalty is limited to whether the measure or mode of penalty or discipline imposed constitutes an abuse of discretion as a matter of law” (*Matter of Maselli v Yonkers Bd. of Educ.*, 231 AD3d 1029, 1030-1031 [2024] [internal quotation marks omitted]). “An administrative penalty must be upheld unless it is so disproportionate to the offense as to be shocking to one’s sense of fairness” (*Matter of Guarnieri v County of Rockland*, 226 AD3d 1018, 1020 [2024] [internal quotation marks omitted]). Contrary to the petitioner’s contention, the penalty of termination of employment was not so disproportionate to the offense as to be shocking to one’s sense of fairness (*see Matter of Phelps v State of N.Y.—Unified Ct. Sys.*, 208 AD3d 880, 881 [2022]; *Matter of Sekul v City of Poughkeepsie*, 195 AD3d 622, 625 [2021]).

Accordingly, we confirm the revised determination, deny the petition, and dismiss the proceeding. Barros, J.P., Iannacci, Voutsinas and Goldberg Velazquez, JJ., concur.

41 In the Matter of Michael Streeter, Appellant, v New York City Department of Environmental Protection, Respondent. [—NYS3d —]

Administrative Law—Judicial Review—Violation of Vehicle Idling Rule—Determination of Frivolous Complaint**Administrative Law—Judicial Review—Written Notification of Duplicative Complaint**

In a proceeding pursuant to CPLR article 78, *inter alia*, to review a determination of the New York City Department of Environmental Protection, in effect, that the petitioner's citizen complaint against an alleged motor vehicle idler under Administrative Code of the City of New York §§ 24-163 and 24-182 was frivolous, the petitioner appeals from an order and judgment (one paper), of the Supreme Court, Kings County (Patria Frias-Colón, J.), dated February 16, 2024. The order and judgment, insofar as appealed from, denied the petition and dismissed the proceeding.

Ordered that the order and judgment is affirmed insofar as appealed from, with costs.

On February 14, 2023, the petitioner electronically filed a citizen complaint with the New York City Department of Environmental Protection (hereinafter DEP), alleging that, between 11:41 a.m. and 11:45 a.m. on that date, he had observed an identified commercial vehicle idling in excess of three minutes on Willoughby Street between Albee Square West and Flatbush Avenue in Brooklyn. The same day, the petitioner electronically filed a second citizen complaint, alleging that, between 11:52 a.m. and 11:56 a.m., he had observed the same vehicle, in the same location, idling for more than three minutes. The first complaint was accepted and pursued by the DEP. However, the petitioner received an error message when attempting to file the second complaint, indicating that the complaint was a duplicate. The petitioner thereafter corresponded with the DEP in an attempt to have the second complaint accepted on the basis that the vehicle had moved "a truck's length" after the first idling incident. The DEP advised the petitioner that because the same vehicle was observed idling at the same address, a second complaint, in effect, was frivolous and would not be accepted.

The petitioner subsequently commenced this proceeding pursuant to CPLR article 78 to review the DEP's determination, in effect, that the second complaint was frivolous and to compel the DEP to provide him with a summons form to allow him to self-prosecute the second complaint. In an order and judgment dated February 16, 2024, the Supreme Court, among other things, denied the petition and dismissed the proceeding. The petitioner appeals.

"In reviewing an administrative agency determination,

[courts] must ascertain whether there is a rational basis for the action in question or whether it is arbitrary and capricious” (*Matter of Edwards v New York City Dept. of Educ.*, 228 AD3d 935, 936 [2024] [internal quotation marks omitted]; see *Matter of Gilman v New York State Div. of Hous. & Community Renewal*, 99 NY2d 144, 149 [2002]). “An action is arbitrary and capricious when it is taken without sound basis in reason or regard to the facts” (*Matter of Peckham v Calogero*, 12 NY3d 424, 431 [2009]; see *Matter of Edwards v New York City Dept. of Educ.*, 228 AD3d at 936). “If the court finds that the determination is supported by a rational basis, it must sustain the determination even if the court concludes that it would have reached a different result than the one reached by the agency” (*Matter of Peckham v Calogero*, 12 NY3d at 431; see *Matter of Edwards v New York City Dept. of Educ.*, 228 AD3d at 936).

With exceptions not applicable here, section 24-163 (a) of the Administrative Code of the City of New York (hereinafter Administrative Code) prohibits vehicles from idling for more than three minutes. “Any natural person” is permitted to serve a complaint on the DEP alleging that this Administrative Code provision has been violated (*id.* § 24-182 [a]). In response, the DEP may bring a proceeding against the alleged violator before the Office of Administrative Trials and Hearings (hereinafter OATH), and if the DEP prevails, the citizen complainant is entitled to 25% of any civil penalty imposed on the violator (see *id.* at § 24-182 [d]). A citizen complainant can self-prosecute before OATH in the event that the DEP fails to serve a notice of violation for the violation alleged in the complaint and fails to notify the complainant in writing of its determination that the complaint is “frivolous or duplicitous” (*id.* at § 24-182 [b]).

Here, the DEP’s determination, in effect, that the petitioner’s second complaint was frivolous was not arbitrary and capricious (see *Matter of Welde v New York City Dept. of Env’tl. Protection*, 237 AD3d 631, 633 [2025]). The conduct alleged in the petitioner’s two complaints concerned the same vehicle, idling at the same address, at 11:41 a.m. and 11:52 a.m. It was rational for the DEP to determine that pursuit of the second complaint under these circumstances would be frivolous (see *id.*).

Furthermore, inasmuch as the petitioner failed to demonstrate that he had a “clear legal right to the relief,” the Supreme Court properly denied so much of the petition as sought to compel the DEP to provide him with a summons form to allow him to self-prosecute the second complaint (*Matter of Lebowitz v Suffolk County*, 237 AD3d 938, 940 [2025]; see

Matter of Bistran Land Corp. v Lynch, 170 AD3d 1170, 1171 [2019]). In that respect, written notification to the petitioner that the second complaint was considered duplicative of the first and would not be allowed was sufficient to satisfy Administrative Code § 24-182 (b) (2).

Accordingly, we affirm the order and judgment insofar as appealed from. Iannacci, J.P., Chambers, Wan and Taylor, JJ., concur.

42 NYCTL 2019-A Trust et al., Respondents, v Westside Plaza Realty, LLC, Appellant, et al., Defendants. [— NYS3d —]—

Judgments—Default Judgment—Vacatur—Reasonable Excuse

Judgments—Default Judgment—Vacatur—Interests of Substantial Justice

In an action to foreclose a tax lien, the defendant Westside Plaza Realty, LLC, appeals from an order of the Supreme Court, Queens County (Cassandra A. Johnson, J.), dated May 30, 2024. The order denied that defendant's motion pursuant to CPLR 317 and 5015 (a) (1) and (4) to vacate a judgment of foreclosure and sale of the same court entered July 26, 2023, upon its failure to appear or answer the complaint, for leave to serve a late answer, and to set aside the foreclosure sale of the subject property.

Ordered that the order is affirmed, with costs.

In November 2020, the plaintiffs commenced this action against the defendant Westside Plaza Realty, LLC (hereinafter the defendant), among others, to foreclose a tax lien on certain real property located in Queens (hereinafter the property). According to an affidavit of service of the plaintiffs' process server, the defendant was served by delivery of the summons and complaint to the Secretary of State on December 21, 2020. The defendant failed to appear or answer the complaint. A judgment of foreclosure and sale, upon the defendant's default, was entered on July 26, 2023. In September 2023, a tax lien foreclosure auction was held, and the property was sold. The defendant moved pursuant to CPLR 317 and 5015 (a) (1) and (4) to vacate the judgment of foreclosure and sale, for leave to serve a late answer, and to set aside the foreclosure sale of the property. In an order dated May 30, 2024, the Supreme Court denied the defendant's motion. The defendant appeals.

"Under CPLR 5015 (a) (4), a default must be vacated once the movant demonstrates lack of jurisdiction" (*Matter of Foreclosure of Tax Liens*, 144 AD3d 1033, 1034 [2016]). Here, the defendant failed to demonstrate that the Supreme Court lacked jurisdiction, as the affidavit of service demonstrated that ser-

vice was properly effectuated upon the Secretary of State in accordance with the Limited Liability Company Law (*see* Limited Liability Company Law § 303), and the defendant failed to rebut the presumption of proper service created by the affidavit of service (*see Greenwood Realty Co. v Katz*, 187 AD3d 1153, 1153 [2020]).

As the Supreme Court correctly determined, CPLR 317 does not apply to this action (*see* Administrative Code of City of NY § 11-340; *NYCTL 1998-2 Trust v Alanis Realty LLC*, 176 AD3d 486, 486 [2019]; *NYCTL 2015-A Trust v Diffio Props. Corp.*, 171 AD3d 538, 538 [2019]).

“A defendant seeking to vacate a default pursuant to CPLR 5015 (a) (1) must demonstrate a reasonable excuse for the default and a potentially meritorious defense” (*Barnett v Diamond Fin. Co., Inc.*, 202 AD3d 651, 652 [2022]; *see Nico v Olajitan*, 229 AD3d 561, 562 [2024]). “The determination of what constitutes a reasonable excuse is within the sound discretion of the Supreme Court” (*Wachovia Mtge., FSB v Coleman*, 170 AD3d 1244, 1245 [2019]; *see Nico v Olajitan*, 229 AD3d at 562).

Here, the defendant’s conclusory denial of receipt of the summons and complaint served through the Secretary of State did not amount to a reasonable excuse for the defendant’s default (*see NYCTL 2019-A Trust v 54 Greene Ave. JV, LLC*, 240 AD3d 802, 803 [2025]; *Dove v 143 Sch. St. Realty Corp.*, 172 AD3d 1315, 1317 [2019]). Contrary to the defendant’s contention, the record demonstrates that the address on file with the Secretary of State was correct at the time of service. Even if the defendant’s address on file with the Secretary of State was incorrect at the time of service, the defendant nevertheless failed to adequately explain its failure to update its address with the Secretary of State (*see Wise v Classon Vil., L.P.*, 172 AD3d 1444, 1446 [2019]; *NYCTL 2013-A Trust v Heights Houses Corp.*, 172 AD3d 1078, 1079 [2019]). In light of the defendant’s failure to establish a reasonable excuse for its default, it is unnecessary to determine whether the defendant demonstrated the existence of a potentially meritorious defense (*see Almonte v Soldati Realty, Inc.*, 231 AD3d 1103, 1105 [2024]).

The defendant also failed to demonstrate that vacatur was warranted in the interests of substantial justice. In addition to the specific grounds set forth in CPLR 5015 (a), a court may, in its discretion, vacate its own judgment “for sufficient reason and in the interests of substantial justice” (*Woodson v Mendon Leasing Corp.*, 100 NY2d 62, 68 [2003]). “A court’s inherent power to exercise control over its judgments is not plenary, and

should be resorted to only to relieve a party from judgments taken through [fraud,] mistake, inadvertence, surprise or excusable neglect” (*Matter of McKenna v County of Nassau, Off. of County Attorney*, 61 NY2d 739, 742 [1984] [internal quotation marks omitted]; see *LaSalle Bank, N.A. v Delice*, 175 AD3d 1283 [2019]). A court should only exercise its discretionary authority to vacate a judgment in the interests of substantial justice where “unique or unusual circumstances . . . warrant such action” (*Cox v Marshall*, 161 AD3d 1140, 1142 [2018] [internal quotation marks omitted]; see *MTGLQ Invs., L.P. v Balan*, 203 AD3d 717, 719 [2022]). Here, “the circumstances presented were not unique or unusual and did not warrant the invocation of a court’s inherent power to vacate an order in the interests of substantial justice” (*Cox v Marshall*, 161 AD3d at 1142).

Accordingly, the Supreme Court properly denied the defendant’s motion pursuant to CPLR 317 and 5015 (a) (1) and (4) to vacate the judgment of foreclosure and sale, for leave to serve a late answer, and to set aside the foreclosure sale of the property. Iannacci, J.P., Christopher, Ventura and Hom, JJ., concur.

43 The People of the State of New York, Respondent, v John Aponte, Appellant. [— NYS3d —]—

Crimes—Fitness to Proceed to Trial—Competency Examination

Crimes—Sentence—Greater than Sentence Offered during Plea Negotiations

Appeal by the defendant from a judgment of the Supreme Court, Richmond County (Ralph J. Porzio, J.), rendered July 22, 2022, convicting him of making a terroristic threat (four counts), aggravated harassment in the second degree (nine counts), criminal contempt in the second degree, and obstructing governmental administration in the second degree (eight counts), upon a jury verdict, and sentencing him to consecutive determinate terms of imprisonment of six years, to be followed by a period of postrelease supervision of five years, on each of the convictions of making a terroristic threat under counts 3, 4, 5, and 20 of the indictment and concurrent definite terms of incarceration of one year on each of the remaining misdemeanor convictions.

Ordered that the judgment is modified, as a matter of discretion in the interest of justice, (1) by reducing the terms of imprisonment imposed on the convictions of making a terroristic threat under counts 3, 4, 5, and 20 of the indictment from determinate terms of imprisonment of six years to determinate terms of imprisonment of four years, and (2) by directing that the sentences imposed on the convictions of mak-

ing a terroristic threat under counts 4, 5, and 20 of the indictment shall run concurrently with each other and consecutively to the sentence imposed on the conviction of making a terroristic threat under count 3 of the indictment, for a total term of imprisonment of eight years; as so modified, the judgment is affirmed.

In May 2019, the defendant was charged with, among other crimes, assault in the third degree. In 2021, additional charges were brought against the defendant, including making a terroristic threat (Penal Law § 490.20), in connection with threatening letters he sent to the Supreme Court and an assistant district attorney assigned to the case. In August 2021, the defendant was admitted to Kirby Forensic Psychiatric Center (hereinafter Kirby). In September 2021, Kirby issued a report determining that the defendant was fit to proceed. Thereafter, defense counsel requested additional examinations pursuant to CPL 730.10, which the Supreme Court denied, finding the defendant fit to proceed to trial. After a jury trial, the defendant was convicted of making a terrorist threat (four counts), aggravated harassment in the second degree (nine counts), criminal contempt in the second degree, and obstructing governmental administration (eight counts), and acquitted of assault in the third degree and attempted assault in the third degree.

“Although [a] defendant is presumed competent, ‘[a]t any time after a defendant is arraigned upon an accusatory instrument other than a felony complaint and before the imposition of sentence, . . . the court wherein the criminal action is pending must issue an order of examination when it is of the opinion that the defendant may be an incapacitated person’” (*People v Sloane*, 238 AD3d 899, 901 [2025] [citation and internal quotation marks omitted], quoting CPL 730.30 [1]). “An ‘incapacitated person’ is ‘a defendant who as a result of mental disease or defect lacks capacity to understand the proceedings against him [or her] or to assist in his [or her] own defense’” (*People v Phillips*, 16 NY3d 510, 516 [2011], quoting CPL 730.10 [1]; see *People v Sloane*, 238 AD3d at 901-902). “The question of whether to order a CPL 730.10 examination lies within the discretion of the trial court” (*People v Warren J.T.*, 208 AD3d 689, 691 [2022]; see *People v Morgan*, 87 NY2d 878, 880 [1995]).

Contrary to the defendant’s contention, the Supreme Court providently exercised its discretion in declining to order a further examination with regard to the defendant’s competency. Although the defendant had previously been deemed unfit to proceed, he had been reevaluated and found competent following his admission to Kirby. “The court was entitled to

give weight to the findings and conclusions of the defendant's most recent competency examination, which found him fit to proceed, and to its own observations of the defendant" (*People v Soto*, 23 AD3d 586, 586 [2005]; see *People v Forrest*, 186 AD3d 1395, 1397 [2020]; *People v King*, 171 AD3d 1217, 1217 [2019]). Further, the court recognized the defendant's ability to communicate with the court and defense counsel, as well as his ability to understand and participate in the proceedings whenever he chose to do so (see *People v Sloane*, 238 AD3d at 902; *People v Clark*, 189 AD3d 1453, 1456 [2020]).

The defendant's contention that the Supreme Court imposed a harsher sentence as punishment for exercising his right to a jury trial rather than accepting a plea offer is unpreserved for appellate review (see *People v Douglas*, 200 AD3d 795, 798 [2021]). In any event, "the fact that the sentence imposed after trial was greater than the sentence offered during plea negotiations does not, standing alone, establish that the defendant was punished for exercising his right to trial" (*id.* at 799 [internal quotation marks omitted]; see *People v Emanuel*, 239 AD3d 767, 769 [2025]). However, the sentence imposed was excessive to the extent indicated (see *People v Suitte*, 90 AD2d 80 [1982]). Barros, J.P., Brathwaite Nelson, Warhit and Goldberg Velazquez, JJ., concur.

44 The People of the State of New York, Respondent, v John Bobbitt, Also Known as "Black," Appellant. [— NYS3d —]

Crimes—Verdict—Sufficiency of Evidence

Crimes—Lesser Included Offense—Failure to Submit to Jury

Appeal by the defendant from a judgment of the County Court, Westchester County (Robert A. Neary, J.), rendered May 19, 2023, convicting him of murder in the second degree and criminal possession of a weapon in the second degree, upon a jury verdict, and imposing sentence.

Ordered that the judgment is affirmed.

The defendant's contention that the evidence was legally insufficient to support his convictions is unpreserved for appellate review (see CPL 470.05 [2]; *People v Hawkins*, 11 NY3d 484, 492 [2008]; *People v Spencer*, 244 AD3d 1254, 1255 [2025]). In any event, viewing the evidence in the light most favorable to the People (see *People v Contes*, 60 NY2d 620, 621 [1983]), we find that the evidence was legally sufficient to establish the defendant's guilt beyond a reasonable doubt (see *People v Li*, 34 NY3d 357, 363 [2019]; *People v Danielson*, 9 NY3d 342, 349 [2007]). Moreover, in fulfilling our responsibility to conduct an

independent review of the weight of the evidence (*see* CPL 470.15 [5]; *People v Danielson*, 9 NY3d at 349), we nevertheless accord great deference to the jury's opportunity to view the witnesses, hear the testimony, and observe demeanor (*see People v Bleakley*, 69 NY2d 490, 495 [1987]). Upon reviewing the record here, we are satisfied that the verdict of guilt was not against the weight of the evidence (*see People v Romero*, 7 NY3d 633, 643-644 [2006]).

Contrary to the defendant's contention, the County Court did not err in failing to submit to the jury the crime of manslaughter in the first degree as a lesser included offense of murder in the second degree. "A court may, in addition, to submitting the greatest offense which it is required to submit, submit in the alternative any lesser included offense if there is a reasonable view of the evidence which would support a finding that the defendant committed the lesser but not the greater offense" (*People v Ashley*, 245 AD3d 732, 733 [2026] [internal quotation marks omitted], quoting *People v Hull*, 27 NY3d 1056, 1058 [2016]; *see* CPL 300.50 [1]). Here, viewing the evidence in the light most favorable to the defendant (*see People v Rivera*, 23 NY3d 112, 122 [2014]), there was no reasonable view of the evidence that would support a finding that the defendant committed the lesser offense of manslaughter in the first degree but not the greater offense of murder in the second degree (*see People v Cooper*, 237 AD3d 844, 845 [2025]; *People v Bonich*, 208 AD3d 679, 681 [2022]).

The sentence imposed was not excessive (*see People v Suitte*, 90 AD2d 80 [1982]). Iannacci, J.P., Dowling, Ventura and Golia, JJ., concur.

45 The People of the State of New York, Respondent, v Theresa R. Caporaso, Appellant. [252 NYS3d 293]—

Crimes—Appeal—Reviewable on Direct Appeal

Appeal by the defendant from an amended judgment of the Supreme Court, Nassau County (Teresa K. Corrigan, J.), rendered February 6, 2025, revoking a sentence of probation previously imposed by the same court, upon a finding that she violated a condition thereof, upon her admission, and imposing a sentence of imprisonment followed by a period of conditional discharge upon her previous conviction of driving while intoxicated as a felony.

Ordered that the amended judgment is affirmed.

The defendant was convicted of driving while intoxicated as a felony (Vehicle and Traffic Law § 1192 [2]). Subsequently, it was alleged that the defendant violated a condition of her

probation. The Supreme Court found, upon the defendant's admission, that the defendant violated a condition of probation and imposed a sentence of imprisonment followed by a period of conditional discharge. The defendant appeals from the amended judgment.

Under the circumstances, the defendant's challenge to the voluntariness of her admission to violating probation is reviewable on this direct appeal from the amended judgment since "the defendant had no actual or practical ability to object to the voluntariness of [her] admission to the violation of probation during the few seconds that elapsed between [her] admission and the imposition of sentence, and the alleged deficiencies in [her] admission are otherwise clear from the face of the record" (*People v Mathews*, 193 AD3d 879, 880 [2021] [internal quotation marks omitted]; see *People v Conceicao*, 26 NY3d 375, 381 [2015]).

However, contrary to the defendant's contention, the record establishes that she knowingly, intelligently, and voluntarily admitted that she violated a condition of probation (see *People v Pichardo-Ramirez*, 235 AD3d 902, 904 [2025]; *People v King*, 170 AD3d 1041, 1042 [2019]). Dillon, J.P., Brathwaite Nelson, Wan and Hom, JJ., concur.

46 The People of the State of New York, Respondent, v Temika Ellis, Appellant. [252 NYS3d 296]—Appeal by the defendant, as limited by her motion, from a sentence of the Supreme Court, Queens County (David J. Kirschner, J.), imposed September 29, 2023, upon her plea of guilty, on the ground that the period of postrelease supervision imposed as part of the sentence was excessive.

Ordered that the sentence is affirmed.

Contrary to the defendant's contention, the period of post-release supervision imposed as part of the sentence was not excessive (see *People v Sanchez*, 221 AD3d 734 [2023]; *People v Suite*, 90 AD2d 80 [1982]). Barros, J.P., Brathwaite Nelson, Warhit, Ventura and Quirk, JJ., concur.

47 The People of the State of New York, Respondent, v Kliford Gutti-Mendoza, Appellant. [252 NYS3d 294]—Appeal by the defendant, as limited by his motion, from a sentence of the Supreme Court, Kings County (Jill Konviser, J.), imposed October 30, 2023, upon his plea of guilty, on the ground that the period of postrelease supervision imposed as part of the sentence was excessive.

Ordered that the sentence is affirmed.

Contrary to the defendant's contention, the period of post-

release supervision imposed as part of the sentence was not excessive (*see People v Suitte*, 90 AD2d 80 [1982]). Dillon, J.P., Genovesi, Ford, Taylor and McCormack, JJ., concur.

48 The People of the State of New York, Respondent, v Darrel D. Madison, Appellant. [253 NYS3d 735]—

**Crimes—Plea of Guilty—Validity—Knowing, Voluntary, and Intelligent
Crimes—Right to Counsel—Effective Representation—Plea of Guilty**

Appeal by the defendant from a judgment of the County Court, Suffolk County (Anthony Senft, Jr., J.), rendered August 10, 2022, as amended March 14, 2023, convicting him of criminal possession of a controlled substance in the third degree and animal fighting (*see* Agriculture and Markets Law § 351 [2] [b]), upon his plea of guilty, and imposing sentence.

Ordered that the judgment, as amended, is affirmed.

“In order to be valid, a plea of guilty must be entered voluntarily, knowingly, and intelligently” (*People v Keller*, 168 AD3d 1098, 1099 [2019]). “Whether a plea was knowing, intelligent and voluntary is dependent upon a number of factors including the nature and terms of the agreement, the reasonableness of the bargain, and the age and experience of the accused” (*People v Garcia*, 92 NY2d 869, 870 [1998] [internal quotation marks omitted]; *see People v Gaity*, 216 AD3d 667, 668 [2023]).

Here, the defendant contends that his plea of guilty was not knowing, voluntary, or intelligent because he was misinformed at the time of the plea regarding the legality of his promised sentence. Although the defendant did not seek to withdraw his plea or otherwise raise this issue before the County Court, the defendant’s challenge to the voluntariness of his plea on this ground is properly before this Court, since “a defendant can hardly be expected to move to withdraw his plea on a ground of which he has no knowledge” (*People v Peque*, 22 NY3d 168, 182 [2013] [internal quotation marks omitted]; *see People v Scott*, 44 NY3d 302, 306-307 [2025]; *People v Keller*, 168 AD3d at 1099). Nevertheless, the record demonstrates that the defendant’s plea was entered knowingly, voluntarily, and intelligently. Given that the defendant received at resentencing the minimum term of imprisonment and a term of postrelease supervision that was less than what was promised at the time of the plea, the resentence comported with the defendant’s reasonable understanding and legitimate expectations (*see People v Collier*, 22 NY3d 429, 434 [2013]; *People v Luck*, 175 AD3d 1430, 1431-1432 [2019]; *People v Moss*, 166 AD3d 655, 655 [2018]).

“A defendant has the right to the effective assistance of

counsel before deciding whether to plead guilty” (*People v Tindley*, 202 AD3d 838, 838 [2022]). “To establish ineffective assistance of counsel under the federal standard, a defendant is required to demonstrate that counsel’s performance fell below an objective standard of reasonableness and that the deficient performance prejudiced the defense” (*People v Moran*, 244 AD3d 1250, 1251 [2025]; see *Strickland v Washington*, 466 US 668 [1984]). “Pursuant to the New York standard, a court must examine whether the evidence, the law, and the circumstances of a particular case, viewed in totality and as of the time of the representation, reveal that the attorney provided meaningful representation” (*People v Montgomery*, 235 AD3d 1004, 1005 [2025] [internal quotation marks omitted]; see *People v Moran*, 244 AD3d at 1251). “In cases asserting ineffective assistance of counsel in the context of a guilty plea, ‘the defendant must show that there is a reasonable probability that, but for counsel’s errors, he would not have pleaded guilty and would have insisted on going to trial, or that the outcome of the proceedings would have been different’ ” (*People v Flinn*, 188 AD3d 1093, 1094 [2020], quoting *People v Parson*, 27 NY3d 1107, 1108 [2016]).

Here, by pleading guilty, the defendant forfeited those claims of ineffective assistance of counsel that do not directly involve the plea-negotiation process and sentence (see *People v Chacon-Diaz*, 203 AD3d 846, 846 [2022]). To the extent that the defendant contends that the alleged ineffective assistance of counsel involved the negotiation of the plea and affected the voluntariness thereof, the record demonstrates that he was not deprived of the effective assistance of counsel. Rather, the record demonstrates that the defendant received an advantageous plea, and the defendant failed to demonstrate a reasonable probability that, but for defense counsel’s errors, the defendant would not have entered a plea of guilty and would have insisted on going to trial or that the outcome of the proceedings would have been different (see *People v Moran*, 244 AD3d at 1252; *People v McIntyre*, 208 AD3d 1365, 1366 [2022]). Chambers, J.P., Dowling, Wan and Ventura, JJ., concur.

49 The People of the State of New York, Respondent, v Asa Robert, Appellant. [252 NYS3d 303]—Application by the defendant for a writ of error coram nobis seeking leave to file a late notice of appeal from a judgment of the Supreme Court, Kings County, rendered January 10, 2017.

Ordered that the application is granted, and the defendant’s application is deemed to be a timely notice of appeal.

The defendant has established his entitlement to the relief

requested (*see People v Syville*, 15 NY3d 391 [2010]). Iannacci, J.P., Wooten, Ventura and Ottley, JJ., concur.

50 The People of the State of New York, Respondent, v Julio Rodriguez-Rodriguez, Appellant. [— NYS3d —]—

Crimes—Fair Trial—Prompt Outcry Exception to Hearsay Rule

Crimes—Evidence—Victim’s Outcry—Promptness

Crimes—Conduct of Trial Judge—Questioning of Witness

Appeal by the defendant from a judgment of the Supreme Court, Rockland County (Sherri L. Eisenpress, J.), rendered October 1, 2024, convicting him of course of sexual conduct against a child in the second degree, sexual abuse in the third degree, and endangering the welfare of a child (two counts), after a nonjury trial, and imposing sentence.

Ordered that the judgment is affirmed.

The defendant failed to preserve for appellate review his contention that he was deprived of his right to fair trial by the Supreme Court’s reliance on evidence outside of the record in rendering its verdict (*see* CPL 470.05 [2]; *People v Lostumbo*, 182 AD3d 1007, 1009 [2020]). In any event, any errors were not so pervasive or egregious as to deprive the defendant of his right to a fair trial (*see People v Crimmins*, 36 NY2d 230, 242 [1975]; *People v Weinberg*, 75 AD3d 612, 614 [2010]; *People v Torres*, 1 AD3d 621, 621 [2003]). “[W]here, as here, a case is tried without a jury, absent a showing of prejudice, the [court] is presumed to have considered only competent evidence adduced at trial in reaching the verdict” (*People v Bradshaw*, 210 AD3d 44, 52 [2022] [internal quotation marks omitted]; *see People v Johnson*, 194 AD3d 1072, 1073 [2021]; *People v Dyson*, 169 AD3d 917, 918 [2019]; *People v Smith*, 163 AD3d 1004, 1004-1005 [2018]; *People v Terranova*, 147 AD3d 1086, 1088 [2017]).

The defendant’s contention that he was deprived of his right to a fair trial by the Supreme Court admitting hearsay statements that did not fall within any exceptions is unpreserved for appellate review (*see* CPL 470.05 [2]) and, in any event, without merit. As a general rule, “‘evidence that a victim of sexual assault promptly complained about the incident is admissible to corroborate the allegation that an assault took place’” (*People v Rosario*, 17 NY3d 501, 511 [2011], quoting *People v McDaniel*, 81 NY2d 10, 16 [1993]; *see People v Gross*, 172 AD3d 741, 743 [2019]). A victim’s outcry is prompt if it is made “‘at the first suitable opportunity’” (*People v McDaniel*, 81 NY2d at 17, quoting *People v O’Sullivan*, 104 NY 481, 486 [1887]), which is “a relative concept dependent on the facts—

what might qualify as prompt in one case might not in another” (*id.*; see *People v Rosario*, 17 NY3d at 512-513; *People v Gross*, 172 AD3d at 743; *People v Evangelista*, 155 AD3d 972 [2017]). Here, the complainant’s outcries were prompt since the complainant made them while the abuse was ongoing (see *People v Rosario*, 17 NY3d at 515; *People v Chin*, 205 AD3d 819, 820 [2022]; *People v Gross*, 172 AD3d at 743). The testimony regarding the complainant’s outcry “did not exceed the allowable level of detail” (*People v McDaniel*, 81 NY2d at 18).

The defendant’s contention that he was deprived of his right to a fair trial by the Supreme Court’s participation in questioning the trial witnesses is unpreserved for appellate review (see CPL 470.05 [2]) and, in any event, without merit. The majority of the court’s interjections during the trial were to clarify confusing answers given by the witnesses (see *People v Reid*, 198 AD3d 819, 820 [2021]; *People v Todd*, 306 AD2d 504, 505 [2003]), and the record as a whole demonstrates that the court was impartial and not biased against the defendant (see *People v Reid*, 198 AD3d at 820; *People v Ojeda*, 118 AD3d 919, 919 [2014]). Dillon, J.P., Ford, Voutsinas and McCormack, JJ., concur.

51 The People of the State of New York, Respondent, v Brandon Rountree, Appellant. [252 NYS3d 297]—

Crimes—Appeal—Validity of Waiver of Right to Appeal

Appeal by the defendant, as limited by his motion, from a sentence of the Supreme Court, Queens County (David J. Kirschner, J.), imposed May 8, 2023, upon his plea of guilty, on the ground that the sentence was excessive.

Ordered that the sentence is affirmed.

Contrary to the People’s contention, the defendant did not validly waive his right to appeal the excessiveness of the sentence imposed (see *People v Arriaza-Ortega*, 216 AD3d 1175, 1175 [2023]; *People v Moye*, 164 AD3d 698, 698 [2018]). During the plea allocution, the Supreme Court expressly excluded a challenge to the excessiveness of the sentence imposed from the challenges foreclosed by the waiver of the right to appeal by telling the defendant that he was giving up his right to appeal, with the exception of challenging the excessiveness of his sentence (see *People v Moye*, 164 AD3d at 698).

Nevertheless, the sentence imposed was not excessive (see *People v Suitte*, 90 AD2d 80 [1982]). Iannacci, J.P., Wooten, Wan, Golia and Ottley, JJ., concur.

52 The People of the State of New York, Respondent, v Gene Sider, Appellant. [252 NYS3d 295]—

Crimes—Appeal—Validity of Waiver of Right to Appeal

Appeal by the defendant from a judgment of the Supreme Court, Queens County (Gia Lynne Morris, J.), rendered January 3, 2024, convicting him of burglary in the third degree, upon his plea of guilty, and imposing sentence.

Ordered that the judgment is affirmed.

Contrary to the defendant's contention, the record demonstrates that the defendant knowingly, willingly, and intelligently waived his right to appeal (*see People v Lopez*, 6 NY3d 248, 254 [2006]; *People v Bolus*, 229 AD3d 465 [2024]). The defendant's valid waiver of his right to appeal precludes appellate review of his contention that the sentence imposed was excessive (*see People v Lopez*, 6 NY3d at 255-256; *People v Pitt*, 227 AD3d 1112, 1114 [2024]).

The defendant's contention that the Supreme Court improperly issued orders of protection in favor of two individuals is unpreserved for appellate review (*see* CPL 470.05 [2]; *People v Nieves*, 2 NY3d 310, 316-318 [2004]; *People v D.A.*, 184 AD3d 581, 583 [2020]), and we decline to review it in the exercise of our interest of justice jurisdiction (*see People v D.A.*, 184 AD3d at 583). Iannacci, J.P., Brathwaite Nelson, Wooten and Taylor, JJ., concur.

53 The People of the State of New York, Respondent, v Philip Walters, Appellant. [252 NYS3d 304]—Application by the defendant for a writ of error coram nobis seeking leave to file a late notice of appeal from a judgment of the Supreme Court, Kings County, rendered September 20, 2023.

Ordered that the application is granted, and the defendant's application is deemed to be a timely notice of appeal.

The defendant has established his entitlement to the relief requested (*see People v Syville*, 15 NY3d 391 [2010]). Barros, J.P., Wan, Golia and Goldberg Velazquez, JJ., concur.

54 The People of the State of New York, Respondent, v Kareem Waters, Appellant. [252 NYS3d 295]—

Crimes—Sentence—Surcharge and Fees

Appeal by the defendant from a judgment of the Supreme Court, Kings County (Danny K. Chun, J.), rendered January 17, 2024, convicting him of attempted criminal possession of a weapon in the second degree, upon his plea of guilty, and imposing sentence.

Ordered that the judgment is modified, on the law and as a matter of discretion in the interest of justice, by vacating the

imposition of a mandatory surcharge and fees; as so modified, the judgment, as amended, is affirmed.

“Criminal Procedure Law § 420.35 (2-a) permits the waiver of surcharges and fees for individuals, like the defendant, who were less than 21 years old at the time of the subject crime” (*People v Dillon H.*, 229 AD3d 722, 723 [2024] [internal quotation marks omitted]). Pursuant to the exercise of our interest of justice jurisdiction, and as consented to by the People, we modify the judgment, by vacating the mandatory surcharge and fees imposed upon the defendant at sentencing (see CPL 420.35[2-a] [c]; *People v Harris*, 247 AD3d 790 [2026]; *People v Dillon H.*, 229 AD3d at 723). Barros, J.P., Chambers, Taylor and Goldberg Velazquez, JJ., concur.

55 The People of the State of New York, Respondent, v Alberto S. Abrile, Appellant. [— NYS3d —]—

Crimes—Sex Offenders—Sex Offender Registration Act—Risk Assessment

Appeal by the defendant from an order of the County Court, Suffolk County (Karen M. Wilutis, J.), dated June 13, 2025, which, after a hearing, designated him a level two sex offender pursuant to Correction Law article 6-C.

Ordered that the order is affirmed, without costs or disbursements.

The defendant was convicted, upon his plea of guilty, of course of sexual conduct against a child in the first degree, rape in the first degree, two counts of criminal sexual act in the second degree, and rape in the second degree. After a hearing pursuant to the Sex Offender Registration Act (SORA) (Correction Law art 6-C), the County Court assessed the defendant a total of 100 points on the risk assessment instrument, denied his application for a downward departure from his presumptive risk level, and designated him a level two sex offender. The defendant appeals.

The defendant challenged the assessment of 35 points: 10 points based upon the fact that the victim allegedly was 10 years old when the sexual abuse began, 10 points for failure to accept responsibility, and 15 points because the defendant was to be deported, and therefore released without supervision. The defendant’s failure to accept responsibility was established by his statements to law enforcement authorities, in which he blamed the victim for what he characterized as consensual sex, his presentence interview, in which he denied his guilt, and his correspondence with the Board of Examiners of Sex Offenders, in which he blamed the victim and her family for his predicament.

Further, the evidence indicates that the defendant was subject to a final removal order directing his deportation. Therefore, he was properly assessed 15 points for release without supervision (*see People v Fernandez*, 222 AD3d 671 [2023]; *People v Torres*, 217 AD3d 976 [2023]).

We need not reach the question of whether the defendant was properly assessed 10 points based upon the victim's age of 10 years when the defendant's conduct against her purportedly began, since the deduction of 10 points from the 100 points assessed against the defendant would not change the defendant's presumptive risk level two designation (*see People v Perez*, 199 AD3d 946 [2021]).

The defendant's age at the time of the SORA hearing, 62 years old, under the circumstances of this case, was not a basis for a downward departure from his presumptive risk level (*see People v Cangiano*, 234 AD3d 885 [2025]).

Accordingly, the defendant was properly adjudicated a level two sex offender. Barros, J.P., Chambers, Taylor and Goldberg Velazquez, JJ., concur.

56 The People of the State of New York, Respondent, v Dwayne Davis, Appellant. [— NYS3d —]—

Crimes—Sex Offenders—Sex Offender Registration Act—Downward Departure

Appeal by defendant from an order of the Supreme Court, Queens County (Ushir Pandit-Durant, J.), dated September 15, 2025, which, after a hearing, designated him a level three sex offender pursuant to Correction Law article 6-C.

Ordered that the order is affirmed, without costs or disbursements.

The defendant was convicted, upon his plea of guilty, of sexual abuse in the first degree. After a hearing pursuant to the Sex Offender Registration Act (Correction Law art 6-C), the Supreme Court assessed the defendant 95 points on the risk assessment instrument. The court also applied an automatic override based on the defendant's prior felony conviction of a sex crime, resulting in a presumptive designation as a level three sex offender, in effect, denied the defendant's application for a downward departure from the presumptive risk level, and designated him a level three sex offender. The defendant appeals.

Since it was undisputed that the defendant had previously been convicted of a felony sex crime, he was presumptively a level three sex offender pursuant to an automatic override (*see*

People v McGuire, 244 AD3d 1261, 1262 [2025]; *People v Berry*, 138 AD3d 945, 946 [2016]). However, a court may depart from the presumptive risk level obtained pursuant to the automatic override where the circumstances warrant a departure, “although such departures are the exception, and not the rule” (*People v Simmons*, 170 AD3d 904, 904 [2019]; see *People v Johnson*, 135 AD3d 720, 721 [2016]).

A defendant seeking a downward departure from a presumptive risk level has the initial burden of “(1) identifying, as a matter of law, an appropriate mitigating factor, namely, a factor which tends to establish a lower likelihood of reoffense or danger to the community and is of a kind, or to a degree, that is otherwise not adequately taken into account by the Guidelines; and (2) establishing the facts in support of its existence by a preponderance of the evidence” (*People v Wyatt*, 89 AD3d 112, 128 [2011]; see Sex Offender Registration Act: Risk Assessment Guidelines and Commentary at 4 [2006] [hereinafter Guidelines]; *People v Gillotti*, 23 NY3d 841, 861 [2014]). If the defendant makes that twofold showing, the court must exercise its discretion by weighing the mitigating factor or factors to determine whether the totality of the circumstances warrants a departure to avoid an overassessment of the defendant’s dangerousness and risk of sexual recidivism (see *People v Gillotti*, 23 NY3d at 861; *People v Felton*, 175 AD3d 734, 735 [2019]).

Here, the temporal remoteness of the defendant’s prior sex crime conviction was adequately taken into account by the Guidelines (see *People v Sang Wong*, 242 AD3d 1133, 1135 [2025]; *People v Henson*, 213 AD3d 958, 958 [2023]).

Accordingly, the Supreme Court properly, in effect, denied the defendant’s application for a downward departure and designated him a level three sex offender. Connolly, J.P., Chambers, Ford and McCormack, JJ., concur.

57 The People of the State of New York, Respondent, v Christian Dowd, Appellant. [— NYS3d —]

Crimes—Sex Offenders—Sex Offender Registration Act—Duration of Offense Risk Factor

Crimes—Sex Offenders—Sex Offender Registration Act—Relationship with Victim Risk Factor

Appeal by the defendant from an order of the Supreme Court, Nassau County (Meryl J. Berkowitz, J.), dated February 14, 2025, which, after a hearing, designated him a level three sex offender pursuant to Correction Law article 6-C.

Ordered that the order is affirmed, without costs or disbursements.

The defendant was convicted, upon his plea of guilty, of attempted criminal sexual act in the second degree and attempted rape in the second degree. After a hearing pursuant to the Sex Offender Registration Act (SORA) (Correction Law art 6-C), the Supreme Court assessed the defendant a total of 165 points on the risk assessment instrument and designated him a level three sex offender. The defendant appeals, challenging the assessment of points under risk factors 4 (duration of offense conduct with victim), 7 (relationship with victim), and 12 (acceptance of responsibility). The defendant also requests a remittal for a determination as to whether he was entitled to a downward departure.

“In establishing a defendant’s risk level pursuant to SORA, the People bear the burden of establishing facts supporting the determination sought by clear and convincing evidence” (*People v Levy*, 192 AD3d 928, 929 [2021]). “In assessing points, evidence may be derived from the defendant’s admissions, the victim’s statements, evaluative reports completed by the supervising probation officer, parole officer, or corrections counselor, case summaries prepared by the Board of Examiners of Sex Offenders . . . , or any other reliable source, including reliable hearsay” (*People v Vasquez*, 189 AD3d 1480, 1481 [2020] [internal quotation marks omitted]).

The defendant correctly contends that the Supreme Court improperly assessed 20 points under risk factor 4 for duration of offense. For the purposes of assessing points under risk factor 4, the Guidelines provide that “an offender has engaged in a continuing course of sexual contact when he engages in either (i) two or more acts of sexual contact, at least one of which is an act of sexual intercourse, oral sexual conduct, anal sexual conduct, or aggravated sexual contact, which acts are separated in time by at least 24 hours, or (ii) three or more acts of sexual contact over a period of at least two weeks” (Sex Offender Registration Act: Risk Assessment Guidelines and Commentary at 10 [2006] [hereinafter Guidelines]; see *People v Wallace*, 240 AD3d 527, 528 [2025]). Here, the People failed to meet their burden of establishing, by clear and convincing evidence, that the acts of sexual contact the defendant committed against the victim were separated in time by at least 24 hours (see *People v Perez*, 221 AD3d 626, 626 [2023]). However, even without the assessment of 20 points under risk factor 4, the defendant’s point total would have been 145, which remains within the range for a presumptive risk level three designation.

Contrary to the defendant’s contention, the Supreme Court

properly assessed 20 points under risk factor 7. The Guidelines provide for an assessment of 20 points to a defendant, in relevant part, if his or her crime “(i) was directed at a stranger or a person with whom a relationship had been established or promoted for the primary purpose of victimization” (Guidelines at 12). The term “stranger” is defined as “anyone who is not an actual acquaintance of the victim” (*id.*).

Here, the People established, by clear and convincing evidence, that the defendant’s relationship with the victim had been established or promoted for the primary purpose of victimization, where the defendant, who was 23 years old at the time, contacted the 14-year-old victim over social media, learned of her age, and asked her to come to his home, where he engaged in sexual intercourse with her approximately 14 times. This evidence was sufficient to support the assessment of points under subsection (i) of risk factor 7 (*see People v Jony*, 219 AD3d 1438, 1439 [2023]).

Further, the Supreme Court properly assessed 15 points under risk factor 12. Under risk factor 12, a court may assess 15 points to an offender who has refused or been expelled from a sex offender program (*see* Guidelines at 15). Here, as the People established by clear and convincing evidence that the defendant was expelled from treatment on two separate occasions, the assessment of points under risk factor 12 was warranted (*see People v Harris*, 100 AD3d 727, 728 [2012]).

The defendant’s contention that the matter should be remitted to determine whether he should be granted a downward departure from his presumptive risk level on the ground that the assessment of points under risk factors 4, 7, and 12 resulted in an overassessment of his risk is unpreserved for appellate review, as he failed to request a downward departure on this basis at the SORA hearing (*see* CPL 470.05 [2]; *People v Howell*, 213 AD3d 708, 709 [2023]). In any event, the contention is without merit (*see People v Howell*, 213 AD3d at 709). Genovesi, J.P., Ford, Voutsinas and Golia, JJ., concur.

58 Russell A. Simone, Sr., Respondent, v Colin Development, LLC, Respondent-Appellant, and F.W. Sims Group, Inc., et al., Appellants-Respondents. [— NYS3d —]—

Labor—Safe Place to Work—Summary Judgment—Authority to Supervise Work and Notice of Condition
Workers’ Compensation—Exclusiveness of Remedy—Special Employment Relationship—Control and Direction of Work

In an action to recover damages for personal injuries, the defendants F.W. Sims Group, Inc., F.W. Sims Mechanical Ser-

vices, LLC, and F.W. Sims, LLC, appeal, and the defendant Colin Development, LLC, cross-appeals, from an order of the Supreme Court, Suffolk County (Joseph A. Santorelli, J.), dated August 31, 2022. The order, insofar as appealed from, denied those branches of the motion of the defendants F.W. Sims Group, Inc., F.W. Sims Mechanical Services, LLC, and F.W. Sims, LLC, which were for summary judgment dismissing the causes of action alleging a violation of Labor Law § 200 and common-law negligence insofar as asserted against them and dismissing the cross-claims asserted against them for common-law indemnification and contribution. The order, insofar as cross-appealed from, denied those branches of the cross-motion of the defendant Colin Development, LLC, which were for summary judgment dismissing the causes of action alleging a violation of Labor Law § 200 and common-law negligence insofar as asserted against it and dismissing the cross-claims asserted against it for common-law indemnification and contribution.

Ordered that the order is affirmed insofar as appealed and cross-appealed from, with costs to the plaintiff.

The plaintiff was employed as an office building's superintendent by nonparty Hauppauge Office Park Associates, LLC (hereinafter HOP), which owned the office building complex where the office building was located. HOP had an oral contract with the defendant Colin Development, LLC (hereinafter Colin), whereby Colin was to act as the property manager for the office buildings. The defendants F.W. Sims Group, Inc., F.W. Sims Mechanical Services, LLC, and F.W. Sims, LLC (hereinafter collectively the Sims defendants), provided HVAC service for the office buildings. The plaintiff allegedly was injured while standing on a ladder attempting to manually turn on an HVAC unit located on the roof of the office building.

The plaintiff commenced this personal injury action against the Sims defendants and Colin, alleging, inter alia, a violation of Labor Law § 200 and common-law negligence. The Sims defendants and Colin asserted cross-claims against each other for, among other things, common-law indemnification and contribution. In April 2022, the Sims defendants moved, inter alia, for summary judgment dismissing the causes of action alleging a violation of Labor Law § 200 and common-law negligence insofar as asserted against them and dismissing the cross-claims asserted against them for common-law indemnification and contribution. Colin thereafter cross-moved, among other things, for summary judgment dismissing the causes of action alleging a violation of Labor Law § 200 and common-law negligence insofar as asserted against it and dismissing the

cross-claims asserted against it for common-law indemnification and contribution. The plaintiff opposed both motions. In an order dated August 31, 2022, the Supreme Court, *inter alia*, denied those branches of the Sims defendants' motion and those branches of Colin's cross-motion. The Sims defendants appeal, and Colin cross-appeals.

"Labor Law § 200 is a codification of the common-law duty of owners, contractors, and their agents to provide workers with a safe place to work" (*Magistro v New York City Hous. Auth.*, 235 AD3d 733, 735 [2025] [internal quotation marks omitted]; *see Novegil-Peralta v Rettig*, 240 AD3d 796, 798 [2025]; *Wright v Pennings*, 233 AD3d 827, 830 [2024]). "To be held liable under Labor Law § 200 for injuries arising from the manner in which work is performed, a defendant must have the authority to exercise supervision and control over the work" (*Shaughnessy v Huntington Hosp. Assn.*, 147 AD3d 994, 997 [2017] [internal quotation marks omitted]; *see Moscati v Consolidated Edison Co. of N.Y., Inc.*, 168 AD3d 717, 720 [2019]). "If a plaintiff's injuries stem not from the manner in which the work was being performed, but from a dangerous condition on the premises, a contractor may be held liable in common-law negligence and under Labor Law § 200 if it had control over the work site and either created or had actual or constructive notice of the dangerous condition" (*Shaughnessy v Huntington Hosp. Assn.*, 147 AD3d at 997). "Where . . . an accident is alleged to involve defects in both the premises and the manner in which the work was performed, a defendant moving for summary judgment dismissing a cause of action alleging a violation of Labor Law § 200 is obligated to address the proof applicable to both liability standards" (*Mitchell v Caton on the Park, LLC*, 167 AD3d 865, 867 [2018] [internal quotation marks omitted]; *see Rodriguez v HY 38 Owner, LLC*, 192 AD3d 839, 841 [2021]).

Here, the plaintiff alleged that he was injured by both a dangerous condition and the manner in which he was directed to perform the work. In moving for summary judgment dismissing the causes of action alleging a violation of Labor Law § 200 and common-law negligence insofar as asserted against them, the Sims defendants failed to eliminate all triable issues of fact as to whether their technician directed the plaintiff to manually turn on the HVAC unit and whether their employee created or had notice of the alleged dangerous condition by setting up the ladder (*see Wright v Pennings*, 233 AD3d at 830; *Moscati v Consolidated Edison Co. of N.Y., Inc.*, 168 AD3d at 720-721; *Shaughnessy v Huntington Hosp. Assn.*, 147 AD3d at 998). Since the Sims defendants failed to meet their *prima facie*

burden of demonstrating that they lacked the authority to supervise and control the manner in which the plaintiff performed his work and that they did not have actual or constructive notice of the alleged condition which caused the plaintiff to fall, the Supreme Court properly denied those branches of their motion which were for summary judgment dismissing the causes of action alleging a violation of Labor Law § 200 and common-law negligence insofar as asserted against them.

“Generally, workers’ compensation benefits are the sole and exclusive remedy of an employee against an employer or co-employee for injuries sustained in the course of employment” (*Chiloyan v Chiloyan*, 197 AD3d 612, 614 [2021]; see Workers’ Compensation Law §§ 11, 29 [6]; *Miolan v Milmar Food Group, LLC*, 229 AD3d 696, 697 [2024]). However, a “person may be deemed to have more than one employer for purposes of the Workers’ Compensation Law, a general employer and a special employer” (*James v Highland Rehabilitation & Nursing Ctr.*, 222 AD3d 736, 737 [2023] [internal quotation marks omitted]; see *Miolan v Milmar Food Group, LLC*, 229 AD3d at 697). “A special employee is one who is transferred for a limited time of whatever duration to the service of another” (*Narvaez v Petrillo Contr., Inc.*, 237 AD3d 725, 728 [2025] [internal quotation marks omitted]; see *Rodriguez v 27-11 49th Ave. Realty, LLC*, 222 AD3d 1013, 1014 [2023]). “‘General employment is presumed to continue, but this presumption is overcome upon clear demonstration of surrender of control by the general employer and assumption of control by the special employer’” (*Rodriguez v 27-11 49th Ave. Realty, LLC*, 222 AD3d at 1014, quoting *Thompson v Grumman Aerospace Corp.*, 78 NY2d 553, 557 [1991]; see *James v Highland Rehabilitation & Nursing Ctr.*, 222 AD3d at 737).

“Many factors are weighed in deciding whether a special employment relationship exists, and generally no single one is decisive Principal factors include who has the right to control the employee’s work, who is responsible for the payment of wages and the furnishing of equipment, who has the right to discharge the employee, and whether the work being performed was in furtherance of the special employer’s or the general employer’s business The most significant factor is who controls and directs the manner, details, and ultimate result of the employee’s work” (*Ortega v 669 Meeker Ave., LLC*, 191 AD3d 686, 688 [2021] [internal quotation marks omitted]; see *Chiloyan v Chiloyan*, 197 AD3d at 614-615). “The determination of special employment status is usually a question of

fact and may only be made as a matter of law where the particular, undisputed critical facts compel that conclusion and present no triable issue of fact” (*James v Highland Rehabilitation & Nursing Ctr.*, 222 AD3d at 737 [internal quotation marks omitted]).

On its cross-motion for summary judgment, Colin failed to establish, *prima facie*, that the plaintiff was its special employee at the time of the accident and, accordingly, that the causes of action alleging a violation of Labor Law § 200 and common-law negligence insofar as asserted against it were barred by the exclusivity provisions of the Workers’ Compensation Law (*see Narvaez v Petrillo Contr., Inc.*, 237 AD3d at 728; *James v Highland Rehabilitation & Nursing Ctr.*, 222 AD3d at 738). While the plaintiff’s supervisor testified and averred that the plaintiff’s work was solely controlled by employees of Colin, the plaintiff testified, *inter alia*, that he took instructions for his work from Colin employees as well as HOP owners and/or partners. Since Colin failed to eliminate all triable issues of fact as to the plaintiff’s status as its special employee, as it did not submit sufficient evidence to establish, among other things, that it controlled and directed the manner, details, and ultimate result of the plaintiff’s work, the Supreme Court properly denied those branches of Colin’s cross-motion which were for summary judgment dismissing the causes of action alleging a violation of Labor Law § 200 and common-law negligence insofar as asserted against it (*see Narvaez v Petrillo Contr., Inc.*, 237 AD3d at 728; *James v Highland Rehabilitation & Nursing Ctr.*, 222 AD3d at 738; *Ortega v 669 Meeker Ave., LLC*, 191 AD3d at 688-689).

As Colin and the Sims defendants failed to meet their *prima facie* burdens in moving for summary judgment dismissing the causes of action alleging a violation of Labor Law § 200 and common-law negligence insofar as asserted against each of them, the Supreme Court properly denied those branches of their motions which were for summary judgment dismissing the cross-claims asserted against each of them for common-law indemnification and contribution (*see Rosario v Horizon Networks, Inc.*, 240 AD3d 537, 541 [2025]; *Titov v V&M Chelsea Prop., LLC*, 230 AD3d 614, 620-621 [2024]).

The Sims defendants’ remaining contention is improperly raised for the first time on appeal. Dillon, J.P., Wooten, Landicino and Golia, JJ., concur.

59 Star201, LLC, Appellant, v Valentin Martinez, Respondent, et al., Defendants. [— NYS3d —]

York

In an action to foreclose a mortgage, the plaintiff appeals from an order of the Supreme Court, Queens County (Carmen R. Velasquez, J.), dated March 14, 2023. The order, insofar as appealed from, conditionally granted the cross-motion of the defendant Valentin Martinez for summary judgment dismissing the complaint insofar as asserted against him unless the plaintiff provided proof of compliance with Limited Liability Company Law § 802 within 30 days of the order.

Ordered that the order is reversed insofar as appealed from, on the law, with costs, the cross-motion of the defendant Valentin Martinez for summary judgment dismissing the complaint insofar as asserted against him is denied, so much of the order as denied the plaintiff's motion, inter alia, for summary judgment on the complaint insofar as asserted against that defendant and for an order of reference without prejudice to renew upon proof of compliance with Limited Liability Company Law § 802 is vacated, and the matter is remitted to the Supreme Court, Queens County, for a determination on the merits of the plaintiff's motion.

The plaintiff commenced this mortgage foreclosure action against, among others, the defendant Valentin Martinez (hereinafter the defendant). The defendant interposed an answer in which he asserted various affirmative defenses and counterclaims. The plaintiff subsequently moved, inter alia, for summary judgment on the complaint insofar as asserted against the defendant and for an order of reference. The defendant cross-moved for summary judgment dismissing the complaint insofar as asserted against him on the ground that the plaintiff lacked the capacity to sue in New York because it was a foreign limited liability company doing business in this State without authority. In an order dated March 14, 2023, the Supreme Court conditionally granted the defendant's cross-motion unless the plaintiff provided proof of compliance with Limited Liability Company Law § 802 within 30 days of the order, and denied the plaintiff's motion without prejudice to renew upon proof of compliance with Limited Liability Company Law § 802. The plaintiff appeals.

Limited Liability Company Law § 802 (a) requires that "[b]efore doing business in this state, a foreign limited liability company shall apply for authority to do business in this state." Limited Liability Company Law § 808 (a) provides that "[a] foreign limited liability company doing business in this state without having received a certificate of authority to do business in this state may not maintain any action, suit or special

proceeding in any court of this state.” Limited Liability Company Law § 803 (a) (1) provides that “a foreign limited liability company shall not be considered to be doing business in this state for the purposes of this chapter, by . . . maintaining or defending any action or proceeding, whether judicial, administrative, arbitral or otherwise or effecting settlement thereof or the settlement of claims or disputes.”

“[T]he party relying upon [the] statutory barrier bears the burden of proving that the corporation’s business activities in New York were not just casual or occasional, but so systematic and regular as to manifest continuity of activity in the jurisdiction” (*JPMorgan Chase Bank, N.A. v Didato*, 185 AD3d 801, 802-803 [2020] [internal quotation marks omitted]; see *S & T Bank v Spectrum Cabinet Sales*, 247 AD2d 373, 373 [1998]). “[A]bsent proof establishing that the [subject corporation] is doing business in New York, it is presumed that [it] is doing business in [the] State of incorporation and not in New York” (*JPMorgan Chase Bank, N.A. v Didato*, 185 AD3d at 803 [internal quotation marks omitted]; see *Highfill, Inc. v Bruce & Iris, Inc.*, 50 AD3d 742, 743-744 [2008]). “[T]he mere maintenance of an action by . . . a foreign corporation does not constitute doing business within the State” (*Federal Fin. Co. v Levine*, 281 AD2d 454, 455 [2001] [internal quotation marks omitted]; see Limited Liability Company Law § 803).

Here, the evidence submitted by the defendant in support of his cross-motion established only that the plaintiff has commenced numerous other mortgage foreclosure actions in New York. However, the mere maintenance of an action by a foreign corporation does not constitute doing business within the State (see Limited Liability Company Law § 803; *JPMorgan Chase Bank, N.A. v Didato*, 185 AD3d at 802-803; *Federal Fin. Co. v Levine*, 281 AD2d at 455). Thus, the defendant failed to establish, prima facie, that the plaintiff was engaged in doing business in this State.

Accordingly, the Supreme Court erred in conditionally granting the defendant’s cross-motion for summary judgment dismissing the complaint insofar as asserted against him unless the plaintiff provided proof of compliance with Limited Liability Company Law § 802 within 30 days of the order. Iannacci, J.P., Genovesi, Landicino and Love, JJ., concur.

60 Oscar Tzaquitza, Respondent, v Metropolitan Trucking, Inc., et al., Defendants, and Logistics One Transport, Inc., et al., Appellants. [— NYS3d —]

Motor Vehicles—Collision—Rear-End Collision—Non-Negligent Explanation

In an action to recover damages for personal injuries, the defendants Logistics One Transport, Inc., and Thomas Hohn appeal from an order of the Supreme Court, Kings County (Francois A. Rivera, J.), dated December 5, 2024. The order, insofar as appealed from, denied those branches of those defendants' motion which were for summary judgment dismissing the complaint and all cross-claims insofar as asserted against them or, in the alternative, for summary judgment on the issue of the plaintiff's negligence.

Ordered the order is affirmed insofar as appealed from, with costs.

The plaintiff commenced this action to recover damages for injuries he allegedly sustained in a four-vehicle chain collision that included, among others, a vehicle operated by the defendant Thomas Hohn and owned by the defendant Logistics One Transport, Inc. (hereinafter together the Logistics defendants). The vehicles were traveling on the Cross Bronx Expressway, in the middle of three lanes, when the lead vehicle, owned by the defendant Metropolitan Trucking, Inc., and operated by the defendant Francis Churchwell (hereinafter the Metropolitan vehicle), stopped to avoid a disabled vehicle from a prior accident. The Logistics defendants' vehicle, which was traveling behind the Metropolitan vehicle, then struck the Metropolitan vehicle. The plaintiff's vehicle, which was traveling behind the Logistics defendants' vehicle, struck the Logistics defendants' vehicle. The fourth vehicle, operated by the defendant Anissa Loftin and owned by Terry Loftin, now deceased, struck the plaintiff's vehicle.

The Logistics defendants moved, among other things, for summary judgment dismissing the complaint and all cross-claims insofar as asserted against them or, in the alternative, for summary judgment on the issue of the plaintiff's negligence. The plaintiff opposed the motion. In an order dated December 5, 2024, the Supreme Court, inter alia, denied those branches of the motion. The Logistics defendants appeal.

"A '[d]efendant[] moving for summary judgment in a negligence action arising out of an automobile accident ha[s] the burden of establishing, prima facie, that [he or she was] not at fault in the happening of the accident, or that the alleged negligence of another person was the sole proximate cause [thereof]' " (*Morante v Blaney*, 234 AD3d 679, 680 [2025], quoting *Woods v Burgos*, 220 AD3d 688, 689 [2023]). "If the defendant makes a prima facie showing of entitlement to judgment as a matter of law, the burden shifts to the plaintiff to raise a triable issue of fact" (*id.*).

“‘A driver of a vehicle approaching another vehicle from the rear is required to maintain a reasonably safe distance and rate of speed under the prevailing conditions to avoid colliding with the other vehicle’” (*Grier-Key v Lyons*, 195 AD3d 798, 799 [2021] [internal quotation marks omitted], quoting *Witonsky v New York City Tr. Auth.*, 145 AD3d 938, 939 [2016]; see *Vehicle and Traffic Law* § 1129 [a]). Thus, “‘a rear-end collision with a stopped or stopping vehicle establishes a prima facie case of negligence on the part of the operator of the rear vehicle, thereby requiring that operator to rebut the inference of negligence by providing a nonnegligent explanation for the collision’” (*Pollet v Charyn*, 200 AD3d 728, 730 [2021], quoting *Drakh v Levin*, 123 AD3d 1084, 1085 [2014]). “‘A nonnegligent explanation includes, but is not limited to, sudden or unavoidable circumstances’” (*Drakh v Levin*, 123 AD3d at 1085 [internal quotation marks omitted], quoting *D’Agostino v YRC, Inc.*, 120 AD3d 1291, 1292 [2014]; see *An v Abbate*, 213 AD3d 891, 892 [2023]; *Gambino v City of New York*, 205 AD2d 583, 583 [1994]). “‘Although a sudden stop of the lead vehicle may constitute a nonnegligent explanation for a rear-end collision, vehicle stops which are foreseeable under the prevailing traffic conditions, even if sudden and frequent, must be anticipated by the driver who follows, since he or she is under a duty to maintain a safe distance between his or her vehicle and the vehicle ahead’” (*Tenezaca v State of New York*, 220 AD3d 959, 961 [2023], quoting *Quintanilla v Mark*, 210 AD3d 713, 714 [2022]; see *Pollet v Charyn*, 200 AD3d at 728).

Moreover, “‘[n]ot every rear-end collision is the exclusive fault of the rearmost driver. The frontmost driver also has the duty not to stop suddenly or slow down without proper signaling so as to avoid a collision’” (*Martinez v Allen*, 163 AD3d 951, 951-952 [2018], quoting *Tuttrani v County of Suffolk*, 64 AD3d 53, 59-60 [2009]). “‘Thus, where the frontmost driver also operates his [or her] vehicle in a negligent manner, the issue of comparative negligence is for a jury to decide’” (*Gaeta v Carter*, 6 AD3d 576, 577 [2004]).

Here, the evidence submitted by the Logistics defendants in support of their motion demonstrated the existence of triable issues of fact as to whether Hohn negligently came to a sudden stop due to Hohn’s alleged inattentiveness and failure to maintain a safe following distance behind the Metropolitan vehicle in the moments before the collision. Under these circumstances, the Logistics defendants failed to establish, prima facie, that they were free from negligence or that any negligence on their part was not a proximate cause of the plaintiff’s

injuries (*see Trinidad v Llapa*, 231 AD3d 1183, 1184 [2024]; *Conroy v New York City Tr. Auth.*, 167 AD3d 977, 979 [2018]; *Colonna v Suarez*, 278 AD2d 355 [2000]). For the same reason, under these circumstances, the Logistics defendants' submissions also failed to establish, *prima facie*, that Hohn's sudden stop did not constitute a nonnegligent explanation for the plaintiff's rear-end collision with the Logistics defendants' vehicle (*see Yearwood v New York City Tr. Auth.*, 227 AD3d 843, 845 [2024]).

Accordingly, the Supreme Court properly denied those branches of the Logistics defendants' motion which were for summary judgment dismissing the complaint and all cross-claims insofar as asserted against them or, in the alternative, for summary judgment on the issue of the plaintiff's negligence, regardless of the sufficiency of the plaintiff's opposition papers (*see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). Barros, J.P., Chambers, Wan and Quirk, JJ., concur.

61 U.S. Bank, National Association, Respondent-Appellant, v Chittra Benjamin, Appellant-Respondent, et al., Defendants.
[— NYS3d —]

Limitation of Actions—Six-Year Statute of Limitations—Mortgage Foreclosure—Acceleration of Debt

**Limitation of Actions—Commencement of Action after Termination of Prior Action—Mortgage Foreclosure—Entitlement to Six-Month Savings Provision
Mortgages—Foreclosure—Attorneys' Fees**

In an action to foreclose a mortgage, the defendant Chittra Benjamin appeals, and the plaintiff cross-appeals, from an order of the Supreme Court, Queens County (Robert I. Caloras, J.), entered September 9, 2019. The order, insofar as appealed from, denied those branches of the motion of the defendant Chittra Benjamin and David Benjamin which were pursuant to CPLR 3211 (a) (5) to dismiss the complaint insofar as asserted against the defendant Chittra Benjamin and pursuant to Real Property Law § 282 for an award of attorneys' fees and costs. The order, insofar as cross-appealed from, granted that branch of the motion of the defendant Chittra Benjamin and David Benjamin which was pursuant to CPLR 3211 (a) (5) to dismiss the complaint insofar as asserted against David Benjamin.

Ordered that the order is modified, on the law, by deleting the provision thereof denying that branch of the motion of the defendant Chittra Benjamin and David Benjamin which was pursuant to CPLR 3211 (a) (5) to dismiss the complaint insofar as asserted against the defendant Chittra Benjamin, and substituting therefor a provision granting that branch of the motion; as so modified, the order is affirmed insofar as ap-

pealed and cross-appealed from, with costs to the defendant Chittra Benjamin payable by the plaintiff.

On May 25, 2007, David Benjamin (hereinafter the decedent) executed a note in the sum of \$594,000, which was secured by a mortgage executed by the decedent and the defendant Chittra Benjamin (hereinafter Chittra and, together with the decedent, the Benjamins) on certain residential property located in South Ozone Park. In December 2008, the mortgage and note were assigned to LaSalle Bank, N.A. (hereinafter LaSalle).

On January 8, 2009, LaSalle commenced an action (hereinafter the 2009 action) against the Benjamins, among others, to foreclose the mortgage. The decedent interposed an answer, but Chittra did not. In a decision dated September 9, 2009, the Supreme Court, among other things, determined that LaSalle's motion, inter alia, for summary judgment on the complaint insofar as asserted against the decedent, to strike the decedent's answer, and for an order of reference should be granted. On September 17, 2014, LaSalle's successor in interest assigned the mortgage to the plaintiff, U.S. Bank, National Association (hereinafter U.S. Bank). In an order entered December 15, 2015 (hereinafter the December 2015 order), the court, among other things, vacated the decision dated September 9, 2009, in effect, granted that branch of the Benjamins' motion which was pursuant to CPLR 3215 to dismiss the complaint insofar as asserted against Chittra as abandoned, and thereupon, directed dismissal of the complaint in its entirety on the ground that Chittra was a necessary party. In a decision and order dated September 12, 2018, this Court affirmed the December 2015 order (*see LaSalle Bank N.A. v Benjamin*, 164 AD3d 1223 [2018]).

On February 7, 2019, U.S. Bank commenced this action against the Benjamins, among others, to foreclose the mortgage. The Benjamins moved pursuant to CPLR 3211 (a) (5) to dismiss the complaint insofar as asserted against them as barred by the statute of limitations or, alternatively, as barred by the doctrine res judicata and pursuant to Real Property Law § 282 for an award of attorneys' fees and costs. U.S. Bank opposed the motion. In an order entered September 9, 2019, the Supreme Court, inter alia, granted that branch of the Benjamins' motion which was pursuant to CPLR 3211 (a) (5) to dismiss the complaint insofar as asserted against the decedent, denied that branch of the motion which was pursuant to CPLR 3211 (a) (5) to dismiss the complaint insofar as asserted against Chittra, and denied that branch of the motion which was pursuant to Real Property Law § 282 for an award of attorneys'

fees and costs. The Benjamins appealed, and U.S. Bank cross-appealed. During the pendency of the appeal, the decedent died, and Chittra, as administrator of the decedent's estate, was substituted for the decedent.

“On a motion to dismiss a cause of action pursuant to CPLR 3211 (a) (5) on the ground that it is barred by the statute of limitations, a defendant bears the initial burden of establishing, *prima facie*, that the time in which to sue has expired” (*Wells Fargo Bank, N.A. v Burke*, 155 AD3d 668, 669 [2017]; *see Deutsche Bank Natl. Trust Co. v Pena*, 240 AD3d 475 [2025]). “The burden then shift[s] to the plaintiff to present admissible evidence establishing that the action was timely or to raise a question of fact as to whether the action was timely” (*U.S. Bank N.A. v Martin*, 144 AD3d 891, 892 [2016]). An action to foreclose a mortgage is governed by a six-year statute of limitations (*see CPLR 213 [4]*). “[E]ven if a mortgage is payable in installments, once a mortgage debt is accelerated, the entire amount is due and the statute of limitations begins to run on the entire debt” (*Bank of N.Y. Mellon v Mor*, 201 AD3d 691, 694 [2022]; *see U.S. Bank N.A. v Connor*, 204 AD3d 861, 862-863 [2022]). The entire mortgage debt will be deemed to have been accelerated, as relevant here, by the commencement of a mortgage foreclosure action in which the complaint seeks payment of the full outstanding loan balance (*see U.S. Bank N.A. v Connor*, 204 AD3d at 863).

Here, the Benjamins established, *prima facie*, that the mortgage debt was accelerated and the statute of limitations began to run on January 8, 2009, when LaSalle commenced the 2009 action. Thus, the statute of limitations expired on January 8, 2015. This foreclosure action was commenced on February 7, 2019, more than four years later. In opposition, U.S. Bank failed to sustain its burden of establishing that the action was timely or to raise a question of fact as to whether the action was timely.

Contrary to U.S. Bank's contention, it is not entitled to the benefit of the six-month savings provision under CPLR 205 (a) to commence a new mortgage foreclosure action, because the Foreclosure Abuse Prevention Act (FAPA) (L 2022, ch 821 [eff Dec. 30, 2022]) replaced the savings provision of CPLR 205 (a) with CPLR 205-a in actions upon instruments described in CPLR 213 (4) (*see id.* § 205 [c]; *Wells Fargo Bank, N.A. v Brandt*, 230 AD3d 623, 625 [2024]). U.S. Bank's contentions that FAPA and, more specifically, CPLR 205-a do not apply retroactively are without merit (*see Deutsche Bank Natl. Trust Co. v Vista Holding, LLC*, 239 AD3d 830 [2025]; *97 Lyman Ave., LLC v*

MTGLQ Invs., L.P., 233 AD3d 1038, 1042 [2024]). Contrary to U.S. Bank's contention, the retroactive application of FAPA does not violate the Due Process Clause of either the United States Constitution or the New York State Constitution (see *Deutsche Bank Natl. Trust Co. v Feurtado*, 241 AD3d 499 [2025]; *Deutsche Bank Natl. Trust Co. v Dagrín*, 233 AD3d 1065, 1069 [2024]; *97 Lyman Ave., LLC v MTGLQ Invs., L.P.*, 233 AD3d at 1039-1042).

As relevant here, under CPLR 205-a, “[i]f an action upon an instrument described under [CPLR 213 (4)] is timely commenced and is terminated in any manner other than [, among other things,] a dismissal of the complaint for any form of neglect, including, but not limited to those specified in [CPLR 3215], the original plaintiff, or, if the original plaintiff dies and the cause of action survives, his or her executor or administrator, may commence a new action upon the same transaction or occurrence or series of transactions or occurrences within six months following the termination” (*U.S. Bank Trust, N.A. v Giangrande*, 229 AD3d 834, 836 [2024] [internal quotation marks omitted]). Thus, under CPLR 205-a, a mortgage foreclosure plaintiff “may not take advantage of the six-month savings provision if the prior action was dismissed pursuant to CPLR 3215” (*Deutsche Bank Natl. Trust Co. v Feurtado*, 241 AD3d at 501). Additionally, CPLR 205-a (a) (1) provides that “a successor in interest or an assignee of the original plaintiff shall not be permitted to commence the new action, unless pleading and proving that such assignee is acting on behalf of the original plaintiff.”

Here, U.S. Bank was not the original plaintiff in the 2009 action and it has neither pleaded nor proved that it is acting on behalf of the original plaintiff. Accordingly, U.S. Bank failed to demonstrate that it is entitled to the benefit of the six-month savings provision of CPLR 205-a to commence a new mortgage foreclosure action against either Chittra or Benjamin (see *Johnson v Cascade Funding Mtge. Trust 2017-1*, 220 AD3d 929, 932 [2023]).

Moreover, U.S. Bank is not entitled to the benefit of CPLR 205-a with respect to a cause of action against Chittra to foreclose the mortgage for the additional reason that the complaint insofar as asserted against Chittra in the 2009 action was dismissed pursuant to CPLR 3215 (see *id.* § 205-a [a]; *Collins v Bank of N.Y. Mellon*, 227 AD3d 948, 951 [2024]; *LaSalle Bank N.A. v Benjamin*, 164 AD3d 1223 [2018]).

Accordingly, the Supreme Court properly granted that branch of the Benjamins' motion which was pursuant to CPLR 3211

(a) (5) to dismiss the complaint insofar as asserted against the decedent. However, the court should have granted that branch of the motion which was pursuant to CPLR 3211 (a) (5) to dismiss the complaint insofar as asserted against Chittra.

In light of our determination, we need not reach the issue of whether the complaint is subject to dismissal under the doctrine of res judicata, which the Benjamins raised as an alternative ground for dismissal pursuant to CPLR 3211 (a) (5) (see *Jones v Flushing Bank*, 212 AD3d 791, 793 [2023]; *Montoute v Wells Fargo Bank, N.A.*, 208 AD3d 474, 475 [2022]).

The Supreme Court properly denied that branch of the Benjamins' motion which was pursuant to Real Property Law § 282 for an award of attorneys' fees and costs. Real Property Law § 282 (1) expressly provides that attorneys' fees are recoverable by a mortgagor only "in an action commenced against the mortgagee or by way of counterclaim in any action or proceeding commenced by the mortgagee against the mortgagor." Here, the Benjamins have not asserted a counterclaim for an award of attorneys' fees pursuant to Real Property Law § 282 (see *U.S. Bank N.A. v Armand*, 220 AD3d 963, 967 [2023]; cf. *Nationstar Mtge., LLC v Dorsin*, 180 AD3d 1054, 1057 [2020]). Dillon, J.P., Chambers, Wan and McCormack, JJ., concur. **[Prior Case History: 2019 NY Slip Op 32579(U).]**

62 Moyshe Weiss, Respondent, v Fran Corp., Doing Business as All Bright Electric, Appellant. [— NYS3d —]—

Negligence—Duty—Failure to Act—Instrument for Good

In an action to recover damages for personal injuries, the defendant appeals from an order of the Supreme Court, Rockland County (Sherri L. Eisenpress, J.), dated June 4, 2024. The order denied the defendant's motion pursuant to CPLR 3211 (a) to dismiss the complaint.

Ordered that the order is reversed, on the law, with costs, and the defendant's motion pursuant to CPLR 3211 (a) to dismiss the complaint is granted.

The plaintiff commenced this action to recover damages for personal injuries he sustained as a pedestrian when he was struck by a motor vehicle at an intersection in the Town of Ramapo. The complaint alleged, among other things, that a street light at the subject intersection was not illuminated at the time of the accident, and that the malfunction of the street light contributed to the happening of the accident. The complaint further alleged, inter alia, that the defendant had entered into a contract with the Town pursuant to which the defendant was obligated to repair the street light, and had

performed a negligent repair of the street light prior to the accident.

The defendant moved pursuant to CPLR 3211 (a) to dismiss the complaint. In support of its motion, the defendant submitted, among other things, a copy of its contract with the Town. The plaintiff submitted an attorney affirmation in opposition to the motion. The Supreme Court denied the motion, and the defendant appeals.

“On a motion to dismiss pursuant to CPLR 3211 (a) (7), the complaint is to be afforded a liberal construction, the facts alleged are presumed to be true, the plaintiff is afforded the benefit of every favorable inference, and the court is to determine only whether the facts as alleged fit within any cognizable legal theory” (*Clevenger v Yuzek*, 222 AD3d 931, 934 [2023] [internal quotation marks omitted]; see *Pergament v Government Empls. Ins. Co. [“GEICO”]*, 225 AD3d 799, 800 [2024]). “Where evidentiary material is submitted and considered on a motion to dismiss a complaint pursuant to CPLR 3211 (a) (7), and the motion is not converted into one for summary judgment, the question becomes whether the plaintiff has a cause of action, not whether the plaintiff has stated one and, unless it has been shown that a material fact as claimed by the plaintiff to be one is not a fact at all and unless it can be said that no significant dispute exists regarding it, dismissal shall not eventuate” (*Clevenger v Yuzek*, 222 AD3d at 934).

“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” (*Espinal v Melville Snow Contrs.*, 98 NY2d 136, 138 [2002]). Generally, a contractual obligation, standing alone, will not give rise to tort liability in favor of a third party (*see id.* at 140). 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 (*see id.*).

Here, the defendant demonstrated, as a matter of law, that it owed no duty of care to the plaintiff (*see id.* at 138; *Valdez v M.A. Angeliades, Inc.*, 222 AD3d 911, 911-912 [2023]). Contrary to the plaintiff’s contention, even if the allegations in the complaint are accepted as true and the plaintiff is accorded the

benefit of every possible favorable inference (*see Leon v Martinez*, 84 NY2d 83, 87 [1994]), the facts alleged do not establish that the defendant launched an instrument of harm, as the defendant is not alleged to have “created or increased the risk [to the plaintiff] beyond the risk which existed even before [the defendant] entered into [its] contractual undertaking” (*Church v Callanan Indus.*, 99 NY2d 104, 112 [2002]). The defendant’s purported negligence in failing to restore illumination to a darkened intersection amounts to, at most, a failure to act as an “instrument for good, which is insufficient to impose a duty of care” upon the defendant in the absence of contractual privity with the plaintiff (*Espeleta v Synergy Resources, Inc.*, 172 AD3d 1320, 1321 [2019] [internal quotation marks omitted]; *see Church v Callanan Indus.*, 99 NY2d at 112; *Santos v Deanco Servs., Inc.*, 142 AD3d 137, 142 [2016]). Moreover, the contract submitted by the defendant in support of its motion conclusively demonstrated that the defendant’s contractual undertaking was “not the type of ‘comprehensive and exclusive’ property maintenance obligation” that would “entirely absorb” the Town’s duty “to maintain the premises safely” (*Espinal v Melville Snow Contrs.*, 98 NY2d at 141, quoting *Palka v Servicemaster Mgt. Servs. Corp.*, 83 NY2d 579, 588 [1994]).

Accordingly, the Supreme Court should have granted the defendant’s motion pursuant to CPLR 3211 (a) to dismiss the complaint (*see Moch Co. v Rensselaer Water Co.*, 247 NY 160, 167-170 [1928]; *Anderson v Jefferson-Utica Group, Inc.*, 26 AD3d 760, 761 [2006]).

The defendant’s remaining contention is academic. Chambers, J.P., Dowling, McCormack and Quirk, JJ., concur.

63 Wilmington Trust, National Association, Respondent, v Fabius Delfeus, Appellant, et al., Defendants. [— NYS3d —]

Process—Service of Process—Affidavit of Personal Service

In an action to foreclose a mortgage, the defendant Fabius Delfeus appeals from an order of the Supreme Court, Kings County (Lawrence Knipel, J.), dated June 25, 2024. The order denied that defendant’s motion, inter alia, pursuant to CPLR 5015 (a) (4) to vacate an order and judgment of foreclosure and sale (one paper) of the same court (Noach Dear, J.) dated February 18, 2020, and pursuant to CPLR 3211 (a) (8) to dismiss the complaint insofar as asserted against him on the ground of lack of personal jurisdiction.

Ordered that the order is affirmed, with costs.

In April 2018, the plaintiff commenced this action to foreclose a mortgage against the defendant Fabius Delfeus (herein-

after the defendant), among others, in the Supreme Court, Kings County. The defendant was purportedly served with process in accordance with CPLR 308 (2), and failed to appear or answer. Thereafter, the Supreme Court granted the plaintiff's unopposed motion, inter alia, for leave to enter a default judgment against the defendant and for an order of reference. In an order and judgment of foreclosure and sale dated February 18, 2020, the court granted the plaintiff's unopposed motion to confirm the referee's report and for a judgment of foreclosure and sale. In August 2022, the property was sold at a foreclosure sale to the plaintiff.

In September 2023, the defendant moved, inter alia, pursuant to CPLR 5015 (a) (4) to vacate the order and judgment of foreclosure and sale and pursuant to CPLR 3211 (a) (8) to dismiss the complaint insofar as asserted against him on the ground of lack of personal jurisdiction. The Supreme Court denied the defendant's motion. The defendant appeals, contending the court lacks personal jurisdiction over him.

"CPLR 5015 (a) (4) provides that '[t]he court which rendered a judgment or order may relieve a party from it upon such terms as may be just,' upon the ground of, inter alia, 'lack of jurisdiction to render the judgment or order' " (*Wells Fargo Bank, N.A. v Guerrero*, 189 AD3d 1669, 1670 [2020], quoting CPLR 5015 [a] [4]). "A default must be vacated once the movant demonstrates a lack of personal jurisdiction, and the movant is relieved of any obligation to demonstrate a reasonable excuse for the default and a potentially meritorious defense" (*id.* [internal quotation marks omitted]; see *Wells Fargo Bank, NA v Spaulding*, 177 AD3d 817, 818 [2019]). "A court lacks personal jurisdiction over a defendant who is not properly served with process" (*Flatow v Goddess Sanctuary & Spa Corp.*, 233 AD3d 656, 657 [2024] [internal quotation marks omitted]; see *Federal Natl. Mtge. Assn. v Smith*, 219 AD3d 938, 940 [2023]). "When it is determined that process was ineffective, all subsequent proceedings are rendered null and void as to that party" (*Flatow v Goddess Sanctuary & Spa Corp.*, 233 AD3d at 657 [internal quotation marks omitted]; see *Federal Natl. Mtge. Assn. v Smith*, 219 AD3d at 940).

" '[S]ervice of process upon a natural person must be made in strict compliance with the methods of service set forth in CPLR 308' " (*Flatow v Goddess Sanctuary & Spa Corp.*, 233 AD3d at 657 [internal quotation marks omitted]; see *Federal Natl. Mtge. Assn. v Smith*, 219 AD3d at 940). "Service of process under CPLR 308 (2) . . . requires that the summons be delivered . . . to a person of suitable age and discretion at the defend-

ant's actual place of business, dwelling place or usual place of abode, along with a mailing of the summons to the defendant's last known residence or actual place of business" (*Flatow v Goddess Sanctuary & Spa Corp.*, 233 AD3d at 657 [internal quotation marks omitted]; see *Federal Natl. Mtge. Assn. v Smith*, 219 AD3d at 940). "Personal jurisdiction is not acquired absent compliance with both the delivery and mailing requirements of the statute" (*Mendez v Rattigan*, 209 AD3d 637, 639 [2022] [internal quotation marks omitted]; *Everbank v Kelly*, 203 AD3d 138, 143 [2022]).

"A process server's affidavit of service establishes a prima facie case as to the method of service and, therefore, gives rise to a presumption of proper service" (*Nurhan v Harley*, 237 AD3d 728, 729-730 [2025] [internal quotation marks omitted]; see *U.S. Bank Trust, N.A. v Catalano*, 215 AD3d 992, 993 [2023]). "To be entitled to vacatur of a default judgment under CPLR 5015 (a) (4), a defendant must overcome the presumption raised by the process server's affidavit of service" (*Nurhan v Harley*, 237 AD3d at 730 [internal quotation marks omitted]; see *TD Bank, N.A. v Turbo Group, Inc.*, 226 AD3d 1058 [2024]). "A sworn denial containing a detailed and specific contradiction of the allegations in the process server's affidavit will defeat the presumption of proper service" (*Nurhan v Harley*, 237 AD3d at 730 [internal quotation marks omitted]; see *HSBC Bank USA, N.A. v Rahmanan*, 194 AD3d 792, 793 [2021]). If the presumption is rebutted, a hearing to determine the propriety of service is necessary, at which the plaintiff must prove jurisdiction by a preponderance of the evidence (see *Creswell Invs., Ltd. v Brazil+Q1 Ltd.*, 234 AD3d 667, 669 [2025]; *Machovec v Svoboda*, 120 AD3d 772, 773 [2014]).

Here, the process server's affidavits of personal service upon the defendant attest that the process server effected substituted service upon the defendant by delivering the papers to one of the defendant's sons, who was a person of suitable age and discretion, at the subject premises and by mailing the papers to the same address. Thus, the affidavits constituted prima facie evidence of proper service upon the defendant. In support of the defendant's motion, neither the defendant nor his son state that the description of the son contained in the affidavit of service concerning delivery of the papers is inaccurate. Moreover, the defendant's assertions were conclusory and unsubstantiated (see *Tuttnauer USA Co., Ltd. v Russo*, 216 AD3d 846, 847 [2023]; *Deutsche Bank Natl. Trust Co. v Kenol*, 205 AD3d 1004, 1005 [2022]). Accordingly, the Supreme Court properly denied the defendant's motion, inter alia, pursuant to

CPLR 5015 (a) (4) to vacate the order and judgment of foreclosure and sale and pursuant to CPLR 3211 (a) (8) to dismiss the complaint insofar as asserted against him on the ground of lack of personal jurisdiction.

The defendant's remaining contention is improperly raised for the first time on appeal and, in any event, need not be reached in light of this determination. Barros, J.P., Iannacci, Voutsinas and Quirk, JJ., concur.

(April 15, 2026)

1 American Transit Insurance Company, Appellant, v Hackensack Surgery Center, LLC, as Assignee of Chong Sok So, Respondent. [— NYS3d —]

Disclosure—Penalty for Failure to Disclose—Striking of Pleading—Willful or Contumacious Conduct

In an action pursuant to Insurance Law § 5106 (c) for a de novo determination of a claim for no-fault insurance benefits, the defendant appeals from an order of the Supreme Court, Kings County (Leon Ruchelsman, J.), dated November 6, 2024. The order granted the plaintiff's motion for leave to renew and reargue its opposition to that branch of the defendant's prior motion which was pursuant to CPLR 3126 to strike the complaint, which had been granted in an order of the same court dated August 11, 2023, and, upon renewal and reargument, vacated so much of the order dated August 11, 2023, as granted that branch of the defendant's prior motion, and thereupon, denied that branch of the defendant's prior motion.

Ordered that the order dated November 6, 2024, is affirmed, with costs.

In April 2022, the plaintiff commenced this action pursuant to Insurance Law § 5106 (c) for a de novo determination of the defendant's claim for no-fault insurance benefits. In June 2023, the defendant moved, inter alia, pursuant to CPLR 3126 to strike the complaint for the plaintiff's failure to comply with a prior order of the Supreme Court to produce an entire no-fault claims file. The plaintiff opposed the motion. In an order dated August 11, 2023 (hereinafter the August 2023 order), the court, among other things, granted that branch of the defendant's motion.

Thereafter, the plaintiff moved for leave to renew and reargue its opposition to that branch of the defendant's motion which was pursuant to CPLR 3126 to strike the complaint and,

upon renewal and reargument, to vacate the August 2023 order and to deny that branch of the defendant's prior motion. The defendant opposed the motion. In an order dated November 6, 2024, the Supreme Court granted the plaintiff's motion. The defendant appeals.

"The supervision of discovery, and the setting of reasonable terms and conditions for disclosure, are matters within the sound discretion of the trial court" (*Bernardis v Town of Islip*, 95 AD3d 1050, 1050 [2012]; see *101CO, LLC v Sand Land Corp.*, 189 AD3d 942 [2020]), as is "[t]he determination whether to strike a pleading for failure to comply with court-ordered disclosure" (*Fishbane v Chelsea Hall, LLC*, 65 AD3d 1079, 1081 [2009]; see *Orgel v Stewart Tit. Ins. Co.*, 91 AD3d 922, 923 [2012]), as well as the "nature and degree of the sanction to be imposed" (*Roug Kang Wang v Chien-Tsang Lin*, 94 AD3d 850, 852 [2012]; see *Dokaj v Ruxton Tower Ltd. Partnership*, 91 AD3d 812, 814 [2012]; *Quinones v Long Is. Jewish Med. Ctr.*, 90 AD3d 632, 632 [2011]). However "[p]ublic policy strongly favors the resolution of actions on the merits whenever possible" (*Krause v Lobacz*, 131 AD3d 1128, 1129 [2015], quoting *Arpino v F.J.F. & Sons Elec. Co., Inc.*, 102 AD3d 201, 210 [2012]; see *Negro v St. Charles Hosp. & Rehabilitation Ctr.*, 44 AD3d 727, 728 [2007]), and "[t]he striking of a party's pleading is a drastic remedy only warranted where there has been a clear showing that the failure to comply with discovery demands was willful and contumacious" (*Krause v Lobacz*, 131 AD3d at 1129, quoting *Arpino v F.J.F. & Sons Elec. Co., Inc.*, 102 AD3d at 210; see *New York Timber, LLC v Seneca Cos.*, 133 AD3d 576, 577 [2015]; *Mangione v Jacobs*, 121 AD3d 953, 954 [2014]).

Here, the defendant failed to establish that the plaintiff's conduct was willful or contumacious (see *Edwards v Freedom Church of Revelation*, 230 AD3d 740, 742 [2024]; *Ferjuste v 437 BMW, LLC*, 219 AD3d 1308, 1310 [2023]; *PAL Envtl. Servs., Inc. v LJC Dismantling Corp.*, 157 AD3d 808, 809-810 [2018]; *Singer v Riskin*, 137 AD3d 999, 1001 [2016]). Accordingly, the Supreme Court properly granted that branch of the plaintiff's motion which was for leave to reargue its opposition to that branch of the defendant's prior motion which was pursuant to CPLR 3126 to strike the complaint and, upon reargument, properly vacated so much of the August 2023 order as granted that branch of the defendant's prior motion and thereupon, denied that branch of the defendant's prior motion.

In light of our determination, we need not reach the defendant's remaining contention. Barros, J.P., Warhit, Landicino and Love, JJ., concur.

2 American Transit Insurance Company, Respondent, v MZY Acupuncture, P.C., as Assignee of Loncey Neverson, Appellant. [— NYS3d —]—

Disclosure—Penalty for Failure to Disclose—Striking of Pleading—Willful or Contumacious Conduct

In an action pursuant to Insurance Law § 5106 (c) for a de novo determination of a claim for no-fault insurance benefits, the defendant appeals from an order of the Supreme Court, Kings County (Leon Ruchelsman, J.), dated November 6, 2024. The order granted the plaintiff's motion for leave to renew and reargue its opposition to that branch of the defendant's prior motion which was pursuant to CPLR 3126 to strike the complaint, which had been granted in an order of the same court (Rachel E. Freier, J.) dated June 12, 2023, and, upon renewal and reargument, vacated so much of the order dated June 12, 2023, as granted that branch of the defendant's prior motion, and thereupon, denied that branch of the defendant's prior motion.

Ordered that the order dated November 6, 2024, is affirmed, with costs.

In October 2022, the plaintiff commenced this action pursuant to Insurance Law § 5106 (c) for a de novo determination of the defendant's claim for no-fault insurance benefits. In May 2023, the defendant moved, inter alia, pursuant to CPLR 3126 to strike the complaint for the plaintiff's failure to comply with a prior order of the Supreme Court to produce an entire no-fault claims file. The plaintiff opposed the motion. In an order dated June 12, 2023 (hereinafter the June 2023 order), the court, among other things, granted that branch of the defendant's motion.

Thereafter, the plaintiff moved for leave to renew and reargue its opposition to that branch of the defendant's motion which was pursuant to CPLR 3126 to strike the complaint and, upon renewal and reargument, to vacate the June 2023 order and to deny that branch of the defendant's prior motion. The defendant opposed the motion. In an order dated November 6, 2024, the Supreme Court granted the plaintiff's motion. The defendant appeals.

"The supervision of discovery, and the setting of reasonable terms and conditions for disclosure, are matters within the sound discretion of the trial court" (*Bernardis v Town of Islip*, 95 AD3d 1050, 1050 [2012]; see *101CO, LLC v Sand Land Corp.*, 189 AD3d 942 [2020]), as is "[t]he determination whether to strike a pleading for failure to comply with court-ordered

disclosure” (*Fishbane v Chelsea Hall, LLC*, 65 AD3d 1079, 1081 [2009]; see *Orgel v Stewart Tit. Ins. Co.*, 91 AD3d 922, 923 [2012]), as well as the “nature and degree of the sanction to be imposed” (*Roug Kang Wang v Chien-Tsang Lin*, 94 AD3d 850, 852 [2012]; see *Dokaj v Ruxton Tower Ltd. Partnership*, 91 AD3d 812, 814 [2012]; *Quinones v Long Is. Jewish Med. Ctr.*, 90 AD3d 632, 632 [2011]). However “‘[p]ublic policy strongly favors the resolution of actions on the merits whenever possible’” (*Krause v Lobacz*, 131 AD3d 1128, 1129 [2015], quoting *Arpino v F.J.F. & Sons Elec. Co., Inc.*, 102 AD3d 201, 210 [2012]; see *Negro v St. Charles Hosp. & Rehabilitation Ctr.*, 44 AD3d 727, 728 [2007]), and “‘[t]he striking of a party’s pleading is a drastic remedy only warranted where there has been a clear showing that the failure to comply with discovery demands was willful and contumacious’” (*Krause v Lobacz*, 131 AD3d at 1129, quoting *Arpino v F.J.F. & Sons Elec. Co., Inc.*, 102 AD3d at 210; see *New York Timber, LLC v Seneca Cos.*, 133 AD3d 576, 577 [2015]; *Mangione v Jacobs*, 121 AD3d 953, 954 [2014]).

Here, the defendant failed to establish that the plaintiff’s conduct was willful or contumacious (see *Edwards v Freedom Church of Revelation*, 230 AD3d 740, 742 [2024]; *Ferjuste v 437 BMW, LLC*, 219 AD3d 1308, 1310 [2023]; *PAL Envtl. Servs., Inc. v LJC Dismantling Corp.*, 157 AD3d 808, 809-810 [2018]; *Singer v Riskin*, 137 AD3d 999, 1001 [2016]). Accordingly, the Supreme Court properly granted that branch of the plaintiff’s motion which was for leave to reargue its opposition to that branch of the defendant’s motion which was pursuant to CPLR 3126 to strike the complaint and, upon reargument, properly vacated so much of the June 2023 order as granted that branch of the defendant’s prior motion and thereupon, denied that branch of the defendant’s prior motion.

In light of our determination, we need reach the defendant’s remaining contention. Barros, J.P., Warhit, Landicino and Love, JJ., concur.

3 Bayview Loan Servicing, LLC, Plaintiff, v Artur Chechetkin, Also Known as Arthur Chechetkin, et al., Defendants, and Marsha Aron, Appellant. 1900 Capital Trust II, Nonparty Respondent. [— NYS3d —]

Mortgages—Foreclosure—Standing—Non-Borrower Record Title Owner

In an action to foreclose a mortgage, the defendant Marsha Aron appeals from an order and judgment of foreclosure and sale (one paper) of the Supreme Court, Kings County (Larry D. Martin, J.), entered July 27, 2023. The order and judgment of

foreclosure and sale, insofar as appealed from, granted those branches of the plaintiff's motion which were to confirm the referee's report and for a judgment of foreclosure and sale, confirmed the referee's report, and directed the sale of the subject property.

Ordered that the order and judgment of foreclosure and sale is affirmed insofar as appealed from, with costs.

On August 27, 2006, the defendant Artur Chechetkin (hereinafter the borrower) executed a note in the amount of \$440,000 in favor of nonparty JPMorgan Chase Bank, N.A. (hereinafter JPMorgan). The note was secured by a mortgage on certain real property located in Brooklyn.

On July 31, 2017, the plaintiff, Bayview Loan Servicing, LLC, JPMorgan's successor in interest, commenced this action to foreclose the mortgage against the borrower and the defendant Marsha Aron (hereinafter the defendant), among others. The complaint alleged that the defendant was the record owner of the subject property. In two orders, both dated May 1, 2019, the Supreme Court granted the plaintiff's motion for summary judgment on the complaint insofar as asserted against the defendant and for an order of reference, and appointed a referee to compute the amount due on the note.

In a deed dated December 1, 2022, and recorded on January 20, 2023, the defendant conveyed her interest in the property to nonparty Mutual Consulting Group, LLC (hereinafter MCG).

On March 23, 2023, the plaintiff moved, *inter alia*, to confirm the referee's report and for a judgment of foreclosure and sale. The defendant opposed the motion.

In an order and judgment of foreclosure and sale entered July 27, 2023, the Supreme Court, among other things, granted those branches of the plaintiff's motion which were to confirm the referee's report and for a judgment of foreclosure and sale, confirmed the referee's report, and directed the sale of the property. The order and judgment also amended the caption to substitute the respondent—1900 Capital Trust II, by U.S. Bank Trust National Association, not in its individual capacity but solely as Certificate Trustee—for the plaintiff. The defendant appeals.

Here, the defendant conveyed her interest in the property to MCG in a deed recorded on January 20, 2023—approximately two months before the plaintiff made the instant motion, *inter alia*, to confirm the referee's report and for a judgment of foreclosure and sale. Thus, the defendant—who had merely been the record owner of the property and was neither borrower nor

mortgagor—had no standing to challenge the plaintiff’s request for a judgment of foreclosure and sale (*see Citimortgage, Inc. v Warsi*, 212 AD3d 592, 594 [2023]; *U.S. Bank N.A. v Davids*, 188 AD3d 943, 944 [2020]).

The parties’ remaining contention need not be reached in light of our determination. Genovesi, J.P., Christopher, Wan and Ventura, JJ., concur.

4 Chad Berl, as Administrator of the Estate of Lawrence Kravit, Deceased, Appellant, v CNH Operating, LLC, Doing Business as the Chateau at Brooklyn Rehabilitation & Nursing Center, Respondent. [— NYS3d —]—

Health—Nursing Homes—Emergency or Disaster Treatment Protection Act—Immunity from Negligence Action

In an action, inter alia, to recover damages for negligence, the plaintiff appeals from (1) an order of the Supreme Court, Kings County (Anne J. Swern, J.), dated April 18, 2024, and (2) an undated judgment of the same court. The order granted the defendant’s motion pursuant to CPLR 3211 (a) (7) to dismiss the complaint. The judgment, upon the order, is in favor of the defendant and against the plaintiff dismissing the complaint.

Ordered that the appeal from the order is dismissed; and it is further,

Ordered that the judgment is affirmed; and it is further,

Ordered that one bill of costs is awarded to the defendant.

The appeal from the order must be dismissed because the right of direct appeal therefrom terminated with the entry of the judgment in the action (*see Matter of Aho*, 39 NY2d 241, 248 [1976]). The issues raised on the appeal from the order are brought up for review and have been considered on the appeal from the judgment (*see* CPLR 5501 [a] [1]).

The plaintiff’s decedent was a resident at the defendant’s rehabilitation and nursing facility from July 2019 until April 2020. He died on April 14, 2020, after allegedly contracting COVID-19 at the defendant’s facility. The plaintiff commenced this action, among other things, to recover damages for negligence, alleging that the defendant failed to prevent the decedent from contracting COVID-19. The defendant moved pursuant to 3211 (a) (7) to dismiss the complaint, inter alia, on the ground that the defendant was immune from liability under the Emergency or Disaster Treatment Protection Act (EDTPA) (Public Health Law former art 30-D, §§ 3080-3082, repealed by L 2021, ch 96, § 1). The Supreme Court granted the motion. The plaintiff appeals.

Generally, on a motion to dismiss a complaint pursuant to CPLR 3211 (a) (7) for failure to state a cause of action, the complaint is afforded a liberal construction, the allegations are accepted as true, the plaintiff is accorded the benefit of every favorable inference, and the court determines whether the facts as alleged fit within any cognizable legal theory (*see Connolly v Long Is. Power Auth.*, 30 NY3d 719, 728 [2018]; *Leon v Martinez*, 84 NY2d 83, 87-88 [1994]). “When evidentiary material is considered, the criterion is whether the [plaintiff] has a cause of action, not whether [the plaintiff] has stated one, and, unless it has been shown that a material fact as claimed by the [plaintiff] to be one is not a fact at all and unless it can be said that no significant dispute exists regarding it, . . . dismissal should not eventuate” (*Guggenheimer v Ginzburg*, 43 NY2d 268, 275 [1977]; *see Leon v Martinez*, 84 NY2d at 88). Submissions by the defendant on a motion pursuant to CPLR 3211 (a) (7) “will seldom if ever warrant [dismissal] unless [they] establish conclusively that plaintiff has no cause of action” (*Rovello v Orofino Realty Co.*, 40 NY2d 633, 636 [1976]; *see Lawrence v Graubard Miller*, 11 NY3d 588, 595 [2008]).

At the outset of the COVID-19 pandemic, the New York State Legislature enacted the EDTPA “in an effort to provide a measure of relief for health care facilities in their attempts to care for patients with the disease” (*Schapers v West Lawrence Care Ctr., LLC*, 241 AD3d 1381, 1382 [2025]; *see* Public Health Law former § 3080). In relevant part, the EDTPA provided health care facilities with immunity from civil liability for any harm or damages alleged to have been sustained as a result of an act or omission in the course of providing health care services, if (1) the health care facility was providing health care services pursuant to a COVID-19 emergency rule or otherwise in accordance with applicable law, (2) the act or omission occurred in the course of providing health care services and the treatment of the individual was impacted by the health care facility’s decisions or activities in response to or as a result of the COVID-19 outbreak and in support of the State’s directives, and (3) the health care facility was providing health care services in good faith (*see* Public Health Law former § 3082 [1]).

Here, the defendant’s evidentiary submissions established conclusively that the three requirements for immunity under the EDTPA were met with respect to the allegations in the complaint, and, therefore, the plaintiff had no cause of action against the defendant (*see Hyman v Richmond Univ. Med. Ctr.*, 239 AD3d 617, 618 [2025]; *Martinez v NYC Health & Hosps. Corp.*, 223 AD3d 731, 732 [2024]; *Mera v New York City Health*

& *Hosp. Corp.*, 220 AD3d 668, 670 [2023]). Although the EDTPA provides for certain exceptions to immunity, including gross negligence (see Public Health Law former § 3082 [2]), the “bare legal conclusions with no factual specificity” in the complaint regarding that exception were “insufficient to survive a motion to dismiss” (*Godfrey v Spano*, 13 NY3d 358, 373 [2009]; see *Hyman v Richmond Univ. Med. Ctr.*, 239 AD3d at 619; *Whitehead v Pine Haven Operating LLC*, 222 AD3d 104, 110-111 [2023]).

The plaintiff’s remaining contentions either are without merit or need not be reached in light of our determination. Brathwaite Nelson, J.P., Ford, Dowling and Goldberg Velazquez, JJ., concur.

5 Lea Brener, Respondent, v Queens Boulevard Extended Care Facility Corp. et al., Appellants. [253 NYS3d 281]—

Negligence—Maintenance of Premises—Slip and Fall—Application of Wax to Floor

In an action to recover damages for personal injuries, the defendants appeal from an order of the Supreme Court, Kings County (Larry Martin, J.), dated March 11, 2024. The order denied the defendants’ motion for summary judgment dismissing the complaint.

Ordered that the order is reversed, on the law, with costs, and the defendants’ motion for summary judgment dismissing the complaint is granted.

The plaintiff allegedly was injured in August 2016, when she slipped and fell in a hallway of a skilled nursing facility owned and operated by the defendants. Thereafter, the plaintiff commenced this action to recover damages for personal injuries. Following the completion of discovery, the defendants moved for summary judgment dismissing the complaint. In an order dated March 11, 2024, the Supreme Court denied the defendants’ motion. The defendants appeal.

“A defendant may not be held liable for the application of wax, polish, or paint to a floor . . . unless the defendant had actual, constructive, or imputed knowledge that the product could render the floor dangerously slippery” (*Union v Excel Commercial Maintenance*, 185 AD3d 869, 869-870 [2020] [internal quotation marks omitted]; see *Faiella v Oradell Constr. Co., Inc.*, 171 AD3d 1013, 1014 [2019]). “A prima facie case of the negligent application of wax may be established by evidence that a dangerous residue of wax was present on the floor” (*Galler v Prudential Ins. Co. of Am.*, 63 NY2d 637, 638 [1984]). “In the absence of evidence of a negligent application

of floor wax or polish, the mere fact that a smooth floor may be shiny or slippery does not support a cause of action to recover damages for negligence, nor does it give rise to an inference of negligence” (*Khaimova v Osnat Corp.*, 21 AD3d 401, 402 [2005]; see *Alvarez v Staten Is. R.T. Operating Auth.*, 225 AD3d 830, 831 [2024]; *Kapoor v Randlett*, 144 AD3d 984, 985 [2016]).

Here, the defendants established their prima facie entitlement to judgment as a matter of law dismissing the complaint by demonstrating that there was no negligent application of wax to the floor (see *Kapoor v Randlett*, 144 AD3d at 985; *Khaimova v Osnat Corp.*, 21 AD3d at 402; *Lee v Rite Aid of N.Y.*, 261 AD2d 368, 368-369 [1999]; *Paul v Roman Catholic Church of Holy Innocents*, 226 AD2d 515, 515 [1996]).

In opposition, the plaintiff failed to raise a triable issue of fact. The affidavit she submitted in opposition to the motion merely raised what appeared to be feigned issues of fact designed to avoid the consequences of her earlier deposition testimony and, therefore, was insufficient to defeat summary judgment (see *Meriweather v Green W. 57th St., LLC*, 156 AD3d 875, 876 [2017]; *Carriero v Nazario*, 116 AD3d 818, 819 [2014]; *Wright v South Nassau Communities Hosp.*, 254 AD2d 277, 278 [1998]). Moreover, since the plaintiff failed to raise a triable issue of fact in opposition to the defendants’ prima facie showing that no dangerous condition existed, “usual questions of notice of the condition are irrelevant” (*Cook v Rezende*, 32 NY2d 596, 599 [1973]; see *Walsh v Super Value, Inc.*, 76 AD3d 371, 376 [2010]).

Accordingly, the Supreme Court should have granted the defendants’ motion for summary judgment dismissing the complaint. LaSalle, P.J., Connolly, Ventura and Goldberg Velazquez, JJ., concur.

6 Anthony Brewer, Appellant, v 71 Pilling Project, LLC, Respondent. [— NYS3d —]

Parties—Standing—Claim to Real Property—Interest

In an action, inter alia, in effect, for a judgment declaring that a deed recorded on July 26, 2021, is null and void, the plaintiff appeals from an order and judgment (one paper) of the Supreme Court, Kings County (Katherine A. Levine, J.), dated October 3, 2023. The order and judgment, in effect, denied the plaintiff’s motion to void the deed recorded on July 26, 2021, and that branch of his separate motion which was, in effect, for the same relief, and granted that branch of the defendant’s motion which was pursuant to CPLR 3211 (a) to dismiss the complaint and its separate motion to void a deed

recorded on July 3, 2023, and thereupon, dismissed the complaint and declared that the deed recorded on July 3, 2023, is canceled and discharged.

Ordered that the order and judgment is modified, on the law, by adding thereto a provision declaring that the deed recorded on July 26, 2021, is not null and void; as so modified, the order and judgment is affirmed, without costs or disbursements.

The plaintiff commenced this action against the defendant, inter alia, in effect, for a judgment declaring that a deed possessed by the defendant and recorded on July 26, 2021 (hereinafter the July 2021 deed), to certain real property located in Brooklyn (hereinafter the premises) is null and void. According to the plaintiff, the July 2021 deed was void and the defendant was trying to defraud the plaintiff, who was allegedly a secured party creditor pursuant to a lease agreement. The plaintiff further alleged, among other things, that in October 2021, he signed a quitclaim deed, which was recorded on July 3, 2023, purportedly transferring the premises to Joihan Trust (hereinafter the July 2023 deed).

The plaintiff moved to void the July 2021 deed and separately moved, inter alia, in effect, for the same relief. The defendant moved, among other things, pursuant to CPLR 3211 (a) to dismiss the complaint, on the ground, inter alia, that the plaintiff lacked standing. Thereafter, the defendant separately moved to void the July 2023 deed.

In an order and judgment dated October 3, 2023, the Supreme Court, in effect, denied the plaintiff's motion to void the July 2021 deed and that branch of his separate motion which was, in effect, for the same relief, and granted that branch of the defendant's motion which was pursuant to CPLR 3211 (a) to dismiss the complaint and its separate motion to void the July 2023 deed, and thereupon, dismissed the complaint and declared that the July 2023 deed is canceled and discharged. The plaintiff appeals.

"Where a CPLR 3211 (a) (3) motion is based upon an alleged lack of standing, the burden is on the moving defendant to establish, prima facie, the plaintiff's lack of standing as a matter of law" (*Wilmington Sav. Fund Socy., FSB v Matamoro*, 200 AD3d 79, 89-90 [2021]; see *Agudas Chasidei Chabad of United States v Simpson*, 239 AD3d 796, 799 [2025]). The plaintiff does not have the burden of establishing his or her standing as a matter of law but must merely raise a question of fact as to standing to defeat such a motion (see *Wilmington Sav. Fund Socy., FSB v Matamoro*, 200 AD3d at 90).

Under RPAPL 1501 (1), to maintain an action to compel the

determination of a claim to real property, the plaintiff needs an estate or interest in the real property. Here, the defendant established that the plaintiff was a tenant with no actionable interest in the premises and, thus, did not have standing to contest the defendant's ownership (see *TDD Irrevocable Trust v J & A Saporta Realty Corp.*, 139 AD3d 706, 708 [2016]; *Kaygreen Realty Co., LLC v IG Second Generation Partners, L.P.*, 78 AD3d 1010, 1014 [2010]). In opposition, the plaintiff failed to raise a question of fact as to his standing.

Accordingly, the Supreme Court properly granted that branch of the defendant's motion which pursuant to CPLR 3211 (a) to dismiss the complaint.

The parties' remaining contentions either are without merit or need not be reached in light of our determination.

Since this is, in part, a declaratory judgment action, the order and judgment must contain the appropriate declaration that the July 2021 deed is not null and void (see *Lanza v Wagner*, 11 NY2d 317, 334 [1962]). Duffy, J.P., Wooten, Hom and Goldberg Velazquez, JJ., concur.

7 Wilbert Bryant, Appellant, v Boston Properties, Inc., et al., Respondents. [— NYS3d —]—

Disclosure—Penalty for Failure to Disclose—Willful and Contumacious Conduct—Reasonable Excuse

In an action to recover damages for personal injuries, the plaintiff appeals from an order of the Supreme Court, Kings County (Lawrence Knipel, J.), dated October 22, 2021. The order, insofar as appealed from, granted that branch of the defendants' motion which was pursuant to CPLR 3126 to dismiss the complaint.

Ordered that the order is affirmed insofar as appealed from, with costs.

In June 2018, the plaintiff commenced this action against the defendants, Boston Properties, Inc. (hereinafter Boston Properties), and Turner Construction Company (hereinafter Turner) to recover damages for injuries he alleged he sustained while working at a commercial property owned by Boston Properties at which Turner was the general contractor. The plaintiff alleged, inter alia, violations of Labor Law §§ 200, 240, and 241 (6).

In March 2020, the defendants moved pursuant to CPLR 3126 to dismiss the complaint due to the plaintiff's failure, among other things, to appear for his deposition and medical examination. In the alternative, the defendants moved to

preclude the plaintiff from offering any testimony or evidence in support of his claims at trial and to compel the plaintiff to appear for his deposition and medical examination. In an order dated September 1, 2020, the Supreme Court directed the plaintiff, inter alia, to appear for a deposition on or before January 5, 2021, and to appear for a medical examination on or before March 5, 2021. The plaintiff failed to do so.

In April 2021, the defendants filed a second motion, among other things, pursuant to CPLR 3126 to dismiss the complaint due to the plaintiff's failure to appear for his deposition and medical examination. The plaintiff opposed the motion, contending that he could not appear for his deposition due to the defendants' allegedly deficient discovery responses. In an order dated May 17, 2021 (hereinafter the May 2021 order), the Supreme Court, inter alia, granted the defendants' motion to the extent of directing the plaintiff to appear for his deposition by June 30, 2021, "irrespective of whether or not all [discovery] responses have been provided by defendant." The May 2021 order also specified that the "[f]ailure of either party to comply shall result in appropriate sanctions pursuant to CPLR 3126." The plaintiff failed to appear for his deposition.

In October 2021, the defendants filed a third motion, among other things, pursuant to CPLR 3126 to dismiss the complaint due to the plaintiff's failure to appear for his deposition and medical examination. In opposition to the defendants' motion, the plaintiff's counsel submitted an affirmation in which she asserted that the plaintiff did not appear for his deposition prior to the May 2021 order because the defendants had failed to produce certain outstanding discovery. The plaintiff's counsel further affirmed that she had been unable to schedule the plaintiff's deposition following the May 2021 order because the plaintiff was incarcerated and the facility where he was being held had provided conflicting information regarding the procedure for scheduling a deposition in light of, inter alia, its COVID-19 protocols. In an order dated October 22, 2021, the Supreme Court, among other things, granted that branch of the defendants' motion. The plaintiff appeals.

"Resolution of discovery disputes and the nature and degree of the penalty to be imposed pursuant to CPLR 3126 are matters within the sound discretion of the motion court" (*Winters v City of New York*, 234 AD3d 805, 807 [2025], quoting *Morales v Zherka*, 140 AD3d 836, 836-837 [2016]). Pursuant to CPLR 3126 (3), "[i]f any party . . . refuses to obey an order for disclosure or wilfully fails to disclose information which the court finds ought to have been disclosed . . . , the court may

make such orders with regard to the failure or refusal as are just,” including, inter alia, an order “dismissing the action.” “‘Before a court invokes the drastic remedy of striking a pleading . . . , there must be a clear showing that the failure to comply with court-ordered discovery was willful and contumacious’” (*De Leo v State-Whitehall Co.*, 126 AD3d 750, 752 [2015], quoting *Harris v City of New York*, 117 AD3d 790, 790 [2014]; see *JPMorgan Chase Bank, N.A. v New York State Dept. of Motor Vehs.*, 119 AD3d 903, 903 [2014]). “Willful and contumacious conduct may be inferred from a party’s repeated failure to comply with court-ordered discovery, coupled with inadequate explanations for the failures to comply or a failure to comply with court-ordered discovery over an extended period of time” (*Empire Enters. I.J.J.A., Inc. v Daimler Buses of N. Am., Inc.*, 172 AD3d 819, 820 [2019]; see *De Leo v State-Whitehall Co.*, 126 AD3d at 752). “‘Absent an improvident exercise of discretion, the determination to impose sanctions for conduct that frustrates the purpose of the CPLR should not be disturbed’” (*Cobo v Pennwalt Corp. Stokes Div.*, 185 AD3d 650, 652 [2020], quoting *Lotardo v Lotardo*, 31 AD3d 504, 505 [2006]).

Here, the willful and contumacious character of the plaintiff’s actions can be inferred from his repeated failures to appear for his deposition and medical examination over a period of more than two years, despite five court orders directing him to do so (see *Williams v Suttle*, 168 AD3d 792, 793-794 [2019]; *Stone v Zinoukhova*, 119 AD3d 928, 929-930 [2014]). Further, the plaintiff failed to offer a reasonable excuse for his failure to appear (see *Williams v Suttle*, 168 AD3d at 794; *Apladenaki v Greenpoint Mtge. Funding, Inc.*, 117 AD3d 976, 977 [2014]). His counsel’s assertion that she struggled to schedule the plaintiff’s deposition following the May 2021 order due to the plaintiff’s incarceration and the COVID-19 protocols at the facility where he was being held does not constitute a reasonable excuse. The record reflects that the plaintiff had been incarcerated since January 2019. The plaintiff’s counsel also failed to detail her purported efforts to schedule the plaintiff’s deposition. Accordingly, the Supreme Court providently exercised its discretion in granting that branch of the defendants’ motion which was pursuant to CPLR 3126 to dismiss the complaint (see *Stone v Zinoukhova*, 119 AD3d at 930; *Apladenaki v Greenpoint Mtge. Funding, Inc.*, 117 AD3d at 977).

The plaintiff’s remaining contention need not be addressed in light of our determination. Duffy, J.P., Dowling, Hom and Quirk, JJ., concur.

8 Christopher Canzona, Respondent, v Charles Atanasio et al., Appellants. [— NYS3d —]

Money Received—Unjust Enrichment—Claim of Extortion

Torts—Conversion—Misappropriation of Funds—Unauthorized Dominion

In an action, inter alia, to recover damages for unjust enrichment, the defendants appeal from an order of the Supreme Court, Suffolk County (James Hudson, J.), dated April 7, 2021. The order, insofar as appealed from, denied those branches of the defendants' motion which were for summary judgment on their counterclaims alleging unjust enrichment, money had and received, and conversion.

Ordered that the order is affirmed insofar as appealed from, with costs.

In 2011, the plaintiff commenced this action against the defendants, Charles Atanasio (hereinafter Charles), the plaintiff's former brother-in-law, and Mary Atanasio, to recover monies allegedly owed to him for expenses related to a boat jointly owned by the plaintiff and the defendants and a beach house previously jointly owned by the plaintiff and the defendants. The defendants interposed an answer asserting counterclaims alleging, inter alia, unjust enrichment, money had and received, and conversion. In an order dated April 3, 2018, the Supreme Court granted the defendants' motion to dismiss the complaint as a sanction for the plaintiff's false deposition testimony and litigation misconduct. Thereafter, the defendants moved, among other things, for summary judgment on their counterclaims alleging unjust enrichment, money had and received, and conversion. In an order dated April 7, 2021, the court, inter alia, denied those branches of the defendants' motion. The defendants appeal.

“To establish an unjust enrichment cause of action, a plaintiff must allege that (1) the other party was enriched, (2) at that party's expense, and (3) it is against equity and good conscience to permit the other party to retain what is sought to be recovered” (*Clarke v Clarke*, 237 AD3d 1039, 1041 [2025], quoting *Dee v Rakower*, 112 AD3d 204, 213 [2013]; see *Auquilla v Villa*, 240 AD3d 48, 56-57 [2025]). “The essential elements of a cause of action for money had and received are (1) the defendant received money belonging to the plaintiff, (2) the defendant benefitted from receipt of the money, and (3) under principles of equity and good conscience, the defendant should not be permitted to keep the money” (*B&H Flooring, LLC v Folger*, 228 AD3d 809, 813 [2024] [internal quotation marks omitted]).

Here, the defendants failed to establish their prima facie

entitlement to judgment as a matter of law on their counterclaims alleging unjust enrichment and money had and received, which were premised on Charles's assertion that the plaintiff extorted \$500,000 from him. In support of their motion, the defendants submitted photocopies of checks from Charles to the plaintiff totaling \$500,000 and an affidavit from Charles alleging that the plaintiff extorted the money from him. However, the defendants submitted no other evidence supporting their extortion claim. Viewing the evidence in the light most favorable to the plaintiff, the defendants' submissions failed to establish that any extortion had occurred and that the plaintiff was thus enriched at the defendants' expense such that it would be against equity and good conscience to permit the plaintiff to retain what was sought to be recovered.

The defendants also failed to establish their *prima facie* entitlement to judgment as a matter of law on their counterclaim for conversion, alleging that the plaintiff misappropriated funds intended for loan payments and failed to repay his half of a loan with respect to a shared asset.

"To establish a cause of action to recover damages for conversion, a plaintiff must show legal ownership or an immediate superior right of possession to a specific identifiable thing and must show that the defendant exercised an unauthorized dominion over the thing in question to the exclusion of the plaintiff's rights" (*MISF, LLC v Sohayegh*, 239 AD3d 732, 733 [2025] [internal quotation marks omitted]; see *Amid v Del Col*, 223 AD3d 698, 700 [2024]). "Moreover, the mere right to payment cannot be the basis for a cause of action alleging conversion since the essence of a conversion cause of action is the unauthorized dominion over the thing in question" (*Barker v Amorini*, 121 AD3d 823, 825 [2014] [internal quotation marks omitted]; see *City of Long Beach v Agostisi*, 221 AD3d 776, 779 [2023]). Here, the defendants asserted that the plaintiff misappropriated funds they sent to the plaintiff to make payments on the boat loan. However, in support of their motion, the defendants submitted an affidavit in which Charles admitted to transferring the money to the plaintiff, as well as receipts demonstrating that the defendants had authorized the payments. The defendants thus failed to establish that the plaintiff had "unauthorized dominion" over the funds (*MISF, LLC v Sohayegh*, 239 AD3d at 733 [internal quotation marks omitted]).

Accordingly, the Supreme Court properly denied those branches of the defendants' motion which were for summary judgment on their counterclaims alleging unjust enrichment, money had and received, and conversion without regard to the

sufficiency of the plaintiff's opposition papers (*see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). Barros, J.P., Warhit, Landicino and Love, JJ., concur.

9 Terry Serge Coimin, Appellant, v City of New York, Defendant, and Stephanie C. Rodney et al., Respondents. [253 NYS3d 283]—

Negligence—Sidewalks—Liability of Abutting Landowner—Exclusive Use for Residential Purposes

In an action to recover damages for personal injuries, the plaintiff appeals from an order of the Supreme Court, Kings County (Patria Frias-Colón, J.), dated January 29, 2025. The order granted the motion of the defendants Stephanie C. Rodney and Suzette G. Rodney for summary judgment dismissing the complaint and all cross-claims insofar as asserted against them.

Ordered that the appeal from so much of the order as granted that branch of the motion of the defendants Stephanie C. Rodney and Suzette G. Rodney which was for summary judgment dismissing all cross-claims insofar as asserted against them is dismissed, as the plaintiff is not aggrieved by that portion of the order (*see* CPLR 5511; *Mixon v TBV, Inc.*, 76 AD3d 144, 156-157 [2010]); and it is further,

Ordered that the order is affirmed insofar as reviewed; and it is further,

Ordered that one bill of costs is awarded to the defendants Stephanie C. Rodney and Suzette G. Rodney.

In November 2022, the plaintiff allegedly was injured when he tripped and fell on a hole in the sidewalk abutting real property owned by the defendants Stephanie C. Rodney and Suzette G. Rodney (hereinafter together the Rodney defendants) in Brooklyn. The plaintiff thereafter commenced this personal injury action against the Rodney defendants and the City of New York.

The Rodney defendants moved for summary judgment dismissing the complaint and all cross-claims insofar as asserted against them, contending, *inter alia*, that they were exempt from liability under the exception set forth in Administrative Code of the City of New York § 7-210 (b). By order dated January 29, 2025, the Supreme Court granted the Rodney defendants' motion. The plaintiff appeals.

“Generally, liability for injuries sustained as a result of negligent maintenance of or the existence of dangerous [or] defective conditions to public sidewalks is placed on the

municipality and not the abutting landowner” (*Hausser v Giunta*, 88 NY2d 449, 452-453 [1996]; see *Giuntini v City of New York*, 226 AD3d 651, 652 [2024]). “An abutting landowner will be liable to a pedestrian injured by a defect in a public sidewalk only when the owner either created the condition or caused the defect to occur because of a special use, or when a statute or ordinance places an obligation to maintain the sidewalk on the owner and expressly makes the owner liable for injuries caused by a breach of that duty” (*Petrillo v Town of Hempstead*, 85 AD3d 996, 997 [2011]; see *Giuntini v City of New York*, 226 AD3d at 652). However, “[i]n 2003, the New York City Council enacted section 7-210 of the Administrative Code of the City of New York to shift tort liability for injuries resulting from defective sidewalks from the City to abutting property owners” (*Zak v City of New York*, 192 AD3d at 735; see *Sangaray v West Riv. Assoc., LLC*, 26 NY3d 793 [2016]; *Giuntini v City of New York*, 226 AD3d at 652). “This liability shifting provision does not, however, apply to ‘one-, two- or three-family residential real property that is (i) in whole or in part, owner occupied, and (ii) used exclusively for residential purposes’” (*Zak v City of New York*, 192 AD3d at 735, quoting Administrative Code § 7-210 [b]).

Here, the Rodney defendants demonstrated, *prima facie*, that their property was an owner-occupied, two-family residential property used exclusively for residential purposes, and, thus, fell within the exception set forth in Administrative Code § 7-210 (b) (see *Martin v Newton*, 206 AD3d 644, 645 [2022]; *Osipova v London*, 186 AD3d 1528, 1529 [2020]; *DeSilvio v Lin Zheng*, 150 AD3d 679 [2017]). The Rodney defendants also established, *prima facie*, that they did not create or cause the alleged defective condition of the sidewalk to occur through a special use of the sidewalk (see *Giuntini v City of New York*, 226 AD3d at 653; *Daniel v Khadu*, 190 AD3d 817, 819 [2021]; *Cosme v City of New York*, 169 AD3d 762, 763 [2019]).

In opposition, the plaintiff failed to raise a triable issue of fact (see *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). Contrary to the plaintiff’s contention, the affirmation of his expert engineer failed to raise a triable issue of fact as to whether the Rodney defendants, or someone on their behalf, created the alleged defective condition of the sidewalk by negligently repairing or replacing the portion of the sidewalk at issue prior to the accident.

Accordingly, the Supreme Court properly granted that branch of the Rodney defendants’ motion which was for summary judgment dismissing the complaint insofar as asserted against them.

The plaintiff's remaining contention is improperly raised for the first time on appeal. Dillon, J.P., Ford, Dowling and Quirk, JJ., concur.

10 Michelle Curry, Respondent, v County of Suffolk et al., Respondents, and Town of Babylon, Appellant, et al., Defendant. [— NYS3d —]

**Municipal Corporations—Tort Liability—Governmental Capacity—Waste Collection
Negligence—Proximate Cause—Substantial Cause—Intervening Act**

In an action to recover damages for personal injuries, the defendant Town of Babylon appeals from an order of the Supreme Court, Suffolk County (Joseph A. Santorelli, J.), dated November 30, 2020. The order, insofar as appealed from, denied that defendant's motion for summary judgment dismissing the complaint and all cross-claims insofar as asserted against it.

Ordered that the order is affirmed insofar as appealed from, with one bill of costs to the plaintiff and the defendants Winters Bros. Waste Systems of Long Island, LLC, and Winters Bros. Recycling Corp. appearing separately and filing separate briefs.

The plaintiff allegedly was injured while driving in the Town of Babylon when another vehicle traveling in the opposite direction crossed into her lane, causing the plaintiff to swerve. The plaintiff's vehicle struck a container, allegedly owned by the Town, that had been placed in the roadway in connection with a commercial eviction that had occurred earlier that day. The plaintiff commenced this action against the Town, among others, to recover damages for personal injuries.

The Town moved for summary judgment dismissing the complaint and all cross-claims insofar as asserted against it on the grounds, inter alia, that it was entitled to governmental function immunity and that the negligence of the driver of the vehicle that crossed into the plaintiff's lane was the sole proximate cause of the accident. In an order dated November 30, 2020, the Supreme Court, among other things, denied the motion. The Town appeals.

"When a negligence claim is asserted against a municipality, the first issue for a court to decide is whether the municipal entity was engaged in a proprietary function or acted in a governmental capacity at the time the claim arose" (*Applewhite v Accuhealth, Inc.*, 21 NY3d 420, 425 [2013]; see *Canberg v County of Nassau*, 214 AD3d 943, 944 [2023]). "If the municipality's actions fall in the proprietary realm, it is subject to suit under the ordinary rules of negligence applicable to non-governmental parties" (*Applewhite v Accuhealth, Inc.*, 21 NY3d

at 425). “If the municipality was acting in a governmental capacity, then the plaintiff must prove the existence of a special duty as an element of his or her negligence cause of action” (*Canberg v County of Nassau*, 214 AD3d at 945; see *Ferreira v City of Binghamton*, 38 NY3d 298, 304 [2022]).

“A governmental entity performs a purely proprietary role when its activities essentially substitute for or supplement traditionally private enterprises” (*Applewhite v Accuhealth, Inc.*, 21 NY3d at 425 [internal quotation marks omitted]). “In contrast, a municipality will be deemed to have been engaged in a governmental function when its acts are undertaken for the protection and safety of the public pursuant to the general police powers” (*id.* [internal quotation marks omitted]). “In deciding whether a function is proprietary or governmental, a court examines ‘the specific act or omission out of which the injury is claimed to have arisen and the capacity in which that act or failure to act occurred . . . , not whether the agency involved is engaged generally in proprietary activity or is in control of the location in which the injury occurred’” (*Wittorf v City of New York*, 23 NY3d 473, 479 [2014], quoting *Miller v State of New York*, 62 NY2d 506, 513 [1984]).

Here, the record reflects that the Town’s involvement in the waste collection industry, including its rental of containers to landlords in connection with commercial evictions, was a substitute for private industry. The Town displaced dozens of private haulers when it entered the waste collection industry in 1983. Further, the Town entered the waste collection industry in order to generate revenue to support its “energy from waste” facility, which was itself a revenue-generating enterprise. Accordingly, the specific acts or omissions at issue here involved a proprietary function (see *Connolly v Long Is. Power Auth.*, 30 NY3d 719, 729 [2018]; *Grasso v New York State Thruway Auth.*, 159 AD3d 674, 677 [2018]), and the Supreme Court correctly determined that the Town was not entitled to summary judgment based on governmental function immunity.

The Supreme Court also correctly determined that triable issues of fact exist as to the proximate cause of the accident. “The overarching principle governing determinations of proximate cause is that a defendant’s negligence qualifies as a proximate cause where it is a substantial cause of the events which produced the injury” (*Hain v Jamison*, 28 NY3d 524, 528-529 [2016] [internal quotation marks omitted]). “Typically, the question of whether a particular act of negligence is a substantial cause of the plaintiff’s injuries is one to be made by

the factfinder, as such a determination turns upon questions of foreseeability and what is foreseeable and what is normal may be the subject of varying inferences” (*id.* at 529 [internal quotation marks omitted]).

“When a question of proximate cause involves an intervening act, liability turns upon whether the intervening act is a *normal or foreseeable consequence* of the situation created by the defendant’s negligence” (*id.* [internal quotation marks omitted]; see *Mazella v Beals*, 27 NY3d 694, 706 [2016]). “Only where ‘the intervening act is extraordinary under the circumstances, not foreseeable in the normal course of events, or independent of or far removed from the defendant’s conduct,’ may it possibly ‘break[] the causal nexus’” (*Mazella v Beals*, 27 NY3d at 706, quoting *Derdiarian v Felix Contr. Corp.*, 51 NY2d 308, 315 [1980]). “The mere fact that other persons share some responsibility for plaintiff’s harm does not absolve defendant from liability because there may be more than one proximate cause of an injury” (*id.* [internal quotation marks omitted]).

Here, the negligence of the driver of the vehicle that crossed into the plaintiff’s lane was a substantial factor in causing the accident. However, the Town failed to eliminate triable issues of fact as to whether its negligence in, among other things, failing to adequately illuminate the street, placing the container in the roadway, and failing to alert passing motorists as to the potential hazard posed by the container was a substantial cause of the plaintiff’s injuries (see *DeBartolo v Coccia*, 276 AD2d 663, 663-664 [2000]; see also *Wittorf v City of New York*, 23 NY3d at 479).

Accordingly, the Supreme Court correctly denied the Town’s motion for summary judgment dismissing the complaint and all cross-claims insofar as asserted against it. As there are triable issues of fact, we decline the plaintiff’s request to search the record and award her summary judgment on the issue of liability against the Town (see *Sneider v Great S. Bay Surgical Assoc. & Vascular Lab, LLP*, 235 AD3d 685, 688 [2025]; *Gutnick v Hebrew Free Burial Socy. for the Poor of the City of Brooklyn*, 198 AD3d 880, 884 [2021]).

The Town’s remaining contentions need not be reached in light of our determination. Genovesi, J.P., Brathwaite Nelson, Dowling and Hom, JJ., concur.

11 Michelle Curry, Respondent, v County of Suffolk et al., Appellants, and Town of Babylon, Respondent, et al., Defendant. [— NYS3d —]

of Police Power**Negligence—Proximate Cause—Substantial Cause—Intervening Act
Pleading—Amendment—Delay in Motion—Prejudice**

In an action to recover damages for personal injuries, (1) the defendant County of Suffolk and the defendants Winters Bros. Waste Systems of Long Island, LLC, and Winters Bros. Recycling Corp. separately appeal from an order of the Supreme Court, Suffolk County (Joseph A. Santorelli, J.), dated April 16, 2021, and (2) the defendants Winters Bros. Waste Systems of Long Island, LLC, and Winters Bros. Recycling Corp. appeal from an order of the same court dated June 23, 2021. The order dated April 16, 2021, insofar as appealed from by the defendant County of Suffolk, denied that defendant's motion for summary judgment dismissing the complaint and all cross-claims insofar as asserted against it. The order dated April 16, 2021, insofar as appealed from by the defendants Winters Bros. Waste Systems of Long Island, LLC, and Winters Bros. Recycling Corp. denied those defendants' motion pursuant to CPLR 3025 for leave to amend their answer. The order dated June 23, 2021, denied the motion of the defendants Winters Bros. Waste Systems of Long Island, LLC, and Winters Bros. Recycling Corp. for leave to renew and reargue their prior motion pursuant to CPLR 3025 for leave to amend their answer.

Ordered that the appeal from the order dated June 23, 2021, is dismissed; and it is further,

Ordered that the order dated April 16, 2021, is affirmed insofar as appealed from by the defendant County of Suffolk; and it is further,

Ordered that the order dated April 16, 2021, is reversed insofar as appealed from by the defendants Winters Bros. Waste Systems of Long Island, Inc., and Winters Bros. Recycling Corp., on the law and in the exercise of discretion, those defendants' motion pursuant to CPLR 3025 for leave to amend their answer is granted, and the amended answer in the form attached to the papers in support of those defendants' motion is deemed served; and it is further,

Ordered that one bill of costs is awarded to the defendants Winters Bros. Waste Systems of Long Island, LLC, and Winters Bros. Recycling Corp. payable by the defendant Town of Babylon, and one bill of costs is awarded to the plaintiff payable by the defendant County of Suffolk.

The plaintiff allegedly was injured while driving on a roadway within the County of Suffolk when another vehicle traveling in the opposite direction crossed into her lane, caus-

ing the plaintiff to swerve. The plaintiff's vehicle struck a container that allegedly had been placed in the roadway by the defendants Winters Bros. Waste Systems of Long Island, LLC, and Winters Bros. Recycling Corp. (hereinafter together Winters Bros.) in connection with a commercial eviction that had occurred earlier that day under the supervision of the County's deputy sheriff. The plaintiff commenced this action against the County and Winters Bros., among others, to recover damages for personal injuries.

The County moved for summary judgment dismissing the complaint and all cross-claims insofar as asserted against it on the grounds, inter alia, that it was entitled to governmental function immunity and that the negligence of the driver of the vehicle that crossed into the plaintiff's lane was the sole proximate cause of the accident.

Winters Bros. moved pursuant to CPLR 3025 for leave to amend their answer to correct certain mistakes, primarily involving the ownership of the container, contending that testimony adduced during discovery established that the defendant Town of Babylon, rather than Winters Bros., owned the container that was involved in the accident.

In an order dated April 16, 2021, the Supreme Court, among other things, denied the separate motions of the County and Winters Bros. The County and Winters Bros. separately appeal. In May 2021, Winters Bros. moved for leave to renew and reargue their prior motion pursuant to CPLR 3025 for leave to amend their answer. In an order dated June 23, 2021, the Supreme Court denied the motion. Winters Bros. appeal.

"When a negligence claim is asserted against a municipality, the first issue for a court to decide is whether the municipal entity was engaged in a proprietary function or acted in a governmental capacity at the time the claim arose" (*Applewhite v Accuhealth, Inc.*, 21 NY3d 420, 425 [2013]; see *Canberg v County of Nassau*, 214 AD3d 943, 944 [2023]). "If the municipality's actions fall in the proprietary realm, it is subject to suit under the ordinary rules of negligence applicable to non-governmental parties" (*Applewhite v Accuhealth, Inc.*, 21 NY3d at 425). "If the municipality was acting in a governmental capacity, then the plaintiff must prove the existence of a special duty as an element of his or her negligence cause of action" (*Canberg v County of Nassau*, 214 AD3d at 945; see *Ferreira v City of Binghamton*, 38 NY3d 298, 304 [2022]).

"A governmental entity performs a purely proprietary role when its activities essentially substitute for or supplement traditionally private enterprises" (*Applewhite v Accuhealth*,

Inc., 21 NY3d at 425 [internal quotation marks omitted]). “In contrast, a municipality will be deemed to have been engaged in a governmental function when its acts are undertaken for the protection and safety of the public pursuant to the general police powers” (*id.* [internal quotation marks omitted]). “In deciding whether a function is proprietary or governmental, a court examines ‘the specific act or omission out of which the injury is claimed to have arisen and the capacity in which that act or failure to act occurred . . . , not whether the agency involved is engaged generally in proprietary activity or is in control of the location in which the injury occurred’ ” (*Wittorf v City of New York*, 23 NY3d 473, 479 [2014], quoting *Miller v State of New York*, 62 NY2d 506, 513 [1984]).

Here, the specific acts alleged to have caused the plaintiff’s injuries were, inter alia, the County’s negligent placement of the container in the roadway and its failure to warn of the potential hazard posed by the container. The County’s actions in this regard were not an exercise of its police powers for the protection and safety of the public, and the Supreme Court correctly determined that the County was not entitled to summary judgment based on governmental function immunity (see *Connolly v Long Is. Power Auth.*, 30 NY3d 719, 729 [2018]; *Turturro v City of New York*, 28 NY3d 469, 480-481 [2016]).

The Supreme Court also correctly determined that triable issues of fact exist as to the proximate cause of the accident. “The overarching principle governing determinations of proximate cause is that a defendant’s negligence qualifies as a proximate cause where it is a substantial cause of the events which produced the injury” (*Hain v Jamison*, 28 NY3d 524, 528-529 [2016] [internal quotation marks omitted]). “Typically, the question of whether a particular act of negligence is a substantial cause of the plaintiff’s injuries is one to be made by the factfinder, as such a determination turns upon questions of foreseeability and what is foreseeable and what is normal may be the subject of varying inferences” (*id.* at 529 [internal quotation marks omitted]).

“When a question of proximate cause involves an intervening act, liability turns upon whether the intervening act is a *normal or foreseeable consequence* of the situation created by the defendant’s negligence” (*id.* [internal quotation marks omitted]; see *Mazella v Beals*, 27 NY3d 694, 706 [2016]). “Only where ‘the intervening act is extraordinary under the circumstances, not foreseeable in the normal course of events, or independent of or far removed from the defendant’s conduct,’ may it possibly ‘break[] the causal nexus’ ” (*Mazella v Beals*, 27 NY3d at 706,

quoting *Derdiarian v Felix Contr. Corp.*, 51 NY2d 308, 315 [1980]). “The mere fact that other persons share some responsibility for plaintiff’s harm does not absolve defendant from liability because there may be more than one proximate cause of an injury” (*id.* [internal quotation marks omitted]).

Here, the negligence of the driver of the vehicle that crossed into the plaintiff’s lane was a substantial factor in causing the accident. However, the County failed to eliminate triable issues of fact as to whether the alleged negligence of the County in, inter alia, placing the container in the roadway and failing to alert passing motorists as to the potential hazard posed by the container was a substantial cause of the plaintiff’s injuries (see *DeBartolo v Coccia*, 276 AD2d 663, 663-664 [2000]; see also *Wittorf v City of New York*, 23 NY3d at 479). Accordingly, the Supreme Court correctly denied the County’s motion for summary judgment dismissing the complaint and all cross-claims insofar as asserted against it.

However, the Supreme Court improvidently exercised its discretion in denying Winters Bros.’ motion pursuant to CPLR 3025 for leave to amend their answer. “Applications for leave to amend pleadings under CPLR 3025 (b) should be freely granted unless the proposed amendment (1) would unfairly prejudice or surprise the opposing party, or (2) is palpably insufficient or patently devoid of merit” (*Inglese v City of New York*, 237 AD3d 1077, 1078 [2025] [internal quotation marks omitted]; see *Jin Liang Lin v Gee*, 200 AD3d 666, 667 [2021]). “No evidentiary showing of merit is required under CPLR 3025 (b)” (*Jin Liang Lin v Gee*, 200 AD3d at 667 [internal quotation marks omitted]; see *Caldara v County of Westchester*, 197 AD3d 607, 608 [2021]). “The court need only determine whether the proposed amendment is ‘palpably insufficient’ to state a cause of action or defense, or is patently devoid of merit” (*Lucido v Mancuso*, 49 AD3d 220, 229 [2008]; see *Caldara v County of Westchester*, 197 AD3d at 608). “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’” (*Redd v Village of Freeport*, 150 AD3d 780, 781 [2017], quoting *Loomis v Civetta Corinno Constr. Corp.*, 54 NY2d 18, 23 [1981]).

Here, the Town failed to identify any prejudice that would result from the proposed amendment, as the parties had been litigating as if the Town owned the container based upon the parties’ testimony to that effect. Further, Winters Bros.’ alleged delay in moving for leave to amend did not warrant denial of

their motion since “[m]ere lateness is not a barrier to the amendment. It must be lateness coupled with significant prejudice to the other side, the very elements of the laches doctrine” (*Edenwald Contr. Co. v City of New York*, 60 NY2d 957, 959 [1983] [internal quotation marks omitted]; see *JBGR, LLC v Chicago Tit. Ins. Co.*, 195 AD3d 604, 606 [2021]). Finally, the Town failed to demonstrate that the proposed amendment was palpably insufficient as a matter of law in light of the parties’ testimony.

In light of our determination, Winters Bros.’ appeal from so much of the order dated June 23, 2021, as denied that branch of their motion which was for leave to renew their prior motion pursuant to CPLR 3025 for leave to amend their answer has been rendered academic (see *Nick v Schneider*, 150 AD3d 1250, 1254 [2017]; *Czarnecki v Corso*, 81 AD3d 774, 776 [2011]). Winters Bros.’ appeal from so much of the order dated June 23, 2021, as denied that branch of their motion which was for leave to reargue their prior motion pursuant to CPLR 3025 for leave to amend their answer must be dismissed, as no appeal lies from the denial of reargument (see *Metro Found. Contrs., Inc. v M.A. Angeliades, Inc.*, 233 AD3d 669, 670 [2024]; *Bank of Am., N.A. v Davis*, 210 AD3d 737, 737 [2022]).

The plaintiff’s remaining contention is without merit. Genovesi, J.P., Brathwaite Nelson, Dowling and Hom, JJ., concur.

12 B.D. et al., Appellants, v Good Samaritan Hospital Medical Center et al., Respondents, et al., Defendants. [— NYS3d —]—

Disclosure—Protective Order—Medical Records—Relation to Injuries Claimed

Disclosure—Protective Order—Deposition of Infant—Competence

In an action, inter alia, to recover damages for medical malpractice, the plaintiffs appeal from an order of the Supreme Court, Kings County (Lawrence Knipel, J.), dated January 18, 2022. The order, insofar as appealed from, denied those branches of the plaintiffs’ motion which were pursuant to CPLR 3103 for a protective order precluding the infant plaintiff from being deposed and precluding the disclosure of certain records.

Ordered that the order is affirmed insofar as appealed from, with one bill of costs to the respondents appearing separately and filing separate briefs.

In 2016, the plaintiffs commenced this action, inter alia, to recover damages for medical malpractice, alleging, among other things, that the defendants failed to properly treat a Salter II

fracture of the right leg of the then four-year-old infant plaintiff, thereby causing a limb length discrepancy.

In December 2021, following years of contentious discovery, the plaintiffs moved, inter alia, pursuant to CPLR 3103 for a protective order precluding the infant plaintiff from being deposed and precluding the disclosure of certain records. By order dated January 18, 2022, the Supreme Court, among other things, denied those branches of the plaintiffs' motion. The plaintiffs appeal.

"It is a fundamental principle in civil litigation that '[t]here shall be full disclosure of all matter material and necessary in the prosecution or defense of an action' " (*Slapo v Winthrop Univ. Hosp.*, 186 AD3d 1281, 1282 [2020], quoting CPLR 3101 [a]; see *Kopelevich & Feldsherova, P.C. v Geller Law Group, P.C.*, 222 AD3d 956, 957-958 [2023]). "The supervision of disclosure and the setting of reasonable terms and conditions therefor rests within the sound discretion of the trial court and, absent an improvident exercise of that discretion, its determination will not be disturbed" (*Venables v Rovegno*, 195 AD3d 876, 879 [2021] [internal quotation marks omitted]; see *Board of Mgrs. of Fishkill Woods Condominium v Gottlieb*, 184 AD3d 792, 794 [2020]).

"Pursuant to CPLR 3103 (a), the Supreme Court may issue a protective order striking a notice for discovery and inspection that is palpably improper. Discovery demands are palpably improper where they seek irrelevant information, are overbroad and burdensome . . . or fail to specify with reasonable particularity many of the documents requested' " (*Moran v Grand Slam Ventures, LLC*, 221 AD3d 994, 996 [2023], quoting *U.S. Bank Trust, N.A. v Carter*, 204 AD3d 727, 728 [2022]). "The party seeking a protective order bears the burden of showing that such relief is warranted" (*Board of Mgrs. of Fishkill Woods Condominium v Gottlieb*, 184 AD3d at 794; see *Nimkoff v Central Park Plaza Assoc., LLC*, 123 AD3d 679, 680-681 [2014]).

Here, the Supreme Court did not improvidently exercise its discretion in denying that branch of the plaintiffs' motion which was pursuant to CPLR 3103 for a protective order precluding the disclosure of certain medical and pharmacy records of the infant plaintiff. The plaintiffs failed to meet their initial burden of showing that medical records from the infant plaintiff's hematologist and geneticist were unrelated to the injuries claimed by the infant plaintiff and further failed to show that the defendants' demand for certain pharmacy records was overbroad or vague, as the plaintiffs' sole objection to disclosure of

those records was a lack of an address for the pharmacies (*cf. Board of Mgrs. of Fishkill Woods Condominium v Gottlieb*, 184 AD3d at 794).

In addition, the Supreme Court did not improvidently exercise its discretion in denying that branch of the plaintiffs' motion which was pursuant to CPLR 3103 for a protective order precluding the infant plaintiff from being deposed (*see Cynthia B. v New Rochelle Hosp. Med. Ctr.*, 60 NY2d 452, 462 [1983]; *C.B. v Park Ave. Pub. Sch.*, 172 AD3d 980, 982 [2019]; *Serrano v Lutheran Social Servs. of Metro. N.Y., Inc.*, 122 AD3d 608, 609 [2014]). Contrary to the plaintiffs' contention, the court did not err in determining that the infant plaintiff is competent to testify without conducting a preliminary examination (*see Serrano v Lutheran Social Servs. of Metro. N.Y., Inc.*, 122 AD3d at 609; *Willis v Cassia*, 255 AD2d 800, 801-802 [1998]; *cf. Matter of Brian VV. v Chenango Forks Cent. School Dist.*, 299 AD2d 803, 804 [2002]; *Tuohy v Gaudio*, 87 AD2d 610, 611 [1982]).

Accordingly, the Supreme Court properly denied those branches of the plaintiffs' motion which were pursuant to CPLR 3103 for a protective order precluding the infant plaintiff from being deposed and precluding the disclosure of certain records.

The plaintiffs' remaining contention is without merit. Brathwaite Nelson, J.P., Ford, Wan and Love, JJ., concur.

13 Delajon Realty Corp., Appellant, v I&D Glatt 2, Inc., Respondent, et al., Defendant. [— NYS3d —]

Landlord and Tenant—Lease—Clear and Unambiguous Terms—Holdover Tenant

In an action, inter alia, to recover damages for breach of a lease, the plaintiff appeals from an order of the Supreme Court, Nassau County (Felice J. Muraca, J.), entered November 7, 2024. The order, insofar as appealed from, denied the plaintiff's motion for summary judgment on the complaint insofar as asserted against the defendant I&D Glatt 2, Inc., and dismissing that defendant's counterclaim for an award of attorneys' fees.

Ordered that the order is reversed insofar as appealed from, on the law, with costs, and the plaintiff's motion for summary judgment on the complaint insofar as asserted against the defendant I&D Glatt 2, Inc., and dismissing that defendant's counterclaim for an award of attorneys' fees is granted.

The plaintiff commenced this action, inter alia, to recover use and occupancy pursuant to a lease agreement with the defendant I&D Glatt 2, Inc. (hereinafter the tenant). In an answer, the tenant asserted a counterclaim for an award of at-

torneys' fees. In an order entered November 7, 2024, the Supreme Court, among other things, denied the plaintiff's motion for summary judgment on the complaint insofar as asserted against the tenant and dismissing the tenant's counterclaim for an award of attorneys' fees. The plaintiff appeals.

The plaintiff and the tenant entered into a lease agreement for certain premises located in Nassau County on or about November 1, 2012, for a term ending on October 31, 2017. The lease stated that if the tenant failed to surrender the premises at the end of the lease, the tenant would be deemed a holdover tenant subject to the terms of the lease and would be liable to the plaintiff for use and occupancy at the amount of three times the fixed minimum rent during the last month of the lease term. The lease further provided that any actions by the plaintiff, including the acceptance of a lower amount of use and occupancy from the tenant, would not result in a waiver of the plaintiff's right to the full amount of the use and occupancy provided for in the lease.

"A complete, clear, and unambiguous agreement must be enforced according to the plain meaning of its terms" (*PRG Assoc. Ltd. Partnership v Planet Organic Holding Corp.*, 205 AD3d 1058, 1059 [2022]; see *W.W.W. Assoc. v Giancontieri*, 77 NY2d 157, 162 [1990]). Here, in support of its motion, the plaintiff demonstrated its prima facie entitlement to summary judgment on the issue of the tenant's breach of the holdover provisions in the lease by demonstrating that the lease's clear and unambiguous terms applied during the holdover period following the expiration of the lease term. Pursuant to these terms, the tenant became a holdover tenant after the expiration of the lease and was responsible for paying the plaintiff the additional use and occupancy at three times the amount of the last month's rent for the duration of the holdover period (see *PRG Assoc. Ltd. Partnership v Planet Organic Holding Corp.*, 205 AD3d at 1059-1060; *Deer Park Enters., LLC v Ail Sys., Inc.*, 57 AD3d 711, 712 [2008]). The plaintiff further demonstrated that pursuant to the lease, it did not waive its right to collect the use and occupancy amount by accepting a lower monthly amount during the holdover period (see *PRG Assoc. Ltd. Partnership v Planet Organic Holding Corp.*, 205 AD3d at 1060).

In opposition to the plaintiff's prima facie showing, the tenant failed to raise a triable issue of fact.

The Supreme Court also should have granted that branch of the plaintiff's motion which was for summary judgment dismissing the tenant's counterclaim for an award of attorneys'

fees (*see Matter of Part 60 Put-Back Litig.*, 36 NY3d 342, 361 [2020]; *Sammy Props., Inc. v Al Saleh Assoc., LLC*, 225 AD3d 815, 817-818 [2024]).

Accordingly, the Supreme Court should have granted the plaintiff's motion for summary judgment on the complaint insofar as asserted against the tenant and dismissing the tenant's counterclaim for an award of attorneys' fees.

The plaintiff's remaining contention need not be reached in light of our determination. LaSalle, P.J., Chambers, Wooten and Voutsinas, JJ., concur.

14 East Main 72, LLC, et al., Respondents, v Children of America, Inc., Appellant. [— NYS3d —]

Process—Service of Process—Personal Service on Corporation

In an action, inter alia, to recover damages for breach of contract, the defendant appeals from (1) an order of the Supreme Court, Queens County (Mojgan C. Lancman, J.), entered March 26, 2024, and (2) an order of the same court entered April 1, 2024. The order entered March 26, 2024, denied the defendant's motion pursuant to CPLR 3211 (a) (8) to dismiss the complaint. The order entered April 1, 2024, denied the defendant's second motion pursuant to CPLR 3211 (a) (8) to dismiss the complaint.

Ordered that the orders are affirmed, with one bill of costs.

In 2020, the defendant, Children of America, Inc., executed a limited guaranty in conjunction with a lease agreement between Children of America (Port Jefferson), LLC (hereinafter the tenant), and PJS Enterprises, LLC, the plaintiffs' predecessor in interest. In June 2023, the plaintiffs commenced this action against the defendant, alleging that the tenant had defaulted on its rental obligations and seeking to recover on the guaranty. In July 2023, the defendant moved pursuant to CPLR 3211 (a) (8) to dismiss the complaint for lack of personal jurisdiction due to improper service of process. In September 2023, the defendant filed a second motion pursuant to CPLR 3211 (a) (8) to dismiss the complaint, on the ground that the defendant was not subject to personal jurisdiction under New York's long-arm statute (*see* CPLR 302). The Supreme Court denied both motions. The defendant appeals.

"It is axiomatic that the failure to serve process in an action leaves the court without personal jurisdiction over the defendant, and all subsequent proceedings are thereby rendered null and void" (*Bank of N.Y. Trust Co., N.A. v Herbin*, 241 AD3d 1247, 1248 [2025] [internal quotation marks omitted]; *see Hos-*

sain v Fab Cab Corp., 57 AD3d 484, 485 [2008]). “Personal service on a corporation must be made to one of the persons authorized by the statute to accept service” (*Flatow v Goddess Sanctuary & Spa Corp.*, 233 AD3d 656, 658 [2024] [internal quotation marks omitted]; see CPLR 311 [a] [1]; *Finnegan v Trimarco*, 173 AD3d 691, 693 [2019]). Here, the plaintiff properly served a corporate officer of the defendant pursuant to CPLR 311 (a) (1) (see *Kaywood v Cigpak, Inc.*, 258 AD2d 623, 623 [1999]). Accordingly, the Supreme Court properly denied the defendant’s first motion pursuant to CPLR 3211 (a) (8) to dismiss the complaint for lack of personal jurisdiction based on improper service.

The defendant’s second motion pursuant to CPLR 3211 (a) (8) to dismiss the complaint, based on lack of personal jurisdiction pursuant to CPLR 302 (a) (1), was also properly denied, as violative of the single motion rule, as this argument could have been raised in the defendant’s initial motion (see *id.* § 3211 [e]; *TRB Acquisitions LLC v Yedid*, 225 AD3d 508 [2024]; *41st Rd. Props., LLC v Wang Real Prop., LLC*, 164 AD3d 455, 459 [2018]).

In light of our determination, we need not reach the defendant’s remaining contention. Connolly, J.P., Brathwaite Nelson, Warhit and Ventura, JJ., concur.

15 Anthony Forgione, Appellant, v Doni Marie Rivas, D.O., et al., Respondents, et al., Defendants. [— NYS3d —]

Hospitals—Malpractice—Departure from Accepted Standard of Care—Conflicting Evidence

In an action to recover damages for medical malpractice, the plaintiff appeals from an order of the Supreme Court, Suffolk County (George M. Nolan, J.), dated June 3, 2024. The order granted the motion of the defendants Doni Marie Rivas, Rachael Goldstein, and Progressive Emergency Physicians, PLLC, for summary judgment dismissing the amended complaint insofar as asserted against them and for related relief.

Ordered that the order is reversed, on the law, with costs, and the motion of the defendants Doni Marie Rivas, Rachael Goldstein, and Progressive Emergency Physicians, PLLC, for summary judgment dismissing the amended complaint insofar as asserted against them and for related relief is denied.

On July 21, 2019, the plaintiff presented to the emergency department of Long Island Community Hospital (hereinafter the hospital) complaining of a laceration to his left palm, where he was treated by the defendant Rachel Goldstein, a physician

assistant working under the supervision of the defendant Doni Marie Rivas, both of whom were employed by the defendant Progressive Emergency Physicians, PLLC (hereinafter Progressive). Thereafter, the plaintiff commenced this action against, among others, Goldstein, Rivas, and Progressive (hereinafter collectively the defendants) to recover damages for medical malpractice. The plaintiff alleged, among other things, that the defendants were negligent in failing to diagnose and treat a severed nerve in the plaintiff's hand. Following the completion of discovery, the defendants moved for summary judgment dismissing the amended complaint insofar as asserted against them and for related relief. In an order dated June 3, 2024, the Supreme Court granted the defendants' motion. The plaintiff appeals.

“The essential elements of medical malpractice are (1) a deviation or departure from accepted medical practice, and (2) evidence that such departure was a proximate cause of injury” (*Kunwar v Northwell Health*, 229 AD3d 528, 532 [2024], quoting *Mendoza v Maimonides Med. Ctr.*, 203 AD3d 715, 716 [2022]; see *Macias v Ferzli*, 131 AD3d 673, 675 [2015]). “In moving for summary judgment dismissing a cause of action alleging medical malpractice, a defendant must establish, prima facie, that there was no departure or deviation from the accepted standard of care or that such departure or deviation was not a proximate cause of any injury to the plaintiff” (*Kunwar v Northwell Health*, 229 AD3d at 532, quoting *Attia v Klebanov*, 192 AD3d 650, 651 [2021]; see *Macias v Ferzli*, 131 AD3d at 675). If such a showing is made, then the burden shifts to the plaintiff to produce evidence in admissible form demonstrating the existence of a triable issue of fact (see *Macias v Ferzli*, 131 AD3d at 675; *Stukas v Streiter*, 83 AD3d 18, 30 [2011]).

Here, the defendants failed to establish, prima facie, that they did not depart from the accepted standard of care. The defendants' expert affirmation, in opining that there was no departure from good and accepted medical practice, relied upon the hospital's medical records and the deposition testimony of Goldstein and Rivas that tingling in the plaintiff's fingers had resolved and that physical examination revealed no deficits in range of motion or sensation. However, the defendants' expert failed to review the deposition testimony of the plaintiff and his spouse, which contained conflicting evidence, specifically, that the plaintiff informed Goldstein that the plaintiff's fingers were numb and that he could not feel his hand (see *Metcalf v O'Halleran*, 137 AD3d 758, 759 [2016]; *Abakpa v Martin*, 132

AD3d 924, 927 [2015]; *Reiss v Sayegh*, 123 AD3d 787, 789 [2014]).

Accordingly, the Supreme Court should have denied the defendants' motion for summary judgment dismissing the amended complaint insofar as asserted against them and for related relief, regardless of the sufficiency of the opposing papers (*see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). Brathwaite Nelson, J.P., Ford, Wan and Love, JJ., concur.

16 Quiteria Orellana Hidalgo, Appellant, v David Contractor NY, Inc., et al., Defendants, and DHC Contracting, Inc., et al., Respondents. [— NYS3d —]

Negligence—Maintenance of Premises—Dangerous Condition—Ownership, Occupancy, Control, or Special Use

In a consolidated action to recover damages for personal injuries, the plaintiff appeals from an order of the Supreme Court, Queens County (Timothy J. Dufficy, J.), entered November 3, 2023. The order, insofar as appealed from, granted that branch of the motion of the defendant DHC Contracting, Inc., which was for summary judgment dismissing the complaint insofar as asserted against it and granted that branch of the motion of the defendant QMB Plumbing & Heating, Inc., which was for summary judgment dismissing the complaint insofar as asserted against it.

Ordered that the order is affirmed insofar as appealed from, with one bill of costs.

In April 2019, the plaintiff allegedly tripped and fell over a hose that was on a sidewalk abutting the premises known as 50-34 69th Street, Queens. At that time, there was ongoing construction at the premises. The defendant DHC Contracting, Inc. (hereinafter DHC), was one of the general contractors for the construction project, and the defendant QMB Plumbing & Heating, Inc. (hereinafter QMB), performed plumbing work on the premises.

The plaintiff commenced separate actions to recover damages for personal injuries, which were later consolidated. Among other things, the plaintiff alleged that DHC and QMB were negligent in creating a tripping hazard on the sidewalk.

Thereafter, QMB moved, inter alia, for summary judgment dismissing the complaint insofar as asserted against it. DHC moved, among other things, for summary judgment dismissing the complaint insofar as asserted against it. In an order entered November 3, 2023, the Supreme Court, inter alia, granted that branch of QMB's motion which was for summary judgment

dismissing the complaint insofar as asserted against it and granted that branch of DHC's motion which was for summary judgment dismissing the complaint insofar as asserted against it. The plaintiff appeals.

"Liability for a dangerous condition on property is generally predicated upon ownership, occupancy, control, or special use of the property" (*Jeffrey v City of New York*, 194 AD3d 701, 702 [2021], quoting *Donatien v Long Is. Coll. Hosp.*, 153 AD3d 600, 600-601 [2017]; see *Robles v City of New York*, 235 AD3d 674, 675 [2025]). "In the absence of ownership, occupancy, control, or special use, a party generally 'cannot be held liable for injuries caused by the dangerous or defective condition of the property'" (*Bartlett v City of New York*, 169 AD3d 629, 630 [2019], quoting *Ruffino v New York City Tr. Auth.*, 55 AD3d 819, 820 [2008]; see *Orellana v Cannon*, 227 AD3d 1013, 1013 [2024]). "A contractor may be held liable for an affirmative act of negligence which results in the creation of a dangerous condition upon a public street or sidewalk" (*Pizzolorusso v Metro Mech., LLC*, 205 AD3d 748, 750 [2022] [brackets and internal quotation marks omitted]; see *Hayes v DeMicco Bros., Inc.*, 34 AD3d 641, 642 [2006]).

In support of its motion, QMB established, prima facie, that it did not cause or create the allegedly dangerous condition that caused the plaintiff's injuries. Although the deposition testimony that QMB submitted in support of its motion contained some inconsistencies as to the scope of QMB's work on the premises, QMB nevertheless established that it did not own the subject hose or place the subject hose on the sidewalk (see *Garafola-Booth v City of New York*, 164 AD3d 473, 473 [2018]; *Schwartz v Orange & Rockland Utils., Inc.*, 93 AD3d 776, 777 [2012]; *Baker v Punancy*, 37 AD3d 504, 505 [2007]; *Tsviling v City of New York*, 275 AD2d 367, 368 [2000]). In opposition, the plaintiff failed to raise a triable issue of fact (see *Coughlin v Bartnick*, 293 AD2d 509, 510 [2002]).

Similarly, DHC established, prima facie, that it did not cause or create the allegedly dangerous condition that caused the plaintiff's injuries. DHC submitted, among other things, a work permit issued to it for the construction project, which established that DHC did not begin work at the premises until after the date of the accident (see *Lewis v City of New York*, 82 AD3d 1054, 1055 [2011]). In opposition, the plaintiff failed to raise a triable issue of fact.

Accordingly, the Supreme Court properly granted that branch of QMB's motion which was for summary judgment dismissing the complaint insofar as asserted against it and properly

granted that branch of DHC's motion which was for summary judgment dismissing the complaint insofar as asserted against it.

In light of our determination, we need not reach QMB's remaining contention. LaSalle, P.J., Connolly, Ventura and Goldberg Velazquez, JJ., concur.

17 HSBC Bank USA, N.A., Appellant, v IPA Asset Management, LLC, Respondent, et al., Defendants. [— NYS3d —]—

Limitation of Actions—Six-Year Statute of Limitations—Acceleration of Mortgage Debt—Voluntary Discontinuance of Prior Action

In an action to foreclose a mortgage, the plaintiff appeals from an order of the Supreme Court, Suffolk County (Robert F. Quinlan, J.), dated May 16, 2023. The order granted the motion of the defendant IPA Asset Management, LLC, pursuant to CPLR 3211 (a) (5) to dismiss the complaint insofar as asserted against it.

Ordered that the order is affirmed, with costs.

In August 2006, Nancy Kaye (hereinafter the borrower) executed a note in the amount of \$301,750 in favor of People's Choice Home Loan, Inc. The note was secured by a mortgage on certain real property located in Coram.

In July 2008, the plaintiff commenced an action (hereinafter the 2008 action) against the borrower, among others, to foreclose the mortgage. In September 2010, a judgment of foreclosure and sale was entered in favor of the plaintiff. In July 2011, the plaintiff moved to discontinue the 2008 action and vacate the judgment of foreclosure and sale. In August 2011, the judgment of foreclosure and sale was vacated and the 2008 action was discontinued.

In July 2012, the plaintiff commenced a second action (hereinafter the 2012 action) against the borrower, among others, to foreclose the mortgage. In June 2017, the plaintiff moved to discontinue the 2012 action. In July 2017, the 2012 action was discontinued.

In December 2022, the plaintiff commenced this action against the defendant IPA Asset Management LLC (hereinafter the defendant), as a nonborrower property owner, among others, to foreclose the mortgage. In February 2023, the defendant moved pursuant to CPLR 3211 (a) (5) to dismiss the complaint insofar as asserted against it as time-barred. In an order dated May 16, 2023, the Supreme Court granted the defendant's motion. The plaintiff appeals.

“On a motion to dismiss a complaint pursuant to CPLR 3211

(a) (5) on the ground that the statute of limitations has expired, the moving defendant must establish, *prima facie*, that the time in which to commence the action has expired” (*HSBC Bank USA v Lem*, 236 AD3d 762, 763 [2025] [internal quotation marks omitted]). “If the defendant satisfies this burden, the burden shifts to the plaintiff to raise a question of fact as to whether the statute of limitations was tolled or otherwise inapplicable, or whether the plaintiff actually commenced the action within the applicable limitations period” (*id.* at 763-764 [internal quotation marks omitted]).

An action to foreclose a mortgage is governed by a six-year statute of limitations (*see* CPLR 213 [4]; *U.S. Bank N.A. v Medianik*, 223 AD3d 935, 937 [2024]). “Where the mortgage debt is accelerated, the entire balance of the debt accrues and the statute of limitations begins to run on the entire debt” (*HSBC Bank USA v Lem*, 236 AD3d at 764). Here, it is undisputed that the plaintiff elected to call due the entire balance of the mortgage debt in the complaint in the 2008 action and in the 2012 action and that the instant foreclosure action was commenced more than six years later (*see FV-1, Inc. v Palaguachi*, 234 AD3d 818, 821 [2025]; *U.S. Bank N.A. v Medianik*, 223 AD3d at 938).

Nevertheless, the plaintiff contends that the voluntary discontinuances of the prior actions served to revoke its prior acceleration of the mortgage debt. The plaintiff’s contention is foreclosed by the Foreclosure Abuse Prevention Act (FAPA). As relevant here, CPLR 203 (h) provides that once a cause of action to foreclose a mortgage has accrued, “no party may, in form or effect, unilaterally waive, postpone, cancel, toll, revive, or reset” the accrual or running of the statute of limitations. This includes a mortgagee’s voluntary discontinuance of a foreclosure action (*see* CPLR 3217 [e]; *U.S. Bank N.A. v Medianik*, 223 AD3d at 938). Thus, contrary to the plaintiff’s contention, the statute of limitations was not reset by the voluntary discontinuances of the prior actions (*see FV-1, Inc. v Palaguachi*, 234 AD3d at 821-822).

The plaintiff’s contention that FAPA should not be applied retroactively is without merit (*see Van Dyke v U.S. Bank, Natl. Assn.*, — NY3d —, —, 2025 NY Slip Op 06537, *5 [2025]; *Article 13 LLC v Ponce De Leon Fed. Bank*, — NY3d —, —, 2025 NY Slip Op 06536, *2-3 [2025]). The plaintiff’s contentions that retroactive application of FAPA violates due process, amounts to an unconstitutional taking, and violates the Contract Clause of the United States Constitution are without merit (*see Van Dyke v U.S. Bank, Natl. Assn.*, — NY3d at —, 2025 NY Slip Op

06537, *5; *Article 13 LLC v Ponce De Leon Fed. Bank*, — NY3d at —, 2025 NY Slip Op 06536, *2-3; *Deutsche Bank Natl. Trust Co. v Dagrín*, 233 AD3d 1065, 1071 [2024]).

Accordingly, the Supreme Court properly granted the defendant's motion pursuant to CPLR 3211 (a) (5) to dismiss the complaint insofar as asserted against it as time-barred. Barros, J.P., Warhit, Voutsinas and Wan, JJ., concur. **[Prior Case History: 79 Misc 3d 821.]**

18 Juber Jaber, Respondent, v Munzer Elayyan, Appellant, and Farhoud Jaber, Respondent, et al., Defendant. [— NYS3d —]—

Trusts—Constructive Trust—Necessary Elements
 Trial—Harmless and Prejudicial Error—Preclusion of Evidence
 Equity—Unclean Hands—Immoral, Unconscionable Conduct

In an action, inter alia, to impose a constructive trust and for a judgment declaring that the plaintiff is the equitable owner of a certain parcel of real property, the defendant Munzer Elayyan appeals from a judgment of the Supreme Court, Richmond County (Lizette Colon, J.), dated September 16, 2022. The judgment, upon a decision of the same court dated August 2, 2022, made after a nonjury trial, imposed a constructive trust in favor of the plaintiff on the subject property and declared that the plaintiff was the owner of the subject property.

Ordered that the judgment is affirmed, with one bill of costs.

In 2017, the plaintiff commenced this action, alleging that he was the equitable owner of a certain parcel of real property located in Staten Island (hereinafter the property) (*see Jaber v Elayyan*, 191 AD3d 964, 965 [2021]; *Jaber v Elayyan*, 168 AD3d 693, 694 [2019]). The plaintiff alleged, among other things, that he and the defendant Munzer Elayyan, who was a real estate developer and the plaintiff's cousin, agreed, inter alia, to form the defendant 12 Whitwell Realty Corp. (hereinafter Realty Corp.) to hold legal title to the property, that the plaintiff's brother, the defendant Farhoud Jaber (hereinafter Farhoud), would be the "legal owner" and sole shareholder of Realty Corp., and that the plaintiff would reside in the property and would be the equitable owner of the property. The plaintiff further alleged that he and Elayyan agreed, among other things, that Elayyan would provide some of the funds for Realty Corp. to purchase the property and upon the plaintiff repaying Elayyan the funds Elayyan provided, title to the property would be transferred to the plaintiff. On January 30, 2012, Realty Corp. purchased the property. Thereafter, the plaintiff

allegedly made improvements to the property, paid taxes and insurance on the property, and resided in the property. In 2017, Elayyan, claiming that he owned Realty Corp., evicted the plaintiff from the property, notwithstanding that the plaintiff had allegedly repaid Elayyan the funds that Elayyan had provided to purchase the property.

In a decision dated August 2, 2022, made after a nonjury trial, the Supreme Court found, *inter alia*, that the plaintiff established the requisite elements of a constructive trust by clear and convincing evidence. The court issued a judgment dated September 16, 2022, upon the decision, imposing a constructive trust in favor of the plaintiff on the property and declaring that the plaintiff was the owner of the property. Elayyan appeals.

Initially, Elayyan previously appealed from an order dated August 12, 2019, which, among other things, denied that branch of the motion of Elayyan and Realty Corp. which was to impose sanctions upon the plaintiff, and an order dated January 28, 2020, which, *inter alia*, denied those defendants' renewed motion to impose sanctions upon the plaintiff. However, the appeals from those orders were deemed dismissed for failure to perfect. "As a general rule, this Court does not consider an issue on a subsequent appeal which was raised or could have been raised in an earlier appeal which was dismissed for failure to perfect, although this Court has the inherent jurisdiction to do so" (*US Bank N.A. v Conroy*, 160 AD3d 785, 786 [2018]; *see Bray v Cox*, 38 NY2d 350 [1976]). We decline to exercise our discretion in this case.

"In reviewing a determination made after a nonjury trial, this Court's authority is as broad as that of the trial court, and this Court may render the judgment it finds warranted by the facts, taking into consideration that in a close case the trial court had the advantage of seeing and hearing the witnesses" (*Toobian v Golzad*, 193 AD3d 784, 785 [2021] [internal quotation marks omitted]; *see Creamer v DaCruz*, 185 AD3d 547, 547 [2020]). "Where the trial court's findings of fact rest in large measure on considerations relating to the credibility of witnesses, deference is owed to the trial court's credibility determinations" (*Ali v Rahaman*, 224 AD3d 721, 722 [2024] [internal quotation marks omitted]; *see Diaz v Diaz*, 130 AD3d 560, 562 [2015]).

"In general, the imposition of a constructive trust is appropriate in situations when property has been acquired in such circumstances that the holder of the legal title may not in good conscience retain the beneficial interest" (*Diaz v Diaz*, 130

AD3d at 561 [internal quotation marks omitted]). “The elements of a constructive trust are (1) a fiduciary or confidential relationship; (2) an express or implied promise; (3) a transfer in reliance on the promise; and (4) unjust enrichment” (*Ali v Rahaman*, 224 AD3d at 722 [internal quotation marks omitted]; see *Diaz v Diaz*, 130 AD3d at 561). “[A]s these elements serve only as a guideline, a constructive trust may still be imposed even if all of the elements are not established” (*Marini v Lombardo*, 79 AD3d 932, 933 [2010]; see *Kaprov v Stalinsky*, 145 AD3d 869, 871 [2016]). “Thus, although the elements of a constructive trust must be proved by clear and convincing evidence, the constructive trust doctrine is given broad scope to respond to all human implications of a transaction in order to give expression to the conscience of equity and to satisfy the demands of justice” (*Kaprov v Stalinsky*, 145 AD3d at 871-872 [alteration, citation, and internal quotation marks omitted]; see *Ning Xiang Liu v Al Ming Chen*, 133 AD3d 644, 645 [2015]).

Here, in light of the evidence presented at trial and affording the Supreme Court’s credibility determinations due deference, we find no basis to disturb the court’s determination that the plaintiff established the necessary elements to impose a constructive trust by clear and convincing evidence (see *Ali v Rahaman*, 224 AD3d at 722; *Toobian v Golzad*, 193 AD3d at 788; *Ning Xiang Liu v Al Ming Chen*, 133 AD3d at 645; *Diaz v Diaz*, 130 AD3d at 561).

Contrary to Elayyan’s contentions, the Supreme Court did not err in precluding certain testimony and evidence during the trial. In any event, even if the court erred in making the evidentiary rulings now challenged by Elayyan, any error, individually or cumulatively, was harmless, since there is no indication that the testimony and evidence would have had a substantial influence on the result of the trial (see CPLR 2002; *Matter of Berk*, 209 AD3d 1014, 1017 [2022]; *Sattar v City of New York*, 201 AD3d 756, 757 [2022]; *Division Seven, Inc. v HP Bldrs. Corp.*, 58 AD3d 796, 797 [2009]).

Contrary to Elayyan’s further contention, he did not demonstrate that the doctrine of unclean hands barred the plaintiff from seeking equitable relief. “The doctrine of unclean hands applies when the complaining party shows that the offending party is guilty of immoral, unconscionable conduct and even then only when the conduct relied on is directly related to the subject matter in litigation and the party seeking to invoke the doctrine was injured by such conduct” (*Citimortgage, Inc. v Heyman*, 186 AD3d 1487, 1488-1489 [2020] [internal quotation marks omitted]; see *Toobian v Golzad*, 193 AD3d at 787). Here,

the evidence did not establish, among other things, that Elayyan was injured by the plaintiff's allegedly immoral, unconscionable conduct (*see Citimortgage, Inc. v Heyman*, 186 AD3d at 1489).

Elayyan's remaining contentions are without merit. LaSalle, P.J., Connolly, Ventura and Goldberg Velazquez, JJ., concur.

19 Juber Jaber, Respondent, v Muzner Elayyan et al., Defendants. 12 Whitwell Realty Corp., Nonparty Appellant. [— NYS3d —]—

Parties—Intervention—Timeliness of Motion

In an action, inter alia, to impose a constructive trust and for a judgment declaring that the plaintiff is the equitable owner of a certain parcel of real property, nonparty 12 Whitwell LLC appeals from an order of the Supreme Court, Richmond County (Lizette Colon, J.), dated November 1, 2022. The order denied the motion of nonparty 12 Whitwell, LLC, for leave to intervene in the action, and thereupon, to vacate a decision of the same court dated August 2, 2022, and to deem served the proposed answer with counterclaims of nonparty 12 Whitwell, LLC.

Ordered that the order is affirmed, with one bill of costs.

In 2017, the plaintiff commenced this action, alleging that he was the equitable owner of a certain parcel of real property located in Staten Island (hereinafter the property), which was owned by the defendant 12 Whitwell Realty Corp. (hereinafter Realty Corp.) (*see Jaber v Elayyan*, 248 AD3d 1005 [2026] [decided herewith]; *Jaber v Elayyan*, 191 AD3d 964, 965 [2019]; *Jaber v Elayyan*, 168 AD3d 693, 694 [2019]). In October 2017, Realty Corp. allegedly leased the property to MBR Catskill Corp. (hereinafter MBR). Daniel Resnick was the president of MBR. On December 13, 2018, Realty Corp. sold the property to nonparty 12 Whitwell, LLC (hereinafter Whitwell LLC). Resnick was the managing member of Whitwell LLC.

In a decision dated August 2, 2022, made after a nonjury trial, the Supreme Court found, inter alia, that the plaintiff established the requisite elements of a constructive trust by clear and convincing evidence (*see Jaber v Elayyan*, 248 AD3d 1005 [2026] [decided herewith]). On August 26, 2022, Whitwell LLC moved for leave to intervene, and thereupon, to vacate the decision and to deem served Whitwell LLC's proposed answer with counterclaims. The court issued a judgment dated September 16, 2022, upon the decision, imposing a constructive trust in favor of the plaintiff on the property and declaring that the plaintiff was the owner of the property (*see Jaber v*

Elayyan, 248 AD3d 1005 [2026] [decided herewith]). In an order dated November 1, 2022, the court denied Whitwell LLC's motion for leave to intervene, and thereupon, to vacate the decision and to deem served Whitwell LLC's proposed answer with counterclaims. Whitwell LLC appeals from the order dated November 1, 2022.

"Upon a timely motion, a person is permitted to intervene in an action as of right, '1. when a statute of the state confers an absolute right to intervene; or 2. when the representation of the person's interest by the parties is or may be inadequate and the person is or may be bound by the judgment; or 3. when the action involves the disposition or distribution of, or the title or a claim for damages for injury to, property and the person may be affected adversely by the judgment' " (*Wells Fargo Bank, N.A. v Mazzara*, 124 AD3d 875, 875-876 [2015], quoting CPLR 1012 [a]; see *Al-Rowmeim v Alazwear*, 233 AD3d 640, 642 [2024]). "Additionally, upon a timely motion, the court, in its discretion, may permit a person to intervene, 'when a statute of the state confers a right to intervene . . . or when the person's claim or defense and the main action have a common question of law or fact' " (*Wells Fargo Bank, N.A. v Mazzara*, 124 AD3d at 876, quoting CPLR 1013). "Intervention under CPLR 1012 and 1013 requires a timely motion" (*Castle Peak 2012-1 Loan Trust v Sattar*, 140 AD3d 1107, 1108 [2016]; see *Deutsche Bank Natl. Trust Co. v Allenstein*, 201 AD3d 783, 785 [2022]).

"[I]ntervention may occur at any time, provided that it does not unduly delay the action or prejudice existing parties" (*Deutsche Bank Natl. Trust Co. v Allenstein*, 201 AD3d at 785 [internal quotation marks omitted]). "In examining the timeliness of the motion, courts do not engage in mere mechanical measurements of time, but consider whether the delay in seeking intervention would cause a delay in resolution of the action or otherwise prejudice a party" (*Yuppie Puppy Pet Prods., Inc. v Street Smart Realty, LLC*, 77 AD3d 197, 201 [2010]; see *Wilmington Sav. Fund Socy., FSB v Smalls*, 228 AD3d 705, 706 [2024]; *Deutsche Bank Natl. Trust Co. v Allenstein*, 201 AD3d at 785). "Another factor is the extent of the time lag between the making of the motion and the proposed intervenor's acquisition of knowledge of the circumstances upon which the motion for leave to intervene is based" (*Wilmington Sav. Fund Socy., FSB v Smalls*, 228 AD3d at 706 [internal quotation marks omitted]; see *U.S. Bank, N.A. v Tsimbalisty*, 181 AD3d 749, 750 [2020]).

Here, in March 2018, Resnick provided an affidavit in connection with this action, as well as in connection with an action in the Supreme Court, New York County (hereinafter the New York County action), which also involved the property. In June 2018, Resnick was deposed in connection with this action and the New York County action. During that deposition, Resnick was told that the property was the subject of the dispute and he was asked about the property. Whitwell LLC took title to the property on December 13, 2018. Nevertheless, Whitwell LLC failed to move for leave to intervene in this action until August 26, 2022, more than four years after Resnick provided an affidavit and was deposed in this action, six months after the nonjury trial in this action was held, and after the decision, made after the nonjury trial, was issued. Under these circumstances, Whitwell LLC's motion was untimely (*see Genzler v JPMorgan Chase Bank, N.A.*, 228 AD3d 838, 840 [2024]; *Federal Natl. Mtge. Assn. v Thomas*, 209 AD3d 841, 843 [2022]).

Accordingly, the Supreme Court providently exercised its discretion in denying Whitwell LLC's motion for leave to intervene in the action, and thereupon, to vacate the decision and to deem served the proposed answer with counterclaims of Whitwell LLC.

In light of our determination, we need not reach the parties' remaining contentions. LaSalle, P.J., Connolly, Ventura and Goldberg Velazquez, JJ., concur.

20 Nancy Johnson, Appellant, v Antonios Zevlakis, Defendant, and Bourema Tamboura, Respondent. [— NYS3d —]—

Motor Vehicles—Collision—Fault

Motions and Orders—Premature Motion—Summary Judgment

In an action to recover damages for personal injuries, the plaintiff appeals from an order of the Supreme Court, Queens County (Carmen R. Velasquez, J.), entered May 29, 2024. The order, insofar as appealed from, granted that branch of the motion of the defendant Bourema Tamboura which was for summary judgment dismissing the complaint insofar as asserted against him.

Ordered that the order is affirmed insofar as appealed from, with costs.

On May 23, 2017, the plaintiff allegedly was injured while crossing a street within a crosswalk in Queens, with a traffic signal in her favor, when she was struck by a vehicle operated by the defendant Bourema Tamboura after Tamboura's vehicle was struck in the rear by a vehicle operated by the defendant

Antonios Zevlakis. In January 2019, the plaintiff commenced this action against Tamboura and Zevlakis to recover damages for personal injuries. Thereafter, Tamboura moved, *inter alia*, for summary judgment dismissing the complaint insofar as asserted against him. In an order entered May 29, 2024, the Supreme Court, among other things, granted that branch of the motion. The plaintiff appeals.

“A defendant who moves for summary judgment in a negligence action has the burden of establishing, *prima facie*, that he or she was not at fault in the happening of the accident” (*Almonte v First Student, Inc.*, 240 AD3d 838, 838 [2025]). Here, Tamboura established, *prima facie*, that his vehicle was stopped for a red traffic signal when it was struck in the rear by Zevlakis’s vehicle, propelling Tamboura’s vehicle into the plaintiff (*see Beltre v Menegos*, 231 AD3d 1106, 1108 [2024]; *Martinez v Kuhl*, 165 AD3d 774, 775 [2018]). In opposition, the plaintiff failed to raise a triable issue of fact as to whether Tamboura was at fault in the happening of the accident (*see Wooldridge-Solano v Dick*, 143 AD3d 698, 700 [2016]).

Furthermore, contrary to the plaintiff’s contention, Tamboura’s motion was not premature, as the plaintiff failed to offer an evidentiary basis to suggest that discovery may lead to relevant evidence or that facts essential to opposing Tamboura’s motion were exclusively within the knowledge and control of Tamboura (*see Berliner v Scherzer*, 240 AD3d 848, 850 [2025]; *Martinez v Kuhl*, 165 AD3d at 775). “The mere hope or speculation that evidence sufficient to defeat a motion for summary judgment may be uncovered during the discovery process is insufficient to deny the motion” (*Berliner v Scherzer*, 240 AD3d at 850 [internal quotation marks omitted]).

In light of our determination, we need not reach Tamboura’s remaining contention.

Accordingly, the Supreme Court properly granted that branch of Tamboura’s motion which was for summary judgment dismissing the complaint insofar as asserted against him. Barros, J.P., Wooten, Taylor and McCormack, JJ., concur.

21 Jean Bernard Joseph, Appellant, v Daven Lewis Marmolejos, Defendant, and A-1 Cars NY, Inc., Respondent. [— NYS3d —]—

Motor Vehicles—Imputing Driver’s Negligence to Owner—Graves Amendment—Vehicle Properly Maintained and in Good Repair

In an action to recover damages for personal injuries, the plaintiff appeals from an order of the Supreme Court, Kings

County (Katherine A. Levine, J.), dated July 27, 2024. The order granted the motion of the defendant A-1 Cars NY, Inc., for summary judgment dismissing the complaint insofar as asserted against it.

Ordered that the order is reversed, on the law, with costs, and the motion of the defendant A-1 Cars NY, Inc., for summary judgment dismissing the complaint insofar as asserted against it is denied.

The plaintiff allegedly was injured when the vehicle he was driving was struck in the rear by a vehicle owned by the defendant A-1 Cars NY, Inc. (hereinafter A-1 Cars), and operated by the defendant Daven Lewis Marmolejos. The plaintiff thereafter commenced this personal injury action against A-1 Cars and Marmolejos, alleging, as to A-1 Cars, among other things, that it was negligent in the maintenance, inspection, and repair of the vehicle.

After joinder of issue, A-1 Cars moved for summary judgment dismissing the complaint insofar as asserted against it, arguing that it was protected under the Graves Amendment (*see* 49 USC § 30106 [a]) from vicarious liability for the plaintiff's alleged injuries. By order dated July 27, 2024, the Supreme Court granted the motion. The plaintiff appeals.

"Under the Graves Amendment (49 USC § 30106), the owner of a leased or rented motor vehicle cannot be held liable for personal injuries resulting from the use of such vehicle if the owner (i) is engaged in the trade or business of renting or leasing motor vehicles, and (ii) engaged in no negligence or criminal wrongdoing" (*Bravo v Vargas*, 113 AD3d 579, 580 [2014]; *see* 49 USC § 30106 [a]; *Kurtaj v Borax Paper Prods., Inc.*, 231 AD3d 939, 941 [2024]). Thus, under the circumstances of this case, in order to establish entitlement to judgment as a matter of law dismissing the complaint under the Graves Amendment, A-1 Cars was required to show, *prima facie*, (1) that it owned the subject vehicle, (2) that it engaged in the trade or business of leasing or renting motor vehicles, (3) that the accident occurred during the period of the lease or rental, and (4) that there is no triable issue of fact as to any allegation of negligent maintenance contributing to the accident (*see Caldeira v EAN Holdings, LLC*, 240 AD3d 654, 655 [2025]; *Kurtaj v Borax Paper Prods., Inc.*, 231 AD3d at 941).

Here, the only evidence submitted by A-1 Cars aside from an uncertified police accident report, which was inadmissible (*see Pei-Qin Wang v Rodriguez*, 235 AD3d 887, 888 [2025]; *Felle v Maxaner*, 232 AD3d 853, 854 [2024]), was an affidavit from its "Claims Administrator," Mariley Mendez. The conclusory, un-

supported affidavit was insufficient to demonstrate, prima facie, A-1 Cars's entitlement to judgment as a matter of law dismissing the complaint insofar as asserted against it on the basis of the Graves Amendment. Among other things, Mendez's averments that she "check[ed]" the vehicle prior to the rental and that there were no records of mechanical problems with the vehicle were insufficient to establish, prima facie, that the vehicle was properly maintained and in good repair at the time of the subject accident (*see Caldeira v EAN Holdings, LLC*, 240 AD3d at 655; *Lozano v Magda, Inc.*, 165 AD3d 1249, 1249-1250 [2018]; *Olmann v Neil*, 132 AD3d 744, 745-746 [2015]).

A-1 Cars's remaining contention is without merit.

Since A-1 Cars failed to satisfy its initial burden, the Supreme Court should have denied its motion for summary judgment dismissing the complaint insofar as asserted against it, regardless of the sufficiency of the opposing papers (*see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). Iannacci, J.P., Brathwaite Nelson, Dowling and Golia, JJ., concur.

22 JPMorgan Chase Bank, National Association, Respondent, v Francine Slade, Also Known as Francine A. Slade,, Appellant, et al., Defendants. [— NYS3d —]—

Process—Service of Process—Affidavit of Process Server

Judgments—Default Judgment—Vacatur—Reasonable Excuse

Mortgages—Foreclosure—Tolling Accrual of Interest—Delay in Prosecution

In an action to foreclose a mortgage, the defendant Francine A. Slade appeals from an order and judgment of foreclosure and sale (one paper) of the Supreme Court, Nassau County (Felice J. Muraca, J.), entered March 22, 2024. The order and judgment of foreclosure and sale, insofar as appealed from, upon an order of the same court (Thomas A. Adams, J.) dated May 8, 2017, inter alia, denying those branches of that defendant's cross-motion which were pursuant to CPLR 3211 (a) (8) to dismiss the complaint insofar as asserted against her or, in the alternative, pursuant to CPLR 5015 (a) to vacate her default in answering and for leave to serve a late answer, and upon an order of the same court (Thomas A. Adams, J.) dated November 22, 2019, among other things, denying that branch of that defendant's separate cross-motion which was to toll the accrual of interest on the subject mortgage loan from August 11, 2011, to July 12, 2016, granted the plaintiff's motion to confirm a referee's report and for a judgment of foreclosure and sale, confirmed the referee's report, awarded the plaintiff certain interest on the mortgage loan, and directed the sale of the subject property.

Ordered that the order and judgment of foreclosure and sale is modified, on the facts and in the exercise of discretion, by deleting the provision thereof awarding interest on the subject mortgage loan from August 11, 2011, to July 12, 2016, and substituting therefor a provision tolling the accrual of interest on the mortgage loan from August 11, 2011, to July 12, 2016; as so modified, the order and judgment of foreclosure and sale is affirmed insofar as appealed from, with costs to the plaintiff, that branch of the cross-motion of the defendant Francine A. Slade which was to toll the accrual of interest on the subject mortgage loan from August 11, 2011, to July 12, 2016, is granted, the order dated November 22, 2019, is modified accordingly, and the matter is remitted to the Supreme Court, Nassau County, for a new determination of the amount of accrued interest in accordance herewith and the entry of an appropriate amended judgment of foreclosure and sale thereafter.

In July 2010, the plaintiff commenced this action against, among others, the defendant Francine Slade (hereinafter the defendant). The defendant failed to timely answer the complaint or make a pre-answer motion to dismiss the complaint.

In July 2016, the plaintiff moved to restore the action to the calendar, for leave to enter a default judgment, and for an order of reference. In an order dated September 30, 2016, the Supreme Court granted the plaintiff's motion, and an order of reference was executed.

In December 2016, the plaintiff moved for a judgment of foreclosure and sale. The defendant cross-moved, *inter alia*, pursuant to CPLR 3211 (a) (8) to dismiss the complaint insofar as asserted against her or, in the alternative, pursuant to CPLR 5015 (a) to vacate her default in answering and for leave to serve a late answer. In an order dated May 8, 2017, the Supreme Court, among other things, granted the plaintiff's motion for a judgment of foreclosure and sale and denied those branches of the defendant's cross-motion.

In July 2017, the plaintiff moved to vacate the judgment of foreclosure and sale, and the motion was granted. In July 2019, the plaintiff again moved, *inter alia*, for a judgment of foreclosure and sale, and the defendant cross-moved, among other things, to toll the accrual of the interest on the subject mortgage loan from August 11, 2011, to July 12, 2016. The motion and the cross-motion were denied in an order dated November 22, 2019.

In August 2023, the plaintiff moved to confirm a referee's report and for a judgment of foreclosure and sale. In an order

and judgment of foreclosure and sale entered March 22, 2024, the court, inter alia, granted the plaintiff's motion to confirm the referee's report and for a judgment of foreclosure and sale, confirmed the referee's report, awarded the plaintiff certain interest on the mortgage loan, and directed the sale of the subject property. The defendant appeals.

The Supreme Court properly denied that branch of the defendant's cross-motion which was pursuant to CPLR 3211 (a) (8) to dismiss the complaint insofar as asserted against her for lack of personal jurisdiction. In pertinent part, CPLR 308 (2) provides that personal service upon a natural person may be made by delivering the summons to a person of suitable age and discretion at the actual place of business, dwelling place, or usual place of abode of the person to be served and by mailing the summons to the person to be served at his or her last known residence (see *Wells Fargo Bank, N.A. v Singh*, 204 AD3d 732, 733 [2022]). "A process server's affidavit of service constitutes prima facie evidence of proper service and, therefore, gives rise to a presumption of proper service" (*Wilmington Sav. Fund Socy. v Brotherson*, 221 AD3d 1053, 1054 [2023], quoting *Bethpage Fed. Credit Union v Grant*, 178 AD3d 997, 997 [2019]). "A mere conclusory denial of service is insufficient to rebut the presumption of proper service arising from the process server's affidavit. In order to warrant a hearing to determine the validity of service of process, the denial of service must be substantiated by specific, detailed facts that contradict the affidavit of service" (*U.S. Bank Trust, N.A. v Catalano*, 215 AD3d 992, 993-994 [2023] [citations and internal quotation marks omitted]; see *Bethpage Fed. Credit Union v Grant*, 178 AD3d at 997).

Here, the affidavit of the plaintiff's process server constituted prima facie evidence that the defendant was properly served pursuant to CPLR 308 (2) (see *Harrison v Schottenstein*, 228 AD3d 848, 850 [2024]; *Bethpage Fed. Credit Union v Grant*, 178 AD3d at 997-998). Contrary to the defendant's contention, her daughter's affidavit was insufficient to rebut the presumption of proper service arising from the process server's affidavit of service (see *TD Bank, N.A. v Turbo Group, Inc.*, 226 AD3d 1058, 1059 [2024]).

The Supreme Court also properly determined that the defendant was not entitled to vacate her default in answering the complaint pursuant to CPLR 5015 (a). A defendant seeking to vacate a default in answering a complaint pursuant to CPLR 5015 (a) (1) must show both a reasonable excuse for the default and the existence of a potentially meritorious defense (see *U.S.*

Bank N.A. v Rauff, 205 AD3d 963, 965 [2022]; *US Bank N.A. v Dedomenico*, 162 AD3d 962 [2018]). Here, in light of the defendant's failure to establish a reasonable excuse for her default, as the only excuse she proffered was lack of personal jurisdiction, the court properly denied the defendant's cross-motion pursuant to CPLR 5015 (a) (1) to vacate her default in answering the complaint (*see U.S. Bank N.A. v Rauff*, 205 AD3d at 965; *US Bank N.A. v Dedomenico*, 162 AD3d at 964). Since the defendant failed to demonstrate a reasonable excuse for her default, it is unnecessary to determine whether she demonstrated the existence of a potentially meritorious defense (*see U.S. Bank N.A. v Rauff*, 205 AD3d at 966; *Bank of N.Y. Mellon v Daniels*, 180 AD3d 738, 739 [2020]).

However, the Supreme Court should have granted that branch of the defendant's cross-motion which was to toll the accrual of interest on the mortgage loan from August 11, 2011, to July 12, 2016. "A foreclosure action is equitable in nature and triggers the equitable powers of the court" (*Wells Fargo Bank, N.A. v Daniel*, 231 AD3d 899, 901 [2024], quoting *Bank of N.Y. Mellon v George*, 186 AD3d 661, 663 [2020]). "In an action of an equitable nature, the recovery of interest is within the court's discretion. The exercise of that discretion will be governed by the particular facts in each case, including any wrongful conduct by either party" (*BAC Home Loans Servicing, L.P. v Jackson*, 159 AD3d 861, 862 [2018] [internal quotation marks omitted]; *see GMAC Mtge., LLC v Yun*, 206 AD3d 798, 798 [2022]). "Further, a tolling and cancellation of interest may also be warranted where there is an unexplained delay in prosecution of a mortgage foreclosure action" (*Deutsche Bank Natl. Trust Co. v Armstrong*, 218 AD3d 738, 739 [2023], quoting *GMAC Mtge., LLC v Yun*, 206 AD3d at 798-799).

In the present case, the plaintiff failed to offer an adequate explanation for the lengthy delay in prosecuting the action. The plaintiff waited more than five years after the last foreclosure settlement conference to move for a default judgment and an order of reference, which delay was largely unexplained and resulted in the accrual of unnecessary interest. The plaintiff contends, in a conclusory fashion, that it delayed in prosecuting the action because it "was reviewing the underlying loan for loss mitigation resolutions" (*see generally Deutsche Bank Trust Co. Ams. v Knights*, 231 AD3d 1016, 1018-1019 [2024]). The plaintiff further contends that the defendant filed for bankruptcy protection while the foreclosure action was pending. However, the plaintiff's bankruptcy petition was active from April 3, 2015, through August 26, 2015. As the defendant cor-

rectly contends, this would not justify the delay in prosecution prior to April 3, 2015, and after August 26, 2015. Therefore, the Supreme Court should have granted that branch of the defendant's cross-motion which was to toll the accrual of interest on the mortgage loan from August 11, 2011, to July 12, 2016.

The parties' remaining contentions are without merit. Barros, J.P., Ford, Ventura and Golia, JJ., concur.

23 Dawn Landro, Plaintiff, v John Abadiotakis et al., Appellants, and City of New York, Respondent, et al., Defendant. [— NYS3d —]—

Municipal Corporations—Sidewalks—Shifting Liability—Abutting Property Owner

In an action to recover damages for personal injuries, the defendants John Abadiotakis, Christian Abadiotakis, Angela Abadiotakis, and Helen Abadiotakis appeal from an order of the Supreme Court, Kings County (Gina Abadi, J.), dated August 14, 2024. The order, insofar as appealed from, granted the motion of the defendant City of New York for summary judgment dismissing the amended complaint and all cross-claims insofar as asserted against it.

Ordered that the appeal from so much of the order as granted those branches of the motion of the defendant City of New York which were for summary judgment dismissing the amended complaint and the cross-claims of the defendant Judy's Hair Salon, Inc., insofar as asserted against it are dismissed, as the defendants John Abadiotakis, Christian Abadiotakis, Angela Abadiotakis, and Helen Abadiotakis are not aggrieved by those portions of the order (*see* CPLR 5511; *Mixon v TBV, Inc.*, 76 AD3d 144, 156-157 [2010]); and it is further,

Ordered that the order is affirmed insofar as reviewed; and it is further,

Ordered that one bill of costs is awarded to the defendant City of New York, payable by the defendants John Abadiotakis, Christian Abadiotakis, Angela Abadiotakis, and Helen Abadiotakis.

In September 2020, the plaintiff allegedly was injured when she fell on an uneven condition on a sidewalk abutting property owned by the defendants John Abadiotakis, Christian Abadiotakis, Angela Abadiotakis, and Helen Abadiotakis (hereinafter collectively the Abadiotakis defendants) in Brooklyn. The plaintiff subsequently commenced this action to recover damages for personal injuries against the Abadiotakis defendants, the defendant City of New York, and another defendant.

The City moved, inter alia, for summary judgment dismiss-

ing the cross-claims of the Abadiotakis defendants insofar as asserted against it. In an order dated August 14, 2024, the Supreme Court, among other things, granted that branch of the City’s motion. The Abadiotakis defendants appeal.

“Administrative Code of the City of New York § 7-210 . . . shifted tort liability for injuries arising from a defective sidewalk from the City to the abutting property owner” (*Scott v 797 Quincy St, LLC*, 237 AD3d 1124, 1125 [2025] [internal quotation marks omitted]). Pursuant to section 7-210 (a) of the Administrative Code, “[i]t [is] the duty of the owner of real property abutting any sidewalk . . . to maintain such sidewalk in a reasonably safe condition.” However, “section 7-210 does not shift liability to abutting property owners from the City of New York with respect to a defective condition existing on a curb” (*Alleyn v City of New York*, 89 AD3d 970, 971 [2011]; see Administrative Code §§ 7-210, 19-101; *Sprinceana v City of New York*, 217 AD3d 985, 986 [2023]).

Here, in support of that branch of its motion which was for summary judgment dismissing the cross-claims of the Abadiotakis defendants insofar as asserted against it, the City met its prima facie burden of establishing that it was not liable as a matter of law pursuant to section 7-210 of the Administrative Code by submitting evidence that the plaintiff fell on the sidewalk abutting the Abadiotakis defendants’ property (*see id.*; *Nicoletti v City of New York*, 77 AD3d 715, 716-717 [2010]). In opposition, the Abadiotakis defendants failed to raise a triable issue of fact (*see Gallis v 23-21 33 Rd., LLC*, 198 AD3d 730, 732 [2021]; *Dragonetti v 301 Mar. Ave. Corp.*, 180 AD3d 870, 871 [2020]; *Ippolito v Consolidated Edison of N.Y., Inc.*, 177 AD3d 715, 717 [2019]).

The Abadiotakis defendants’ remaining contention need not be reached.

Accordingly, the Supreme Court properly granted that branch of the City’s motion which was for summary judgment dismissing the cross-claims of the Abadiotakis defendants insofar as asserted against it. Chambers, J.P., Dowling, McCormack and Quirk, JJ., concur.

24 Steven W. Lannon, Appellant, v Everest National Insurance Company, Respondent, et al., Defendant. [— NYS3d —]—

Disclosure—Protective Order—Extrinsic Evidence of Insurance Policy—Relevance

In an action for a declaratory judgment regarding insurance coverage, the plaintiff appeals from an order of the Supreme Court, Suffolk County (Joseph A. Santorelli, J.), dated Decem-

ber 6, 2024. The order denied the plaintiff's motion to compel the defendant Everest National Insurance Company to produce certain discovery and granted that defendant's cross-motion pursuant to CPLR 3103 for a protective order.

Ordered that the order is affirmed, with costs.

On August 19, 2009, the plaintiff allegedly was injured in the course of his employment as a carpenter for nonparty McM Homes, Inc. (hereinafter McM), a subcontractor hired by the defendant Bay Creek Builders, LLC (hereinafter Bay Creek), a general contractor. The defendant Everest National Insurance Company (hereinafter Everest) had issued a general liability insurance policy to McM that was in effect at the time of the plaintiff's injury. In March 2010, the plaintiff commenced an action (hereinafter the underlying action) against Bay Creek, among others, asserting causes of action to recover damages for negligence and Labor Law violations. In February 2011, the plaintiff commenced an action for a judgment declaring the legal rights of several parties, including Everest, alleging that Everest failed to add Bay Creek as an additional insured under the insurance policy covering McM (hereinafter the prior declaratory judgment action). In an order dated June 14, 2012, the Supreme Court, inter alia, granted those branches of Everest's motion which were to dismiss the complaint in the prior declaratory judgment action insofar as asserted against it based on the plaintiff's lack of standing and to dismiss cross-claims asserted by Bay Creek against Everest. In November 2018, a judgment was entered in favor of the plaintiff and against Bay Creek in the underlying action, after Bay Creek defaulted in that action.

In April 2019, the plaintiff commenced this action for a declaratory judgment, alleging, inter alia, that McM was to add Bay Creek as an additional insured. Everest moved, among other things, pursuant to CPLR 3211 (a) (5) to dismiss the complaint insofar as asserted against it, arguing, inter alia, that the action was barred by the doctrines of res judicata and collateral estoppel. In an order dated June 4, 2020, the Supreme Court, among other things, granted that branch of Everest's motion. The plaintiff appealed and this Court reversed, determining that Everest failed to provide a judgment on the merits that determined that Everest need not indemnify Bay Creek (*see Lannon v Everest Natl. Ins. Co.*, 212 AD3d 798, 799 [2023]). Thereafter, the plaintiff moved to compel Everest to produce the underwriting file for the policy and the full, unredacted "notes report" for any and all claims involving the plaintiff. Everest cross-moved pursuant to CPLR 3103 for a

protective order. The Supreme Court denied the plaintiff's motion and granted Everest's cross-motion. The plaintiff appeals.

CPLR 3101 (a) directs that "[t]here shall be full disclosure of all matter material and necessary in the prosecution or defense of an action." "The right to disclosure, although broad, is not unlimited" (*Bronstein v Omega Constr. Group, Inc.*, 221 AD3d 577, 578 [2023] [internal quotation marks omitted]). "The words, material and necessary, are . . . to be interpreted liberally to require disclosure, upon request, of any facts bearing on the controversy which will assist preparation for trial" (*Harrington v New York City Tr. Auth.*, 223 AD3d 787, 788 [2024] [internal quotation marks omitted]). "However, the principle of full disclosure does not give a party the right to uncontrolled and unfettered disclosure, and the trial courts have broad power to regulate discovery to prevent abuse" (*id.* [internal quotation marks omitted]; see *McAlwee v Westchester Health Assoc., PLLC*, 163 AD3d 547, 548 [2018]). "It is incumbent on the party seeking disclosure to demonstrate that the method of discovery sought will result in the disclosure of relevant evidence or is reasonably calculated to lead to the discovery of information bearing on the claims" (*State Farm Mut. Auto. Ins. Co. v RLC Med., P.C.*, 150 AD3d 1034, 1035 [2017] [internal quotation marks omitted]).

A court may issue a protective order "denying, limiting, conditioning or regulating the use of any disclosure device" to "prevent unreasonable annoyance, expense, embarrassment, disadvantage, or other prejudice to any person or the courts" (CPLR 3103 [a]; see *Orange & Rockland Utils., Inc. v County of Rockland*, 206 AD3d 668, 669 [2022]).

Here, the Supreme Court providently exercised its discretion in denying the plaintiff's motion to compel Everest to produce the underwriting file and the full, unredacted "notes report" and granting Everest's cross-motion pursuant to CPLR 3103 for a protective order. Where an insurance policy is unambiguous, extrinsic evidence of its meaning is not considered (see *Allied World Ins. Co. v National Union Fire Ins. Co. of Pittsburgh, PA*, 204 AD3d 512, 513 [2022]; *Nisari v Ramjohn*, 85 AD3d 987, 989-990 [2011]). Accordingly, the plaintiff failed to demonstrate that disclosure of the underwriting file will result in the disclosure of relevant evidence or that his demand was reasonably calculated to lead to the discovery of information bearing on his cause of action (see *Orange & Rockland Utils., Inc. v County of Rockland*, 206 AD3d at 669). Further, Everest demonstrated that the redacted portions of the "notes report" were privileged (see *Teran v Ast*, 164 AD3d 1496, 1498 [2018]; *Bombard v Amica Mut. Ins. Co.*, 11 AD3d 647, 648-649 [2004]).

Although unauthorized surreplies containing new arguments generally should not be considered, the Supreme Court has the authority to regulate the motion practice before it, as well as the discretion to determine whether to accept late papers or even surreply papers for “good cause” (CPLR 2214 [c]; *see U.S. Bank Trust, N.A. v Rudick*, 156 AD3d 841, 842 [2017]; *Gluck v New York City Tr. Auth.*, 118 AD3d 667, 668 [2014]). Here, the court providently exercised its discretion in considering Everest’s surreply (*see Gluck v New York City Tr. Auth.*, 118 AD3d at 668; *Hanscom v Goldman*, 109 AD3d 964, 965 [2013]). LaSalle, P.J., Chambers, Ford and McCormack, JJ., concur.

25 Lutheran Church of the Risen Christ, Missouri Synod, Appellant, v Atlantic District of the Lutheran Church Missouri Synod, Respondent, et al., Defendant. [— NYS3d —]

Religious Corporations and Associations—Judicial Review—Neutral Principles of Law

In an action, inter alia, to impose a constructive trust upon certain real property, the plaintiff appeals from an order of the Supreme Court, Kings County (Peter P. Sweeney, J.), dated December 23, 2022. The order granted the motion of the defendant Atlantic District of the Lutheran Church Missouri Synod pursuant to CPLR 3211 (a) to dismiss the complaint insofar as asserted against it.

Ordered that the order is reversed, on the law, with costs, and the motion of the defendant Atlantic District of the Lutheran Church Missouri Synod pursuant to CPLR 3211 (a) to dismiss the complaint insofar as asserted against it is denied.

The plaintiff is a local member congregation of the Lutheran Church that historically conducted its services on certain property owned by the defendant Atlantic District of the Lutheran Church Missouri Synod (hereinafter Synod), a local district of the Lutheran Church, in Brooklyn (hereinafter the church property). In December 2020, the plaintiff commenced this action against Synod, and another defendant, inter alia, to impose a constructive trust on the church property and for judgment declaring the plaintiff the owner of the church property. The complaint alleged, among other things, that Synod held the church property in trust for the plaintiff, as the beneficial owner, and that Synod wrongfully ousted the plaintiff from the church property in March 2020 following a series of disputes between the plaintiff and Synod. Synod moved pursuant to CPLR 3211 (a) to dismiss the complaint insofar as asserted against it, arguing, inter alia, that resolution of the causes of action requires review of ecclesiastical matters over which the

Supreme Court lacked subject matter jurisdiction. In an order dated December 23, 2022, the court granted Synod's motion. The plaintiff appeals.

"The First Amendment forbids civil courts from interfering in or determining religious disputes, because there is substantial danger that the state will become entangled in essentially religious controversies or intervene on behalf of groups espousing particular doctrines or beliefs' " (*Eltingville Lutheran Church v Rimbo*, 174 AD3d 856, 857-858 [2019], quoting *Matter of Congregation Yetev Lev D'Satmar, Inc. v Kahana*, 9 NY3d 282, 286 [2007]; see *Chestnut v United Methodist Church*, 230 AD3d 182, 196 [2024]). "However, a court may resolve church property disputes 'when the case can be decided solely upon the application of neutral principles of . . . law, without reference to any religious principle' " (*Eltingville Lutheran Church v Rimbo*, 174 AD3d at 857-858 [internal quotation marks omitted], quoting *Matter of Congregation Yetev Lev D'Satmar, Inc. v Kahana*, 9 NY3d at 286). "The neutral principles of law approach requires the court to apply objective, well-established principles of secular law to the issues,' and '[i]n doing so, courts may rely upon internal documents, such as a congregation's bylaws, but only if those documents do not require interpretation of ecclesiastical doctrine' " (*Chestnut v United Methodist Church*, 230 AD3d at 197, quoting *Matter of Congregation Yetev Lev D'Satmar, Inc. v Kahana*, 9 NY3d at 286).

Here, contrary to Synod's contention, it failed to demonstrate that the causes of action cannot be resolved solely upon the application of neutral principles of law, without reference to any religious principle (see *Escobar v Segunda Iglesia Pentecostal Juan 3:16 Asamblea de Dios*, 232 AD3d 719, 720 [2024]; *Chestnut v United Methodist Church*, 230 AD3d at 197; cf. *Eltingville Lutheran Church v Rimbo*, 174 AD3d at 857-858). Accordingly, Synod's motion pursuant to CPLR 3211 (a) to dismiss the complaint insofar as asserted against it should have been denied.

Synod's remaining contentions are without merit. Dillon, J.P., Ford, Dowling and Quirk, JJ., concur.

26 Derrick T. McMullin II, as Administrator of the Estate of Tina Marie Davis, Deceased, Appellant, v Village of Spring Valley, Respondent. [— NYS3d —]

Municipal Corporations—Tort Liability—Governmental Function—Discretionary Acts
Death—Wrongful Death—Validity of Claim for Personal Injuries

In an action, inter alia, to recover damages for negligence

and wrongful death, etc., the plaintiff appeals from an order of the Supreme Court, Rockland County (Sherri L. Eisenpress, J.), dated March 25, 2024. The order granted the defendant's motion for summary judgment dismissing the complaint.

Ordered that the order is affirmed, with costs.

The plaintiff, individually and as administrator of the decedent's estate, commenced this action, inter alia, to recover damages for negligence and wrongful death, alleging that the decedent suffered personal injuries and death following an encounter with police officers employed by the Spring Valley Police Department. Following the completion of discovery, the defendant, the Village of Spring Valley, moved for summary judgment dismissing the complaint. The plaintiff opposed the motion. In an order dated March 25, 2024, the Supreme Court granted the motion. The plaintiff appeals.

"The governmental function immunity defense 'provides immunity for the exercise of discretionary authority during the performance of a governmental function' " (*Ferreira v City of Binghamton*, 38 NY3d 298, 311 [2022], quoting *Turturro v City of New York*, 28 NY3d 469, 479 [2016]). "The doctrine of governmental function immunity reflects separation of powers principles and is intended to ensure that public servants are free to exercise their decision-making authority without interference from the courts" (*Connolly v Long Is. Power Auth.*, 30 NY3d 719, 727 [2018] [internal quotation marks omitted]). "Discretionary acts 'involve the exercise of reasoned judgment which could typically produce different acceptable results' " (*Cappiello v City of Glen Cove*, 232 AD3d 844, 845 [2024], quoting *Kralkin v City of New York*, 204 AD3d 772, 773 [2022]). "For the defense to attach, the municipal defendant must establish that the discretion it possessed was in fact exercised in relation to the conduct on which liability is predicated" (*id.* at 845 [internal quotation marks omitted]; see *Ferreira v City of Binghamton*, 38 NY3d at 311; *Valdez v City of New York*, 18 NY3d 69, 76 [2011]).

Here, the defendant established, prima facie, the applicability of the governmental function immunity defense with regard to the cause of action alleging negligence. Evidence submitted by the defendant in support of its motion for summary judgment dismissing the complaint demonstrated that its police officers exercised reasoned judgment in administering and seeking medical attention for the decedent (see *Kralkin v City of New York*, 204 AD3d at 773; *Davila v City of New York*, 139 AD3d 890, 892-894 [2016]; cf. *Owens v City of New York*, 183 AD3d 903, 906-907 [2020]). In opposition, the plaintiff failed to

raise a triable issue of fact (*see Wagner v Parker*, 172 AD3d 954, 955 [2019]; *Kerrins v South Nassau Communities Hosp.*, 148 AD3d 795, 796 [2017]). Accordingly, the Supreme Court properly granted that branch of the defendant's motion which was for summary judgment dismissing the cause of action alleging negligence.

Because the defendant's actions were discretionary, this Court need not address the issue of whether a special duty was owed to the plaintiff (*see Cappiello v City of Glen Cove*, 232 AD3d at 846; *Kralkin v City of New York*, 204 AD3d at 773).

"[A] cause of action alleging wrongful death [is] not derivative of a negligence cause of action, but [is] an independent cause of action vested in the [decedent's] distributees" (*Marinos v Brahaj*, 241 AD3d 76, 82 [2025]; *see McDaniel v Clarkstown Cent. School Dist. No. 1*, 110 AD2d 349, 353 [1985]). However, to support a survivor's cause of action alleging wrongful death, an injured plaintiff must have possessed a valid cause of action for their personal injuries (*see Kudisch v Grumpy Jack's, Inc.*, 112 AD3d 788, 790 [2013]; *McDaniel v Clarkstown Cent. School Dist. No. 1*, 110 AD2d at 353).

Here, the defendant demonstrated that it was protected from liability for its actions during the incident with the decedent pursuant to the governmental function immunity defense. Therefore, as the decedent would not have possessed a viable cause of action to recover damages for her injuries, the plaintiff similarly possesses no viable cause of action to recover damages for wrongful death (*see Kudisch v Grumpy Jack's, Inc.*, 112 AD3d at 790).

The parties' remaining contentions are without merit. Genovesi, J.P., Brathwaite Nelson, Dowling and Hom, JJ., concur.

27 Angela Militana, Respondent, v Thomas DeMartino, Appellant. [— NYS3d —]—

Parent, Child and Family—Support—Calculation

Husband and Wife and Other Domestic Relationships—Counsel Fees—Amount to be Awarded

In an action for a divorce and ancillary relief, the defendant appeals from (1) a judgment of divorce of the Supreme Court, Nassau County (Hope Schwartz Zimmerman, J.), entered June 22, 2018, and (2) a qualified domestic relations order of the same court dated May 29, 2019. The judgment of divorce, insofar as appealed from, upon a decision and order (one paper) of the same court dated March 12, 2018, granting the plaintiff's application, in effect, to vacate so much of a so-ordered stipula-

tion of settlement dated March 2, 2017, as related to the defendant's child support obligation, directed the defendant to pay child support in the amount of \$3,125 per month until the parties' younger child reaches 21 years of age, awarded the plaintiff attorneys' fees in the sum of \$80,000, and equitably distributed a particular annuity. The qualified domestic relations order directed the distribution of the annuity.

Ordered that the appeal from the qualified domestic relations order is dismissed, as no appeal lies as of right from a qualified domestic relations order (*see Dunn v Dunn*, 78 AD3d 649 [2010]; *Bernstein v Bernstein*, 18 AD3d 683 [2005]), and leave to appeal has not been granted; and it is further,

Ordered that the judgment of divorce is modified, on the law and the facts, (1) by deleting the provision thereof directing the defendant to pay child support in the amount of \$3,125 per month until the parties' younger child reaches 21 years of age, and substituting therefor a provision directing the defendant to pay child support in the amount of \$3,125 per month until the parties' older child reaches 21 years of age and thereafter to pay child support in the amount of \$2,125 per month until the parties' younger child reaches 21 years of age, and (2) by deleting the provision thereof awarding the plaintiff attorneys' fees in the sum of \$80,000; as so modified, the judgment is affirmed insofar as appealed from, without costs or disbursements, and the matter is remitted to the Supreme Court, Nassau County, for further proceedings consistent herewith, and for entry of an appropriate amended judgment of divorce thereafter.

The parties were married in 2005 and have two children together, one born on September 27, 2006, and the other on January 6, 2011. In 2013, the plaintiff commenced this action for a divorce and ancillary relief. By so-ordered stipulation dated March 2, 2017, the parties agreed, inter alia, that the plaintiff would have sole physical custody of the parties' children. The parties further agreed that the defendant's annual income was \$80,000, that the plaintiff earned no income for purposes of calculating the defendant's child support obligation, and that the defendant was obligated to pay child support in the amount of \$1,488.18 per month. In addition, the parties agreed that all other issues not referenced in the stipulation were to be decided by the Supreme Court based upon written submissions.

Thereafter, the parties filed written submissions with the Supreme Court. In her submission, the plaintiff, who asserted that the defendant had not been forthright about his finances,

in effect, sought to vacate so much of the stipulation as related to the defendant's child support obligation and contended that the defendant should be obligated to pay child support in a higher amount. In a decision and order dated March 12, 2018, the court, among other things, granted the plaintiff's application, imputed an annual income of \$150,000 to the defendant for purposes of calculating child support, and, based on his imputed income, directed the defendant to pay child support in the amount of \$3,125 per month until the parties' younger child reaches 21 years of age. In addition, the court awarded the plaintiff 100% of a particular annuity held in the defendant's name and awarded the plaintiff attorneys' fees in the sum of \$80,000. A judgment of divorce was entered upon the decision and order. The defendant appeals.

Contrary to the defendant's contention, the Supreme Court's discretionary determination to impute an annual income of \$150,000 to the defendant for the purposes of calculating child support is supported by the record (*see Qazi v Qazi*, 220 AD3d 660, 661 [2023]). However, upon calculating the defendant's child support obligation, the court should not have directed the defendant to pay child support in the amount of \$3,125 per month until the parties' younger child reaches 21 years of age. Rather, the court should have directed the defendant to pay that amount until the parties' older child reaches 21 years of age and thereafter to pay child support in the amount of \$2,125 per month until the parties' younger child reaches 21 years of age (*see Domestic Relations Law* § 240 [1-b] [b] [3] [i], [ii]; *Castello v Castello*, 144 AD3d 723 [2016]; *Azizo v Azizo*, 51 AD3d 438 [2008]; *Rubenstein v Rubenstein*, 155 AD2d 522 [1989]).

"The award of reasonable attorney's fees is a matter in the court's sound discretion, and the court may consider, inter alia, a party's tactics that unnecessarily prolonged the litigation" (*Forman v Forman*, 211 AD3d 698, 701 [2022]; *see Tenaglia v Tenaglia*, 134 AD3d 801 [2015]). "Where a party has asserted unreasonable positions or failed to cooperate in discovery, and thereby increased the cost of the litigation, the court may make a counsel fee award in favor of the offended party or not make, or make a lesser award, in favor of the offending party" (*Kaufman v Kaufman*, 189 AD3d 31, 75 [2020]). Here, the Supreme Court providently exercised its discretion in awarding the plaintiff attorneys' fees. However, as the plaintiff's submissions were insufficient for the court to properly determine the amount of attorneys' fees that should be awarded, the matter must be remitted to the Supreme Court, Nassau County, for

the parties to file new submissions concerning the amount of attorneys' fees to which the plaintiff is entitled, to be followed by a new determination of that issue and the entry of an appropriate amended judgment of divorce thereafter (*see Maitland v Maitland*, 220 AD3d 762, 767 [2023]).

The defendant's remaining contentions are without merit. Chambers, J.P., Dowling, Wan and Ventura, JJ., concur.

28 MTGLQ Investors, L.P., Appellant, v Alvina Foshee, Also Known as Alvina I. Foshee, Respondent, et al., Defendants. [— NYS3d —]—

Limitation of Actions—Six-Year Statute of Limitations—Accrual of Mortgage Debt—Voluntary Discontinuance of Prior Action

In an action to foreclose a mortgage, the plaintiff appeals from an order of the Supreme Court, Suffolk County (Christopher Modelewski, J.), dated April 23, 2024. The order granted the cross-motion of the defendant Alvina Foshee for summary judgment dismissing the complaint insofar as asserted against her and denied, as academic, the plaintiff's motion, inter alia, for summary judgment on the complaint insofar as asserted against that defendant, to strike that defendant's answer, and for an order of reference.

Ordered that the order is affirmed, with costs.

In August 2007, the defendant Alvina Foshee (hereinafter the defendant) and Gregory Foshee executed a note in favor of the plaintiff's predecessor in interest, Bank of America, N.A. (hereinafter BOA), which was secured by a mortgage on certain real property located in Amityville. In May 2012, BOA commenced an action to foreclose the mortgage (hereinafter the 2012 action). However, in 2014, counsel for BOA filed an affirmation of discontinuance of action and an attorney affirmation of cancellation of notice of pendency in connection with the 2012 action.

In November 2018, the plaintiff, as assignee of the note and mortgage, commenced this action against the defendant, among others, to foreclose the mortgage. After the defendant interposed an answer, the plaintiff moved, inter alia, for summary judgment on the complaint insofar as asserted against the defendant, to strike the defendant's answer, and for an order of reference. The defendant opposed the motion and cross-moved for summary judgment dismissing the complaint insofar as asserted against her as time-barred. The plaintiff opposed the cross-motion. By order dated April 23, 2024, the Supreme Court granted the defendant's cross-motion and denied, as academic, the plaintiff's motion. The plaintiff appeals.

An action to foreclose a mortgage is governed by a six-year statute of limitations (*see* CPLR 213 [4]; *Lubonty v U.S. Bank N.A.*, 34 NY3d 250, 261 [2019]). Where, as here, a mortgage is payable in installments, separate causes of action accrue for each installment that is not paid and the statute of limitations begins to run on the date each installment becomes due (*see US Bank Trust, N.A. v Reizes*, 222 AD3d 907, 909 [2023]; *Nationstar Mtge., LLC v Weisblum*, 143 AD3d 866, 867 [2016]). However, once the mortgage debt is accelerated, the entire balance of the debt accrues and the statute of limitations begins to run on the full amount due (*see GMAT Legal Title Trust 2014-1 v Kator*, 213 AD3d 915, 916 [2023]; *EMC Mtge. Corp. v Patella*, 279 AD2d 604, 605 [2001]).

Here, the defendant demonstrated, *prima facie*, that the six-year statute of limitations began to run in May 2012, when BOA commenced the 2012 action and elected in the complaint to call due the entire amount secured by the mortgage (*see HSBC Bank USA, N.A. v Corrales*, 224 AD3d 816, 818 [2024]). The defendant further demonstrated that this action was commenced in November 2018, more than six years later (*see* CPLR 213 [4]; *U.S. Bank N.A. v Simon*, 216 AD3d 1041, 1042-1043 [2023]). Thus, the defendant established, *prima facie*, that this action was untimely (*see Deutsche Bank Natl. Trust Co. v DiGiorgio*, 237 AD3d 899, 900-901 [2025]).

In opposition to the defendant's *prima facie* showing, the plaintiff failed to raise a triable issue of fact. The plaintiff contends that the voluntary discontinuance of the 2012 action served to reset the statute of limitations and that, therefore, this action was timely. However, pursuant to the Foreclosure Abuse Prevention Act (FAPA) (L 2022, ch 821 [eff Dec. 30, 2022]), the voluntary discontinuance of the 2012 action did not serve to de-accelerate the mortgage debt or revive or reset the statute of limitations (*see* CPLR 3217 [e]; 203 [h]; *IPA Asset Mgt., LLC v HSBC Bank USA, N.A.*, 234 AD3d 948 [2025]; *Citimortgage, Inc. v Gunn*, 234 AD3d 922 [2025]).

Moreover, there is no merit to the plaintiff's contention that FAPA does not apply retroactively (*see Van Dyke v U.S. Bank, Natl. Assn.*, — NY3d —, —, 2025 NY Slip Op 06537, *5 [2025]; *Article 13 LLC v Ponce De Leon Fed. Bank*, — NY3d —, —, 2025 NY Slip Op 06536, *2-3 [2025]). The plaintiff's challenges to the constitutionality of the retroactive application of FAPA are also without merit (*see Van Dyke v U.S. Bank, Natl. Assn.*, — NY3d at —, 2025 NY Slip Op 06537, *5-8; *Article 13 LLC v Ponce De Leon Fed. Bank*, — NY3d at —, 2025 NY Slip Op 06536, *3-5; *U.S. Bank N.A. v Singh*, 247 AD3d 816, 819 *FV-1*,

Inc. v Palaguachi, 234 AD3d 818, 822 [2025]; *Deutsche Bank Natl. Trust Co. v Dagrín*, 233 AD3d 1065, 1069-1071 [2024]; 97 *Lyman Ave., LLC v MTGLQ Invs., L.P.*, 233 AD3d 1038, 1043 [2024]).

Accordingly, the Supreme Court properly granted the defendant's cross-motion for summary judgment dismissing the complaint insofar as asserted against her as time-barred and denied, as academic, the plaintiff's motion, among other things, for summary judgment on the complaint insofar as asserted against the defendant, to strike the defendant's answer, and for an order of reference. Connolly, J.P., Wooten, Taylor and Landicino, JJ., concur. **[Prior Case History: 82 Misc 3d 1233(A), 2024 NY Slip Op 50463(U).]**

29 In the Matter of Robert E. Asselbergs et al., Appellants, v Village of Chestnut Ridge et al., Respondents. [— NYS3d —]—

Environmental Conservation—Environmental Quality Review—Existence of Significant Dispute

In a proceeding pursuant to CPLR article 78 to review a resolution of the Board of Trustees of the Village of Chestnut Ridge dated July 21, 2022, adopting, inter alia, Local Law No. 7 (2022) of the Village of Chestnut Ridge and the 2022 Village of Chestnut Ridge comprehensive plan, the petitioners appeal from an order and judgment (one paper) of the Supreme Court, Rockland County (Rolf M. Thorsen, J.), dated October 5, 2023. The order and judgment granted the respondents' motion pursuant to CPLR 3211 (a) and 7804 (f) to dismiss the petition and dismissed the proceeding.

Ordered that the order and judgment is affirmed, with costs.

In 2019, the Board of Trustees of the Village of Chestnut Ridge (hereinafter the Village Board) formed a comprehensive planning committee to commence the drafting and adoption of the first formal comprehensive plan for the Village of Chestnut Ridge. In September 2020, the Village Board declared itself lead agency for the development and adoption of the comprehensive plan, a Type 1 action, in accordance with the State Environmental Quality Review Act (SEQRA). The Village Board issued a positive declaration, determined that a generic environmental impact statement should be prepared, and scheduled a public scoping session for the draft generic environmental impact statement (hereinafter the DGEIS). The Village Board then made the draft comprehensive plan available for public review in August 2021 and held hearings between September 2021 and December 2021.

In March 2022, the Village Board prepared a revised draft

comprehensive plan and held public hearings on the DGEIS. In May 2022, a final generic environmental impact statement (hereinafter the FGEIS) was published to the Village website for public review, and a copy of the FGEIS was accepted. Following hearings and the submission of comments, the Village Board accepted a revised FGEIS. On July 21, 2022, the Village Board adopted a findings statement, comprehensive plan, and Local Law No. 7 (2022) of the Village of Chestnut Ridge by way of a resolution.

In November 2022, the petitioners commenced this proceeding pursuant to CPLR article 78 to review the resolution that adopted the findings statement, comprehensive plan, and Local Law No. 7. In February 2023, the Village, the Village Board, Rosario Presti, Jr., Paul Van Alstyne, Avrohom Fromovitz, and Grant Valentine (hereinafter collectively the respondents) moved pursuant to CPLR 3211 (a) and 7804 (f) to dismiss the petition. In an order and judgment dated October 5, 2023, the Supreme Court granted the respondents' motion and dismissed the proceeding. The petitioners appeal.

“On a motion to dismiss pursuant to CPLR 3211 (a) (7), the complaint is to be afforded a liberal construction, the facts alleged are presumed to be true, the plaintiff is afforded the benefit of every favorable inference, and the court is to determine only whether the facts as alleged fit within any cognizable legal theory” (*Gorbatov v Tsirelman*, 155 AD3d 836, 837 [2017]; see *City of Long Beach v Agostisi*, 221 AD3d 776, 779 [2023]). “Where a party offers evidentiary proof on a motion pursuant to CPLR 3211 (a) (7), and such proof is considered but the motion has not been converted to one for summary judgment, the criterion is whether the proponent of the pleading has a cause of action, not whether the proponent has stated one, and, unless it has been shown that a material fact as claimed by the pleader to be one is not a fact at all and unless it can be said that no significant dispute exists regarding it . . . , dismissal should not eventuate” (*MJ Lilly Assoc., LLC v Ovis Creative, LLC*, 221 AD3d 805, 807 [2023] [brackets and internal quotation marks omitted]; see *Guggenheimer v Ginzburg*, 43 NY2d 268, 274-275 [1977]). “[B]are legal conclusions set forth in a petition, without more, are insufficient to state a valid claim for relief under CPLR article 78” (*Matter of Silverman v Town of Ramapo*, 222 AD3d 652, 653 [2023] [internal quotation marks omitted]).

“A court’s authority to examine a SEQRA review conducted by an entity that was required to do so is limited to reviewing whether the determination was made in violation of lawful

procedure, was affected by an error of law or was arbitrary and capricious or an abuse of discretion” (*Matter of Jellyfish Props., LLC v Incorporated Vil. of Greenport*, 220 AD3d 778, 780 [2023] [internal quotation marks omitted]; see *Matter of Gernatt Asphalt Prods. v Town of Sardinia*, 87 NY2d 668, 688 [1996]; *Matter of Town of Beekman v Town Bd. of the Town of Union Vale*, 219 AD3d 1430, 1432 [2023]). “This review is deferential for ‘it is not the role of the courts to weigh the desirability of any action or choose among alternatives, but to assure that the agency itself has satisfied SEQRA, procedurally and substantively’ ” (*Matter of Friends of P.S. 163, Inc. v Jewish Home Lifecare, Manhattan*, 30 NY3d 416, 430 [2017], quoting *Matter of Jackson v New York State Urban Dev. Corp.*, 67 NY2d 400, 416 [1986]). “The relevant question before the court is whether the agency identified the relevant areas of environmental concern, took a hard look at them, and made a reasoned elaboration of the basis for its determination” (*Matter of Jellyfish Props., LLC v Incorporated Vil. of Greenport*, 220 AD3d at 780 [internal quotation marks omitted]; see *Matter of Rimler v City of New York*, 172 AD3d 868, 871 [2019]).

Here, the evidentiary materials submitted by the respondents demonstrated that the petitioners’ allegations that the resolution was arbitrary and capricious and that the Village Board failed to identify the relevant areas of environmental concern as related to the comprehensive plan, take the requisite hard look, and make a reasoned elaboration of the basis for its determination were not facts at all and that no significant dispute exists regarding those allegations (see *Matter of Elizabeth St. Garden, Inc. v City of New York*, 42 NY3d 992, 994 [2024]; *Matter of Jellyfish Props., LLC v Incorporated Vil. of Greenport*, 220 AD3d at 780). Accordingly, the Supreme Court properly granted the respondents’ motion pursuant to CPLR 3211 (a) and 7804 (f) to dismiss the petition for failure to state a cause of action.

The parties’ remaining contentions either need not be reached in light of our determination or are without merit. Barros, J.P., Wooten, Love and Quirk, JJ., concur.

30 In the *Matter of Rocco Cangero, Respondent, v County of Nassau et al., Appellants.* [— NYS3d —]—

Civil Service—Termination of Employment—Probationary Employee—Bad Faith

In a proceeding pursuant to CPLR article 78 to review a determination of the Nassau County Sheriff’s Department dated February 2, 2022, which terminated the petitioner’s probation-

ary employment as a correction officer, the appeal is from a judgment of the Supreme Court, Nassau County (Roy S. Mahon, J.), entered August 24, 2022. The judgment granted the petition and, in effect, annulled the determination.

Ordered that the judgment is affirmed, with costs.

In March 2022, the petitioner commenced this proceeding pursuant to CPLR article 78 to review a determination of the Nassau County Sheriff's Department (hereinafter the Sheriff's Department) dated February 2, 2022, which terminated the petitioner's probationary employment as a correction officer. The petitioner alleged, among other things, that he was terminated in bad faith after he complained about being assigned excessive overtime hours. In a judgment entered August 24, 2022, the Supreme Court granted the petition and, in effect, annulled the determination. This appeal ensued.

"The employment of a probationary employee may be terminated without a hearing and without a statement of reasons in the absence of a demonstration that the termination was in bad faith, for a constitutionally impermissible or an illegal purpose, or in violation of statutory or decisional law" (*Matter of Lane v City of New York*, 92 AD3d 786, 786 [2012]). "The petitioner bears the burden of presenting competent proof of the alleged bad faith, the violation of statutory or decisional law, or the constitutionally impermissible or illegal purpose" (*Matter of Capece v Schultz*, 117 AD3d 1045, 1046 [2014]; see *Matter of Young v City of New York*, 221 AD3d 721, 722 [2023]).

Here, the petitioner met his burden of demonstrating that the determination to terminate his probationary employment was made in bad faith. The petitioner established that his termination of probationary employment followed a complaint he made regarding being assigned excessive overtime hours and the purported failure of the Sheriff's Department to comply with Rule 20 of the Sheriff's Department Rules and Regulations, which requires equal distribution of overtime (see *Matter of Capece v Schultz*, 117 AD3d at 1046; *Matter of Johnson v City of New York*, 34 AD3d 484, 485 [2006]). In response to the petitioner's showing, the appellants failed to establish, or even adequately allege, that the termination of the petitioner's probationary employment was made in good faith (see *Matter of Capece v Schultz*, 117 AD3d at 1046; *Matter of Johnson v City of New York*, 34 AD3d at 485).

Accordingly, the Supreme Court properly granted the petition and, in effect, annulled the determination. LaSalle, P.J., Connolly, Ventura and Goldberg Velazquez, JJ., concur.

31 In the *Matter of Lazar Follman, Deceased. Avraham Follman, Respondent; Ahron Follman, Appellant*. [— NYS3d —]

Wills—Probate—Right to Examine Witnesses—Waiver
Wills—Probate—Objections—Timeliness

In a probate proceeding, Ahron Follman appeals from a decree of the Surrogate's Court, Queens County (Peter J. Kelly, S.), dated September 23, 2022. The decree, upon an order of the same court, also dated September 23, 2022, admitted the last will and testament of the decedent to probate.

Ordered that the decree is affirmed, with costs.

Ahron Follman (hereinafter Ahron) and the petitioner are brothers and the decedent was their father. In July 2018, the petitioner commenced this proceeding to probate the decedent's last will and testament dated March 24, 2017 (hereinafter the 2017 will).

In an order dated February 2, 2022, the Surrogate's Court, inter alia, directed that SCPA 1404 examinations were to be conducted on February 16, 2022, and were to continue, if necessary, on February 28, 2022, and that objections were to be filed within 10 days of the completion of the examinations. In a stipulation dated March 23, 2022, the parties agreed, among other things, that the SCPA 1404 examinations would be held on April 4, 2022, and April 5, 2022, and that objections would be filed 10 days after the completion of the examinations. In another stipulation, dated April 13, 2022, the parties agreed, inter alia, that the SCPA 1404 examinations would be held on May 3, 2022, and May 5, 2022, and that objections would be filed 10 days after the completion of the examinations.

On August 16, 2022, the petitioner filed a notice of settlement with a proposed decree to admit the 2017 will to probate. In two affirmations from his attorneys, Ahron, among other things, opposed admitting the 2017 will to probate and requested that the notice of settlement be stricken. Ahron argued, inter alia, that the SCPA 1404 examinations had not yet been conducted and the deadline to file objections to probate had not yet run.

In a decree dated September 23, 2022, upon an order of the same date, the Surrogate's Court admitted the 2017 will to probate. Ahron appeals.

SPCA 1404 provides, inter alia, that any party to the proceeding, before or after filing objections to the probate of the will, may examine any or all of the attesting witnesses or the person who prepared the will (*see id.* § 1404 [4]; *Matter of American Comm. for Weizmann Inst. of Science v Dunn*, 10 NY3d 82, 95 [2008]; *Matter of LaMotta*, 101 AD3d 1009, 1009 [2012]). “As a general rule, the right of potential objectants, such as adversely

affected distributees or legatees, to examine under SCPA 1404, is unconditional, without any preliminary showing of the need for the examination” (*Matter of LaMotta*, 101 AD3d at 1009 [internal quotation marks omitted]).

Here, Ahron was not deprived of his right to SCPA 1404 examinations (*see Matter of Scianni*, 87 AD3d 783, 784 [2011]). The February 2, 2022 order directed the examinations to occur on February 16, 2022, and February 28, 2022, if necessary. Although the parties subsequently entered into stipulations to adjourn the examinations in order to allow for settlement discussions, those adjourned dates also passed without any examinations occurring. To the extent that Ahron contends that the petitioner impeded the examinations from occurring, the undetailed statement in the affirmation of one of Ahron’s attorneys that the petitioner did not produce the drafter of the 2017 will or the attesting witnesses was insufficient. Under these circumstances, Ahron waived his right to SCPA 1404 examinations (*see Matter of Scianni*, 87 AD3d at 784; *Matter of Fox*, 14 Misc 3d 552, 553-554 [Sur Ct, Bronx County 2006]).

Contrary to Ahron’s contention, by the time the petitioner filed the notice of settlement on August 16, 2022, Ahron’s time to file objections had expired (*see Matter of Scianni*, 87 AD3d at 784; *Matter of Fox*, 14 Misc 3d at 553-554). “If preobjection examinations made pursuant to SCPA 1404 occur, objections to probate ‘must be filed within 10 days after the completion of such examinations, or within such other time as is fixed by stipulation of the parties or by the court’” (*Matter of Scianni*, 87 AD3d at 784, quoting SCPA 1410). Here, Ahron never conducted the requested examinations and the petitioner filed the notice of settlement months after the examinations were to be completed. Although the Surrogate’s Court would have had the discretion to allow the filing of objections beyond the time limitation established in SCPA 1410 (*see Matter of Pascale*, 102 AD3d 796, 797 [2013]; *Matter of Kornicki*, 101 AD3d 722, 724 [2012]; *Matter of Orlowski*, 281 AD2d 422, 423 [2001]), here, Ahron did not move for permission to file late objections to probate (*see Matter of Esteves*, 31 AD3d 1028, 1030 [2006]). Contrary to Ahron’s further contention, the two attorney affirmations that he submitted in opposition to the petitioner’s notice of settlement did not themselves constitute objections to probate (*see SCPA 302, 303; see also Matter of Kearney*, 182 AD3d 705, 705 [2020]). In any event, the two affirmations did not provide sufficient reason to warrant denying probate of the 2017 will (*see Matter of Scianni*, 87 AD3d at 784; *Matter of Esteves*, 31 AD3d at 1030; *Matter of Fox*, 14 Misc 3d at 554; *see also Matter of Maxwell*, 13 AD3d 630, 631 [2004]).

Ahron's remaining contentions are either improperly raised for the first time on appeal or without merit.

Accordingly, the Surrogate's Court properly admitted the 2017 will to probate. LaSalle, P.J., Connolly, Ventura and Goldberg Velazquez, JJ., concur.

32 In the Matter of Gannett Co., Inc., Respondent, v City of Mount Vernon Police Department et al., Appellants. [— NYS3d —]—

Records—Freedom of Information Law—Counsel Fees—Substantially Prevalled

In a proceeding pursuant to CPLR article 78 to compel the production of certain records pursuant to the Freedom of Information Law (Public Officers Law art 6) and for an award of attorney's fees and litigation costs, the appeal is from a judgment of the Supreme Court, Westchester County (George E. Fufidio, Jr., J.), dated December 13, 2023. The judgment, insofar as appealed from, granted that branch of the petition which was for an award of attorney's fees and litigation costs.

Ordered that the judgment is affirmed insofar as appealed from, with costs.

In June 2020, the petitioner, through an entity it had engaged for the purpose of obtaining police department disciplinary records statewide, submitted a request to the respondent City of Mount Vernon Police Department (hereinafter the MVPD) pursuant to the Freedom of Information Law (FOIL) (Public Officers Law art 6) seeking disclosure of certain law enforcement disciplinary records. On May 7, 2021, the petitioner's counsel sent a letter to the MVPD seeking a response to the petitioner's FOIL request (hereinafter the May 7 letter). In a letter dated May 14, 2021, the respondent City of Mount Vernon stated, among other things, that the City's Law Department did not have any record of the petitioner's FOIL request and that it was the City's goal to complete the request within 30 business days from its receipt of the May 7 letter, but "due to the number of requests being processed, [the] request might be completed beyond the date provided." Subsequently, the petitioner's counsel sent an additional letter to the City in November 2021, inter alia, seeking a response to the petitioner's FOIL request. After receiving no response, the petitioner's counsel sent a letter to the City dated January 12, 2022, appealing the constructive denial of the petitioner's FOIL request, and the City again failed to respond.

Thereafter, in May 2022, the petitioner commenced this proceeding pursuant to CPLR article 78 to compel the MVPD,

the City, Glenn Scott, Marcel Olifiers, and Brian G. Johnson (hereinafter collectively the respondents) to produce the subject records and for an award of attorney's fees and litigation costs. In a judgment dated December 13, 2023, the Supreme Court granted the petition. The respondents appeal from so much of the judgment as granted that branch of the petition which was for an award of attorney's fees and litigation costs.

"In order to create a clear deterrent to unreasonable delays and denials of access and thus, encourage government to make a good faith effort to comply with the requirements of FOIL, the legislature has provided for the assessment of attorney's fees and other litigation costs in FOIL proceedings" (*Matter of Law Offs. of Cory H. Morris v County of Nassau*, 184 AD3d 830, 832 [2020]; see Public Officers Law § 89 [4] [c]; *Matter of Ateres Bais Yaakov Academy of Rockland v Town of Clarkstown*, 218 AD3d 462, 465 [2023]). Thus, the court "shall assess, against such agency involved, reasonable attorney's fees and other litigation costs reasonably incurred by such person in any case under the provisions of" Public Officers Law § 89 "in which such person has substantially prevailed and the court finds that the agency had no reasonable basis for denying access" (Public Officers Law § 89 [4] [c] [ii]; see *Matter of Tsunis Gasparis, LLP v Stony Brook Fire Dist.*, 238 AD3d 1059, 1060 [2025]; *Matter of Ateres Bais Yaakov Academy of Rockland v Town of Clarkstown*, 218 AD3d at 466). "A petitioner has 'substantially prevailed' within the meaning of Public Officers Law § 89 (4) (c) when the commencement of the CPLR article 78 proceeding ultimately succeeds in obtaining the records responsive to the FOIL request, whether by court order or by voluntary disclosure" (*Matter of Lane v County of Nassau*, 221 AD3d 1008, 1011 [2023] [internal quotation marks omitted]; see *Matter of McNerney v Carmel Cent. Sch. Dist.*, 204 AD3d 1012, 1014 [2022]).

Here, the petitioner substantially prevailed in this proceeding. Moreover, contrary to the respondents' contention, they failed to demonstrate a reasonable basis for denying access to the records requested by the petitioner (see *Matter of New York Civ. Liberties Union v Village of Freeport*, 229 AD3d 629, 632 [2024]; *Matter of New York Civ. Liberties Union v Nassau County*, 228 AD3d 864, 866 [2024]; cf. *Matter of Puig v City of Middletown*, 230 AD3d 794, 796 [2024]).

Accordingly, the Supreme Court properly granted that branch of the petition which was for an award of attorney's fees and litigation costs.

In light of our determination, we need not reach the parties'

remaining contentions. Dillon, J.P., Christopher, Warhit and Landicino, JJ., concur.

33 In the Matter of Nicholas Leo, Jr., Petitioner, v Elizabeth Fox-McDonough, as Justice of the Supreme Court of the State of New York, Nassau County, Respondent. [252 NYS3d 304]—

Proceeding against Body or Officer—Mandamus

Proceeding pursuant to CPLR article 78, inter alia, in effect, in the nature of mandamus to compel the respondent, Elizabeth Fox-McDonough, a Justice of the Supreme Court, Nassau County, to decide certain motions in an action entitled *Buonocore v Leo*, pending in the Supreme Court, Westchester County, under index No. 69368/24.

Adjudged that the petition is denied and the proceeding is dismissed on the merits, without costs or disbursements.

The extraordinary remedy of mandamus will lie only to compel the performance of a ministerial act, and only where there exists a clear legal right to the relief sought (*see Matter of Legal Aid Socy. of Sullivan County v Scheinman*, 53 NY2d 12, 16 [1981]). The petitioner has failed to demonstrate a clear legal right to the relief sought. Dillon, J.P., Wooten, Ventura and Ottley, JJ., concur.

34 In the Matter of Hong Li, Appellant, v Michael D. Chen, Respondent. [— NYS3d —]—

Parent, Child and Family—Support—Willful Violation of Order—Inability to Make Payments

In a proceeding pursuant to Family Court Act article 4, the mother appeals from (1) an order of the Family Court, Nassau County (Lisa M. Williams, S.M.), dated November 15, 2024, and (2) an order of the same court (Robin M. Kent, J.) dated February 3, 2025. The order dated November 15, 2024, after a hearing, and upon findings of fact also dated November 15, 2024, insofar as appealed from, determined that the father's failure to pay child support was not willful. The order dated February 3, 2025, denied the mother's objections to the order dated November 15, 2024.

Ordered that the appeal from the order dated November 15, 2024, is dismissed, without costs or disbursements; and it is further,

Ordered that the order dated February 3, 2025, is affirmed, without costs or disbursements.

The parties, who have one child together, were divorced by a judgment of divorce dated March 20, 2009. According to the

child support terms of a separation agreement dated July 22, 2008, which was incorporated but not merged into the judgment of divorce, the father agreed to pay the expenses of the child's college education, including tuition, books and supplies, room and board, travel, and incidental expenses (hereinafter the college expenses provision). On November 30, 2023, the mother filed a petition alleging, inter alia, that the father willfully violated the college expenses provision by failing to pay for the child's college expenses of approximately \$130,000. Following a hearing, upon findings of fact dated November 15, 2024, in an order also dated November 15, 2024, the Support Magistrate, among other things, determined that the father had failed to obey the judgment of divorce but that his failure was not willful (hereinafter the Support Magistrate's order). The Support Magistrate also entered a money judgment in favor of the mother and against the father in the total sum of \$99,300.04 for the outstanding college expenses. The mother filed objections to the Support Magistrate's order, contending that the Support Magistrate should have determined that the father's failure to pay was willful. In an order dated February 3, 2025, the Family Court denied the mother's objections. The mother appeals.

The mother's appeal from the Support Magistrate's order must be dismissed because that order was superseded by the order dated February 3, 2025 (*see Matter of Kaloustian v Tsvetkov*, 236 AD3d 789, 791 [2025]).

Contrary to the mother's contention, the Family Court properly denied her objections to the Support Magistrate's order. At a hearing pursuant to Family Court Act § 454 to determine whether a respondent has willfully failed to obey a lawful order of support, the burden is on the petitioner to establish that the respondent willfully violated the terms of the order by failing to pay the required support (*see id.* § 454 [3]; *Matter of Martinez v Lauretano*, 240 AD3d 597, 598 [2025]; *Matter of Hanrahand v Hanrahand*, 202 AD3d 679, 680 [2022]). Proof of failure to pay child support as ordered constitutes prima facie evidence of willful violation of an order of support (*see Matter of Camacho v Leggio*, 227 AD3d 1064, 1066 [2024]; *Matter of Santman v Schonfeldt*, 209 AD3d 742, 743 [2022]). If the petitioner makes this prima facie showing, the burden shifts to the respondent to present competent, credible evidence that his or her failure to pay support in accordance with the terms of the order was not willful (*see Matter of Martinez v Lauretano*, 240 AD3d at 598; *Matter of Hanrahand v Hanrahand*, 202 AD3d at 680). Great deference should be given to the

credibility determinations of the Support Magistrate, who is in the best position to assess the credibility of the witnesses (*see Matter of Santman v Schonfeldt*, 209 AD3d at 743; *Matter of Hanrahand v Hanrahand*, 202 AD3d at 680).

Here, the mother demonstrated that she had paid \$99,290.04 for the child's college expenses, and it is undisputed that the father did not pay for those expenses. The Support Magistrate determined that the father had adduced competent, credible evidence, in response to the mother's prima facie showing, of his inability to make the required payments, meeting his burden of establishing that he did not willfully violate the judgment of divorce. The Support Magistrate's credibility determinations were supported by the record and will not be disturbed (*see Matter of Martinez v Lauretano*, 240 AD3d at 599; *Matter of Santman v Schonfeldt*, 209 AD3d at 743). The Support Magistrate also properly determined that the mother failed to demonstrate that she apprised the father of the amount due for the child's college expenses before commencing this proceeding.

Accordingly, the Family Court properly denied the mother's objections to the Support Magistrate's order. Barros, J.P., Wan, Golia and Goldberg Velazquez, JJ., concur.

35 In the Matter of Greicy Z.M., Respondent, v Felix O.F., Appellant. [— NYS3d —]

Parent, Child and Family—Support—Financial Disclosure

Parent, Child and Family—Support—Imputation of Income

In a proceeding pursuant to Family Court Act article 4, the father appeals from an order of the Family Court, Queens County (Adetokunbo O. Fasanya, J.), dated November 27, 2024. The order denied the father's objections to an amended order of the same court (Rose M. Garcia, S.M.) dated October 8, 2024, which, after a hearing, and upon findings of fact dated October 2, 2024, inter alia, directed him to pay child support in the sum of \$418 per month and retroactive child support in the sum of \$13,831.81.

Ordered that the order is affirmed, without costs or disbursements.

The parties are the parents of one child. In 2021, the mother commenced this proceeding against the father pursuant to Family Court Act article 4 for child support. After a hearing, the Support Magistrate, in an amended order dated October 8, 2024, upon findings of fact dated October 2, 2024, inter alia, directed the father to pay child support in the sum of \$418 per month and retroactive child support in the sum of \$13,831.81.

In an order dated November 27, 2024, the Family Court denied the father's objections to the amended order. The father appeals.

Family Court Act § 424-a (a) provides, in relevant part, that “[a] sworn statement of net worth shall be filed with the clerk of the court on a date to be fixed by the court, no later than ten days after the return date of the petition.” “Where a respondent in a child support proceeding fails, without good cause, to comply with the compulsory financial disclosure mandated by Family Court Act § 424-a, ‘the court on its own motion or on application shall grant the relief demanded in the petition or shall order that, for purposes of the support proceeding, the respondent shall be precluded from offering evidence as to respondent’s financial ability to pay support’ ” (*Matter of McGoldrick v Gebaide*, 188 AD3d 885, 885-886 [2020], quoting Family Ct Act § 424-a [b]; see *Matter of Grant v Seraphin*, 221 AD3d 897, 898 [2023]). Here, since the father failed, without good cause, to comply with the statutory requirement to provide financial disclosure, the Support Magistrate was not required to consider the father’s evidence of a disability that purportedly reduced his financial ability to pay support (see Family Ct Act § 424-a [b]). In any event, the Support Magistrate properly declined to admit into evidence medical records that were not certified or authenticated (see CPLR 4518 [c]; *Matter of Johnson v Johnson*, 146 AD3d 954, 955 [2017]; *Matter of Pepe v Pepe*, 128 AD3d 831, 834 [2015]).

“In determining child support obligations, a court need not rely upon a party’s own account of his or her finances, but may impute income based upon the party’s past income or demonstrated future potential earnings” (*Matter of Askinazi v Askinazi*, 240 AD3d 775, 777 [2025] [alterations and internal quotation marks omitted]; see *Matter of Morales v Foley*, 242 AD3d 888, 889 [2025]). Here, the Support Magistrate providently exercised her discretion in imputing income to the father based on his 2021 tax return, as he failed to present evidence of his financial status after January 2022.

The father’s contention that he was not allowed to testify before the Support Magistrate is unpreserved for appellate review, as he failed to raise this contention in his objections before the Family Court (see *Matter of Licitra v Licitra*, 219 AD3d 837, 838 [2023]).

The father’s remaining contention is without merit. LaSalle, P.J., Christopher, Landicino and McCormack, JJ., concur.

36 In the Matter of Angela Militana, Respondent, v Thomas A. DeMartino, Appellant. [— NYS3d —]

Parent, Child and Family—Support—Finality of Order—Support Magistrate Determination

In related proceedings pursuant to Family Court Act article 4, the father appeals from an order of the Family Court, Nassau County (Joy M. Watson, J.), dated April 28, 2023. The order denied the father's objections to an order of the same court (Elizabeth A. Bloom, S.M.) dated October 19, 2022, which, after a hearing, and upon findings of fact dated October 18, 2022, inter alia, determined that the father was in willful violation of a prior order of support and recommended commitment.

Ordered that the order dated April 28, 2023, is affirmed, without costs or disbursements.

The parties were married in 2005 and divorced in 2018. In a judgment of divorce entered June 22, 2018, the father was directed to pay \$3,125 per month in child support for the parties' two children and \$1,500 per month in maintenance for a period of two years. Thereafter, in 2021, the mother filed a petition alleging that the father was in willful violation of his support obligations. Following a hearing, the Support Magistrate, inter alia, determined that the father was in willful violation of his support obligations, calculated child support and maintenance arrears owed by the father, recommended commitment, and referred its determination to the Family Court for confirmation. The father filed objections to the Support Magistrate's determination. In an order dated April 28, 2023, the Family Court denied his objections. The father appeals.

"A determination by a support magistrate that a person is in willful violation of a support order and recommending commitment has no force and effect until confirmed by a Judge of the Family Court" (*Matter of Dakin v Dakin*, 75 AD3d 639, 639-640 [2010]; see Family Ct Act § 439 [a]; *Matter of Clarissa C. v Alexei G.*, 208 AD3d 1089 [2022]). "Such a determination by a support magistrate does not constitute a final order to which a party may file written objections" (*Matter of Dakin v Dakin*, 75 AD3d at 640; see *Matter of Henry v Greenidge*, 127 AD3d 1192 [2015]). Here, the father improperly filed objections to the nonfinal determination of the Support Magistrate. Accordingly, the Family Court correctly denied his objections (see *Matter of Clarissa C. v Alexei G.*, 208 AD3d at 1090; *Matter of Henry v Greenidge*, 127 AD3d at 1193). Thus, contrary to the father's contention, the issue of whether the father willfully violated the judgment of divorce is not properly before this Court (see *Matter of Brady v White*, 158 AD3d 748 [2018]).

The father's remaining contentions are either without merit or unpreserved for appellate review. Chambers, J.P., Dowling, Wan and Ventura, JJ., concur.

37 In the Matter of Aura Moody, Appellant, v City of New York et al., Respondents. [252 NYS3d 757]—

Appeal—Matters Appealable—Order Denying Reargument

In a proceeding pursuant to CPLR article 78, inter alia, to review a determination of the respondent New York City Department of Education dated February 11, 2022, which terminated the petitioner's employment, the petitioner appeals from an order of the Supreme Court, Queens County (Kevin J. Kerrigan, J.), dated March 13, 2023. The order, insofar as appealed from, denied that branch of the petitioner's motion which was for leave to reargue her opposition to the cross-motion of the respondents United Federation of Teachers and Michael Mulgrew, and the application of the respondents City of New York, New York City Department of Education, New York City Department of Health and Mental Hygiene, Community School District 29, Bill de Blasio, Eric Adams, Dave Chokshi, Ashwin Vasan, Meisha Porter, David Banks, and Beverly Mitchell, to dismiss the petition insofar as asserted against each of them, which had been, in effect, granted in an order and judgment (one paper) of the same court entered January 30, 2023.

Ordered that the appeal is dismissed, with one bill of costs to the respondents appearing separately and filing separate briefs, as no appeal lies from an order denying reargument.

The petitioner's appeal from so much of the order dated March 13, 2023, as denied that branch of her motion which was for leave to reargue must be dismissed, as no appeal lies from an order denying reargument (*see Halvatzis v Perrone*, 199 AD3d 787, 788 [2021]; *Matter of New S. Ins. Co. v Rosado*, 125 AD3d 867, 867 [2015]). Duffy, J.P., Wooten, Hom and Goldberg Velazquez, JJ., concur.

38 In the Matter of Oceanside Development Group, LLC, et al., Appellants, v Town of Hempstead et al., Respondents. [— NYS3d —]—

Municipal Corporations—Zoning—Variance—Balancing Test

In a proceeding pursuant to CPLR article 78, inter alia, to review a determination of the Town of Hempstead Board of Zoning Appeals dated February 16, 2022, as supplemented by findings of fact dated April 6, 2022, which, after a hearing, granted the application of Sunrise Development, Inc., for area variances, the petitioners appeal from a judgment of the Supreme Court, Nassau County (Erica L. Prager, J.), entered November 7, 2022. The judgment, insofar as appealed from,

denied that branch of the amended petition which was to review the determination dated February 16, 2022, as supplemented by the findings of fact dated April 6, 2022, and, in effect, dismissed the proceeding.

Ordered that the judgment is affirmed insofar as appealed from, with costs to the respondent Sunrise Development, Inc.

Sunrise Development, Inc. (hereinafter Sunrise), is a contract vendee of certain property located in Oceanside (hereinafter the property). In 2021, Sunrise applied to the Board of Appeals of the Town of Hempstead for area variances that would permit Sunrise to construct an assisted living facility on the property.

In January 2022, a hearing was held before the Board, and on February 16, 2022, the Board granted the application. Thereafter, the petitioners commenced this CPLR article 78 proceeding, inter alia, to review the Board's determination. The petition was amended after the Board issued findings of fact dated April 6, 2022. In a judgment entered November 7, 2022, the Supreme Court, among other things, denied that branch of the amended petition which was to review the determination, as supplemented by the findings of fact, and, in effect, dismissed the proceeding. The petitioners appeal.

The Supreme Court properly determined that the Board's determination to grant the requested area variances was not arbitrary and capricious. "Local zoning boards have broad discretion in considering applications for area variances, and judicial review is limited to determining whether the action taken by the board was illegal, arbitrary, or an abuse of discretion" (*Matter of deBordenave v Village of Tuxedo Park Bd. of Zoning Appeals*, 168 AD3d 838, 839 [2019]). "The determination of a local zoning board is entitled to great deference, and will be set aside only if it is illegal, arbitrary and capricious, or irrational" (*Matter of Seaview Assn. of Fire Is., NY, Inc. v Town of Islip Zoning Bd. of Appeals*, 221 AD3d 717, 718 [2023] [internal quotation marks omitted]; see *Matter of 666 OCRTT, LLC v Board of Zoning Appeals of the Town of Hempstead*, 200 AD3d 682, 683 [2021]).

In determining whether to grant an area variance, a zoning board is required to engage in a balancing test, weighing the benefit to the applicant against the detriment to the health, safety, and welfare of the neighborhood or community (see Town Law § 267-b [3] [b]; *Matter of deBordenave v Village of Tuxedo Park Bd. of Zoning Appeals*, 168 AD3d at 839). The zoning board must also consider: "(1) whether an undesirable change will be produced in the character of the neighborhood or a detriment to nearby properties will be created by the granting of

the area variance; (2) whether the benefit sought by the applicant can be achieved by some method, feasible for the applicant to pursue, other than an area variance; (3) whether the requested area variance is substantial; (4) whether the proposed variance will have an adverse effect or impact on the physical or environmental conditions in the neighborhood or district; and (5) whether the alleged difficulty was self-created, which consideration shall be relevant to the decision of the board of appeals, but shall not necessarily preclude the granting of the area variance” (Town Law § 267-b [3] [b]; see *Matter of Humphreys v Somers Zoning Bd. of Appeals*, 206 AD3d 1000, 1001 [2022]). A zoning board is “‘not required to justify its determination with supporting evidence for each of the five statutory factors as long as its determination balancing the relevant considerations is rational’ ” (*Matter of Humphreys v Somers Zoning Bd. of Appeals*, 206 AD3d at 1002, quoting *Matter of Kramer v Zoning Bd. of Appeals of Town of Southampton*, 131 AD3d 1170, 1172 [2015]).

Here, the record demonstrates that the Board engaged in the required balancing test and considered the relevant statutory factors (see *id.*; *Matter of Capetola v Town of Riverhead*, 192 AD3d 789, 791 [2021]). Contrary to the petitioners’ contention, the evidence before the Board supported its findings that the benefit sought by Sunrise would not produce an undesirable change in the character of the neighborhood, have an adverse impact on the physical or environmental conditions, or otherwise result in a detriment to the health, safety, and welfare of the neighborhood or community, even if the proposed area variances were arguably substantial and the difficulty was self-created (see *Matter of Borrok v Town of Southampton*, 130 AD3d 1024, 1025 [2015]; *Matter of Goodman v City of Long Beach*, 128 AD3d 1064, 1065 [2015]).

The parties’ remaining contentions are without merit.

Accordingly, the Supreme Court properly denied that branch of the amended petition which was to review the determination dated February 16, 2022, as supplemented by the findings of fact dated April 6, 2022, and, in effect, dismissed the proceeding. LaSalle, P.J., Chambers, Ford and McCormack, JJ., concur.

39 In the Matter of Rosanna Parco, Appellant, v Christopher T. Parco, Respondent. [— NYS3d —]

Parent, Child and Family—Custody—Uniform Child Custody Jurisdiction and Enforcement Act—Consideration of Relevant Factors

In a proceeding pursuant to Family Court Act article 6, the mother appeals from an order of the Family Court, Richmond

County (Peter F. DeLizzo, J.), dated March 20, 2025. The order, without a hearing, sua sponte, dismissed the mother's petition to modify the custody provisions of a judgment of divorce of the same court (Ralph J. Porzio, J.) dated December 2, 2022, which incorporated but did not merge a stipulation of settlement dated September 15, 2021, so as to award her sole legal and residential custody of the parties' children.

Ordered that the order is reversed, on the law, without costs or disbursements, the petition is reinstated, and the matter is remitted to the Family Court, Richmond County, for further proceedings consistent herewith.

The parties were divorced in New York by a judgment of divorce dated December 2, 2022, which incorporated but did not merge a stipulation of settlement dated September 15, 2021. The parties subsequently relocated to Florida with the parties' children. In March 2024, the mother and the children returned to New York. In April 2024, the mother filed a petition (hereinafter the 2024 petition) to modify the custody provisions of the judgment of divorce so as to award her sole legal and residential custody of the children, alleging, inter alia, that there had been a change in circumstances in that the father had committed acts of domestic violence against the mother in the children's presence. In August 2024, the Family Court dismissed the 2024 petition, without prejudice, for lack of subject matter jurisdiction.

In March 2025, the mother filed a second petition (hereinafter the 2025 petition) to modify the custody provisions of the judgment of divorce so as to award her sole legal and residential custody of the children. In an order dated March 20, 2025, the Family Court, without a hearing, sua sponte, dismissed the 2025 petition, stating that the "application raised in the petition has been addressed in a prior Decision and Order of the Court dated August 15, 2024." The mother appeals from the order dated March 20, 2025.

The Family Court's jurisdiction in this child custody proceeding is governed by the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA) (Domestic Relations Law art 5-A; see § 75-a [4]; *Matter of Montanez v Tompkinson*, 167 AD3d 616, 618 [2018]). Nevertheless, the court failed to make any determination, despite the children's residence in New York for more than six months at the time of the filing of the 2025 petition, as to whether it had jurisdiction under Domestic Relations Law § 76 on the basis that New York was the children's "home state" (*id.* § 75-a [7]; see *Matter of Jenny M. [Thomas M.]*, 198 AD3d 893, 894-895 [2021]). The court further failed to

determine whether it had temporary emergency jurisdiction under Domestic Relations Law § 76-c (see *Matter of Nathaniel H.* [*Nathaniel H.*], 213 AD3d 525, 525-526 [2023]; *Paul v Paul*, 161 AD3d 888, 891 [2018]). In addition, the court failed to determine whether a “proceeding concerning the custody of the child [had] been commenced in a court of another state having jurisdiction,” in which case the court would have been required to stay the proceedings and communicate with the court of the other state (Domestic Relations Law § 76-e [1]; see *Matter of Frankel v Frankel*, 127 AD3d 1186, 1188 [2015]). Moreover, in the event that the court found that New York was an inconvenient forum and that Florida was the more appropriate forum, there is no indication that the court considered the required factors (see Domestic Relations Law § 76-f [2] [a]-[h]). Finally, upon such a finding, the court is required to “stay the proceedings upon condition that a child custody proceeding be promptly commenced in another designated state” (*id.* § 76-f [3]).

Accordingly, we reverse the order dated March 20, 2025, reinstate the 2025 petition, and remit the matter to the Family Court, Richmond County, for a determination, after a hearing if necessary, of whether that court has jurisdiction pursuant to the UCCJEA (see Domestic Relations Law art 5-A). Dillon, J.P., Ford, Voutsinas and McCormack, JJ., concur.

40 In the *Matter of Sterling Riles*, Petitioner, v Conrad D. Singer, as Justice of the Supreme Court of the State of New York, Nassau County, et al., Respondents. [252 NYS3d 778]—

Proceeding against Body or Officer—Mandamus

Proceeding pursuant to CPLR article 78, inter alia, in effect, in the nature of mandamus to compel the respondent Conrad D. Singer, a Justice of the Supreme Court, Nassau County, to enter an order dismissing an underlying civil action entitled *LCF Group, Inc. v Boos Hawg Trucking Logistics, LLC*, pending in that court under index No. 623205/24, and application by the petitioner for a waiver of costs, fees, and expenses. Motion by the respondent LCF Group, Inc., in effect, pursuant to CPLR 3211 (a) to dismiss the petition insofar as asserted against it, inter alia, for failure to state a cause of action.

Upon the petition, and the papers filed in support of the motion and the papers filed in opposition thereto, it is

Ordered that the application for a waiver of costs, fees, and expenses is granted to the extent that the filing fee imposed by CPLR 8022 (b) is waived, and the application is otherwise denied as academic; and it is further,

Adjudged that the petition is denied and the proceeding is

dismissed on the merits, without costs or disbursements; and it is further,

Ordered that the motion is denied as academic in light of the determination of the petition.

The extraordinary remedy of mandamus will lie only to compel the performance of a ministerial act, and only where there exists a clear legal right to the relief sought (*see Matter of Legal Aid Socy. of Sullivan County v Scheinman*, 53 NY2d 12, 16 [1981]). The petitioner has failed to demonstrate a clear legal right to the relief sought. Dillon, J.P., Wooten, Ventura and Ottley, JJ., concur.

41 New Residential Mortgage Loan Trust 2017-1-RPL1, Respondent, v Ronald R. Hafferkamp, Appellant, et al., Defendants. [— NYS3d —]

Appeal—Appeal as of Right—Timeliness—Deadline after Service

In an action to foreclose a mortgage, the defendant Ronald R. Hafferkamp appeals from (1) an order of the Supreme Court, Suffolk County (Thomas F. Whelan, J.), dated January 24, 2020, and (2) an order of the same court dated October 6, 2020. The order dated January 24, 2020, inter alia, granted those branches of the plaintiff's motion which were for summary judgment on the complaint insofar as asserted against the defendant Ronald R. Hafferkamp and for an order of reference, and denied that branch of the cross-motion of the defendant Ronald R. Hafferkamp which was to dismiss the complaint insofar as asserted against him.

Ordered that the appeals are dismissed, with one bill of costs.

In October 2018, the plaintiff commenced this action to foreclose a mortgage against, among others, the defendant Ronald R. Hafferkamp. In October 2019, the plaintiff moved, inter alia, for summary judgment on the complaint insofar as asserted against Hafferkamp and for an order of reference. Hafferkamp opposed the motion and cross-moved, among other things, to dismiss the complaint insofar as asserted against him. In an order dated January 24, 2020, the Supreme Court, inter alia, granted those branches of the plaintiff's motion and denied that branch of Hafferkamp's cross-motion. Thereafter, Hafferkamp moved for leave to renew and reargue his prior cross-motion and his opposition to the plaintiff's prior motion. In an order dated October 6, 2020, the court denied Hafferkamp's motion. Hafferkamp appeals from both orders.

The appeal from the order dated October 6, 2020, must be dismissed as abandoned, as the brief filed by Hafferkamp does

not seek reversal or modification of any portion of that order (see *Teodoro v C.W. Brown, Inc.*, 200 AD3d 999, 1000 [2021]; *D.S. v Poliseno*, 189 AD3d 1102, 1104 [2020]; *Sanchez v Rivera*, 171 AD3d 965, 966 [2019]).

Further, the plaintiff correctly contends that the appeal from the order dated January 24, 2020, must be dismissed as untimely. An appeal as of right must be taken “within thirty days after service by a party upon the appellant of a copy of the judgment or order appealed from and written notice of its entry” (CPLR 5513 [a]). Where, as here, service is made within the state by mail, the period is extended by five days (see *id.* § 2103 [b] [2]; [c]). “The time period for filing a notice of appeal is nonwaivable and jurisdictional” (*Jones Sledzik Garneau & Nardone, LLP v Schloss*, 37 AD3d 417, 417 [2007]; see *Matter of Van Zwienen*, 202 AD3d 802, 804 [2022]). Here, the plaintiff served Hafferkamp with a copy of the order dated January 24, 2020, and notice of its entry by mail on February 10, 2020. However, Hafferkamp did not file his notice of appeal until November 10, 2020, which was well after the 35 days prescribed by law. Accordingly, the appeal from the order dated January 24, 2020, must be dismissed as untimely taken (see *Rantinella v Tomas*, 163 AD3d 1022, 1023 [2018]). Connolly, J.P., Chambers, Voutsinas and Goldberg Velazquez, JJ., concur.

42 The People of the State of New York, Respondent, v Jamaine Basnight, Appellant. [— NYS3d —]

Crimes—Appeal—Preservation of Issue for Review

Crimes—Argument and Conduct of Counsel—Prosecutor’s Comments during Summation

Appeal by the defendant from a judgment of the County Court, Nassau County (Howard E. Sturim, J.), rendered May 1, 2024, convicting him of criminal possession of a weapon in the second degree, criminal possession of a weapon in the third degree (two counts), aggravated unlicensed operation of a motor vehicle in the first degree, aggravated unlicensed operation of a motor vehicle in the second degree, aggravated unlicensed operation of a motor vehicle in the third degree, driving while intoxicated, and operating a motor vehicle without a license, upon a jury verdict, and imposing sentence.

Ordered that the judgment is affirmed.

The defendant contends that he was deprived of his rights to due process and a fair trial by certain comments made by the prosecutor during summation. The defendant’s challenges to the prosecutor’s comments to the effect that there was no reason for the police to lie, about the presence of DNA evidence on

certain items, and that the jury should not fall for a “trap” are unpreserved for appellate review, since defense counsel did not object to these comments (see *People v O’Doherty*, 236 AD3d 929, 930 [2025]). The defendant’s challenges to the prosecutor’s comments to the effect that the defense was trying to “side-track” the jury and telling them a “ridiculous story” are unpreserved for appellate review because defense counsel failed to request additional relief when the County Court sustained objections or provided curative instructions (see *People v Bajan*, 82 AD3d 1111, 1112 [2011]). Moreover, “the defendant’s motion for a mistrial, made after the completion of summations, was untimely and failed to preserve his contentions” (*People v Malave*, 7 AD3d 542, 542 [2004]; see *People v Romero*, 7 NY3d 911, 912 [2006]; *People v Balls*, 69 NY2d 641, 642 [1986]). We decline to exercise our interest of justice jurisdiction to consider the defendant’s challenges to comments that have not been preserved for appellate review.

With respect to the defendant’s challenges to comments that have been preserved for appellate review, the majority of the challenged comments made by the prosecutor during summation were within the bounds of permissible rhetorical comment (see *People v Ashwal*, 39 NY2d 105, 109 [1976]), fairly responsive to arguments made in defense counsel’s summation (see *People v Spencer*, 244 AD3d 1254, 1254 [2025]), or constituted fair comment on the evidence (see *People v Escalona*, 237 AD3d 968, 970 [2025]). Any prejudice that resulted was alleviated by the County Court’s curative instructions (see *People v Chandler*, 237 AD3d 1105, 1106 [2025]). Moreover, to the extent that any of the challenged comments were improper, they were not so pervasive or egregious as to have deprived the defendant of his rights to a fair trial or due process (see *People v Spencer*, 244 AD3d at 1254).

The defendant’s *Batson* challenge (see *Batson v Kentucky*, 476 US 79 [1986]) is unpreserved for appellate review. At no time during step three of the *Batson* analysis did defense counsel contend that the People failed to meet their burden of providing race-neutral reasons for peremptorily challenging the prospective juror in question. Under the circumstances, we decline to exercise our interest of justice jurisdiction to reach the *Batson* challenge to the prospective juror in question (see *People v Taylor*, 185 AD3d 724, 727-729 [2020]).

The sentence imposed was not excessive (see *People v Suitte*, 90 AD2d 80 [1982]). Dillon, J.P., Brathwaite Nelson, Love and McCormack, JJ., concur.

43 The People of the State of New York, Respondent, v Jeremy O. Blake, Appellant. [252 NYS3d 297]—

Crimes—Right to Counsel—Withdrawal—Sufficiency of Brief

Appeal by the defendant from a judgment of the County Court, Westchester County (Maurice Dean Williams, J.), rendered April 26, 2024, convicting him of criminal possession of a firearm, upon his plea of guilty, and imposing sentence. Assigned counsel has submitted a brief in accordance with *Anders v California* (386 US 738 [1967]), in which he moves for leave to withdraw as counsel for the appellant.

Ordered that the judgment is affirmed.

We are satisfied with the sufficiency of the brief filed by the defendant's assigned counsel pursuant to *Anders v California* (386 US 738 [1967]), and, upon an independent review of the record, we conclude that there are no nonfrivolous issues which could be raised on appeal. Counsel's application for leave to withdraw as counsel is, therefore, granted (*see id.*; *Matter of Giovanni S. [Jasmin A.]*, 89 AD3d 252 [2011]; *People v Paige*, 54 AD2d 631 [1976]; *cf. People v Gonzalez*, 47 NY2d 606 [1979]). Genovesi, J.P., Chambers, Voutsinas and Hom, JJ., concur.

44 The People of the State of New York, Respondent, v David Bonola, Appellant. [252 NYS3d 299]—Appeal by the defendant, as limited by his motion, from a sentence of the Supreme Court, Queens County (Michael B. Aloise, J.), imposed November 16, 2022, upon his plea of guilty, on the ground that the sentence was excessive.

Ordered that the sentence is affirmed.

The sentence imposed was not excessive (*see People v Suitte*, 90 AD2d 80 [1982]). Iannacci, J.P., Wooten, Wan, Golia and Otley, JJ., concur.

45 The People of the State of New York, Appellant, v Joshua Bourdeau, Respondent. [— NYS3d —]—

Crimes—Right to Speedy Trial—Delays**Crimes—Right to Speedy Trial—Hearing on Motion**

Appeal by the People from so much of an order of the Supreme Court, Kings County (Deepa Ambekar, J.), dated April 30, 2024, as granted that branch of the defendant's motion which was pursuant to CPL 30.30 (1) (a) to dismiss the indictment on the ground that he was deprived of his statutory right to a speedy trial.

Ordered that the order is reversed insofar as appealed from, on the law, and the matter is remitted to the Supreme Court, Kings County, for a hearing and a new determination thereafter of that branch of the defendant's motion which was pursu-

ant to CPL 30.30 (1) (a) to dismiss the indictment on the ground that he was deprived of his statutory right to a speedy trial.

The defendant moved, inter alia, pursuant to CPL 30.30 to dismiss the indictment on the ground that he was deprived of his statutory right to a speedy trial. The defendant asserted that the People were chargeable with more than 200 days of delay. The People argued that a majority of the time was excludable. In an order dated April 30, 2024, the Supreme Court, among other things, granted that branch of the defendant's motion without a hearing, finding that the People were chargeable with 202 days. The People appeal.

“Where, as here, a defendant is charged with a felony, the People are required to be ready for trial within six months of the commencement of the criminal action” (*People v Pike*, 228 AD3d 886, 887 [2024], quoting *People v Taback*, 216 AD3d 673, 674 [2023]; see CPL 30.30 [1] [a]). “A defendant seeking dismissal of the indictment on speedy trial grounds under CPL 30.30 meets his or her initial burden on the motion simply by alleging that the People failed to declare readiness within the statutorily prescribed period” (*People v Brown*, 214 AD3d 823, 824 [2023] [internal quotation marks omitted]; see *People v Beasley*, 16 NY3d 289, 292 [2011]). “Once a defendant has alleged that more than the statutorily prescribed time has elapsed without a declaration of readiness by the People, the People bear the burden of establishing sufficient excludable delay” (*People v Ryan*, 237 AD3d 754, 755 [2025], quoting *People ex rel. Nieves v Molina*, 207 AD3d 797, 798 [2022]; see *People v Berkowitz*, 50 NY2d 333, 348-349 [1980]).

Preliminarily, the Supreme Court improperly determined that, based on 22 NYCRR 202.5-c (c) (3), the People were ready for trial on July 6, 2023, and not July 5, 2023. Here, the record demonstrates that both the defendant and the court were notified of the People's readiness for trial on July 5, 2023 (see *People v Licius*, 45 NY3d 109 [2025]). Accordingly, this one day should not have been counted against the People for speedy trial purposes.

Contrary to the defendant's contention, the time periods from March 3, 2023, to March 8, 2023, and March 8, 2023, to March 9, 2023, were not chargeable to the People, since the transcript of the pertinent proceedings established that defense counsel requested the adjournments at issue (see CPL 30.30 [4] [b]; *People v Barden*, 27 NY3d 550, 555 [2016]; *People v Pike*, 228 AD3d at 887). These adjournments were for the defendant's benefit; he acquiesced therein, and he is, accordingly, deemed to have waived any objection to the delays (see *People v Worley*, 66 NY2d 523 [1985]; *People v Buntin*, 118 AD2d 863 [1986]).

Moreover, the Supreme Court should have held a hearing to resolve factual issues related to that branch of the defendant's motion which was to dismiss the indictment on speedy trial grounds with respect to the time periods from March 9, 2023, to April 17, 2023, April 17, 2023, to May 15, 2023, and May 15, 2023, to May 22, 2023 (*see* CPL 210.45). Review of the defendant's motion papers, the People's opposition papers, and the defendant's reply papers reveals that there was a factual dispute as to the excludability of these time periods. These issues can only be properly resolved at a hearing (*see id.* § 210.45 [3], [5], [6]; *People v Santos*, 68 NY2d 859, 861-862 [1986]; *People v Gruden*, 42 NY2d 214, 217-218 [1977]; *People v Beckerman*, 184 AD3d 850, 850 [2020]; *People v Brady*, 167 AD3d 927, 928 [2018]).

Accordingly, the order must be reversed insofar as appealed from and the matter remitted to the Supreme Court, Kings County, for a hearing pursuant to CPL 210.45 (6) for the time periods from March 9, 2023, to April 17, 2023, April 17, 2023, to May 15, 2023, and May 15, 2023, to May 22, 2023, and a new determination thereafter of that branch of the defendant's motion which was pursuant to CPL 30.30 (1) (a) to dismiss the indictment on the ground that he was deprived of his statutory right to a speedy trial. Brathwaite Nelson, J.P., Wan, Love and Goldberg Velazquez, JJ., concur.

46 The People of the State of New York, Respondent, v Joseph Colon, Appellant. [252 NYS3d 758]—

Crimes—Harmless and Prejudicial Error—Determinations on Cross-Examinations

Appeal by the defendant from a judgment of the Supreme Court, Kings County (Susan Quirk, J.), rendered October 25, 2023, convicting him of attempted murder in the second degree, reckless endangerment in the first degree, criminal use of a firearm in the first degree, and criminal possession of a weapon in the second degree (two counts), upon a jury verdict, and imposing sentence.

Ordered that the judgment is affirmed.

The defendant was convicted after a jury trial of attempted murder in the second degree and related crimes for the nonfatal shooting of the complainant. At trial, in addition to testimonial evidence, the People submitted video evidence that clearly depicted the shooting, as well as the defendant's movements before and after the shooting. The defendant raised a justification defense, which was rejected by the jury.

The defendant contends that the Supreme Court erred in

limiting his cross-examination of the complainant (*see People v Rouse*, 34 NY3d 269, 275-276 [2019]; *People v Smith*, 27 NY3d 652, 659-662 [2016]) and in allowing the prosecutor to ask questions of the defendant's character witnesses that improperly assumed the defendant's guilt of the crimes for which he was on trial (*see People v Lowery*, 214 AD2d 684, 685 [1995]; *People v Gandy*, 152 AD2d 909 [1989]; *People v Pryor*, 70 AD2d 805, 806 [1979]). Any error with regard to these determinations did not deprive the defendant of his fundamental right to a fair trial, and was harmless beyond a reasonable doubt, since the proof of the defendant's guilt was overwhelming and there is no reasonable possibility that the jury would have acquitted the defendant had it not been for the error (*see People v Crimmins*, 36 NY2d 230, 237-238 [1975]).

Contrary to the defendant's contention, he was not deprived of the effective assistance of counsel (*see People v Benevento*, 91 NY2d 708 [1998]; *People v Baldi*, 54 NY2d 137 [1981]). Connelly, J.P., Brathwaite Nelson, Warhit and McCormack, JJ., concur.

47 The People of the State of New York, Respondent, v Tommy Cruz, Appellant. [252 NYS3d 298]—

Crimes—Sentence—Surcharge and Fees

Appeal by the defendant from a judgment of the Supreme Court, Kings County (Donald Leo, J.), rendered January 17, 2023, convicting him of attempted criminal possession of a weapon in the second degree, upon his plea of guilty, and imposing sentence.

Ordered that the judgment is modified, on the law and as a matter of discretion in the interest of justice, by vacating the imposition of a mandatory surcharge and fees; as so modified, the judgment is affirmed.

The period of postrelease supervision imposed as part of the sentence was not excessive (*see People v Suite*, 90 AD2d 80 [1982]).

“Criminal Procedure Law § 420.35 (2-a) permits the waiver of surcharges and fees for individuals, like the defendant, who were less than 21 years old at the time of the subject crime” (*People v Cabrera*, 222 AD3d 878, 879 [2023]). In light of the defendant's age at the time of the crime and his indigency, pursuant to the exercise of our interest of justice jurisdiction, and as consented to by the People, we modify the judgment by vacating the mandatory surcharge and fees imposed upon the defendant at sentencing (*see* CPL 420.35 [2-a] [c]; *People v Odesanya*, 225 AD3d 631, 632 [2024]). Duffy, J.P., Wooten, Hom and Goldberg Velazquez, JJ., concur.

48 The People of the State of New York, Respondent, v Manuel Espinosa, Appellant. [252 NYS3d 759]—

Crimes—Order of Protection—Victim or Witness

Appeal by the defendant from a judgment of the Supreme Court, Kings County (Raymond Rodriguez, J., at plea; Quynnda L. Santacroce, J., at sentence), rendered August 20, 2019, convicting him of attempted burglary in the third degree, upon his plea of guilty, and imposing sentence. The appeal brings up for review an order of protection issued at the time of sentencing.

Ordered that upon the appeal from the judgment, so much of the order of protection issued at the time of sentencing as was in favor of Angel Rivera is vacated, as a matter of discretion in the interest of justice; and it is further,

Ordered that the judgment is affirmed.

The defendant's contention that the Supreme Court improperly issued an order of protection in favor of Angel Rivera is unpreserved for appellate review, since the defendant failed to object to that portion of the order of protection at sentencing or otherwise raise the issue before the court (*see* CPL 470.05 [2]; *People v Nieves*, 2 NY3d 310, 316-317 [2004]). Nevertheless, we reach this issue in the exercise of our interest of justice jurisdiction (*see* CPL 470.15 [6]; *People v Gilyard*, 237 AD3d 1223 [2025]; *People v Fletcher*, 220 AD3d 805 [2023]). As the defendant correctly contends, the court had no authority to issue an order of protection in favor of that individual, as he was neither a victim nor a witness to the particular crime to which the defendant entered a plea of guilty (*see* CPL 530.13 [4]; *People v Gaffar*, 243 AD3d 586, 587 [2025]; *People v Gilyard*, 237 AD3d at 1223).

Accordingly, we vacate so much of the order of protection as was issued in favor of Angel Rivera at the time of sentencing. Connolly, J.P., Brathwaite Nelson, Warhit and McCormack, JJ., concur.

49 The People of the State of New York, Respondent, v Timothy Garcia, Appellant. [— NYS3d —]—

Crimes—Fitness to Proceed to Trial—Further Proceedings—Competency

Appeal by the defendant from a judgment of the County Court, Suffolk County (Timothy P. Mazzei, J.), rendered December 13, 2023, convicting him of criminal possession of a weapon in the second degree, criminal possession of a weapon in the third degree (three counts), criminal possession of a weapon in the fourth degree, and resisting arrest, upon a jury verdict, and imposing sentence.

Ordered that the judgment is reversed, on the law, on the facts, and as a matter of discretion in the interest of justice, and the matter is remitted to the County Court, Suffolk County, for further proceedings consistent herewith.

For his act of, inter alia, possessing an untraceable, loaded handgun, the defendant was convicted of criminal possession of a weapon in the second degree and related crimes. On appeal, the defendant contends that he was not competent to waive the assistance of counsel and proceed to trial.

In April 2023, the defendant was found competent by two psychologists, one of whom deemed his prognosis “guarded.” No hearing was held on the question of the defendant’s competency.

The defendant’s conduct during the course of the proceedings demonstrated a lack of understanding of the consequences of his actions. In May 2023, after the defendant asked how he could settle the matter, and the County Court suggested that he plead guilty, the defendant replied “is it the custom of this court to dishonor acceptances?” The court noted that it was still concerned about whether the defendant understood the charges against him. Although the defendant chose to represent himself, during the court’s lengthy colloquy of the defendant to ensure his waiver of counsel was knowing and voluntary, the defendant, for the most part, simply repeated that he was “not here to testify.” In August 2023, the defendant was offered a plea of guilty, which he claimed he accepted, but he refused to engage in a plea allocution, claiming he was “not here to testify,” despite the presence of a legal advisor to advise him how to proceed.

The defendant proceeded to trial in October 2023. The defendant’s conduct during the course of those proceedings demonstrated a lack of understanding of the consequences of the proceedings or an ability to assist in his own defense (*cf. People v Stone*, 22 NY3d 520 [2014]; *People v James*, 200 AD3d 711 [2021]). He declined to cross-examine witnesses. At the conclusion of the trial, he repeated a statement he had made previously, that “I’m here by special appearance, not a general appearance” and, when asked if he wished to give a summation, stated that “I’m not here to argue.” Thereafter, he repeated another statement he had also made previously, that he was “accepting” the County Court’s offer “and hereby returning it in settlement and closure.” His bizarre statements indicated that he had no understanding of what was about to unfold.

Given the defendant’s conduct, the County Court should have conducted further proceedings with respect to the defendant’s competency before proceeding to trial, which could have

included further competency examinations and a hearing. The defendant may have been competent in April 2023, and, thereafter, his condition may have deteriorated. “In view of the passage of time and the lack of contemporaneous psychiatric reports of the defendant’s mental condition at the time of trial, it would be futile to remit the matter for a reconstruction hearing to attempt to determine the defendant’s fitness to proceed at that time” (*People v Bellucci*, 189 AD3d 869, 871 [2020]; see *People v Peterson*, 40 NY2d 1014 [1976]). Therefore, we remit the matter to the County Court, Suffolk County, for new competency examinations, a competency hearing if warranted, and, if and when the defendant is found competent, a new trial.

In light of our determination, we need not reach the defendant’s remaining contentions. Barros, J.P., Genovesi, Voutsinas and Landicino, JJ., concur.

50 The People of the State of New York, Respondent, v Jermaine Grant, Appellant. [— NYS3d —]

Crimes—Identification of Defendant—Showup—Procedure

Crimes—Verdict—Sufficiency of Evidence

Crimes—Harmless and Prejudicial Error—Admission of Non-Eyewitness Identification

Appeal by the defendant from a judgment of the County Court, Nassau County (Helene F. Gugerty, J.), rendered December 21, 2022, convicting him of attempted murder in the second degree and criminal possession of a weapon in the second degree (two counts), upon a jury verdict, and imposing sentence. The appeal brings up for review the denial, after a hearing, of that branch of the defendant’s omnibus motion which was to suppress identification evidence.

Ordered that the judgment is affirmed.

Contrary to the defendant’s contention, the County Court properly denied that branch of his omnibus motion which was to suppress identification evidence. The defendant’s initial detention for the purpose of conducting a showup identification procedure did not constitute a de facto arrest, because it was brief and occurred at a location where the defendant was stopped (see *People v Albert*, 217 AD3d 776, 776 [2023]; *People v Dunbar*, 188 AD3d 1247, 1248-1249 [2020]). Furthermore, the fact that a police officer approached the defendant with a weapon drawn and the fact that the defendant was handcuffed did not elevate the initial encounter into an arrest, as the officer had been informed that a shooting had occurred nearby and the assailant had fled in a vehicle matching the defend-

ant's vehicle (*see People v Gibson*, 227 AD3d 1105, 1106 [2024]; *People v Albert*, 217 AD3d at 776). Additionally, the People demonstrated that the showup procedure was not unduly suggestive, as it occurred approximately 90 minutes after the crime occurred and a few miles from the crime scene (*see People v Bartlett*, 137 AD3d 806, 806 [2016]; *People v Hudson*, 71 AD3d 1046, 1047 [2010]) and was part of an "unbroken chain of events" (*People v Garcia*, 210 AD3d 906, 907-908 [2022], *aff'd* 42 NY3d 1077 [2024]; *see People v Thomas*, 164 AD3d 619, 620 [2018]). Moreover, the showup procedure was not rendered unduly suggestive by the fact that the defendant was handcuffed and in the presence of uniformed police officers and police cars or the fact that a police officer shined a light on the defendant (*see People v Deas*, 226 AD3d 823, 825 [2024]; *People v Williams*, 143 AD3d 847, 848 [2016]).

The defendant's contention that the evidence was legally insufficient to establish his conviction of attempted murder in the second degree is partially unpreserved for appellate review (*see* CPL 470.05 [2]). In any event, viewing the evidence in the light most favorable to the prosecution (*see People v Contes*, 60 NY2d 620, 621 [1983]), we find that it was legally sufficient to establish the defendant's guilt beyond a reasonable doubt. Moreover, in fulfilling our responsibility to conduct an independent review of the weight of the evidence (*see* CPL 470.15 [5]; *People v Danielson*, 9 NY3d 342 [2007]), we nevertheless accord great deference to jury's opportunity to view the witnesses, hear the testimony, and observe demeanor (*see People v Mateo*, 2 NY3d 383, 410 [2004]; *People v Bleakley*, 69 NY2d 490, 495 [1987]). Upon reviewing the record here, we are satisfied that the verdict of guilt was not against the weight of the evidence (*see People v Romero*, 7 NY3d 633 [2006]).

The defendant's contention regarding the admission of non-eyewitness testimony identifying him from photographic evidence is unpreserved for appellate review (*see* CPL 470.05 [2]). In any event, any error in admitting the testimony was harmless, as the evidence of the defendant's identity as the shooter was overwhelming, and there was no significant probability that the jury would have acquitted the defendant had that testimony been excluded (*see People v Crimmins*, 36 NY2d 230, 237 [1975]; *People v Lowe*, 237 AD3d 1225, 1227 [2025]).

The defendant's challenge to remarks made by the prosecutor during her opening statement and summation is unpreserved for appellate review (*see* CPL 470.05 [2]). In any event, the challenged comments were either fair comment on the evidence or, to the extent they were improper, were not so

pervasive as to have deprived the defendant of a fair trial (*see People v Flippen*, 236 AD3d 815, 816 [2025]; *People v Dubarry*, 215 AD3d 689, 691 [2023]).

The defendant was provided with the effective assistance of counsel (*see People v Benevento*, 91 NY2d 708, 713 [1998]; *People v Baldi*, 54 NY2d 137 [1981]).

The defendant's contention that the sentence imposed by the County Court punished him for exercising his right to a jury trial is without merit. The fact that the sentence imposed after trial was greater than the sentence offered during plea negotiations is not, standing alone, an indication that the defendant was punished for exercising his right to trial (*see People v Robinson*, 228 AD3d 960, 961 [2024]; *People v Roland*, 167 AD3d 942, 944 [2018]).

The sentence imposed was not excessive (*see People v Suitte*, 90 AD2d 80 [1982]).

The defendant's remaining contentions, including those raised in his pro se supplemental brief, are unpreserved for appellate review and, in any event, without merit. Genovesi, J.P., Ford, Voutsinas and Golia, JJ., concur.

51 The People of the State of New York, Respondent, v Maurice Hennegan, Appellant. [— NYS3d —]—

Crimes—Verdict—Sufficiency of Evidence

Crimes—Right to Counsel—Substitution of Assigned Counsel

Appeal by the defendant from a judgment of the Supreme Court, Kings County (Vincent M. Del Giudice, J.), rendered April 10, 2019, convicting him of murder in the second degree and criminal possession of a controlled substance in the third degree, upon a jury verdict, and imposing sentence.

Ordered that the judgment is affirmed.

The defendant was convicted, upon a jury verdict, of murder in the second degree and criminal possession of a controlled substance in the third degree in connection with the shooting death of a victim and possessing a quantity of cocaine with intent to sell. The defendant failed to preserve for appellate review his contention that the evidence was legally insufficient to support his conviction of criminal possession of a controlled substance in the third degree beyond a reasonable doubt, since he did not specify the grounds he argues on appeal at the trial (*see* CPL 470.05 [2]; *People v Hawkins*, 11 NY3d 484, 492 [2008]). In any event, viewing the evidence in the light most favorable to the prosecution (*see People v Contes*, 60 NY2d 620 [1983]), we find that it was legally sufficient to establish the

defendant's guilt of that count beyond a reasonable doubt (*see People v Danielson*, 9 NY3d 342, 349 [2007]).

Moreover, in fulfilling our responsibility to conduct an independent review of the weight of the evidence (*see* CPL 470.15 [5]; *People v Danielson*, 9 NY3d at 348), we nevertheless accord great deference to the jury's opportunity to view the witnesses, hear the testimony, and observe demeanor (*see People v Mateo*, 2 NY3d 383, 410 [2004]; *People v Bleakley*, 69 NY2d 490, 495 [1987]). Upon reviewing the record here, we are satisfied that the verdict of guilt was not against the weight of the evidence (*see People v Romero*, 7 NY3d 633, 643-644 [2006]).

Contrary to the defendant's contention, the defendant's pre-trial pro se written letter requesting substitution of counsel, alone, was an insufficient basis to relieve counsel. When provided with an opportunity in court to detail his reasons for requesting substitution of counsel, the defendant specifically declined to do so. The defendant proffered no facts to indicate a genuine conflict of interest or other impediment to the defendant's representation by assigned counsel, and the court satisfied its duty of inquiry on the matter (*see People v Porto*, 16 NY3d 93, 100 [2010]; *People v Mendoza*, 239 AD3d 773, 773-774 [2025]). Inasmuch as the defendant expressed no further dissatisfaction with defense counsel, he abandoned any request for substitution of counsel (*see People v Molina*, 208 AD3d 1641, 1642-1643 [2022]; *People v Ocasio*, 81 AD3d 1469, 1470 [2011]).

The sentence imposed was not excessive (*see People v Suitte*, 90 AD2d 80 [1982]).

The defendant's remaining contentions are without merit. Duffy, J.P., Christopher, Landicino and Quirk, JJ., concur.

52 The People of the State of New York, Respondent, v Brandon King, Appellant. [252 NYS3d 305]—Application by the appellant for a writ of error coram nobis to vacate, on the ground of ineffective assistance of appellate counsel, a decision and order of this Court dated May 2, 2018 (*People v King*, 161 AD3d 772 [2018]), affirming a judgment of the Supreme Court, Queens County, rendered October 2, 2013.

Ordered that the application is denied.

The appellant has failed to establish that he was denied the effective assistance of appellate counsel (*see Jones v Barnes*, 463 US 745 [1983]; *People v Stultz*, 2 NY3d 277 [2004]). Barros, J.P., Wan, Golia and Goldberg Velazquez, JJ., concur.

53 The People of the State of New York, Respondent, v Jason Kroll, Appellant. [— NYS3d —]

Crimes—Right of Confrontation—Testifying at Suppression Hearing
Crimes—Right to Counsel—Effective Representation—Fairness of Process

Appeal by the defendant from a judgment of the Supreme Court, Nassau County (Terence P. Murphy, J.), rendered January 23, 2019, convicting him of robbery in the first degree, robbery in the second degree (two counts), criminal obstruction of breathing, criminal mischief in the fourth degree, and petit larceny, upon a jury verdict, and imposing sentence. The appeal brings up for review the denial, after a hearing pursuant to a stipulation in lieu of motions (William C. Donnino, J.), of the suppression of physical evidence and the defendant's statements to law enforcement officials.

Ordered that the judgment is affirmed.

The defendant was indicted on various robbery charges arising from alleged robberies that occurred at two gas stations. The defendant was arrested at the scene of the second alleged robbery on April 9, 2016. Following a suppression hearing, where the defendant did not testify, the Supreme Court denied suppression of certain physical evidence and certain statements that the defendant made to law enforcement officials.

After a jury trial, the defendant was convicted of robbery in the first degree, two counts of robbery in the second degree, criminal obstruction of breathing, criminal mischief in the fourth degree, and petit larceny. The defendant appeals.

The defendant sought to testify at the suppression hearing over his own counsel's objection. After the Supreme Court, upon inquiry, found that the defendant's testimony would not be relevant to the suppression issues, it determined that the defendant should not be allowed to testify. Under the circumstances, that determination was not an improvident exercise of discretion, nor is there evidence in this record that the defendant was deprived of the effective assistance of counsel.

A defendant has no absolute right to testify at a suppression hearing (see e.g. *United States v Flores-Martinez*, 677 F3d 699, 709 [5th Cir 2012]; *United States v Pierce*, 959 F2d 1297, 1304, n 13 [5th Cir 1992]; *Grady v Com.*, 325 SW3d 333 [Ky 2010]). Whether a defendant should be allowed to testify at a suppression hearing is a decision that should be left to defense counsel because it is a strategic litigation decision requiring expertise (see *People v Adams*, 186 AD3d 842, 843 [2020]; *People v Hines*, 172 AD3d 1225, 1226 [2019]). Where a defendant seeks to testify at a suppression hearing, over the objection of his or her own counsel, particularly where, as here, there was no showing that the defendant's testimony would have been relevant to the

suppression issues, the defendant may be denied the opportunity to testify at the suppression hearing in the reasoned exercise of the trial court's discretion (*see People v Peterson*, 6 AD3d 363 [2004]).

While counsel has the ability to make strategic choices, a defendant may raise concerns of ineffective assistance of counsel. "To prevail on a claim of ineffective assistance under the federal constitution, a defendant 'must show that counsel's representation fell below an objective standard of reasonableness' and 'that the deficient performance prejudiced the defense'" (*People v Facey*, 180 AD3d 927, 928 [2020] [citation omitted], quoting *Strickland v Washington*, 466 US 668, 687-688 [1984]). "Under the New York Constitution, a defendant must show that he or she was not afforded 'meaningful representation,' which also entails a two-pronged test" (*People v Bernard*, 195 AD3d 740, 742 [2021] [citation omitted], quoting *People v Baldi*, 54 NY2d 137, 147 [1981]; *see* NY Const, art I, § 6). The first prong of this test is identical to its federal counterpart (*see People v Galan*, 116 AD3d 787, 789 [2014]). "The second prong focuses on prejudice to the defendant, regarding the 'fairness of the process as a whole rather than its particular impact on the outcome of the case'" (*People v Saunders*, 193 AD3d 766, 768 [2021], quoting *People v Caban*, 5 NY3d 143, 156 [2005]). Here, each of the defendant's assigned counsel met with the defendant multiple times and both attorneys as well as the Supreme Court concluded that there was nothing that the defendant could testify to that was relevant to the scope of the suppression hearing. Moreover, the defendant did not demonstrate a lack of strategy or legitimate explanation, and therefore "it will be presumed that counsel acted in a competent manner and exercised professional judgment" (*People v Jeffriesel*, 209 AD3d 1034, 1036 [2022], quoting *People v Rivera*, 71 NY2d 705, 709 [1988]).

The sentence imposed was not excessive (*see People v Vega*, 165 AD3d 984, 984 [2018]; *People v Suite*, 90 AD2d 80 [1982]). Barros, J.P., Voutsinas, Golias and Hom, JJ., concur.

54 The People of the State of New York, Respondent, v Ainsley Senior, Appellant. [252 NYS3d 299]—Appeal by the defendant, as limited by his motion, from a sentence of the Supreme Court, Queens County (Ushir Pandit-Durant, J.), imposed March 12, 2024, upon his plea of guilty, on the ground that the sentence was excessive.

Ordered that the sentence is affirmed.

The record demonstrates that the defendant knowingly, vol-

untarily, and intelligently waived his right to appeal (see *People v Thomas*, 34 NY3d 545 [2019]; *People v Lopez*, 6 NY3d 248 [2006]). The defendant's valid waiver of his right to appeal precludes appellate review of his contention that the sentence imposed was excessive (see *People v Lopez*, 6 NY3d at 255). Connolly, J.P., Christopher, Voutsinas, Love and Goldberg Velazquez, JJ., concur.

55 The People of the State of New York, Respondent, v Alexander Vaughn, Appellant. [— NYS3d —]—

Crimes—Identification of Defendant—Showup

Crimes—Verdict—Sufficiency of Evidence

Crimes—Witnesses—Expert Witness—Sufficient Experience

Appeal by the defendant from a judgment of the County Court, Suffolk County (Mark D. Cohen, J.), rendered July 11, 2018, convicting him of burglary in the first degree, upon a jury verdict, and imposing sentence. The appeal brings up for review the denial, after a hearing, of that branch of the defendant's omnibus motion which was to suppress identification evidence.

Ordered that the judgment is affirmed.

Contrary to the defendant's contention, the County Court properly denied that branch of his omnibus motion which was to suppress evidence from a showup identification procedure. Exigent circumstances existed warranting the showup procedure because police officers needed to determine whether they had apprehended the right person in connection with a home invasion burglary or if they should continue searching for other suspects (see *People v Howard*, 22 NY3d 388, 402 [2013]; *People v Mayes*, 200 AD3d 718 [2021]). Moreover, the showup procedure was not rendered unduly suggestive by the fact that the defendant was handcuffed and in the presence of police officers or the fact that the police officers shined lights on him (see *People v Croom*, 171 AD3d 781, 782 [2019]; *People v Bartlett*, 137 AD3d 806, 807 [2016]).

The defendant's challenge to the legal sufficiency of the evidence is unpreserved for appellate review (see CPL 470.05 [2]; *People v Hawkins*, 11 NY3d 484, 492 [2008]). In any event, viewing the evidence in the light most favorable to the prosecution (see *People v Contes*, 60 NY2d 620, 621 [1983]), we find that it was legally sufficient to establish the defendant's guilt beyond a reasonable doubt. Moreover, in fulfilling our responsibility to conduct an independent review of the weight of the evidence (see CPL 470.15 [5]; *People v Danielson*, 9 NY3d 342, 348 [2007]), we nevertheless accord great deference to the fact-

finder's opportunity to view the witnesses, hear the testimony, and observe demeanor (*see People v Mateo*, 2 NY3d 383, 410 [2004]; *People v Bleakley*, 69 NY2d 490, 495 [1987]). Upon reviewing the record here, we are satisfied that the verdict of guilt was not against the weight of the evidence (*see People v Romero*, 7 NY3d 633, 644 [2006]).

The defendant's contention that the County Court improperly permitted testimony from a communications analyst pertaining to the analyst's interpretation of cell tower records and cell phone data is unpreserved for appellate review (*see* CPL 470.05 [2]; *Matter of Bella S. [Alice Y.-S.]*, 225 AD3d 883, 884 [2024]). In any event, that testimony was properly admitted to "help . . . clarify an issue calling for professional or technical knowledge . . . and beyond the ken of the typical juror" (*People v Williams*, 20 NY3d 579, 583-584 [2013], quoting *De Long v County of Erie*, 60 NY2d 296, 307 [1983]; *see People v Inoa*, 25 NY3d 466, 472 [2015]). Moreover, although the analyst was not formally qualified as an expert, the analyst demonstrated through his testimony that he had sufficient experience to qualify as an expert witness on the interpretation of cell tower records and cell phone data (*see People v Robinson*, 118 AD3d 1028, 1029 [2014]).

The defendant's contention that the County Court improperly failed to replace an excused prospective alternate juror is unpreserved for appellate review (*see People v Wade*, 209 AD2d 733 [1994]) and, in any event, without merit.

The defendant's contention that his exclusion from sidebar conferences resulted in a violation of his fundamental right to be present at all material stages of trial is without merit (*see People v Fabricio*, 3 NY3d 402 [2004]; *People v White*, 238 AD3d 789, 790-791 [2025]). The record demonstrates that the sidebar conferences either involved purely legal matters, at which the defendant's presence was not required (*see People v DePallo*, 96 NY2d 437, 443 [2001]; *People v Crowe*, 167 AD3d 1036 [2018]), or matters in which there was no "potential for the defendant to meaningfully participate in the subject discussions" (*People v Fabricio*, 3 NY3d at 406; *see People v White*, 238 AD3d at 791).

The sentence imposed was not excessive (*see People v Suitte*, 90 AD2d 80 [1982]).

The defendant's remaining contentions, including those raised in his pro se supplemental brief, either are without merit or do not warrant reversal. LaSalle, P.J., Chambers, Wooten and Voutsinas, JJ., concur.

56 The People of the State of New York, Respondent, v Herbert Bruno, Appellant. [252 NYS3d 300]—Appeal by the de-

fendant from an order of the Supreme Court, Kings County (Jane Tully, J.), dated March 31, 2023, which, after a hearing, designated him a level one sex offender pursuant to Correction Law article 6-C.

Ordered that the order is affirmed, without costs or disbursements.

The defendant was convicted, upon his plea of guilty, of attempted promoting prostitution in the second degree in connection with his conduct of serving as a driver for his codefendant and the 17-year-old complainant. The codefendant arranged for the complainant to have sexual intercourse with men in exchange for money, with the defendant receiving a fee for providing transportation for the complainant and the codefendant. Following a hearing pursuant to the Sex Offender Registration Act (SORA) (*see* Correction Law art 6-C), the Supreme Court designated the defendant a level one sex offender. The defendant appeals.

The defendant's contention that SORA is unconstitutional as applied to him is without merit (*see People v Knox*, 12 NY3d 60 [2009]; *People v Douglas*, 189 AD3d 1276 [2020]; *People v Suarez*, 147 AD3d 802 [2017]). Iannacci, J.P., Dowling, Ventura and Golia, JJ., concur.

57 The People of the State of New York, Respondent, v Brandon Corinaldi, Appellant. [— NYS3d —]—

Crimes—Sex Offenders—Sex Offender Registration Act—Downward Departure

Appeal by the defendant from an order of the Supreme Court, Queens County (Anthony M. Battisti, J.), dated August 25, 2025, which, after a hearing, designated him a level two sex offender pursuant to Correction Law article 6-C.

Ordered that the order is affirmed, without costs or disbursements.

The defendant was convicted, upon his plea of guilty, of criminal sexual act in the second degree. After a hearing pursuant to the Sex Offender Registration Act (Correction Law art 6-C), the Supreme Court found that the defendant was a presumptive level two sex offender, denied his application for a downward departure from his presumptive risk level, and designated him a level two sex offender.

A defendant seeking a downward departure from the presumptive risk level has the initial burden of “(1) identifying, as a matter of law, an appropriate mitigating factor, namely, a factor which tends to establish a lower likelihood of

reoffense or danger to the community and is of a kind, or to a degree, that is otherwise not adequately taken into account by the Guidelines; and (2) establishing the facts in support of its existence by a preponderance of the evidence” (*People v Wyatt*, 89 AD3d 112, 128 [2011]; see Sex Offender Registration Act: Risk Assessment Guidelines and Commentary at 4 [2006] [hereinafter Guidelines]; *People v Gillotti*, 23 NY3d 841, 861 [2014]). “If the defendant makes that twofold showing, the court must exercise its discretion by weighing the mitigating factor to determine whether the totality of the circumstances warrants a departure to avoid an overassessment of the defendant’s dangerousness and risk of sexual recidivism” (*People v Khan*, 182 AD3d 613, 614 [2020]; see *People v Gillotti*, 23 NY3d at 861).

The defendant’s contention that he is entitled to a downward departure because the victim’s lack of consent was due only to an inability to consent by virtue of the victim’s age is unpreserved for appellate review (see *People v Ramirez*, 214 AD3d 1008, 1010 [2023]). In any event, a downward departure is not warranted given, among other things, the age disparity between the then 30-year-old defendant and the then 14-year-old victim (see *People v Saul*, 220 AD3d 892, 894 [2023]; *People v Ramirez*, 214 AD3d at 1010).

Although a defendant’s response to treatment may qualify as a ground for a downward departure where the response is exceptional (see Guidelines at 17; *People v Wallace*, 144 AD3d 775, 776 [2016]), here, the defendant failed to prove by a preponderance of the evidence that his response to treatment was exceptional (see *People v Cambarmatute*, 243 AD3d 930, 931 [2025]; *People v Kumar*, 242 AD3d 1231, 1232 [2025]).

The defendant’s remaining contention is without merit.

Accordingly, the Supreme Court properly denied the defendant’s application for a downward departure and designated him a level two sex offender. Duffy, J.P., Christopher, Warhit and Goldberg Velazquez, JJ., concur.

58 Osiel Perez, Respondent, et al., Plaintiff, v ZZZ Carpentry, Inc., Defendant/Third-Party Plaintiff-Appellant, et al., Defendant. A.R. Equipment, LLC, Third-Party Defendant-Appellant. (Appeal No. 1.) Osiel Perez et al., Plaintiffs, v ZZZ Carpentry, Inc., Defendant/Third-Party Plaintiff-Respondent, et al., Defendant. A.R. Equipment, LLC, Third-Party Defendant-Appellant. (Appeal No. 2.) [— NYS3d —]

Structures**Indemnity—Contractual Indemnification—Third-Party Claim**

In an action to recover damages for personal injuries, and a third-party action, inter alia, for contractual indemnification, (1) the third-party defendant appeals, and the defendant ZZZ Carpentry, Inc., separately appeals, from an order of the Supreme Court, Kings County (Karen B. Rothenberg, J.), dated May 13, 2022, and (2) the third-party defendant appeals from an order of the same court dated August 15, 2022. The order dated May 13, 2022, granted the motion of the plaintiff Osiel Perez for summary judgment on the issue of liability on the causes of action alleging violations of Labor Law §§ 240 (1) and 241 (6) insofar as asserted by that plaintiff against the defendant ZZZ Carpentry, Inc. The order dated August 15, 2022, insofar as appealed from, denied those branches of the third-party defendant's motion which were for summary judgment dismissing the third-party causes of action for contractual indemnification and alleging breach of contract and failure to procure insurance.

Ordered that the order dated May 13, 2022, is affirmed; and it is further,

Ordered that the order dated August 15, 2022, is affirmed insofar as appealed from; and it is further,

Ordered that one bill of costs is awarded to the plaintiff Osiel Perez, payable by the defendant ZZZ Carpentry, Inc., and the third-party defendant, and one bill of costs is awarded to the defendant ZZZ Carpentry, Inc., payable by the third-party defendant.

On July 23, 2018, the plaintiff Osiel Perez allegedly was injured while working on a construction project at certain premises owned by the defendant Angela Sun. The project was managed by the general contractor, the defendant ZZZ Carpentry, Inc. (hereinafter ZZZ Carpentry). ZZZ Carpentry hired the third-party defendant, A.R. Equipment, LLC (hereinafter AR Equipment), to perform demolition work on the project. Perez, an employee of AR Equipment, allegedly was injured when a section of a ceiling collapsed and fell on him.

Perez and another plaintiff subsequently commenced this action to recover damages for personal injuries, asserting causes of action against, among others, ZZZ Carpentry alleging, among other things, violations of Labor Law §§ 240 (1) and 241 (6). ZZZ Carpentry commenced a third-party action against AR Equipment, inter alia, for contractual indemnification. Perez moved for summary judgment on the issue of liability on the Labor Law §§ 240 (1) and 241 (6) causes of action insofar as as-

serted by him against ZZZ Carpentry. AR Equipment moved, among other things, for summary judgment dismissing the third-party causes of action for contractual indemnification and alleging breach of contract and failure to procure insurance. In an order dated May 13, 2022, the Supreme Court granted the plaintiff's motion, and in an order dated August 15, 2022, the court, inter alia, denied those branches of AR Equipment's motion. ZZZ Carpentry appeals from the order dated May 13, 2022, and AR Equipment appeals from the orders dated May 13, 2022, and August 15, 2022.

"In order for liability to be imposed under Labor Law § 240 (1), there must be a foreseeable risk of injury from an elevation-related hazard . . . as [d]efendants are liable for all normal and foreseeable consequences of their acts" (*Carrillo v Circle Manor Apts.*, 131 AD3d 662, 662 [2015] [internal quotation marks omitted]; see *Shipkoski v Watch Case Factory Assoc.*, 292 AD2d 587 [2002]). The collapse of a permanent ceiling or similar structure may give rise to liability under the statute as long as the collapse of the permanent building structure was foreseeable, and accordingly, the need for safety devices, was foreseeable (see *Carrillo v Circle Manor Apts.*, 131 AD3d at 663; *Martins v Board of Educ. of City of N.Y.*, 82 AD3d 1062, 1063 [2011]; *Balladares v Southgate Owners Corp.*, 40 AD3d 667, 669 [2007]). "To establish a prima facie case [a] plaintiff need not demonstrate that the precise manner in which the accident happened or the injuries occurred was foreseeable; it is sufficient that [the plaintiff] demonstrate that the risk of some injury from [the] defendants' conduct was foreseeable" (*Gordon v Eastern Ry. Supply*, 82 NY2d 555, 562 [1993]).

Here, the evidence submitted by Perez in support of his motion for summary judgment established, prima facie, that the collapse of the ceiling and, in turn, the need for safety devices to protect him from that hazard, were foreseeable (see *Mena v 485 Seventh Ave. Assoc. LLC*, 199 AD3d 420, 421 [2021]; *Cavanagh v Mega Contr., Inc.*, 34 AD3d 411, 412 [2006]; cf. *Paguary v Cup of Tea, LLC*, 165 AD3d 964, 966 [2018]). In support of his motion, Perez submitted, inter alia, transcripts of the deposition testimony of ZZZ Carpentry's principal and one of AR Equipment's foremen. Such testimony established that the rear portion of the fourth floor ceiling had been demolished by employees of AR Equipment prior to the accident, leaving the remaining front portion of the ceiling in a weakened state; the remaining ceiling was being held up by 12- to 14-inch pieces of wood and was not adequately supported; the remaining ceiling was not braced, shored, or secured by either ZZZ Carpentry or

AR Equipment, although AR Equipment left six two-by-four pieces of wood remaining in the existing walls to support the ceiling; and that ceilings at demolition sites should be secured at all times while workers were working underneath them. In opposition, ZZZ Carpentry and AR Equipment failed to raise a triable issue of fact. Contrary to the contentions of ZZZ Carpentry and AR Equipment, the work performed by Perez at the time of the accident was covered under Labor Law § 240 (1), even though he was cleaning the area, as opposed to demolishing the ceiling (*see id.*; *Saint v Syracuse Supply Co.*, 25 NY3d 117, 124-125 [2015]). Accordingly, the Supreme Court properly granted that branch of Perez's motion which was for summary judgment on the issue of liability on the cause of action alleging a violation of Labor Law § 240 (1) insofar as asserted by him against ZZZ Carpentry.

"Labor Law § 241 (6) imposes upon owners and general contractors, and their agents, a nondelegable duty to provide reasonable and adequate protection and safety for workers, and to comply with the specific safety rules and regulations promulgated by the Commissioner of the Department of Labor" (*Norero v 99-105 Third Ave. Realty, LLC*, 96 AD3d 727, 728 [2012]; *see Moscati v Consolidated Edison Co. of N.Y., Inc.*, 168 AD3d 717, 718 [2019]). To sustain a cause of action pursuant to Labor Law § 241 (6), "a plaintiff must demonstrate that his or her injuries were proximately caused by a violation of an Industrial Code provision that is applicable under the circumstances of the accident" (*Doran v JP Walsh Realty Group, LLC*, 189 AD3d 1363, 1364 [2020]; *see Cagua v Bushwick Holdings, LLC*, 238 AD3d 698, 702 [2025]).

Here, Perez established, *prima facie*, that ZZZ Carpentry violated Industrial Code (12 NYCRR) § 23-3.3 (b) (3), which provides that "[w]alls, chimneys and other parts of any building or other structure shall not be left unguarded in such condition that such parts may fall, collapse or be weakened by wind pressure or vibration" (*see Wilinski v 334 E. 92nd Hous. Dev. Fund Corp.*, 18 NY3d 1, 12 [2011]). As ZZZ Carpentry and AR Equipment acknowledge, "the phrase 'by wind pressure or vibration,' does not attach to the words 'fall' or 'collapse,' but only to the immediately preceding words, 'be weakened' " (*id.* [internal quotation marks omitted]), and therefore, as the Supreme Court determined, Perez was not required to show that the ceiling collapsed or fell due to wind pressure or vibration to state a claim under 12 NYCRR 23-3.3 (b) (3).

Perez also established, *prima facie*, that ZZZ Carpentry violated Industrial Code (12 NYCRR) § 23-3.3 (c), which

mandates continuing inspections during hand demolition operations, by submitting evidence that no such inspections were performed.

In opposition, ZZZ Carpentry and AR Equipment failed to raise a triable issue of fact with respect to either Industrial Code provision. Accordingly, the Supreme Court properly granted that branch of Perez's motion which was for summary judgment on the issue of liability on the Labor Law § 241 (6) cause of action insofar as asserted by him against ZZZ Carpentry.

Finally, the Supreme Court properly denied that branch of AR Equipment's motion which was for summary judgment dismissing the third-party cause of action for contractual indemnification. "Workers' Compensation Law § 11 permits third-party claims against an injured worker's employer only under limited circumstances, including, as relevant here, where the third-party claim is 'based upon a provision in a written contract entered into prior to the accident or occurrence by which the employer had expressly agreed to contribution to or indemnification of the claimant'" (*Barrett v Magnetic Constr. Group Corp.*, 149 AD3d 1022, 1024 [2017], quoting Workers' Compensation Law § 11; see *Flores v Lower E. Side Serv. Ctr., Inc.*, 4 NY3d 363, 365 [2005]). Even an unsigned contract may be enforceable for purposes of Workers' Compensation Law § 11, as long as there "is objective evidence establishing that the parties intended to be bound" (*Barrett v Magnetic Constr. Group Corp.*, 149 AD3d at 1024 [internal quotation marks omitted]; see *Flores v Lower E. Side Serv. Ctr., Inc.*, 4 NY3d at 368).

Here, AR Equipment established its prima facie entitlement to judgment as a matter of law dismissing the contractual indemnification third-party cause of action by submitting evidence that no written contract was in effect between it and ZZZ Carpentry at the time of Perez's accident. However, in opposition, ZZZ Carpentry raised a triable issue of fact as to whether AR Equipment intended to indemnify it (see *Ajche v Park Ave. Plaza Owner, LLC*, 171 AD3d 411, 414 [2019]; *Seales v Trident Structural Corp.*, 142 AD3d 1153, 1159 [2016]; *Podhaskie v Seventh Chelsea Assoc.*, 3 AD3d 361, 363 [2004]).

AR Equipment's remaining contentions are without merit. Dillon, J.P., Chambers, Wan and McCormack, JJ., concur.

Appeals from an order of the Supreme Court, Kings County, dated May 13, 2022, and appeal from an order of the same court dated August 15, 2022. Motion by the plaintiff-respon-

dent to strike stated portions of the third-party defendant-appellant's reply brief on the ground that they improperly raise arguments for the first time on appeal. By decision and order on motion of this Court dated July 1, 2024, the motion was held in abeyance and referred to the panel of Justices hearing the appeals for determination upon the argument or submission thereof.

Upon the papers filed in support of the motion and the papers filed in opposition thereto, and upon the argument of the appeals, it is

Ordered that the motion is granted, and all material on pages 3, 16, 17, 18, 22, 24, and 28 of the third-party defendant-appellant's reply brief relating to latent defects is stricken from the third-party defendant-appellant's reply brief and has not been considered in the determination of the appeals. Dillon, J.P., Chambers, Wan and McCormack, JJ., concur.

59 Vanessa Potanovic, Appellant, v George Nikolarkis et al., Defendants, and SDF Capital Limited Liability Company, Respondent. [— NYS3d —]

Negligence—Maintenance of Premises—Liability of Prior Owner—Creation or Concealment of Dangerous Condition

In an action to recover damages for personal injuries, the plaintiff appeals from an order of the Supreme Court, Westchester County (Joan B. Lefkowitz, J.), dated January 11, 2023. The order, insofar as appealed from, granted that branch of the motion of the defendant SDF Capital Limited Liability Company which was for summary judgment dismissing the amended complaint insofar as asserted against it.

Ordered that the order is affirmed insofar as appealed from, with costs.

The plaintiff allegedly slipped and fell on ice on a sidewalk adjacent to property owned by the defendants George Nikolarkis and Anastasia Nikolarkis (hereinafter together the Nikolarkises). The plaintiff commenced this action against, among others, the Nikolarkises and SDF Capital Limited Liability Company (hereinafter SDF), which had sold the property to the Nikolarkises approximately eight months prior to the accident. The plaintiff alleged that ice formed on the sidewalk due to an improperly installed roof leader that directed water flow onto the sidewalk where it created a dangerous icy condition.

SDF moved, inter alia, for summary judgment dismissing the amended complaint insofar as asserted against it. In support of its motion, SDF submitted evidence establishing that it had owned the property for approximately six months before selling it to the Nikolarkises and that it had made only interior

cosmetic renovations to the property and had pressure washed and painted the exterior of the property. SDF additionally submitted evidence that after the Nikolarkises purchased the property, they had some exterior work done to the property, which included repair to the downspout at the front of the property. In opposition, the plaintiff submitted, among other things, an affidavit of an engineer who opined, *inter alia*, that all roof runoff for the front half of the Nikolarkises' property discharged out of a single leader and down the driveway towards the sidewalk. The plaintiff's expert further opined that SDF's renovations would have required it to remove the lower leader extension and that SDF was negligent and deviated from accepted industry standards by reinstalling the lower leader without rerouting it to discharge the roof runoff differently. In an order dated January 11, 2023, the Supreme Court, among other things, granted that branch of SDF's motion which was for summary judgment dismissing the amended complaint insofar as asserted against it. The plaintiff appeals.

"As a general rule, liability for dangerous conditions on land does not extend to a prior owner of the premises. A narrow exception exists, however, and liability may be imposed where a dangerous condition existed at the time of the conveyance and the new owner has not had a reasonable time to discover the condition, if it was unknown, and to remedy the condition once it is known" (*Bittrolff v Ho's Dev. Corp.*, 77 NY2d 896, 898 [1991] [citation omitted]; *see Hayden v 334 Dune Rd., LLC*, 196 AD3d 634, 636 [2021]; *Polanco v Creston Ave. Props., Inc.*, 84 AD3d 1337, 1340 [2011]). In addition, the prior owner may be liable if it affirmatively created the dangerous condition (*see Davis v Angioletti*, 215 AD3d 552, 552 [2023]; *Middleton v Dovalle*, 4 AD3d 345, 346 [2004]).

Here, SDF established, *prima facie*, that it did not own the property at the time of the plaintiff's accident and that it did not create the allegedly dangerous condition or conceal it from the Nikolarkises (*see Hayden v 334 Dune Rd., LLC*, 196 AD3d at 636; *Matthews v Tobias*, 260 AD2d 608, 609 [1999]). SDF further established that the accident occurred eight months after it had sold the property to the Nikolarkises and that there was a reasonable amount of time for the Nikolarkises to discover the condition if it was unknown or to remedy it once it became known (*see Hayden v 334 Dune Rd., LLC*, 196 AD3d at 636-637). In opposition, the plaintiff failed to raise a triable issue of fact. The affidavit of the plaintiff's expert was speculative, conclusory, and insufficient to defeat that branch of SDF's motion which was for summary judgment dismissing the

amended complaint insofar as asserted against it (*see Sales v City of New York*, 241 AD3d 1378, 1379 [2025]; *Race v Village of Brewster*, 185 AD3d 1071, 1072 [2020]).

Accordingly, the Supreme Court properly granted that branch of SDF's motion which was for summary judgment dismissing the amended complaint insofar as asserted against it. Iannacci, J.P., Brathwaite Nelson, Dowling and Golia, JJ., concur.

60 Alan Cristian Romero, Appellant, v Evergreen Gardens II, LLC, et al., Respondent. (And a Third-Party Action.) [—NYS3d —]—

**Labor—Safe Place to Work—Elevation-Related Hazard—Securing Device
Labor—Safe Place to Work—Industrial Code Violation—Protection from
Overhead Hazards**

In an action to recover damages for personal injuries, the plaintiff appeals from an order of the Supreme Court, Kings County (Ingrid Joseph, J.), dated February 28, 2022. The order, insofar as appealed from, denied those branches of the plaintiff's cross-motion which were for summary judgment on the issue of liability on the cause of action alleging a violation of Labor Law § 240 (1) and so much of the cause of action alleging a violation of Labor Law § 241 (6) as was predicated on violations of 12 NYCRR 23-1.7 (a), 23-5.1 (i), and 23-1.17.

Ordered that the order is affirmed insofar as appealed from, with costs.

The plaintiff commenced this action against the defendants, Evergreen Gardens II, LLC (hereinafter Evergreen), and Brooklyn GC, LLC (hereinafter Brooklyn GC), to recover damages for personal injuries he alleged he sustained when two bricks fell onto his head while he was working for the third-party defendant, Reliable Masonry Corp., a subcontractor for Brooklyn GC, at a construction site on premises owned by Evergreen. The plaintiff asserted, inter alia, causes of action alleging violations of Labor Law §§ 240 (1) and 241 (6). As relevant to this appeal, the plaintiff cross-moved, among other things, for summary judgment on the issue of liability on the cause of action alleging a violation of Labor Law § 240 (1) and so much of the cause of action alleging a violation of Labor Law § 241 (6) as was predicated on violations of 12 NYCRR 23-1.7 (a), 23-5.1 (i), and 23-1.17. In an order dated February 28, 2022, the Supreme Court, inter alia, denied those branches of the plaintiff's cross-motion. The plaintiff appeals.

“Labor Law § 240 (1) imposes absolute liability upon an owner or contractor for failing to provide or erect safety devices necessary to give proper protection to a worker who sustains

injuries proximately caused by that failure’ ” (*Gonzalez v Madison Sixty, LLC*, 216 AD3d 1141, 1142 [2023], quoting *Bland v Manocherian*, 66 NY2d 452, 459 [1985]). “The contemplated hazards [of Labor Law § 240 (1)] are those related to the effects of gravity where protective devices are called for either because of a difference between the elevation level of the required work and a lower level or a difference between the elevation level where the worker is positioned and the higher level of the materials or load being hoisted or secured” (*Rocovich v Consolidated Edison Co.*, 78 NY2d 509, 514 [1991]; see *Rodriguez v Waterfront Plaza, LLC*, 207 AD3d 489, 490 [2022]). Therefore, a plaintiff must show more than simply that an object fell, thereby causing injury to a worker but rather, must show that, at the time the object fell, it was being hoisted or secured, or that the falling object required securing for the purposes of the undertaking (see *Pazmino v 41-50 78th St. Corp.*, 139 AD3d 1029, 1030 [2016]).

Here, the Supreme Court properly denied that branch of the plaintiff’s cross-motion which was for summary judgment on the issue of liability on the cause of action alleging a violation of Labor Law § 240 (1). The plaintiff’s submissions in support of his cross-motion failed to eliminate triable issues of fact as to what caused the bricks to fall and whether, under the circumstances of this case, this was a situation where a securing device of the kind enumerated in Labor Law § 240 (1) would have been necessary or even expected (see *Majerski v City of New York*, 193 AD3d 715, 715 [2021]; *Gonzalez v TJM Constr. Corp.*, 87 AD3d 610, 611 [2011]).

“Labor Law § 241 (6) imposes a nondelegable duty upon owners and contractors to provide reasonable and adequate protection and safety to construction workers . . . In order to recover damages on a cause of action alleging a violation of Labor Law § 241 (6), a plaintiff must establish the violation of an Industrial Code provision which sets forth specific safety standards” (*La Veglia v St. Francis Hosp.*, 78 AD3d 1123, 1125 [2010] [internal quotation marks omitted]).

Here, the Supreme Court also properly denied that branch of the plaintiff’s cross-motion which was for summary judgment on the issue of liability on so much of the cause of action alleging a violation of Labor Law § 241 (6) as was predicated on a violation of 12 NYCRR 23-1.7 (a). The plaintiff’s submissions in support of his cross-motion failed to eliminate triable issues of fact as to the applicability of 12 NYCRR 23-1.7 (a) (1), as the plaintiff failed to establish, prima facie, that he was standing in an area “normally exposed to falling material or objects” at

the time of the accident (*see Crichigno v Pacific Park 550 Vanderbilt, LLC*, 186 AD3d 664, 665 [2020]; *Gonzalez v TJM Constr. Corp.*, 87 AD3d at 611). Additionally, 12 NYCRR 23-5.1 (i) and 23-1.17 set standards for scaffolding and life nets, respectively, and the plaintiff failed to eliminate triable issues of fact as to whether these standards were applicable (*see Weekes v Tishman Tech. Corp.*, 238 AD3d 948 [2025]; *Venegas v Shymer*, 201 AD3d 1001, 1003 [2022]).

Accordingly, the Supreme Court properly denied those branches of the plaintiff's cross-motion which were for summary judgment on the issue of liability on the cause of action alleging a violation of Labor Law § 240 (1) and so much of the cause of action alleging a violation of Labor Law § 241 (6) as was predicated on violations of 12 NYCRR 23-1.7 (a), 23-5.1 (i), and 23-1.17. Duffy, J.P., Ford, Golia and Quirk, JJ., concur.

61 Spin Capital, LLC, Respondent, v Bridgelink Engineering, LLC, et al., Appellants. [— NYS3d —]

Usury—Usurious Transaction—Purchase of Interest in Future Receivables—Adjustment of Remittances

In an action, inter alia, to recover damages for breach of contract, the defendants appeal from (1) an order of the Supreme Court, Nassau County (Philippe Solages, Jr., J.), dated January 23, 2024, and (2) a judgment of the same court entered February 9, 2024. The order, insofar as appealed from, granted the plaintiff's motion pursuant to CPLR 3211 (a) to dismiss the defendants' counterclaims and those branches of the plaintiff's separate motion which were for summary judgment on the causes of action alleging breach of contract and breach of guaranty and, in effect, dismissing the defendants' affirmative defenses. The judgment, upon the order, is in favor of the plaintiff and against the defendants in the total sum of \$8,234,160.50.

Ordered that the appeal from the order is dismissed; and it is further,

Ordered that the judgment is affirmed; and it is further,

Ordered that one bill of costs is awarded to the plaintiff.

The appeal from the order must be dismissed because the right of direct appeal therefrom terminated with the entry of the judgment in the action (*see Matter of Aho*, 39 NY2d 241, 248 [1976]). The issues raised on the appeal from the order are brought up for review and have been considered on the appeal from the judgment (*see* CPLR 5501 [a] [1]).

On August 15, 2022, the plaintiff and the defendants entered

into a written merchant agreement whereby the plaintiff purchased from the defendants future receivables valued at \$7,500,000 for a purchase price of \$5,000,000. The defendants Cole Wayne Johnson and Cord Johnson executed a personal guaranty. The defendants made payments to the plaintiff totaling \$210,000, but thereafter, the authorized Automated Clearing House debits were rejected for insufficient funds and closure of the account. The plaintiff commenced this action against the defendants, alleging, among other things, a cause of action to recover damages for breach of contract. The defendants interposed an answer, asserting counterclaims that the transaction at issue was a criminally usurious loan in violation of the Racketeer Influenced and Corrupt Organizations Act (18 USC § 1962). The plaintiff moved pursuant to CPLR 3211 (a) to dismiss the defendants' counterclaims. Thereafter, the plaintiff moved for summary judgment on the complaint and, in effect, dismissing the defendants' affirmative defenses.

In an order dated January 23, 2024, the Supreme Court, inter alia, granted the plaintiff's motion pursuant to CPLR 3211 (a) to dismiss the defendants' counterclaims and those branches of the plaintiff's motion which were for summary judgment on the causes of action alleging breach of contract and breach of guaranty and, in effect, dismissing the affirmative defenses. On February 9, 2024, a judgment was entered, upon the order, in favor of the plaintiff and against the defendants in the total sum of \$8,234,160.50. The defendants appeal.

"The rudimentary element of usury is the existence of a loan or forbearance of money, and where there is no loan, there can be no usury, however unconscionable the contract may be" (*LG Funding, LLC v United Senior Props. of Olathe, LLC*, 181 AD3d 664, 665 [2020]; see *Crystal Springs Capital, Inc. v Big Thicket Coin, LLC*, 220 AD3d 745, 746 [2023]). "When determining whether a transaction constitutes a usurious loan it must be considered in its totality and judged by its real character, rather than by the name, color, or form which the parties have seen fit to give it" (*Abir v Malky, Inc.*, 59 AD3d 646, 649 [2009] [internal quotation marks omitted]; see *LG Funding, LLC v United Senior Props. of Olathe, LLC*, 181 AD3d at 665). "To determine whether a transaction constitutes a usurious loan: The court must examine whether the plaintiff is absolutely entitled to repayment under all circumstances. Unless a principal sum advanced is repayable absolutely, the transaction is not a loan" (*Principis Capital, LLC v I Do, Inc.*, 201 AD3d 752, 754 [2022] [internal quotation marks omitted]). Courts generally "weigh three factors when determining

whether repayment is absolute or contingent: (1) whether there is a reconciliation provision in the agreement; (2) whether the agreement has a finite term; and (3) whether there is any recourse should the merchant declare bankruptcy” (*id.* [internal quotation marks omitted]; see *True Bus. Funding, LLC v Guerrero A Constr. Corp.*, 239 AD3d 787 [2025]).

Here, the plaintiff established, *prima facie*, that the merchant agreement contained a clause that provided for the adjustment of the defendants’ remittances in response to fluctuations in the defendants’ receipts (see *Principis Capital, LLC v I Do, Inc.*, 201 AD3d at 754). This clause rendered the term of the agreement indefinite (see *id.*). Moreover, no contractual provision existed establishing that a declaration of bankruptcy would constitute an event of default (*cf. True Bus. Funding, LLC v Guerrero A Constr. Corp.*, 239 AD3d at 788; *LG Funding, LLC v United Senior Props. of Olathe, LLC*, 181 AD3d at 666).

Taken together, these factors satisfied the plaintiff’s *prima facie* burden of demonstrating that the transaction at issue was a purchase of future receivables and not a criminally usurious loan (see *Principis Capital, LLC v I Do, Inc.*, 201 AD3d at 754). Moreover, the plaintiff established its *prima facie* entitlement to judgment as a matter of law on the causes of actions alleging breach of contract and breach of guaranty by demonstrating the existence of an agreement and breach (see *True Bus. Funding, LLC v Guerrero A Constr. Corp.*, 239 AD3d at 788; *Principis Capital, LLC v I Do, Inc.*, 201 AD3d at 754; *H.L. Realty, LLC v Edwards*, 131 AD3d 573, 574 [2015]). In opposition, the defendants failed to raise a triable issue of fact. Accordingly, the Supreme Court properly granted those branches of the plaintiff’s motion which were for summary judgment on its causes of action alleging breach of contract and breach of guaranty.

Likewise, the Supreme Court properly granted the plaintiff’s motion pursuant to CPLR 3211 (a) to dismiss the defendants’ counterclaims.

The defendants’ remaining contentions are without merit. Connolly, J.P., Wooten, Taylor and Landicino, JJ., concur.

62 U.S. Bank Trust National Association, Respondent, v Congregation Khal Chasidei Skwera, Inc., Appellant, et al., Defendants. [— NYS3d —]—

Judgments—Default Judgment—Procedure to Cure

In an action to foreclose a mortgage, the defendant Congregation Khal Chasidei Skwera, Inc., appeals from an order of

the Supreme Court, Kings County (Lawrence Knipel, J.), dated March 13, 2024. The order denied that defendant's motion denominated as one for leave to reargue an order and judgment of foreclosure and sale (one paper) of the same court dated September 28, 2023.

Ordered that the order is affirmed, with costs.

In 2015, the plaintiff's predecessor in interest commenced this action against the defendant Congregation Khal Chasidei Skwera, Inc. (hereinafter the defendant), among others, to foreclose a mortgage encumbering certain real property located in Brooklyn. In June 2023, the plaintiff's motion for summary judgment and for an order of reference was granted, without opposition. In August 2023, the plaintiff moved to confirm the referee's report and for a judgment of foreclosure and sale. The defendant did not oppose that motion. In an order and judgment of foreclosure and sale dated September 28, 2023, the Supreme Court granted the plaintiff's motion, confirmed the referee's report, and directed the sale of the property.

In February 2024, the defendant filed a motion denominated as one for leave to reargue the order and judgment of foreclosure and sale. The plaintiff opposed the motion. In an order dated March 13, 2024, the Supreme Court denied the defendant's motion. The defendant appeals. We affirm.

The Supreme Court properly denied the defendant's motion. The defendant's contention that the motion was, "de facto," one for leave to renew is improperly raised for the first time on appeal. In any event, as the order and judgment of foreclosure and sale granted the plaintiff's unopposed motion, there was no opposition to the plaintiff's motion for the defendant to renew or reargue (*see BSD 253, LLC v Wilmington Sav. Fund Socy., FSB*, 219 AD3d 900, 901 [2023]; *Wright v Brooklyn Renaissance Funding Co., LLC*, 174 AD3d 676, 677 [2019]; *Hudson City Sav. Bank v Bomba*, 149 AD3d 704, 705 [2017]).

"The proper procedure to cure a default in opposing a motion . . . is to move to vacate the default pursuant to CPLR 5015 (a) (1), and to appeal that determination, if necessary' " (*Ernest v St. Juste*, 240 AD3d 667, 668 [2025], quoting *U.S. Bank, N.A. v Blagman*, 188 AD3d 1284, 1285 [2020]; *see BSD 253, LLC v Wilmington Sav. Fund Socy., FSB*, 219 AD3d at 901). Since the defendant failed to move pursuant to CPLR 5015 (a) (1) to vacate its default and otherwise failed to address its default in its motion, the Supreme Court properly denied the defendant's motion.

The parties' remaining contentions are either without merit or not properly before this Court. Genovesi, J.P., Ford, Ventura and Quirk, JJ., concur.

63 Willett Avenue, LLC, Appellant, v Village of Port Chester, Respondent. [— NYS3d —]—

Limitation of Actions—Four-Year Statute of Limitations—Conversion of Plenary Action to CPLR Article 78 Proceeding

In an action, inter alia, in effect, to recover damages for a violation of the Code of Village of Port Chester § 153-1, the plaintiff appeals from an order of the Supreme Court, Westchester County (Janet C. Malone, J.), dated August 28, 2024. The order, insofar as appealed from, granted that branch of the defendant's motion which was pursuant to CPLR 3211 (a) to dismiss the complaint and denied the plaintiff's cross-motion for summary judgment on the issue of liability.

Ordered that the order is affirmed insofar as appealed from, with costs.

In July 2021, the plaintiff, the owner of two mixed-use buildings located on Willet Avenue in the Village of Port Chester, commenced this action against the Village, inter alia, in effect, to recover damages for a violation of the Code of Village of Port Chester § 153-1. Subsequently, the Village moved, among other things, pursuant to CPLR 3211 (a) to dismiss the complaint. The plaintiff opposed the Village's motion and cross-moved for summary judgment on the issue of liability. In an order dated August 28, 2024, the Supreme Court, inter alia, granted that branch of the Village's motion and denied the plaintiff's cross-motion. The plaintiff appeals.

Contrary to the plaintiff's contention, the Supreme Court properly directed dismissal of the complaint. As an initial matter, the Village adequately preserved the affirmative defense that the plaintiff failed to commence a CPLR article 78 proceeding (*see id.* § 3026). Moreover, a CPLR article 78 proceeding is the appropriate vehicle to review the plaintiff's claims, among other things, that the Village Fire Chief “improperly, negligently, without just cause and without authority of law and in violation of the Village Code, condemned both buildings and evicted the tenants”—allegations that sound in improper administrative determinations and actions by the government (*see Rock v New York City Employees' Retirement Sys.*, 231 AD3d 979, 981 [2024]). Although the building was reopened prior to the commencement of the action, the gravamen of the plaintiff's argument was that the actions of the Village Fire Chief on January 31, 2021, were improper and that incidental damages flowed from these actions. Accordingly, the plaintiff's claims should have been brought as a CPLR article 78 proceeding (*see Meisner v Hamilton, Fulton, Montgomery Bd. of Coop. Educ. Servs.*, 175 AD3d 1653, 1656 [2019]).

“Although courts generally possess the authority to convert a plenary action to a CPLR article 78 proceeding if jurisdiction of the parties has been obtained, conversion is not appropriate where the claims are barred by the four-month statute of limitations governing CPLR article 78 proceedings” (*id.* [citation omitted]). Here, because the plaintiff commenced this action more than four months after January 31, 2021, the Supreme Court properly directed dismissal of the complaint for failure to bring the challenge as a CPLR article 78 proceeding.

The parties’ remaining contentions either are without merit or need not be considered in light of our determination.

Accordingly, we affirm the order insofar as appealed from. Duffy, J.P., Ford, Golia and Quirk, JJ., concur.

(April 22, 2026)

1 Helen Bass, Individually and as Administratrix of the Estate of Lillian Barr, Deceased, Appellant, et al., Plaintiff, v Garnet Health Medical Center-Catskills, Formerly Known as Catskill Regional Medical Center et al., Defendants, and Funsho Busari-Alabi, M.D., et al., Respondents. (And a Third-Party Action.) [— NYS3d —]

Limitation of Actions—Defendants United in Interest—Failure to Establish New Defendant’s Notice within Applicable Limitations Period

In an action, inter alia, to recover damages for medical malpractice and wrongful death, the plaintiff Helen Bass appeals from an order of the Supreme Court, Nassau County (Eileen C. Daly-Sapraicone, J.), dated November 29, 2023. The order granted those branches of the separate motions of the defendants Funsho Busari-Alabi and Sullivan Emergency Services, P.C., and the defendants Faith Reeves and Ramapo Anesthesiologists, P.C., which were pursuant to CPLR 3211 (a) (5) to dismiss the amended complaint insofar as asserted against each of them.

Ordered that the order is affirmed, with one bill of costs.

On November 3, 2020, Helen Bass, individually and as administrator of the estate of the deceased infant (hereinafter the decedent), and another, commenced this action against, among others, the defendant Garnet Health Medical Center-Catskills (hereinafter the medical center), inter alia, to recover damages for medical malpractice and wrongful death in connection with treatment rendered to the decedent in the medical center’s emergency department on April 28, 2018. On March

9, 2023, the medical center commenced a third-party action asserting causes of action for indemnification and contribution against Funsho Busari-Alabi and Faith Reeves, who both allegedly treated the decedent in the medical center's emergency department, Sullivan Emergency Services, P.C. (hereinafter Sullivan), and Ramapo Anesthesiologists, P.C. (hereinafter Ramapo). On March 24, 2023, the plaintiffs filed an amended summons and complaint adding Busari-Alabi, Sullivan (hereinafter together the Sullivan defendants), Reeves, and Ramapo (hereinafter together the Ramapo defendants) as additional defendants in the main action.

Thereafter, the Sullivan defendants and the Ramapo defendants separately moved, among other things, pursuant to CPLR 3211 (a) (5) to dismiss the amended complaint insofar as asserted against each of them as time-barred. The plaintiffs opposed the motions. In an order dated November 29, 2023, the Supreme Court, *inter alia*, granted those branches of the separate motions. Bass appeals.

"On a motion to dismiss a complaint pursuant to CPLR 3211 (a) (5) on the ground that the statute of limitations has expired, the moving defendant must establish, *prima facie*, that the time in which to commence the action has expired" (*Raymond James Bank v Guzzetti*, 240 AD3d 631, 632 [2025]). "If the defendant satisfies this burden, the burden shifts to the plaintiff to raise a question of fact as to whether the statute of limitations was tolled or otherwise inapplicable, or whether the plaintiff actually commenced the action within the applicable limitations period" (*U.S. Bank N.A. v Bernice 380 Corp.*, 186 AD3d 1750, 1752 [2020]; *see Randolph v Fox*, 230 AD3d 1173, 1173 [2024]).

Here, the Sullivan defendants and the Ramapo defendants each demonstrated that the relevant statute of limitations had expired by the time the plaintiffs amended the complaint to add the Sullivan defendants and the Ramapo defendants as additional defendants in the main action (*see* CPLR 214 [5]; 214-a; EPTL 5-4.1 [1]). Consequently, the burden shifted to the plaintiffs to raise a question of fact as to whether the relation-back doctrine applied (*see Fitzpatrick v City of New York*, 232 AD3d 670, 672 [2024]; *Sanders v Guida*, 213 AD3d 712, 714 [2023]).

"In order to establish the applicability of the relation-back doctrine, a plaintiff must demonstrate that (1) the causes of action arose out of the same conduct, transaction, or occurrence; (2) the new party is united in interest with one or more of the original defendants, and by reason of that relationship can be

charged with such notice of the institution of the action that he or she will not be prejudiced in maintaining his or her defense on the merits; and (3) the new defendant knew or should have known that, but for a mistake by the plaintiff as to the identity of the proper parties, the action would have been commenced against him or her as well” (*Mignone v Nyack Hosp.*, 212 AD3d 802, 803 [2023]; see *Buran v Coupal*, 87 NY2d 173, 178 [1995]). “The ‘linchpin’ of the relation-back doctrine is whether the new defendant had notice within the applicable limitations period” (*Alvarado v Beth Israel Med. Ctr.*, 60 AD3d 981, 982 [2009], citing *Buran v Coupal*, 87 NY2d at 180).

Here, the plaintiffs satisfied the first prong of the three-prong test by demonstrating that the causes of action against the Sullivan defendants and the Ramapo defendants arose out of the same occurrence as the causes of action against the medical center (see *Rivera v Wyckoff Hgts. Med. Ctr.*, 175 AD3d 522, 524 [2019]). Additionally, the plaintiffs satisfied the second prong of the relation-back doctrine. “Where, as here, a patient enters a hospital through its emergency room seeking treatment from the hospital, and not from a particular physician of the patient’s choosing, the hospital may be held vicariously liable for the negligence of the treating physician, an independent contractor, under a theory of apparent agency” (*id.*; see *Mignone v Nyack Hosp.*, 212 AD3d at 803). “The vicarious liability of the hospital allows for a finding of unity of interest” (*Mignone v Nyack Hosp.*, 212 AD3d at 803; see *Rivera v Wyckoff Hgts. Med. Ctr.*, 175 AD3d at 524-525). The record reflects that the plaintiffs entered the medical center through its emergency department seeking treatment for the decedent from the medical center, and there is no evidence in the record that the plaintiffs went to the medical center specifically seeking treatment for the decedent from the Sullivan defendants or the Ramapo defendants rather than from the medical center itself (see *Mignone v Nyack Hosp.*, 212 AD3d at 803; cf. *Gardner v Brookdale Hosp. Med. Ctr.*, 73 AD3d 1124, 1125 [2010]).

However, the plaintiffs failed to satisfy the third prong of the three-prong test, which focuses, among other things, on “whether the defendant could have reasonably concluded that the failure to sue within the limitations period meant that there was no intent to sue that person at all and that the matter has been laid to rest as far as he [or she] is concerned” (*Buran v Coupal*, 87 NY2d at 181 [emphasis and internal quotation marks omitted]; see *Sanders v Guida*, 213 AD3d at 716). There is no evidence in the record that the Sullivan defendants or the Ramapo defendants had notice that an action

had been commenced against the medical center until October 2021, when Busari-Alabi and Reeves were served with subpoenas to appear for nonparty depositions. By that time, the statute of limitations for the causes of action alleging wrongful death and medical malpractice had expired. Moreover, the plaintiffs still did not seek to add the Sullivan defendants or the Ramapo defendants as additional defendants in the main action until March 24, 2023, nearly five years after the decedent's death. The plaintiffs failed to establish that the Sullivan defendants or the Ramapo defendants knew that, but for a mistake by the plaintiffs as to the identity of the proper parties, the action would have been brought against them as well (see *Sanders v Guida*, 213 AD3d at 716; *Stevens v Winthrop S. Nassau Univ. Health Sys., Inc.*, 89 AD3d 835, 836 [2011]). Under the circumstances, the Sullivan defendants and the Ramapo defendants could have reasonably concluded that the plaintiffs "had no intent to sue [them], and thus, that the matter had been laid to rest" (*Alvarado v Beth Israel Med. Ctr.*, 60 AD3d at 983; see *Sanders v Guida*, 213 AD3d at 717).

Accordingly, the Supreme Court properly granted those branches of the separate motions of the Sullivan defendants and the Ramapo defendants which were pursuant to CPLR 3211 (a) (5) to dismiss the amended complaint insofar as asserted against each of them as time-barred.

The plaintiffs' remaining contentions either are without merit or need not be reached in light of our determination. Barros, J.P., Christopher, Warhit and Voutsinas, JJ., concur.

2 Justin A. Bonilla, Plaintiff, and Joel E. Caraballo, Respondent, v Aileen Betances, Appellant, et al., Defendants. [253 NYS3d 286]—

Motor Vehicles—Collision—Rear-End Collision—Summary Judgment Dismissing Complaint—Neither Defendant Nor Her Vehicle was Involved in Accident

In an action to recover damages for personal injuries, the defendant Aileen Betances appeals from an order of the Supreme Court, Kings County (Katherine Levine, J.), dated September 4, 2024. The order denied that defendant's renewed motion for summary judgment dismissing the amended complaint insofar as asserted against her.

Ordered that the order is reversed, on the law, with costs, and the renewed motion of the defendant Aileen Betances for summary judgment dismissing the amended complaint insofar as asserted against her is granted.

The plaintiffs commenced this action to recover damages for personal injuries that they alleged they sustained when a vehi-

cle in which they were passengers (hereinafter the host vehicle) was struck in the rear. It was alleged that the host vehicle was the lead vehicle and the defendant Aileen Betances (hereinafter the defendant) owned and/or operated an offending vehicle. In an order dated September 4, 2024, the Supreme Court denied the defendant's renewed motion for summary judgment dismissing the amended complaint insofar as asserted against her. The defendant appeals.

"A defendant moving for summary judgment in a negligence action has the burden of establishing, prima facie, that he or she was not at fault in the happening of the subject accident" (*Boulos v Lerner-Harrington*, 124 AD3d 709, 709 [2015]). Here, the defendant established, prima facie, that neither she nor her vehicle was involved in the accident (*see Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]; *see generally Forte v City of New York*, 237 AD3d 1164, 1165 [2025]; *Han Hao Huang v "John Doe"*, 169 AD3d 1014, 1015 [2019]). The papers filed in opposition to the defendant's renewed motion failed to raise a triable issue of fact.

Accordingly, the Supreme Court should have granted the defendant's renewed motion for summary judgment dismissing the amended complaint insofar as asserted against her. Genovesi, J.P., Ford, Ventura and Quirk, JJ., concur.

3 Sandy Cox et al., Appellants, v First Citizens Bancshares, Inc., Respondent. [— NYS3d —]

Declaratory Judgments—When Remedy Appropriate—Failure of Mortgagee to Produce Requested Chain of Title for Mortgage Loan They Did Not Originate—Mortgagors Not Entitled to be Released from Subject Loan

In an action for certain declaratory relief, the plaintiffs appeal from an order of the Supreme Court, Nassau County (Leonard D. Steinman, J.), entered December 27, 2024. The order denied the plaintiffs' motion pursuant to CPLR 3215 for leave to enter a default judgment and granted the defendant's cross-motion pursuant to CPLR 3211 (a) (7) to dismiss the complaint.

Ordered that the order is modified, on the law, by deleting the provision thereof granting the defendant's cross-motion pursuant to CPLR 3211 (a) (7) to dismiss the complaint, and adding a provision thereto deeming the cross-motion to be for a declaratory judgment in the defendant's favor, and thereupon granting the cross-motion; as so modified, the order is affirmed, with costs to the defendant, and the matter is remitted to the Supreme Court, Nassau County, for the entry of a judgment declaring that the defendant's failure to respond to the

plaintiffs' request to produce the chain of title for the subject mortgage loan does not entitle the plaintiffs to be released from the subject mortgage loan.

In July 2024, the plaintiffs commenced this action seeking a declaratory judgment "releasing" them from their mortgage loan. In their verified complaint, the plaintiffs alleged that they are the mortgagors and the defendant is the mortgagee with regard to the mortgage loan. They further alleged that on March 28, 2024, they mailed a letter to the defendant requesting production of the chain of title for the mortgage loan, which the defendant did not originate. Despite delivery of the letter the following day, the defendant failed to produce the chain of title as requested. Thus, according to the plaintiffs, they are entitled to a declaratory judgment releasing them from the mortgage loan.

By notice of motion dated July 9, 2024, the plaintiffs moved pursuant to CPLR 3215 for leave to enter a default judgment. Subsequently, on or about July 25, 2024, the defendant interposed a timely verified answer to the complaint. Thereafter, the defendant cross-moved pursuant to CPLR 3211 (a) (7) to dismiss the complaint for failure to state a cause of action. In an order entered December 27, 2024, the Supreme Court denied the plaintiffs' motion and granted the defendant's cross-motion. The plaintiffs appeal.

First, contrary to the plaintiffs' contentions, the Supreme Court properly denied their motion pursuant to CPLR 3215 for leave to enter a default judgment. A plaintiff may seek a default judgment against a defendant pursuant to CPLR 3215 (a) only when the "defendant has failed to appear, plead or proceed to trial of an action reached and called for trial, or when the court orders a dismissal for any other neglect to proceed." Here, the plaintiffs prematurely moved for leave to enter a default judgment against the defendant one day after commencing this action and on the same date as service of the summons and complaint, to which the defendant timely interposed an answer (*see id.* § 320 [a]). Accordingly, the plaintiffs' motion pursuant to CPLR 3215 for leave to enter a default judgment was properly denied.

Pursuant to CPLR 3001, "[t]he supreme court may render a declaratory judgment . . . as to the rights and other legal relations of the parties to a justiciable controversy" (*see DiGiorgio v 1109-1113 Manhattan Ave. Partners, LLC*, 102 AD3d 725, 728 [2013]). "[T]he demand for relief in the complaint shall specify the rights and other legal relations on which a declaration is requested" (CPLR 3017 [b]; *see DiGiorgio v 1109-1113 Manhattan Ave. Partners, LLC*, 102 AD3d at 728).

In general, a motion to dismiss the complaint in a declaratory judgment action presents for consideration only the issue of whether a cause of action for declaratory relief has been stated, not the question of whether the plaintiff is entitled to a favorable declaration (*see DiGiorgio v 1109-1113 Manhattan Ave. Partners, LLC*, 102 AD3d at 728; *Matter of Tilcon N.Y., Inc. v Town of Poughkeepsie*, 87 AD3d 1148, 1150 [2011]). Accordingly, if a cause of action is sufficient to invoke the court's power to render a declaratory judgment as to the rights and other legal relations of the parties to a justiciable controversy, a motion to dismiss that cause of action should be denied (*see DiGiorgio v 1109-1113 Manhattan Ave. Partners, LLC*, 102 AD3d at 728; *Matter of Tilcon N.Y., Inc. v Town of Poughkeepsie*, 87 AD3d at 1150). However, where the court, deeming the allegations of the complaint to be true, is nevertheless able to determine, as a matter of law, that the defendant is entitled to a declaration in its favor, the court may enter a judgment making the appropriate declaration (*see Hoffman v City of Syracuse*, 2 NY2d 484, 487 [1957]; *DiGiorgio v 1109-1113 Manhattan Ave. Partners, LLC*, 102 AD3d at 728; *Matter of Tilcon N.Y., Inc. v Town of Poughkeepsie*, 87 AD3d at 1150).

Here, the plaintiffs sought a declaratory judgment releasing them from the mortgage loan based on allegations that the defendant, as the alleged holder but non-originator of the loan, did not respond to the plaintiffs' request to provide them with the chain of title. Contrary to the plaintiffs' contention, there is no legal basis for the requested declaration, and the defendant is entitled, as a matter of law, to a judgment declaring that its failure to respond to the plaintiffs' request to produce the chain of title for the mortgage loan does not entitle them to be released from the loan (*see generally Hoffman v City of Syracuse*, 2 NY2d at 487). To the extent the complaint could be viewed as seeking a declaratory judgment releasing the plaintiffs from the mortgage loan based on allegations that the defendant lacks standing to enforce the loan in a foreclosure action, such a cause of action would be premature and an improper request for an advisory opinion (*see Matter of JDM Holdings, LLC v Village of Warwick*, 200 AD3d 880, 883 [2021]). Significantly, a plaintiff seeking to foreclose a mortgage must merely be the owner or holder of the note at the time of commencement of the mortgage foreclosure action, which is not alleged to have yet occurred (*see Aurora Loan Servs., LLC v Taylor*, 25 NY3d 355, 361 [2015]).

Accordingly, we remit the matter to the Supreme Court, Nassau County, for the entry of an appropriate judgment as set forth herein. Dillon, J.P., Ford, Dowling and Quirk, JJ., concur.

4 Elvin Cruz, Appellant, v Metropolitan Transportation Authority et al., Respondents, and Christoffe Cintron et al., Appellants. [— NYS3d —]

Motor Vehicles—Collision—Liability of Bus Operator—Weight of Evidence

In an action to recover damages for personal injuries, the plaintiff appeals, and the defendants Christoffe Cintron and Richely Cintron separately appeal, from a judgment of the Supreme Court, Kings County (Gina Abadi, J.), dated July 13, 2023. The judgment, insofar as appealed from by the plaintiff, upon a jury verdict in favor of the defendants Metropolitan Transportation Authority, New York City Transit Authority, MTA Bus Company, and Loraine Lord on the issue of liability, is in favor of those defendants and against the plaintiff, in effect, dismissing the complaint insofar as asserted against those defendants. The judgment, insofar as appealed from by the defendants Christoffe Cintron and Richely Cintron, upon a jury verdict in favor of the defendants Metropolitan Transportation Authority, New York City Transit Authority, MTA Bus Company, and Loraine Lord on the issue of liability, is in favor of those defendants and, in effect, against Christoffe Cintron and Richely Cintron dismissing their cross-claim asserted against those defendants.

Ordered that the judgment is affirmed insofar as appealed from, with one bill of costs payable by the appellants appearing separately and filing separate briefs.

The plaintiff allegedly was injured when a motor vehicle in which he was a passenger (hereinafter the Cintron vehicle), which was operated by the defendant Christoffe Cintron and owned by the defendant Richely Cintron (hereinafter together the Cintron defendants), collided with a public bus operated by the defendant Loraine Lord. The plaintiff commenced this action against the Cintron defendants, Lord, and the defendants Metropolitan Transportation Authority, New York City Transit Authority, and MTA Bus Company (hereinafter collectively with Lord, the MTA defendants). The Cintron defendants asserted a cross-claim against the MTA defendants for contribution and/or indemnification. Two other passengers in the Cintron vehicle commenced separate personal injury actions that were joined with this action for the purposes of a trial on the issue of liability (*see Garcia v New York City Tr. Auth.*, 248 AD3d —, 2026 NY Slip Op 02393 [2026] [decided herewith]; *Rios v New York City Tr. Auth.*, 248 AD3d —, 2026 NY Slip Op 02429 [2026] [decided herewith]).

Following the trial on the issue of liability, the jury returned

a verdict finding that Lord's negligence in operating the bus was not a substantial factor in causing the accident, that Christoffe Cintron was negligent in operating the Cintron vehicle, and, in effect, that his negligence was the sole proximate cause of the accident. Thereafter, the plaintiff and the Cintron defendants separately moved, inter alia, pursuant to CPLR 4404 (a) to set aside, as against the weight of the evidence, so much of the jury's verdict as found that Lord's negligence was not a substantial factor in causing the accident. The Supreme Court, among other things, denied those branches of the motions. The court issued a judgment dated July 13, 2023, in favor of the MTA defendants and against the plaintiff, in effect, dismissing the complaint insofar as asserted against the MTA defendants, and, in effect, against the Cintron defendants dismissing their cross-claim asserted against the MTA defendants. The plaintiff and the Cintron defendants separately appeal.

For the reasons set forth in our decision and order on a related appeal (*see Garcia v New York City Tr. Auth.*, 248 AD3d —, 2026 NY Slip Op 02393 [2026] [decided herewith]), the jury's verdict was not contrary to the weight of the evidence.

The parties' remaining contentions are either without merit or not properly before this Court. Brathwaite Nelson, J.P., Ford, Wan and Love, JJ., concur.

5 Deutsche Bank National Trust Company, Respondent, v Kathy McElroy, Appellant, et al., Defendants. [— NYS3d —]

Mortgages—Foreclosure—Authority for Appearance of Plaintiff's Attorney in Real Property Action

In an action to foreclose a mortgage, the defendant Kathy McElroy appeals from an order of the Supreme Court, Suffolk County (Thomas F. Whelan, J.), dated March 4, 2024. The order, insofar as appealed from, denied those branches of that defendant's motion which were pursuant to CPLR 322 (a) and 3211 (a) to dismiss the amended complaint insofar as asserted against her or, in the alternative, pursuant to CPLR 322 (a) to compel the plaintiff's counsel to produce admissible evidence of its authority to commence the action.

Ordered that the order is affirmed insofar as appealed from, with costs.

On July 24, 2023, the plaintiff, by attorneys, Knuckles, Komosinski & Manfro, LLP (hereinafter KKM), commenced this action against the defendant Kathy McElroy (hereinafter the defendant), among others, to foreclose a mortgage on certain real property located in East Northport.

In October 2023, the defendant moved, pre-answer, *inter alia*, pursuant to CPLR 322 (a) and 3211 (a) (1), (3), and (8) to dismiss the complaint insofar as asserted against her or, in the alternative, pursuant to CPLR 322 (a) to compel KKM to produce admissible evidence of its authority to commence the action. Thereafter, the plaintiff filed a supplemental summons and amended complaint, and the defendant elected to make her motion as against the amended complaint.

In opposing the motion, the plaintiff submitted an affidavit of Nicholas J. Raab, an assistant vice president of Specialized Loan Servicing, LLC (hereinafter SLS), its servicer and attorney-in-fact, along with a limited power of attorney appointing SLS its attorney-in-fact with respect to certain “enumerated transactions,” including “[t]he full enforcement and preservation of the [plaintiff’s] interests in [mortgage loans for which the plaintiff was acting as Trustee] . . . by way of . . . foreclosure . . . or the completion of judicial or non-judicial foreclosure.” Raab averred in his affidavit, among other things, that SLS retained KKM as counsel “for the purpose of commencing and representing [the plaintiff] throughout this action” and that KKM “had the authority to begin this action on behalf of Plaintiff.”

In an order dated March 4, 2024, the Supreme Court, *inter alia*, denied those branches of the defendant’s motion which were pursuant to CPLR 322 (a) and 3211 (a) (1), (3), and (8) to dismiss the complaint insofar as asserted against her or, in the alternative, pursuant to CPLR 322 (a) to compel KKM to produce admissible evidence of its authority to commence the action. The defendant appeals.

CPLR 322 (a) provides that “[w]here the defendant in an action affecting real property has not been served with evidence of the authority of the plaintiff’s attorney to begin the action, he [or she] may move at any time before answering for an order directing the production of such evidence. Any writing by the plaintiff or his [or her] agent requesting the attorney to begin the action or ratifying his [or her] conduct of the action on behalf of the plaintiff is *prima facie* evidence of the attorney’s authority.”

Here, the plaintiff sufficiently established that KKM was authorized to commence this action by submitting Raab’s affidavit indicating that KKM had such authority, accompanied by a power of attorney authorizing the plaintiff’s servicing agent to act on the plaintiff’s behalf (*see Bank of N.Y. Mellon Trust Co., N.A. v Berokhim*, 231 AD3d 916, 917 [2024]; *Chase Manhattan Bank v Beckerman*, 271 AD2d 392, 393 [2000]).

The parties' remaining contentions either are without merit or need not be addressed in light of our determination.

Accordingly, the Supreme Court properly denied those branches of the defendant's motion which were pursuant to CPLR 322 (a) and 3211 (a) (1), (3), and (8) to dismiss the amended complaint insofar as asserted against her or, in the alternative, pursuant to CPLR 322 (a) to compel KKM to produce admissible evidence of its authority to commence the action. Iannacci, J.P., Chambers, Wan and Taylor, JJ., concur.

6 John DiMiceli, Appellant-Respondent, v Credit Shelter Trust et al., Defendants-Respondents, and Skanska USA, Inc., Defendant-Respondent-Appellant, et al., Defendants. [— NYS3d —]—

Limitation of Actions—Defendants United in Interest—Separate Corporations with Different Defenses

Motions and Orders—Reargument or Renewal—Leave to Renew Motion to Amend Complaint to Add Defendant Based on Relation-Back Doctrine—Failure to Demonstrate That Purported New Facts Would Change Prior Determination Denying Motion

Motions and Orders—Premature Motion—Summary Judgment—Discovery Might Lead to Relevant Evidence

In an action to recover damages for personal injuries, (1) the plaintiff appeals, and the defendant Skanska USA, Inc., cross-appeals, from an order of the Supreme Court, Kings County (Devin P. Cohen, J.), dated July 14, 2023, and (2) the plaintiff appeals from an order of the same court dated December 21, 2023. The order dated July 14, 2023, insofar as appealed from, denied that branch of the plaintiff's motion which was for leave to amend the complaint to add Skanska Civil Northeast, Inc., as a defendant. The order dated July 14, 2023, insofar as cross-appealed, denied that branch of the renewed cross-motion of the defendant Skanska USA, Inc., which was for summary judgment dismissing the complaint insofar as asserted against it. The order dated December 21, 2023, insofar as appealed from, denied that branch of the plaintiff's motion which was for leave to renew that branch of his prior motion which was for leave to amend the complaint to add Skanska Civil Northeast, Inc., as a defendant.

Ordered that the order dated July 14, 2023, is affirmed insofar as appealed and cross-appealed from, without costs or disbursements; and it is further,

Ordered that the order dated December 21, 2023, is affirmed insofar as appealed from, without costs or disbursements.

In August 2015, the plaintiff allegedly was injured while working at a construction project. In 2018, he commenced this

action to recover damages for personal injuries against, among others, Skanska USA, Inc. (hereinafter Skanska USA).

In 2022, the plaintiff moved, inter alia, for leave to amend the complaint to add Skanska Civil Northeast, Inc. (hereinafter Skanska Northeast), as a defendant. Skanska USA opposed the plaintiff's motion and made a renewed cross-motion, among other things, for summary judgment dismissing the complaint insofar as asserted against it. The plaintiff opposed the renewed cross-motion. In an order dated July 14, 2023, the Supreme Court denied the plaintiff's motion and Skanska USA's renewed cross-motion. The plaintiff appeals, and Skanska USA cross-appeals, from the order dated July 14, 2023.

Thereafter, the plaintiff moved, inter alia, for leave to renew that branch of his prior motion which was for leave to amend the complaint to add Skanska Northeast as a defendant. Skanska USA opposed the motion. In an order dated December 21, 2023, the Supreme Court, among other things, denied that branch of the plaintiff's motion. The plaintiff appeals from the order dated December 21, 2023.

The Supreme Court properly denied that branch of the plaintiff's motion which was for leave to amend the complaint to add Skanska Northeast as a defendant. In seeking to add Skanska Northeast as a defendant, the plaintiff relied on the relation-back doctrine. "[T]he relation-back doctrine permits, under certain defined circumstances, the commencement of claims against a party that has not been timely sued, but which relate back to the original timely complaint" (*Bisono v Mist Enters., Inc.*, 231 AD3d 134, 141 [2024]). A plaintiff must establish all three prongs of a three-part test for the addition of untimely claims or parties (see *Buran v Coupal*, 87 NY2d 173, 178 [1995]). "The first prong is that the new claims arise out of the same conduct, transaction, or occurrence as that alleged in the original complaint" (*Bisono v Mist Enters., Inc.*, 231 AD3d at 141). "Second, if a new party is to be added, it must be united in interest with one or more of the original defendants, and by reason of that relationship can be charged with such notice of the institution of the action that he or she will not be prejudiced in defending the action on the merits" (*id.*). "Third, if a new party is to be added, the newly-added defendant must have known, or should have known, that the action would have been timely commenced against him or her but for a mistake by the plaintiff as to the identity of the proper parties" (*id.*).

The plaintiff failed to establish that Skanska Northeast and Skanska USA were united in interest. "Parties are united in

interest when their interests in the subject matter is such that they will stand or fall together with respect to the plaintiff's claim. If the relationship between the parties is such that one may have a defense not available to the other, they are not united in interest" (*Ragusa v Drazie's Farm II, LLC*, 226 AD3d 836, 837-838 [2024] [citation and internal quotation marks omitted]). Here, the record demonstrated that Skanska USA and Skanska Northeast are separate corporations with different defenses (*see id.* at 838).

Further, the Supreme Court properly denied that branch of the plaintiff's motion which was for leave to renew that branch of his prior motion which was for leave to amend the complaint to add Skanska Northeast as a defendant. A motion for leave to renew must be identified specifically as such, must be based on new facts not offered on the prior motion that would change the prior determination or must demonstrate that there has been a change in the law that would change the prior determination, and must contain reasonable justification for the failure to present such facts on the prior motion (*see* CPLR 2221 [e] [1], [2], [3]). Here, the plaintiff failed to demonstrate that the purported new facts would change the prior determination denying that branch of the plaintiff's motion which was for leave to amend the complaint to add Skanska Northeast as a defendant based on the relation-back doctrine.

The Supreme Court properly denied that branch of Skanska USA's renewed cross-motion which was for summary judgment dismissing the complaint insofar as asserted against it. "A party who contends that a summary judgment motion is premature is required to demonstrate that discovery might lead to relevant evidence or the facts essential to justify opposition to the motion were exclusively within the knowledge and control of the movant" (*Cajas-Romero v Ward*, 106 AD3d 850, 852 [2013]; *see Tarasiuk v Levoritz*, 216 AD3d 1031, 1035 [2023]). "The mere hope or speculation that evidence sufficient to defeat a motion for summary judgment may be uncovered during the discovery process is insufficient to deny the motion" (*Haidhaqi v Metropolitan Transp. Auth.*, 153 AD3d 1328, 1329 [2017]; *see Cenlar FSB v Tenenbaum*, 172 AD3d 806, 807 [2019]). Here, based on certain materials in the record that Skanska USA had disseminated to the public, the plaintiff demonstrated that discovery might lead to relevant evidence, which would justify opposition to that branch of Skanska USA's renewed cross-motion for summary judgment dismissing the complaint insofar as asserted against it (*see Sarceno v Manhattan View, LLC*, 230 AD3d 1176, 1177 [2024]; *Tarasiuk v Levoritz*, 216 AD3d at 1035).

The parties' remaining contentions are either not properly before us or without merit.

Accordingly, we affirm the orders insofar as challenged on the appeals and cross-appeal. Dillon, J.P., Chambers, Wan and McCormack, JJ., concur.

7 Justine Foranocce, Appellant, v Michael Foranocce, Respondent. [— NYS3d —]—

Contempt—Civil Contempt—Failure to Comply with Provisions of Matrimonial Parties' Stipulation of Settlement Governing Child Support—Lack of Clear and Convincing Evidence of Violation of Unequivocal Mandate Which Prejudiced Plaintiff

In a matrimonial action in which the parties were divorced by judgment dated August 8, 2011, the plaintiff appeals from an order of the Supreme Court, Suffolk County (Valerie A. Cartright, J.), dated June 30, 2023. The order, insofar as appealed from, denied, without a hearing, those branches of the plaintiff's motion which were to hold the defendant in civil contempt for failing to comply with certain provisions of the parties' stipulation dated June 22, 2009, for an award of retroactive child support, and for an award of counsel fees.

Ordered that the order is affirmed insofar as appealed from, with costs.

The parties are the parents of one child. As relevant here, pursuant to a stipulation dated June 22, 2009 (hereinafter the 2009 stipulation), which was incorporated but not merged into the parties' judgment of divorce dated August 8, 2011, the defendant's child support obligation was to be increased yearly commencing on January 1, 2011, in proportion to any increase in the Consumer Price Index (hereinafter the Consumer Price Index provision). Subsequently, pursuant to an amendment dated April 25, 2011 (hereinafter the 2011 amendment), which also was incorporated but not merged into the parties' judgment of divorce, the parties stipulated to amend and modify the child support provision of the 2009 stipulation. As relevant here, the 2011 amendment did not include a provision pursuant to which the defendant's child support obligation was to be increased yearly in proportion to any increase in the Consumer Price Index.

In December 2022, the plaintiff moved, inter alia, to hold the defendant in civil contempt for his failure to comply with certain provisions of the 2009 stipulation, including the Consumer Price Index provision and a provision pursuant to which the parties were to exchange certain tax returns for the calculation of the parties' respective pro rata share of their

child's reasonable college expenses, for an award of retroactive child support, and for an award of counsel fees. In an order dated June 30, 2023, the Supreme Court, among other things, denied those branches of the plaintiff's motion. The plaintiff appeals.

"A motion to punish a party for civil contempt is addressed to the sound discretion of the court, and the movant bears the burden of proving the contempt by clear and convincing evidence" (*Lombardi v Lombardi*, 229 AD3d 537, 538 [2024] [internal quotation marks omitted]; see *Botros v Botros*, 233 AD3d 1051, 1053 [2024]). The movant must establish "(1) that a lawful order of the court, clearly expressing an unequivocal mandate, was in effect, (2) that the party against whom contempt is sought disobeyed the order, (3) that the party who disobeyed the order had knowledge of its terms, and (4) that the movant was prejudiced by the offending conduct" (*Spencer v Spencer*, 159 AD3d 174, 177 [2018]; see Judiciary Law § 753 [A] [3]). "A hearing is not mandated in every instance where contempt is sought; it need only be conducted if a factual dispute exists which cannot be resolved on the papers alone" (*Jaffe v Jaffe*, 44 AD3d 825, 826 [2007] [internal quotation marks omitted]; see *Del Vecchio v Del Vecchio*, 219 AD3d 572, 578 [2023]).

"A stipulation of settlement which is incorporated but not merged into a judgment of divorce is a contract subject to principles of contract construction and interpretation" (*Del Vecchio v Del Vecchio*, 219 AD3d at 575 [internal quotation marks omitted]; see *Ackermann v Ackermann*, 82 AD3d 1020, 1020 [2011]). "The fundamental, neutral precept of contract interpretation is that agreements are construed in accord with the parties' intent, and [t]he best evidence of what parties to a written agreement intend is what they say in their writing" (*Del Vecchio v Del Vecchio*, 219 AD3d at 575 [internal quotation marks omitted]).

Here, pursuant to the 2011 amendment, the Consumer Price Index provision was no longer in force and effect after the parties amended the child support provision of the 2009 stipulation. The amended and modified child support provision did not include the Consumer Price Index provision and there were no exclusions as to the extent it was being amended (see *Riverside S. Planning Corp. v CRP/Extell Riverside, L.P.*, 13 NY3d 398, 403 [2009]). "[W]hen parties set down their agreement in a clear, complete document, their writing should be enforced according to its terms" (*id.* [internal quotation marks omitted]). Contrary to the plaintiff's contention, a provision of

the 2011 amendment pursuant to which “[i]n all other respects” the 2009 stipulation “remains in full force and effect,” is not part of the amended child support provision and does not otherwise constitute clear and convincing evidence of the defendant’s failure to comply with a clearly expressed and unequivocal mandate that was in effect.

The plaintiff also failed to prove by clear and convincing evidence that she was prejudiced by the defendant’s failure to turn over his tax returns for 2019, 2020, and 2021. Accordingly, the Supreme Court properly denied, without a hearing, those branches of the plaintiff’s motion which were to hold the defendant in civil contempt for his failure to comply with the Consumer Price Index provision and the provision of the 2009 stipulation pursuant to which the parties were to exchange certain tax returns (*see Matter of Unger v Koren Ha*, 234 AD3d 783, 785 [2025]; *Matter of Reid v Williams*, 234 AD3d 774, 776 [2025]; *Perrone v Perrone*, 229 AD3d 816, 817-818 [2024]).

The parties’ remaining contentions either are without merit or need not be considered in light of our determination.

Accordingly, we affirm the order insofar as appealed from. Dillon, J.P., Chambers, Wan and McCormack, JJ., concur.

8 Randolph Garcia, Appellant, v New York City Transit Authority et al., Respondents, and Christoffe Cintron et al., Appellants. [— NYS3d —]

Trial—Verdict—Setting Verdict Aside—Fair Interpretation of Evidence Finding Defendant Driver Negligent in Failing to See Bus in Turning Lane and Avoid Collision as Sole Proximate Cause of Accident

In an action to recover damages for personal injuries, the plaintiff appeals, and the defendants Christoffe Cintron and Richely Cintron separately appeal, from a judgment of the Supreme Court, Kings County (Gina Abadi, J.), dated July 13, 2023. The judgment, insofar as appealed from by the plaintiff, upon a jury verdict in favor of the defendants New York City Transit Authority and Loraine C. Lord on the issue of liability, is in favor of those defendants and against the plaintiff, in effect, dismissing the complaint insofar as asserted against those defendants. The judgment, insofar as appealed from by the defendants Christoffe Cintron and Richely Cintron, upon the jury verdict in favor of the defendants New York City Transit Authority and Loraine C. Lord on the issue of liability, is in favor of those defendants and, in effect, against Christoffe Cintron and Richely Cintron dismissing their cross-claim asserted against those defendants.

Ordered that the judgment is affirmed insofar as appealed

from, with one bill of costs payable by the appellants appearing separately and filing separate briefs.

The plaintiff allegedly was injured when a motor vehicle in which he was a passenger (hereinafter the Cintron vehicle), which was owned by the defendant Richely Cintron and operated by the defendant Christoffe Cintron (hereinafter together the Cintron defendants), collided with a public bus operated by the defendant Loraine C. Lord. The plaintiff commenced this action against the Cintron defendants, Lord, and the defendant New York City Transit Authority (hereinafter together with Lord, the NYCTA defendants). The Cintron defendants asserted a cross-claim against the NYCTA defendants for contribution and/or indemnification.

It is undisputed that the accident occurred when Lord drove the bus eastbound in a turning lane designated for westbound traffic in order to move around a tractor trailer that was parked in the eastbound travel lane. Before trial, the Supreme Court determined that Lord was negligent in the operation of the bus as a matter of law. After a trial on the issue of liability, the jury found that Lord's negligence in operating the bus was not a substantial factor in causing the accident, that Christoffe Cintron was negligent in the operation of the Cintron vehicle, and, in effect, that his negligence was the sole proximate cause of the accident. Subsequently, the plaintiff and the Cintron defendants separately moved, inter alia, pursuant to CPLR 4404 (a) to set aside, as against the weight of the evidence, so much of the jury's verdict as found that Lord's negligence was not a substantial factor in causing the accident. The court, among other things, denied those branches of the separate motions. The court issued a judgment dated July 13, 2023, in favor of the NYCTA defendants and against the plaintiff, in effect, dismissing the complaint insofar as asserted against the NYCTA defendants, and, in effect, against the Cintron defendants dismissing their cross-claim asserted against the NYCTA defendants. The plaintiff and the Cintron defendants separately appeal.

A jury verdict may not be set aside as contrary to the weight of the evidence unless the evidence so preponderated in favor of another party that the verdict could not have been reached on any fair interpretation of the evidence (*see Killon v Parrotta*, 28 NY3d 101, 107 [2016]; *Lolik v Big V Supermarkets*, 86 NY2d 744, 746 [1995]). "[T]he discretionary power to set aside a jury verdict and order a new trial must be exercised with considerable caution, for in the absence of indications that substantial justice has not been done, a successful litigant is

entitled to the benefits of a favorable jury verdict” (*Nicastro v Park*, 113 AD2d 129, 133 [1985]; *see Bacchus v Restaurant Depot, LLC*, 234 AD3d 903, 904 [2025]). “It is for the jury to make determinations as to the credibility of the witnesses, and great deference in this regard is accorded to the jury, which had the opportunity to see and hear the witnesses” (*Harewood v Holmes*, 163 AD3d 638, 638-639 [2018]; *see Bacchus v Restaurant Depot, LLC*, 234 AD3d at 904). Furthermore, “where there is a reasonable view of the evidence under which it is not logically impossible to reconcile a finding of negligence but no proximate cause, it will be presumed that, in returning such a verdict, the jury adopted that view” (*Bonomo v City of New York*, 78 AD3d 1094, 1095 [2010]; *see Cruz-Rivera v National Grid Energy Mgt., LLC*, 190 AD3d 687, 688 [2021]).

Here, a fair interpretation of the evidence supports the jury’s finding that Lord’s negligence in driving eastbound in the westbound turning lane was not a substantial factor in causing the accident. At trial, there was testimonial, photographic, and video evidence from which the jury reasonably could conclude that the bus was traveling in the westbound turning lane before the Cintron vehicle approached in the westbound travel lane, that there was sufficient space for three vehicles to safely pass each other on that section of the roadway, and that Christoffe Cintron’s negligence in failing to see the bus and failing to avoid a collision was the sole proximate cause of the accident. Therefore, the jury’s verdict was not contrary to the weight of the evidence (*see Graviano v New York City Tr. Auth.*, 202 AD3d 932, 933 [2022]; *Gibson v Singh Towing, Inc.*, 155 AD3d 614, 616 [2017]; *see also Tafolla v Aldrich Mgt. Co., LLC*, 220 AD3d 690, 691 [2023]; *Cruz-Rivera v National Grid Energy Mgt., LLC*, 190 AD3d at 688). The parties’ remaining contentions are either without merit or not properly before this Court. Brathwaite Nelson, J.P., Ford, Wan and Love, JJ., concur.

9 Natalia Generalova, Appellant-Respondent, v Avenue K LG, LLC, Respondent-Appellant. [— NYS3d —]

Negligence—Maintenance of Premises—Apartment Building Owner’s Failure to Maintain Water Heater System in Reasonably Safe Manner—Notice of Dangerous Condition

In an action to recover damages for personal injuries, the plaintiff appeals, and the defendant cross-appeals, from an order of the Supreme Court, Kings County (Wayne Saitta, J.), dated June 9, 2021. The order, insofar as appealed from, denied the plaintiff’s cross-motion, in effect, for summary judgment on the issue of liability. The order, insofar as cross-appealed from, denied the defendant’s motion for summary judgment dismissing the complaint.

Ordered that the order is affirmed insofar as appealed and cross-appealed from, without costs or disbursements.

According to the plaintiff's deposition testimony, on January 7, 2017, the plaintiff was employed as a live-in home health attendant working for an elderly tenant (hereinafter the tenant) in an apartment located in a building owned by the defendant. At some point after 11:00 p.m., the plaintiff went into the bathroom to take a shower. After adjusting the water to the appropriate temperature, the plaintiff entered the bathtub to shower. The plaintiff testified that as she was rinsing shampoo from her hair, "hard boiled water" suddenly came out of the showerhead, causing "serious and severe burns about her face [and] body."

In March 2017, the plaintiff commenced this action against the defendant to recover damages for personal injuries she alleged she sustained in connection with the incident. In the bill of particulars, the plaintiff alleged that the defendant was negligent by, inter alia, negligently maintaining the hot water/boiler system and allowing the water flowing therefrom to flow in an unexpected, erratic, and scalding manner.

In May 2019, prior to the note of issue being filed, the defendant moved for summary judgment dismissing the complaint. Thereafter, in February 2020, the plaintiff opposed the defendant's motion and cross-moved for summary judgment, in effect, on the issue of liability. By order dated June 9, 2021, the Supreme Court denied both the motion and the cross-motion. The plaintiff appeals, and the defendant cross-appeals.

In the premises liability context, "[t]o establish a prima facie case of negligence, the plaintiff must demonstrate either that the defendant created the dangerous or defective condition that caused the incident, or that [the defendant] had actual or constructive notice of the condition" (*Schafran v Simms*, 293 AD2d 518, 519 [2002]; see *Tkachuk v D&J Realty of N.Y., LLC*, 234 AD3d 1009, 1010 [2025]). "A defendant may . . . establish its prima facie entitlement to judgment as a matter of law by submitting evidence that no dangerous or defective condition existed at the time of the plaintiff's accident" (*Shvuyetsov v 1900 Newkirk Ave., LLC*, 217 AD3d 704, 706 [2023]; see *McKevitt v True N. Urgent Care, LLC*, 224 AD3d 741, 742 [2024]).

Here, the Supreme Court properly denied the defendant's motion for summary judgment dismissing the complaint. In support of its motion, the defendant submitted, among other things, an affidavit sworn to by Daryl James Smith. In his affidavit, Smith averred that the building's boiler produced both steam to heat the building's apartments and the hot water for

the sinks and showers. Smith explained that the hot water supplied to the apartments generally was at 125F to 130F, as measured by the hot water system tempering valve. That temperature was achieved by the tempering/mixing valve bringing together cold and hot water. However, Smith acknowledged that the building's hot water system allowed for fluctuations in the hot water temperature. He stated that such fluctuations were "not uncommon" in the type of hot water system at issue here, since the cold water supply could be interrupted by the flushing of toilets or the use of large amounts of cold water in adjoining apartments. Moreover, the defendant also submitted a transcript of the plaintiff's deposition testimony, which contained the plaintiff's testimony that at the time of the incident, "hard boiled water" suddenly came out of the showerhead, causing burns to her face and body. Given this evidence and drawing every available inference in favor of the plaintiff as the nonmoving party (*see Matter of Eighth Jud. Dist. Asbestos Litig.*, 33 NY3d 488, 496 [2019]), the defendant failed to establish, *prima facie*, that it maintained its water heater system in a reasonably safe manner and that it did not create or have notice of the alleged dangerous condition (*see Moshe K. v Nu Kol Tuv, Inc.*, 98 AD3d 652, 652 [2012]; *Scholtz v Catholic Health Sys. of Long Is., Inc.*, 70 AD3d 808, 808-809 [2010]; *Shkolnik v Longo*, 63 AD3d 819, 820 [2009]).

The Supreme Court also properly denied the plaintiff's cross-motion, in effect, for summary judgment on the issue of liability. In support of her cross-motion, the plaintiff submitted, *inter alia*, a transcript of the deposition testimony of Zhanna Bromberg, the tenant's daughter. At her deposition, Bromberg testified that the tenant's apartment had previously experienced issues with excessively hot water unexpectedly running from the bathtub faucet and showerhead. These included one incident at the "end" of 2015, when excessively hot water suddenly emanated from the faucet and showerhead in the bathtub, and two incidents in December 2016, with the first involving the showerhead and the other involving the faucet in the bathroom sink. Bromberg testified that after each instance she informed the building superintendent of the issues with the hot water. Notably, after the first incident in December 2016, Bromberg told the superintendent that "it's impossible to bathe, you try to adjust the water running, it looks like normal, and then all of a sudden hot water starts running." In each instance, the superintendent advised her to call the management office, which Bromberg did. Given this testimony, contrary to the defendant's contention, Bromberg's testimony established, *prima facie*, that the defendant was on notice of

the dangerous condition (*see Tkachuk v D&J Realty of N.Y., LLC*, 234 AD3d at 1009).

In opposition, the defendant submitted, among other things, a transcript of the deposition testimony of the building superintendent. At his deposition, the superintendent, who had worked at the building for approximately 25 years, denied ever receiving any complaints from the tenant, her relatives, or any of the tenant's home health aides before the date of the alleged incident. The superintendent also denied receiving any complaints from the tenants or their guests about burning or injuring themselves with hot water before the date of the alleged incident. The defendant also submitted an affidavit from the superintendent, in which he averred, consistent with his deposition testimony, that prior to the date of the alleged incident, he received no complaints about the water being too hot in any of building's apartments. The superintendent's testimony and averments, which conflict with Bromberg's testimony, were sufficient to raise triable issues of fact (*see Shkolnik v Longo*, 63 AD3d at 820).

The parties' remaining contentions either are improperly raised for the first time on appeal or need not be considered in light of our determination. Iannacci, J.P., Chambers, Wan and Taylor, JJ., concur.

10 Kelvin Goode, Appellant, v Bespoke Motor Group, LLC, et al., Respondents, et al., Defendants. [— NYS3d —]

Judgments—Default Judgment—Breach of Contract—No Reasonable Excuse for Default in Answering Complaint

In an action, inter alia, to recover damages for breach of contract, the plaintiff appeals from an order of the Supreme Court, Nassau County (Philippe Solages, Jr., J.), entered April 16, 2024. The order, insofar as appealed from, denied the plaintiff's motion pursuant to CPLR 3215 for leave to enter a default judgment against the defendants Bespoke Motor Group, LLC, and Bentley Long Island, LLC.

Ordered that the order is reversed insofar as appealed from, on the law, with costs, and the plaintiff's motion pursuant to CPLR 3215 for leave to enter a default judgment against the defendants Bespoke Motor Group, LLC, and Bentley Long Island, LLC, is granted.

In July 2023, the plaintiff commenced this action, inter alia, to recover damages for breach of contract by filing a summons with notice against the defendants Bespoke Motor Group, LLC, and Bentley Long Island, LLC (hereinafter together the defendants), among others. According to the affidavits of service,

the defendants were served by delivery of copies of the summons with notice to an individual who was identified as a “service consultant,” who was authorized to receive service on behalf of the defendants. The defendants filed a notice of appearance and demand for a copy of the complaint on July 17, 2023. The plaintiff electronically filed the complaint on August 7, 2023. The defendants failed to timely answer the complaint. In September 2023, the plaintiff moved pursuant to CPLR 3215 for leave to enter a default judgment against the defendants. The defendants opposed the motion.

In an order entered April 16, 2024, the Supreme Court, *inter alia*, denied the plaintiff’s motion pursuant to CPLR 3215 for leave to enter a default judgment against the defendants. The plaintiff appeals.

“On a motion for leave to enter judgment against a defendant for the failure to answer or appear, a plaintiff must submit proof of service of the summons and complaint, proof of the facts constituting its claim, and proof of the defendant’s default’ ” (*Gray v Doyle*, 170 AD3d 969, 970 [2019], quoting *Triangle Props. #2, LLC v Narang*, 73 AD3d 1030, 1032 [2010]; see CPLR 3215; *Bachvarov v Khaimov*, 224 AD3d 724, 725 [2024]). “Service of process on a limited liability company may be made on, among others, ‘any . . . agent authorized by appointment to receive process, or . . . any other person designated by the limited liability company to receive process’ ” (*Nurse v Marion 502, LLC*, 241 AD3d 1352, 1353 [2025], quoting CPLR 311-a [a] [iii], [iv]). “In order to successfully oppose a motion for leave to enter a default judgment, a defendant who ha[d] failed to timely appear or answer the complaint must provide a reasonable excuse for the default and demonstrate the existence of a potentially meritorious defense to the action” (*Bachvarov v Khaimov*, 224 AD3d at 725 [internal quotation marks omitted]; see *Rosenzweig v Gubner*, 194 AD3d 1086, 1089 [2021]; *L & Z Masonry Corp. v Mose*, 167 AD3d 728, 729 [2018]).

Here, the plaintiff established his entitlement to a default judgment against the defendants (see *Bachvarov v Khaimov*, 224 AD3d at 725; *Rosenzweig v Gubner*, 194 AD3d at 1089). The plaintiff submitted proof of service of the summons and complaint (see CPLR 311-a; *Nurse v Marion 502, LLC*, 241 AD3d at 1353), as well as proof of the defendants’ default in answering. Moreover, the defendants correctly concede that the verified complaint contained a potentially meritorious claim (see *Rosenzweig v Gubner*, 194 AD3d at 1088-1089; *Triangle Props. #2, LLC v Narang*, 73 AD3d at 1032). In opposition, the

defendants failed to demonstrate a reasonable excuse for their default in answering the complaint (*see Pantanilla v Yuson*, 237 AD3d 1213, 1215 [2025]; *Rosenzweig v Gubner*, 194 AD3d at 1089). The defendants' contention that their default should be excused due to law office failure is improperly raised for the first time on appeal (*see Pantanilla v Yuson*, 237 AD3d at 1215). In light of the defendants' failure to establish a reasonable excuse for their default, it is unnecessary to determine whether they demonstrated a potentially meritorious defense (*see Rivas v Palacios*, 238 AD3d 1186, 1187 [2025]; *Pantanilla v Yuson*, 237 AD3d at 1215).

Accordingly, the Supreme Court should have granted the plaintiff's motion pursuant to CPLR 3215 for leave to enter a default judgment against the defendants.

The defendants' remaining contentions are improperly raised for the first time on appeal. Iannacci, J.P., Brathwaite Nelson, Dowling and Golia, JJ., concur.

11 Moh Hosan, Appellant, v Parth N. Patel et al., Respondents. [— NYS3d —]—

Motor Vehicles—Injuries to Bicyclist—Defendant Driver Attempting Left Turn at Intersection—Summary Judgment on Issue of Liability—Comparative Negligence of Bicyclist

In an action to recover damages for personal injuries, the plaintiff appeals from an order of the Supreme Court, Kings County (Robin K. Sheares, J.), dated March 27, 2025. The order denied the plaintiff's motion for summary judgment on the issue of liability and pursuant to CPLR 3211 (b) to dismiss the defendants' affirmative defense alleging comparative negligence.

Ordered that the order is modified, on the law, by deleting the provision thereof denying that branch of the plaintiff's motion which was for summary judgment on the issue of liability, and substituting therefor a provision granting that branch of the motion; so as modified, the order is affirmed, without costs or disbursements.

The plaintiff commenced this action to recover damages for personal injuries he allegedly sustained when an electric bicycle he was riding collided with a vehicle operated by the defendant Parth N. Patel (hereinafter the defendant driver) and owned by the defendant Admiral Plumbing Co. at or near the intersection of Evergreen Avenue and Halsey Avenue in Brooklyn. The plaintiff and the defendant driver were traveling in the same direction on Evergreen Avenue, with the plaintiff in a bicycle lane to the left of the defendants' vehicle,

when the plaintiff's electric bicycle collided with the defendants' vehicle as the defendant driver was attempting to turn left at the intersection. The plaintiff moved for summary judgment on the issue of liability and pursuant to CPLR 3211 (b) to dismiss the defendants' affirmative defense alleging comparative negligence. In an order dated March 27, 2025, the Supreme Court denied the motion. The plaintiff appeals.

"A plaintiff in a negligence action moving for summary judgment on the issue of liability must establish, *prima facie*, that the defendant breached a duty owed to the plaintiff and that the defendant's negligence was a proximate cause of the alleged injuries" (*Tsyganash v Auto Mall Fleet Mgt., Inc.*, 163 AD3d 1033, 1033-1034 [2018]; *see Moustakas v Giardina*, 241 AD3d 912, 913 [2025]). "To be entitled to partial summary judgment a plaintiff does not bear the . . . burden of establishing . . . the absence of his or her own comparative fault" (*Rodriguez v City of New York*, 31 NY3d 312, 324-325 [2018]).

"A violation of the Vehicle and Traffic Law constitutes negligence as a matter of law" (*Jaipaulsingh v Umana*, 208 AD3d 765, 766 [2022]). "In general, a motorist is required to keep a reasonably vigilant lookout for bicyclists, to sound the vehicle's horn when a reasonably prudent person would do so in order to warn a bicyclist of danger, and to operate the vehicle with reasonable care to avoid colliding with anyone on the road" (*Palma v Sherman*, 55 AD3d 891, 891 [2008]; *see Vehicle and Traffic Law* § 1146 [a]). A vehicle with the right-of-way is entitled to anticipate that others will obey the traffic laws (*see Thoresz v Vallone*, 70 AD3d 1031, 1031-1032 [2010]). A driver has a "common-law duty to see that which he [or she] should have seen through the proper use of his [or her] senses" (*Lieb v Jacobson*, 202 AD3d 1072, 1073 [2022]).

Here, the plaintiff established his *prima facie* entitlement to judgment as a matter of law on the issue of liability. In support of his motion, the plaintiff submitted, *inter alia*, transcripts of the deposition testimony of the plaintiff and the defendant driver. While there were some discrepancies between the plaintiff's account of the accident and the defendant driver's account of the accident, even under the defendant driver's account of the accident, the defendant driver was negligent in attempting to make a left turn when the turn could not be made with reasonable safety (*see Vehicle and Traffic Law* § 1146 [a]; *Kruter v United Parcel Serv. Gen. Servs. Co.*, 210 AD3d 671, 672 [2022]; *Jaipaulsingh v Umana*, 208 AD3d at 766; *Jung v Glover*, 169 AD3d 782, 783 [2019]). In opposition, the defendants failed to raise a triable issue of fact. Accordingly, the

Supreme Court should have granted that branch of the plaintiff's motion which was for summary judgment on the issue of liability.

However, the Supreme Court properly denied that branch of the plaintiff's motion which was pursuant to CPLR 3211 (b) to dismiss the defendants' affirmative defense alleging comparative negligence. "CPLR 3211 (b) authorizes a plaintiff to move, at any time, to dismiss a defendant's affirmative defense on the ground that it has no merit" (*Muniz v SPO Rest., LLC*, 227 AD3d 1002, 1004 [2024] [internal quotation marks omitted]). "Thus, when moving to dismiss or strike an affirmative defense, the plaintiff bears the burden of demonstrating that the affirmative defense is 'without merit as a matter of law'" (*Greco v Christoffersen*, 70 AD3d 769, 771 [2010], quoting *Vita v New York Waste Servs., LLC*, 34 AD3d 559, 559 [2006]; see *Muniz v SPO Rest., LLC*, 227 AD3d at 1004). Here, the plaintiff failed to establish that the defendants' affirmative defense alleging comparative negligence was without merit as a matter of law (see *Bornsztejn v Zito*, 221 AD3d 770, 772 [2023]; *Kirby v Davis*, 208 AD3d 1171, 1173 [2022]). Connolly, J.P., Brathwaite Nelson, Warhit and Ventura, JJ., concur.

12 Leon Anthony Kirby, Appellant, v Nalston P. Philbert et al., Respondents. [— NYS3d —]

Disclosure—Penalty for Failure to Disclose—No Clear Showing That Defendants' Failure to Comply with Court-Ordered Discovery was Willful and Contumacious

In an action to recover damages for personal injuries, the plaintiff appeals from an order of the Supreme Court, Kings County (Leon Ruchelsman, J.), dated March 20, 2024. The order, insofar as appealed from, denied the plaintiff's motion pursuant to CPLR 3124 and 3126 to strike the defendants' answer for failure to produce court-ordered discovery or, in the alternative, to preclude the defendants from supporting claims on defenses or to direct all liability issues resolved in favor of the plaintiff.

Ordered that the order is affirmed insofar as appealed from, without costs or disbursements.

The plaintiff commenced this action to recover damages for personal injuries. In a compliance conference order dated May 15, 2023, the defendants were directed to respond to the plaintiff's post-deposition demand for certain disclosure by June 24, 2023. By notice of motion dated October 19, 2013, the plaintiff moved pursuant to CPLR 3124 and 3126 to strike the defendants' answer for failure to produce the material de-

manded or, in the alternative, to preclude the defendants from supporting claims on defenses or to direct all liability issues resolved in favor of the plaintiff. In an order dated March 20, 2024, the Supreme Court denied the plaintiff's motion but directed the defendants to produce the material demanded on or before June 5, 2024. The plaintiff appeals.

“The Supreme Court has broad discretion in making determinations concerning matters of disclosure, including the nature and degree of the penalty to be imposed under CPLR 3126’ ” (*Perez v Tedesco*, 214 AD3d 1010, 1011-1012 [2023], quoting *Sepulveda v 101 Woodruff Ave. Owner, LLC*, 166 AD3d 835, 836 [2018]). “Although public policy strongly favors that actions be resolved on the merits when possible, a court may resort to the drastic remedies of striking a pleading or precluding evidence upon a clear showing that a party's failure to comply with a disclosure order was the result of willful and contumacious conduct. The willful and contumacious character of a party's conduct can be inferred from either the repeated failure to respond to demands or comply with discovery orders, without demonstrating a reasonable excuse for these failures, or the failure to comply with court-ordered discovery over an extended period of time” (*Taglianetti v Bay Ridge Med. Imaging, P.C.*, 229 AD3d 477, 478-479 [2024] [citations and internal quotation marks omitted]).

Here, there was no clear showing that the defendants' failure to comply with court-ordered discovery was willful and contumacious. Accordingly, the Supreme Court providently exercised its discretion in denying the plaintiff's motion, while extending the deadline for the defendants to produce the discovery demanded (*see Javeed v 3619 Realty Corp.*, 129 AD3d 1029, 1033 [2015]; *Iscowitz v County of Suffolk*, 54 AD3d 725 [2008]; *Jenkins v City of New York*, 13 AD3d 342, 342-343 [2004]). LaSalle, P.J., Connolly, Ventura and Goldberg Velazquez, JJ., concur.

13 LaSalle Bank, N.A., Respondent, v John Evelyn, Appellant, et al., Defendants. [252 NYS3d 760]—

Appeal—Dismissal—Right of Direct Appeal Terminated with Entry of Order and Judgment of Foreclosure and Sale

In an action to foreclose a mortgage, the defendant John Evelyn appeals from (1) an order of the Supreme Court, Kings County (Lawrence Knipel, J.), dated October 28, 2022, and (2) an order of the same court dated November 4, 2022. The order dated October 28, 2022, insofar as appealed from, in effect, denied that defendant's cross-motion pursuant to CPLR 3215

(c) to dismiss the amended complaint insofar as asserted against him as abandoned. The order dated November 4, 2022, granted that branch of the plaintiff's motion which was pursuant to CPLR 1003 to "drop" the defendant John Evelyn as a named defendant and to amend the caption accordingly.

Motion by the plaintiff, inter alia, to dismiss the appeals from the orders on the ground that the right of direct appeal therefrom terminated with the entry of an order and judgment of foreclosure and sale in the action. By decision and order on motion dated October 7, 2024, that branch of the motion was held in abeyance and referred to the panel of Justices hearing the appeals for determination upon the argument or submission thereof.

Upon the papers filed in support of the motion and no papers having been filed in opposition or in relation thereto, and upon the argument of the appeals, it is

Ordered that the branch of the motion which is to dismiss the appeals from the orders on the ground that the right of direct appeal therefrom terminated with the entry of the order and judgment of foreclosure and sale is granted; and it is further,

Ordered that the appeals are dismissed, without costs or disbursements.

The appeals from the orders must be dismissed because the right of direct appeal therefrom terminated with the entry of the order and judgment of foreclosure and sale in the action (*see Matter of Aho*, 39 NY2d 241 [1976]). The issues raised on the appeals from the orders that are brought up for review on the appeal from the order and judgment of foreclosure and sale have been considered on the appeal from the order and judgment of foreclosure and sale (*see* CPLR 5501 [a] [1]; *U.S. Bank, N.A. v New York City Tr. Adjudication Bur.*, 248 AD3d —, 2026 NY Slip Op 02432 [2026] [decided herewith]). Connolly, J.P., Brathwaite Nelson, Warhit and Ventura, JJ., concur.

14 Toni Ann Magadino, Appellant, v Christopher McCabe et al., Respondents, et al., Defendants. [— NYS3d —]—

Motor Vehicles—Collision—Rear-End Collision—Defendant Not at Fault in Happening of Chain Collision Accident

In an action to recover damages for personal injuries, the plaintiff appeals from an order of the Supreme Court, Suffolk County (William J. Condon, J.), dated February 1, 2022. The order, insofar as appealed from, granted those branches of the separate motions of the defendant Brown's of Bellport, Inc., and the defendant Christopher McCabe which were for sum-

mary judgment dismissing the complaint insofar as asserted against each of them.

Ordered that the order is affirmed insofar as appealed from, with one bill of costs to the defendant Christopher McCabe and the defendant Brown's of Bellport, Inc., payable by the plaintiff.

The plaintiff commenced this action to recover damages for personal injuries she allegedly sustained in a three-vehicle chain collision on the Long Island Expressway (hereinafter the LIE). The accident occurred in a portion of the LIE consisting of three westbound travel lanes and a single high occupancy vehicle lane (hereinafter the HOV lane) to the left of the three travel lanes. The plaintiff was operating her vehicle in the left-most non-HOV lane when the vehicle in front of her, operated by the defendant Christopher McCabe and owned by the defendant Brown's of Bellport, Inc. (hereinafter Brown's), swerved into the HOV lane. The plaintiff was unable to slow her vehicle and struck a stopped truck and trailer operated by the defendant Francisco X. Silva-Morales and owned by the defendant Peter Auto Sales & Service in the rear, propelling that vehicle into a vehicle owned and operated by the defendant Robert Seeger. Thereafter, Brown's and McCabe separately moved, among other things, for summary judgment dismissing the complaint insofar as asserted against each of them. In an order dated February 1, 2022, the Supreme Court, *inter alia*, granted those branches of the separate motions. The plaintiff appeals.

"A defendant moving for summary judgment in a negligence action has the burden of establishing, *prima facie*, that he or she was not at fault in the happening of the subject accident" (*Boulos v Lerner-Harrington*, 124 AD3d 709, 709 [2015]; *see Beltre v Menegos*, 231 AD3d 1106, 1107 [2024]). "Evidence of negligence is not enough by itself to establish liability. It must also be proved that the negligence was the cause of the event which produced the harm sustained by one who brings the complaint" (*Kouzine v Strutsinskiy*, 241 AD3d 810, 811 [2025], quoting *Sheehan v City of New York*, 40 NY2d 496, 501 [1976]). Thus, "liability may not be imposed upon a party who 'merely furnished the condition or occasion for the occurrence of the event,' but was not one of its causes" (*id.* [internal quotation marks omitted], quoting *Sheehan v City of New York*, 40 NY2d at 503). "A driver of a vehicle approaching another vehicle from the rear is required to maintain a reasonably safe distance and rate of speed under the prevailing conditions to avoid colliding with the other vehicle" (*Ordonez v Lee*, 177 AD3d 756, 757 [2019] [internal quotation marks omitted]; *see Vehicle and Traffic Law* § 1129 [a]). As such, "[a] rear-end collision with a

stopped or stopping vehicle establishes a prima facie case of negligence on the part of the operator of the rear vehicle, thereby requiring that operator to rebut the inference of negligence by providing a nonnegligent explanation for the collision” (*Fischetti v Simonovsky*, 227 AD3d 670, 671 [2024] [internal quotation marks omitted]).

Here, Brown’s and McCabe each established, prima facie, that McCabe avoided being struck in the rear by the plaintiff’s vehicle by accelerating left into the HOV lane and that the plaintiff was negligent in the operation of her vehicle by striking the vehicle operated by Silva-Morales, which had been fully stopped for 30 seconds, in the rear. Any purported negligence by McCabe in swerving to avoid an accident was not the proximate cause of the accident but merely furnished the condition or occasion for it (see *Kouzine v Strutsinskiy*, 241 AD3d 810 [2025]; *Lancer Ins. Co. v Cortes*, 208 AD3d 1176 [2022]). Under these circumstances, Brown’s and McCabe each established, prima facie, that McCabe was not at fault in the happening of the accident (see *Beltre v Menegos*, 231 AD3d at 1108; *McPhaul-Guerrier v Leppla*, 201 AD3d 920, 921-922 [2022]; *Daniel v Ian-Michael*, 188 AD3d 1155, 1156 [2020]). In opposition, the plaintiff failed to raise a triable issue of fact as to McCabe’s negligence in the happening of the accident (see *Daniel v Ian-Michael*, 188 AD3d at 1156; *Arellano v Richards*, 162 AD3d 967, 967-968 [2018]).

Inasmuch as McCabe established that he is not liable to the plaintiff, Brown’s cannot be held liable under any theory of vicarious liability (see *Hannen v Nici*, 230 AD3d 1118, 1120 [2024]).

Accordingly, the Supreme Court properly granted those branches of the separate motions of Brown’s and McCabe which were for summary judgment dismissing the complaint insofar as asserted against each of them. Barros, J.P., Wooten, Love and Quirk, JJ., concur.

15 Daysi Selena Moscoso, Appellant, v Upward Mobility Limousine, Inc., et al., Respondents. [— NYS3d —]

Motor Vehicles—Injuries to Pedestrians—Plaintiff Struck while Walking Toward Rear Driver’s Side Door of Her Vehicle—Triable Issues of Fact as to Whether Defendant Driver Could Have Seen Her and Taken Evasive Action and Whether She was at Fault in Happening of Accident

In an action to recover damages for personal injuries, the plaintiff appeals from an order of the Supreme Court, Queens County (Ulysses B. Leverett, J.), dated May 15, 2024. The order denied the plaintiff’s motion for summary judgment on the issue of liability and dismissing the defendants’ affirmative defenses alleging comparative negligence.

Ordered that the order is affirmed, with costs.

The plaintiff commenced this action to recover damages for personal injuries she allegedly sustained when the defendants' vehicle struck her as she walked toward the rear driver's side door of her vehicle. In December 2023, the plaintiff moved for summary judgment on the issue of liability and dismissing the defendants' affirmative defenses alleging comparative negligence, contending that the defendant Barry W. LeCount (hereinafter the defendant driver) was solely at fault in the happening of the accident. The defendants opposed the motion. In an order dated May 15, 2024, the Supreme Court denied the plaintiff's motion. The plaintiff appeals.

“A plaintiff in a negligence action moving for summary judgment on the issue of liability must establish, prima facie, that the defendant breached a duty owed to the plaintiff and that the defendant's negligence was a proximate cause of the alleged injuries” (*Yentel v Lauer*, 239 AD3d 1027, 1027 [2025], quoting *Tsyganash v Auto Mall Fleet Mgt., Inc.*, 163 AD3d 1033, 1033-1034 [2018]; see *Rodriguez v City of New York*, 31 NY3d 312, 324-325 [2018]). “A plaintiff is no longer required to show freedom from comparative fault in establishing his or her prima facie case” (*Tsyganash v Auto Mall Fleet Mgt., Inc.*, 163 AD3d at 1034; see *Rodriguez v City of New York*, 31 NY3d at 324-325). “Nonetheless, the issue of a plaintiff's comparative negligence may be decided in the context of a motion for summary judgment where, as here, the plaintiff moves for summary judgment dismissing an affirmative defense alleging comparative negligence” (*Yentel v Lauer*, 239 AD3d at 1027-1028; see *Farooq v Uber USA, LLC*, 235 AD3d 846, 846-847 [2025]).

Here, the plaintiff failed to meet her prima facie burden, as she failed to eliminate all triable issues of fact as to whether the defendant driver could have seen her prior to the accident and taken evasive action and whether she was at fault in the happening of the accident (see *Uhteg v Kendra*, 200 AD3d 1695, 1698-1699 [2021]; *Fitch v Lee*, 200 AD3d 651, 652 [2021]; *Garrido v Puente*, 114 AD3d 722, 723 [2014]). In support of her motion, the plaintiff submitted, inter alia, a transcript of her deposition testimony. The plaintiff testified that she stepped into the street from behind her vehicle, which was parked in the middle of a long block, that “[a]s soon as like [she] walked out . . . [she] was about to open the door and the car hit [her],” and that she did not see the defendants' vehicle prior to the impact. The plaintiff failed to provide any details as to how long she was at the rear driver's side door of her vehicle or as

to how long it took her to reach the rear driver's side door of her vehicle. Nor did she offer any testimony describing the conditions of the subject roadway and the manner in which her vehicle was parked at the time of the accident. Since the plaintiff failed to meet her prima facie burden, we need not consider the sufficiency of the defendants' opposition papers (*see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]).

Accordingly, the Supreme Court properly denied the plaintiff's motion for summary judgment on the issue of liability and dismissing the defendants' affirmative defenses alleging comparative negligence.

In light of the foregoing, the parties' remaining contentions need not be reached. Genovesi, J.P., Christopher, Wan and Golia, JJ., concur.

16 In the Matter of Thomas B., Appellant. Kimberly Resnick, Respondent. [— NYS3d —]

Incapacitated and Intellectually or Developmentally Disabled Persons—Involuntary Administration of Drug—Lack of Capacity to Make Reasoned Decision with Respect to Treatment

In a proceeding for permission to administer a course of medication to a patient without his consent, Thomas B. appeals from an order of the Supreme Court, Orange County (Timothy P. McElduff, J.), dated October 5, 2023. The order, after a hearing, granted the petition.

Ordered that the order is affirmed, without costs or disbursements.

On August 3, 2023, the petitioner commenced this proceeding for authorization to administer psychotropic medication to Thomas B., an involuntarily committed patient at a secure psychiatric facility, against his will. Thomas B. denies that he suffers from a mental illness. Following a hearing, the Supreme Court issued an order authorizing the petitioner to administer the proposed course of medication over Thomas B.'s objection. Thomas B. appeals.

The State may administer a course of medical treatment against a patient's will if it establishes, by clear and convincing evidence, that the patient lacks the capacity to make a reasoned decision with respect to proposed treatment (*see Rivers v Katz*, 67 NY2d 485, 497 [1986]), and that "the proposed treatment is narrowly tailored to give substantive effect to the patient's liberty interest, taking into consideration all relevant circumstances, including the patient's best interests, the benefits to be gained from the treatment, the adverse side ef-

fects associated with the treatment and any less intrusive alternative treatments” (*id.* at 497-498; *see Matter of Tyrone M.*, 186 AD3d 604, 605 [2020]). Whether a mentally ill patient has the capacity to make a reasoned decision with respect to treatment is a question of fact for the hearing court, the credibility findings of which are entitled to due deference (*see Matter of Marvin P. [Mid-Hudson Forensic Psychiatric Ctr.]*, 222 AD3d 758, 759 [2023]; *Matter of Tyrone M.*, 186 AD3d at 605).

Here, the petitioner demonstrated by clear and convincing evidence that Thomas B. lacks the capacity to make a reasoned decision with respect to the proposed treatment (*see Matter of Tyrone M.*, 186 AD3d at 605-606; *Matter of Paris M. v Creedmoor Psychiatric Ctr.*, 30 AD3d 425, 425-426 [2006]). In particular, Thomas B.’s treating psychiatrist testified that Thomas B. was “seriously, dangerously mentally ill.” Thomas B. was diagnosed with schizophrenia and schizoaffective disorder, with symptoms of delusions, hallucinations, and impulsive and assaultive behaviors. His symptoms include violent behavior as a result of psychotic symptoms. Thomas B. did not testify at the hearing or present other evidence.

Further, the petitioner established by clear and convincing evidence that the proposed course of treatment is narrowly tailored to preserve Thomas B.’s liberty interest (*see Matter of Marvin P. [Mid-Hudson Forensic Psychiatric Ctr.]*, 222 AD3d at 759).

Thomas B.’s remaining contention is unpreserved for appellate review. Barros, J.P., Chambers, Christopher and McCormack, JJ., concur.

17 In the Matter of Breck Branch, Appellant, v Damion Lee, Respondent. [— NYS3d —]

Parent, Child and Family—Custody—Modification—Mother’s Relocation with Child to Michigan—Impact on Quantity and Quality of Child’s Contact with Father

In related proceedings pursuant to Family Court Act article 6, the mother appeals from an order of the Family Court, Kings County (Nisha Menon, J.), dated January 30, 2025. The order, insofar as appealed from, after a hearing, denied the mother’s petition to modify an order of the same court dated May 14, 2018, so as to permit her to relocate with the subject child to Michigan.

Ordered that the order dated January 30, 2025, is affirmed insofar as appealed from, with costs to the respondent.

The parties, who were never married, have one child together, born in 2016. Pursuant to an order dated May 14,

2018 (hereinafter the 2018 order), upon a so-ordered parenting agreement of the same date, the parties were awarded joint legal custody of the child and the mother was awarded physical custody of the child, subject to the father's parental access with the child. At the time, the mother was residing in New Jersey and the father was residing in Brooklyn.

In July 2021, the mother married her current husband, who resides in Michigan. In January 2023, the mother filed a petition to modify the 2018 order so as to permit her to relocate with the child from New Jersey to Michigan. In an order dated January 30, 2025, after a hearing, the Family Court, *inter alia*, denied the mother's petition. The mother appeals.

A parent seeking to relocate with a child bears the burden of establishing by a preponderance of the evidence that the proposed move would be in the child's best interests (*see Matter of Scotto v Alexander*, 231 AD3d 1157, 1157-1158 [2024]; *Quinn v Quinn*, 134 AD3d 688, 689 [2015]). "In determining whether relocation is appropriate, the court must consider a number of factors including 'each parent's reasons for seeking or opposing the move, the quality of the relationships between the child and the custodial and noncustodial parents, the impact of the move on the quantity and quality of the child's future contact with the noncustodial parent, the degree to which the custodial parent's and child's life may be enhanced economically, emotionally and educationally by the move, and the feasibility of preserving the relationship between the noncustodial parent and child through suitable visitation arrangements'" (*Matter of Banks v DeLeon*, 174 AD3d 598, 599 [2019], quoting *Matter of Tropea v Tropea*, 87 NY2d 727, 740-741 [1996]; *see Matter of Scotto v Alexander*, 231 AD3d at 1158). "In assessing these factors, no single factor should be treated as dispositive or given such disproportionate weight as to predetermine the outcome, but the impact of the move on the relationship between the child and the noncustodial parent will remain a central concern" (*Matter of Fortune v Jasmin*, 232 AD3d 601, 603 [2024] [internal quotation marks omitted]; *Matter of Barker v Rohack*, 173 AD3d 1173, 1174 [2019] [internal quotation marks omitted]).

Here, contrary to the mother's contention, the Family Court's determination that the child's best interests would not be served by relocating with the mother to Michigan is supported by a sound and substantial basis in the record (*see Matter of Bailey v Ayoub*, 203 AD3d 1043, 1044 [2022]; *Matter of Wells v Dellago*, 195 AD3d 625, 626 [2021]). The mother failed to establish that the relocation to Michigan would enhance the

child's life economically or educationally (*see Matter of Reyes v Gill*, 155 AD3d 1044, 1045 [2017]). The mother also failed to establish that the move would not have a negative impact on the quantity and quality of the child's contact with the father (*see Matter of Bailey v Ayoub*, 203 AD3d at 1044; *Matter of Barker v Rohack*, 173 AD3d at 1175).

Accordingly, the Family Court properly denied the mother's petition to modify the 2018 order so as to permit her to relocate with the child from New Jersey to Michigan. Dillon, J.P., Wooten, Ventura and Ottley, JJ., concur.

18 In the Matter of Gabriel G., Appellant. [— NYS3d —]—

Infants—Juvenile Delinquents—Five-Month Delay between Commission of Underlying Offense and Arrest Not Denial of Due Process Right to Speedy Trial

In a juvenile delinquency proceeding pursuant to Family Court Act article 3, Gabriel G. appeals from an order of disposition of the Family Court, Kings County (Alan Beckoff, J.), dated August 13, 2024. The order of disposition, upon an order of fact-finding of the Supreme Court, Kings County (Craig S. Walker, J.), dated June 28, 2024, made upon the admission of Gabriel G., finding that he committed an act which, if committed by an adult, would have constituted the crime of robbery in the third degree, after a dispositional hearing, adjudicated him a juvenile delinquent and conditionally discharged him for a period of 12 months. The appeal brings up for review the denial of Gabriel G.'s motion to dismiss the indictment on the grounds that he was denied his constitutional right to due process by an unreasonable delay in prosecution and his statutory right to a speedy trial.

Ordered that the appeal from so much of the order of disposition as conditionally discharged Gabriel G. for a period of 12 months is dismissed as academic, without costs or disbursements; and it is further,

Ordered that the order of disposition is affirmed insofar as reviewed, without costs or disbursements.

The appeal from so much of the order of disposition as conditionally discharged Gabriel G. for a period of 12 months must be dismissed as academic, as the period of conditional discharge has expired (*see Matter of Adonis J.W.*, 238 AD3d 775, 776 [2025]; *Matter of Marlon C.*, 139 AD3d 941, 941 [2016]). However, because there may be collateral consequences resulting from the adjudication of delinquency, that portion of the appeal which brings up for review the denial of Gabriel G.'s motion to dismiss the indictment on the grounds that he was

denied his constitutional right to due process by an unreasonable delay in prosecution and his statutory right to a speedy trial is not academic (*see Matter of Adonis J.W.*, 238 AD3d at 776; *see Matter of Marlon C.*, 139 AD3d at 941).

This matter arises from Gabriel G.'s theft of a cell phone on September 16, 2022, when he was 14 years old. Three days after the theft, on September 19, 2022, the victim identified Gabriel G. in a photo array. Gabriel G. was arrested five months later, on February 18, 2023. On February 20, 2023, Gabriel G. was arraigned in the Supreme Court on crimes arising out of the theft and was thereafter indicted on charges of robbery in the second degree, robbery in the third degree, and assault in the third degree, among others. On July 26, 2023, the People served and filed a certificate of compliance with discovery, announcing readiness for trial (hereinafter the initial COC). On September 1, 2023, the People filed a supplemental certificate of compliance indicating that they had additionally disclosed previously undisclosed photographs and again announcing readiness for trial (hereinafter the supplemental COC).

By notice of motion dated October 24, 2023, Gabriel G. moved in the Supreme Court to dismiss the indictment on the grounds that he was denied his constitutional right to due process by the five-month delay between his commission of the underlying offense on September 16, 2022, and his arrest on February 18, 2023, and his statutory right to a speedy trial. In an order dated February 21, 2024, the Supreme Court denied Gabriel G.'s motion. Subsequently, Gabriel G. made an admission to robbery in the third degree (Penal Law § 160.05), and the matter was removed to the Family Court for disposition. In an order of disposition dated August 13, 2024, the Family Court adjudicated Gabriel G. a juvenile delinquent and conditionally discharged him for a period of 12 months. Gabriel G. appeals.

“By statute and constitutional law, New York guarantees criminal defendants the right to a speedy trial and prompt prosecution” (*People v Grant*, — AD3d —, —, 2026 NY Slip Op 00910, *3 [2026], quoting *People v Regan*, 39 NY3d 459, 464 [2023]; *see* NY Const, art I, § 6; CPL 30.20, 30.30). “This right necessarily prohibits unreasonable pre-indictment delay” (*People v Tyson*, — NY3d —, —, 2026 NY Slip Op 01446, *1 [2026]). “[A] deprivation of the defendant’s right to a prompt prosecution may require dismissal of an indictment ‘even though, in the interim, [the] defendant was not formally accused, restrained or incarcerated for the offense’” (*People v Grant*, — AD3d at —, 2026 NY Slip Op 00910, *3 [internal

quotation marks omitted], quoting *People v Regan*, 39 NY3d at 464-465). “The due process right to a speedy trial extends to respondents in juvenile delinquency proceedings” (*Matter of Adonis J.W.*, 238 AD3d at 776, quoting *Matter of Isaiah L.*, 169 AD3d 907, 908 [2019]; see *Matter of Benjamin L.*, 92 NY2d 660, 667 [1999]). Due process claims predicated on a pre-indictment delay in both criminal and juvenile delinquency proceedings are analyzed by weighing the five factors set forth in *People v Taranovich*: “(1) the extent of the delay; (2) the reason for the delay; (3) the nature of the underlying charge; (4) whether or not there has been an extended period of pretrial incarceration; and (5) whether or not there is any indication that the defense has been impaired by reason of the delay” (*People v Tyson*, — NY3d at —, 2026 NY Slip Op 01446, *1 [2026], quoting *People v Taranovich*, 37 NY2d 442, 445 [1975]; see *Matter of Benjamin L.*, 92 NY2d at 668-669). “When applying this balancing test [to juvenile proceedings], ‘courts must remain acutely cognizant of the goals, character and unique nature of juvenile proceedings’” (*Matter of Isaiah L.*, 169 AD3d at 908, quoting *Matter of Benjamin L.*, 92 NY2d at 668; see *Matter of Adonis J.W.*, 238 AD3d at 777).

Here, weighing the relevant factors, Gabriel G. was not denied due process by the five-month delay between his commission of the underlying offense on September 16, 2022, and his arrest on February 18, 2023 (see *People v Jones*, 187 AD3d 934 [2020]; *Matter of Dayshawn S.*, 122 AD3d 748 [2014]; *People v Chance*, 105 AD3d 758 [2013]; see also *Matter of Daquan W.*, 233 AD3d 526 [2024]; cf. *Matter of Adonis J.W.*, 238 AD3d at 776; *Matter of Isaiah L.*, 169 AD3d at 907).

CPL 30.30 (1) (a) requires the People to be ready for trial within six months of the commencement of a criminal action in felony cases (see *People v Gonzalez*, 244 AD3d 1229, 1229 [2025]). Here, contrary to Gabriel G.’s contention, the initial COC was valid. The record demonstrates that the People exercised due diligence and made reasonable inquiries prior to filing the initial COC despite the belated or missing disclosures, as extensive documents and disclosures were provided to Gabriel G. with the initial COC, and the additional disclosures accompanying the supplemental COC were minimal and made in good faith and were voluntarily provided to Gabriel G. once the People were made aware that certain materials had not been previously disclosed (see *id.* at 1230; *People v Macaluso*, 230 AD3d 1158, 1160 [2024]). Furthermore, contrary to Gabriel G.’s contention, the period of time between the filing of the subject motion on October 24, 2023, and the Supreme Court’s

order on February 21, 2024, is properly excludable for statutory speedy trial purposes (*see* CPL 30.30 [4] [a]; *People v Sheard*, 236 AD3d 826, 827 [2025]).

Accordingly, Gabriel G.'s motion to dismiss the indictment on the grounds that he was denied his constitutional right to due process by the five-month delay between his commission of the underlying offense on September 16, 2022, and his arrest on February 18, 2023, and his statutory right to a speedy trial was properly denied.

Gabriel G.'s remaining contention is without merit. Dillon, J.P., Dowling, Landicino and McCormack, JJ., concur.

19 In the Matter of Yael Glantz, Respondent, v Marc Kadoch, Appellant. [— NYS3d —]

Parent, Child and Family—Custody—Erroneous Final Custody Determination without Hearing—Failure to Make Specific Findings of Fact Regarding Best Interests of Child or to Clearly Articulate Factors Material to Court's Determination

In a proceeding pursuant to Family Court Act article 6, the father appeals from an order of the Supreme Court, Kings County (IDV Part) (Esther M. Morgenstern, J.), dated August 8, 2022. The order, without a hearing, granted the mother's petition for sole legal and physical custody of the parties' child and directed the father to pay temporary child support arrears.

Ordered that the order is reversed, on the law, without costs or disbursements, and the matter is remitted to the Supreme Court, Kings County, for a hearing and new determination thereafter of the mother's petition for sole legal and physical custody of the parties' child; and it is further,

Ordered that pending the hearing and new determination of the mother's petition for sole legal and physical custody of the parties' child, the custody provision of the order dated August 8, 2022, shall remain in effect.

The parties, who are married but have resided separately since 2014, are the parents of a child, born in 2012. In September 2020, the mother filed a petition for sole legal and physical custody of the child. In an order dated August 8, 2022, the Supreme Court, without a hearing, granted the mother's petition and directed the father to pay \$3,600 in temporary child support arrears. The father appeals.

As an initial matter, there is no merit to the contention of the attorney for the child that the appeal should be dismissed as untimely taken. There is no evidence in the record that the father was served with the order by a party or the attorney for the child, that the father received the order in court, or that

the Supreme Court mailed the order to the father. Accordingly, it cannot be determined on the record before this Court whether the father filed his notice of appeal within the required time period (*see* Family Ct Act § 1113; *Matter of Mark M.L. [Shantia B.]*, 210 AD3d 1093, 1094 [2022]; *Matter of Batts v Muhammad*, 198 AD3d 750, 751 [2021]).

“Custody determinations should ‘[g]enerally be made only after a full and plenary hearing and inquiry’” (*Matter of Guy v Weichel*, 173 AD3d 1028, 1030 [2019], quoting *S.L. v J.R.*, 27 NY3d 558, 563 [2016]). “This general rule furthers the substantial interest, shared by the State, the children, and the parents, in ensuring that custody proceedings generate a just and enduring result that, above all else, serves the best interest of a child” (*S.L. v J.R.*, 27 NY3d at 563; *see Matter of Horoshko v Pasieshvili*, 238 AD3d 1038, 1039 [2025]; *Matter of Baez-Delgadillo v Moya*, 215 AD3d 829, 830 [2023]). “While the general right to a hearing in custody and visitation cases is not absolute, where ‘facts material to the best interest analysis, and the circumstances surrounding such facts, remain in dispute,’ a hearing is required” (*Palazzola v Palazzola*, 188 AD3d 1081, 1082 [2020], quoting *S.L. v J.R.*, 27 NY3d at 564). “‘[A] court opting to forgo a plenary hearing must take care to clearly articulate which factors were—or were not—material to its determination, and the evidence supporting its decision’” (*Matter of Horoshko v Pasieshvili*, 238 AD3d at 1039, quoting *S.L. v J.R.*, 27 NY3d at 564).

Here, the Supreme Court erred in making a final custody determination without a hearing (*see id.*; *Matter of Baez-Delgadillo v Moya*, 215 AD3d at 830). Furthermore, the court failed to make any specific findings of fact regarding the best interests of the child and failed to clearly articulate which factors were material to its determination (*see S.L. v J.R.*, 27 NY3d at 564; *Matter of Akaberi v Cruciani*, 229 AD3d 541, 543 [2024]). Accordingly, the matter must be remitted to the Supreme Court, Kings County, for a hearing and a new determination thereafter of the mother’s petition for sole legal and physical custody of the child.

Under the circumstances presented, the Supreme Court erred in directing the father to pay temporary child support arrears (*see* Family Ct Act § 828 [4]; *Matter of Josefin O. v Francisco P.*, 213 AD3d 1158, 1160 [2023]). Connolly, J.P., Christopher, Warhit and Golia, JJ., concur.

20 In the Matter of Jayceon H. Administration for Children’s Services, Respondent; Aniya M., Appellant. [— NYS3d —]—

Parent, Child and Family—Abused or Neglected Child—Family Court to Determine Mother’s Therapeutic Supervised Parental Access

In a proceeding pursuant to Family Court Act article 10, the mother appeals from (1) an order of fact-finding of the Family Court, Kings County (Linda M. Capitti, J.), dated February 6, 2023, and (2) an order of disposition of the same court dated April 13, 2024. The order of fact-finding granted the petitioner’s motion for summary judgment on the issues of whether the mother abused and neglected the subject child. The order of disposition, insofar as appealed from, upon the order of fact-finding, and after a dispositional hearing, directed the issuance of a final order of protection in favor of the subject child and against the mother directing the mother to stay away from the subject child and granted the petitioner discretion to determine the mother’s therapeutic supervised parental access with the subject child.

Ordered that the appeal from the order of fact-finding is dismissed, without costs or disbursements, as the order of fact-finding was superseded by the order of disposition and is brought up for review on the appeal from the order of disposition; and it is further,

Ordered that the order of disposition is modified, on the law, by deleting the provision thereof granting the petitioner discretion to determine the mother’s therapeutic supervised parental access with the subject child; as so modified, the order of disposition is affirmed insofar as appealed from, without costs or disbursements, and the matter is remitted to the Family Court, Kings County, for a determination of whether the mother shall have therapeutic supervised parental access with the subject child, and, if so, to set forth a schedule for such parental access.

In September 2019, the Administration for Children’s Services (hereinafter ACS) commenced this proceeding pursuant to Family Court Act article 10, alleging that the mother abused and neglected the subject child by shooting the father during a physical altercation in the child’s presence. The mother was arrested and indicted for attempted murder in the second degree, assault in the first degree, and criminal possession of a weapon in the second degree. The mother was convicted, upon her plea of guilty, of each count of the indictment.

Based upon the mother’s convictions, ACS moved for summary judgment on the issues of whether the mother abused and neglected the child. In an order of fact-finding dated February 6, 2023, the Family Court granted the motion.

After a dispositional hearing, in an order of disposition dated

April 13, 2024, the Family Court, inter alia, directed the issuance of a final order of protection in favor of the child and against the mother directing the mother to stay away from the child and granted ACS discretion to determine the mother's therapeutic supervised parental access with the child. The mother appeals.

The Family Court properly granted ACS's motion for summary judgment on the issues of whether the mother abused and neglected the child. ACS met its prima facie burden of demonstrating that the doctrine of collateral estoppel is applicable (see *Matter of Jadeliz M.Q. [Steven Q.]*, 209 AD3d 655, 656-657 [2022]; *Matter of Brittani A. [Soily A.-S.]*, 188 AD3d 876, 877-878 [2020]). "A criminal conviction may be given collateral estoppel effect in a Family Court proceeding where (1) the identical issue has been resolved, and (2) the defendant in the criminal action had a full and fair opportunity to litigate the issue of his or her criminal conduct" (*Matter of Tereza R. [Jose A.]*, 199 AD3d 921, 922 [2021] [internal quotation marks omitted]; see *Matter of Suffolk County Dept. of Social Servs. v James M.*, 83 NY2d 178, 182-183 [1994]). The counts in the indictment to which the mother pleaded guilty were based upon the same acts alleged in this proceeding. In opposition, the mother failed to raise a triable issue of fact as to whether the identical issues had been resolved in the criminal action or whether she had a full and fair opportunity to litigate the issues in the criminal action (see *Zuckerman v City of New York*, 49 NY2d 557, 563 [1980]; *Matter of Tereza R. [Jose A.]*, 199 AD3d at 922).

Eleven years ago, in a proceeding pursuant to Family Court Act article 10, this Court, in *Matter of Victoria P. (Victor P.)* (121 AD3d 1006, 1007 [2014]), held that a determination of the Family Court to limit the father to supervised parental access with the subject children at the discretion of the petitioning agency had a sound and substantial basis in the record. This holding seemingly indicated that a court may delegate its authority to set parental access to an agency in a proceeding pursuant to Family Court Act article 10. However, since that appeal was decided, this Court has made clear, in numerous other appeals, that a court may not delegate its authority in such a way as to permit a determination of parental access to be made by either a therapist, a parent, or by the subject children (see *Matter of Leva v Sokol*, 240 AD3d 496, 498 [2025]; *Matter of Lopez v Neira*, 237 AD3d 1097, 1099-1100 [2025]; *Matter of Cornielle v Rosado*, 231 AD3d 824, 827 [2024]; *Matter of Clezidor v Lexune*, 192 AD3d 792, 794 [2021]; *Matter of*

Acosta v Melendez, 179 AD3d 912, 914 [2020]; *Matter of Mondschein v Mondschein*, 175 AD3d 686, 687-688 [2019]). Considering the foregoing, and that “[t]he determination of visitation is entrusted to the court based upon the best interests of the children” (*Matter of Juliane M.*, 23 AD3d 473, 473 [2005]), to the extent that *Matter of Victoria P. (Victor P.)*, stands for the proposition that a court in a proceeding pursuant to Family Court Act article 10 may delegate its authority to determine issues of parental access to an agency, that case should no longer be followed. Thus, here, the Family Court erred by delegating to ACS the authority to determine the mother’s therapeutic supervised parental access with the child (see *Matter of Lopez v Neira*, 237 AD3d at 1099-1100; *Matter of Clezidor v Lexune*, 192 AD3d at 794; *Matter of Acosta v Melendez*, 179 AD3d at 914).

Accordingly, we modify the order of disposition and remit the matter to the Family Court, Kings County, for a determination of whether the mother shall have therapeutic supervised parental access with the child, and, if so, to set forth a schedule for such parental access (see *Matter of Lopez v Neira*, 237 AD3d at 1100). Genovesi, J.P., Christopher, Wan and Golia, JJ., concur.

21 In the Matter of Tara Inzinna, Appellant, v Patrick Inzinna, Respondent. (Proceeding No. 1.) In the Matter of Patrick Inzinna, Respondent, v Tara Inzinna, Appellant. (Proceeding No. 2.) [— NYS3d —]—

Parent, Child and Family—Support—Father’s Deferred Income Not Counted—Recalculation of Father’s Combined Income Necessary

Parent, Child and Family—Support—Improvident Imputation of Additional Income to Mother in Excess of Her Reported Income

In related proceedings pursuant to Family Court Act article 4, the mother appeals from an order of the Family Court, Suffolk County (Alfred C. Graf, J.), dated March 13, 2024. The order denied the mother’s objections to (1) an order of the same court (Jennifer Ann Mendelsohn, S.M.) dated January 24, 2024, which, after a hearing, and upon findings of fact dated January 16, 2024, directed the father to pay certain spousal support, and (2) so much of an order of the same court (Jennifer Ann Mendelsohn, S.M.) also dated January 24, 2024, as, after a hearing, and upon the findings of fact dated January 16, 2024, directed the mother to pay certain child support.

Ordered that the order dated March 13, 2024, is reversed, on the law, with costs, the mother’s objections to the first order dated January 24, 2024, and so much of the second order dated January 24, 2024, as directed the mother to pay certain child

support, are granted, the first order dated January 24, 2024, and that portion of the second order dated January 24, 2024, are vacated, and the matter is remitted to the Family Court, Suffolk County, for further proceedings in accordance herewith.

The parties were married in 2009 and have two children. In January 2023, the parties separated. In May 2023, the mother filed a petition seeking spousal support, and the father thereafter filed a petition seeking child support.

After a hearing, wherein both parties testified, the Support Magistrate issued findings of fact, determining, inter alia, that the father's income was approximately \$161,000 and imputing income in the amount of \$79,196.04 to the mother. In an order dated January 24, 2024, upon the findings of fact, the Support Magistrate directed that the father pay certain spousal support to the mother. In a separate order of the same date, upon the findings of fact, the Support Magistrate directed, among other things, that the mother pay certain child support to the father.

In February 2024, the mother filed objections to the first order dated January 24, 2024, and so much of the second order dated January 24, 2024, as directed her to pay certain child support to the father. In an order dated March 13, 2024, the Family Court denied the mother's objections. The mother appeals.

The Family Court erred in denying the mother's objections. Family Court Act § 413 (1) (b) (5) provides that a party's income shall include all gross income that should have been reported in the most recent federal income tax return plus "to the extent not already included in gross income . . . , the amount of income or compensation voluntarily deferred and income received . . . from . . . pensions and retirement benefits" (*id.* § 413 [1] [b] [5] [iii] [F]). The Support Magistrate determined that the father's income was approximately \$161,000. Since the father's deferred income was not counted, a recalculation of the father's combined income is necessary (*see Gilbert v Gilbert*, 32 AD3d 414 [2006]).

"A court is not bound by a party's account of his or her own finances, and where a party's account is not believable, the court is justified in finding a true or potential income higher than that claimed" (*Matter of Vittorio v Vittorio*, 236 AD3d 805, 806 [2025], quoting *Saks v Saks*, 199 AD3d 950, 952 [2021]; *see Malkani v Malkani*, 208 AD3d 863, 865 [2022]). Family Court Act § 413 (1) (b) (5) (iv) (D) provides that "the court may attribute or impute income from such other resources as may be available to the parent, including, but not

limited to . . . money, goods, or services provided by relatives and friends.”

The Support Magistrate improvidently exercised her discretion in imputing additional income to the mother in excess of her reported income (see *Matter of Rahim v Braden*, 239 AD3d 862, 863 [2025]; *Matter of Bram v Bram*, 228 AD3d 933, 935 [2024]).

Accordingly, we remit the matter to the Family Court, Suffolk County, for a new determination of the parties’ child support and maintenance obligations. Barros, J.P., Wan, Golia and Goldberg Velazquez, JJ., concur.

22 In the Matter of Devorah Krausz, Respondent, v Mirel Frankel Englander, Appellant. [253 NYS3d 317]—

Parent, Child and Family—Family Offense Proceeding—Harassment and Stalking—Order of Protection

In a proceeding pursuant to Family Court Act article 8, the appeal is from an order of protection of the Family Court, Kings County (Sharon N. Clarke, J.), dated December 16, 2024. The order of protection, upon a finding, in effect, that the appellant committed the family offenses of harassment in the second degree and stalking in the fourth degree, made after a fact-finding hearing, directed her, inter alia, to stay away from the subject child until December 15, 2026, except pursuant to a court order of visitation.

Ordered that the order of protection is affirmed, without costs or disbursements.

In 2024, the petitioner commenced this proceeding pursuant to Family Court Act article 8, against the appellant, on behalf of her adopted child. The appellant, who is the child’s biological mother, surrendered her parental rights to the child in 2016 and agreed to the adoption.

After a fact-finding hearing, the Family Court found, in effect, that the appellant committed the family offenses of harassment in the second degree and stalking in the fourth degree. The court then issued an order of protection in which it directed the appellant, inter alia, to stay away from the child, except pursuant to a court order of visitation. This appeal ensued.

The determination of whether a family offense was committed is a factual issue to be resolved by the Family Court, upon a determination that the allegations were supported by a fair preponderance of the evidence; that court’s determination regarding the credibility of witnesses is entitled to great weight

on appeal and will not be disturbed if supported by the record (see *Matter of Jeudy v Duroc*, 237 AD3d 708, 708-709 [2025]; *Matter of Renz v Little*, 137 AD3d 920, 921 [2016]).

Here, a fair preponderance of the evidence adduced at the hearing established that the appellant committed the family offenses of harassment in the second degree (see Penal Law § 240.26 [2]; Family Ct Act § 812 [1]; *Matter of Preston v Hormadaly*, 246 AD3d 923 [2026]) and stalking in the fourth degree (see Penal Law § 120.45 [2]; *Matter of Golian v Golyan*, 242 AD3d 745, 746-747 [2025]).

The appellant's remaining contentions are either unpreserved for appellate review or without merit. Duffy, J.P., Christopher, Landicino and Quirk, JJ., concur.

23 In the Matter of Sean Szlepcsik, Appellant, v County of Suffolk, Respondent. [— NYS3d —]

Civil Service—Appointment and Promotion—Psychological Fitness for Employment as Police Officer

In a proceeding pursuant to CPLR article 78 to review a determination of the Suffolk County Department of Civil Service dated May 22, 2024, affirming its prior determination that the petitioner was not qualified for employment as a police officer, the petitioner appeals from an order and judgment (one paper) of the Supreme Court, Suffolk County (Christopher Modlewski, J.), dated November 13, 2024. The order and judgment, in effect, granted the respondent's motion pursuant to CPLR 3211 (a) and 7804 (f) to dismiss the petition, denied the petition, and dismissed the proceeding.

Ordered that the order and judgment is affirmed, with costs.

The petitioner sought employment as a police officer with the Suffolk County Police Department. Candidates for such employment are required to undergo a background investigation and pass a psychological evaluation, among other things. Based on the results of the petitioner's psychological evaluation, he was not recommended for the position, and the Suffolk County Department of Civil Service (hereinafter the Department) notified the petitioner that he had been found not qualified. The petitioner appealed the Department's determination, submitting an independent evaluation by a psychologist who disagreed with the conclusion of the Department's evaluator. Following an appeal interview, the Appeal Committee of the Department concluded that there was no significant evidence to reverse the disqualification. In a determination dated May 22, 2024, the Department affirmed its prior determination that the petitioner was not qualified for employment as a police offi-

cer. The petitioner subsequently commenced this proceeding pursuant to CPLR article 78 to review the determination dated May 22, 2024. The County of Suffolk moved pursuant to CPLR 3211 (a) and 7804 (f) to dismiss the petition. In an order and judgment dated November 13, 2024, the Supreme Court, in effect, granted the County's motion, denied the petition, and dismissed the proceeding. The petitioner appeals.

"An appointing authority has wide discretion in determining the fitness of candidates, and this discretion is particularly broad in the hiring of law enforcement officers, to whom high standards may be applied" (*Matter of Brown v County of Nassau*, 214 AD3d 793, 795 [2023] [internal quotations marks omitted]; see *Matter of Dellisanti v Suffolk County Police Dept.*, 239 AD3d 976, 978 [2025]; *Matter of Winnegar v County of Suffolk*, 13 AD3d 382, 382 [2004]). "So long as the administrative determination is not irrational or arbitrary and capricious, this Court will not disturb it" (*Matter of Brown v County of Nassau*, 214 AD3d at 795 [internal quotation marks omitted]; see *Matter of Coyle v Kampe*, 185 AD3d 1028 [2020]). "An action is arbitrary and capricious when it is taken without sound basis in reason or regard to the facts" (*Matter of Adirondack Wild: Friends of the Forest Preserve v New York State Adirondack Park Agency*, 34 NY3d 184, 195 [2019] [internal quotation marks omitted]; see *Matter of Underhill-Washington Equities, LLC v Division of Hous. & Community Renewal*, 157 AD3d 705, 706 [2018]). "If a determination is rational it must be sustained even if the court concludes that another result would also have been rational" (*Matter of Adirondack Wild: Friends of the Forest Preserve v New York State Adirondack Park Agency*, 34 NY3d at 195 [internal quotation marks omitted]; see *Matter of Underhill-Washington Equities, LLC v Division of Hous. & Community Renewal*, 157 AD3d at 706-707). "[I]n an article 78 proceeding, the reviewing court may not weigh the evidence, choose between conflicting proof, or substitute its assessment of the evidence or witness credibility for that of the administrative factfinder" (*Matter of Bennett v Zoning Bd. of Appeals of the Vil. of Sagaponack*, 170 AD3d 716, 717 [2019]; see *Matter of Brown v County of Nassau*, 214 AD3d at 796; *Matter of Winnegar v County of Suffolk*, 13 AD3d at 383).

Here, the Supreme Court properly concluded that the Department's determination disqualifying the petitioner from eligibility for the position of police officer was neither irrational nor arbitrary and capricious (see *Matter of Brown v County of Nassau*, 214 AD3d at 795-796; *Matter of Coyle v Kampe*, 185 AD3d at 1028; *Matter of Winnegar v County of Suffolk*, 13 AD3d

at 382-383). “In determining whether a candidate is medically qualified to serve as a police officer, the appointing agency is ‘entitled to rely upon the findings of its own medical personnel, even if those findings are contrary to those of professionals retained by the candidate’ ” (*Matter of Brown v County of Nassau*, 214 AD3d at 795, quoting *Matter of Thomas v Straub*, 29 AD3d 595, 596 [2006]; see *Matter of Winnegar v County of Suffolk*, 13 AD3d at 383). “It is not for the courts to choose between the diverse professional opinions. That is the function of the proper department heads and as long as they act reasonably and responsibly, the courts will not interfere” (*Matter of Brown v County of Nassau*, 214 AD3d at 796 [internal quotation marks omitted]; see *Matter of Winnegar v County of Suffolk*, 13 AD3d at 383). Here, the Department was entitled to rely upon the findings of its own personnel in determining the petitioner’s psychological fitness for employment, even if those findings were contrary to those of the petitioner’s psychologist, and, contrary to the petitioner’s contention, “it [wa]s not for the court[] to choose between the diverse professional opinions” (*Matter of Brown v County of Nassau*, 214 AD3d at 796 [internal quotation marks omitted]; see *Matter of Thomas v Straub*, 29 AD3d at 596).

The petitioner’s remaining contention is without merit.

Accordingly, the Supreme Court properly, in effect, granted the County’s motion pursuant to CPLR 3211 (a) and 7804 (f) to dismiss the petition, denied the petition, and dismissed the proceeding. Barros, J.P., Wooten, Taylor and McCormack, JJ., concur.

24 In the Matter of Sophia T. Administration for Children’s Services, Respondent; Luke T., Appellant, et al., Respondent. (Proceeding No. 1.) In the Matter of Ezra T. Administration for Children’s Services, Respondent; Luke T., Appellant, et al., Respondent. (Proceeding No. 2.) [— NYS3d —]—

Parent, Child and Family—Abused or Neglected Child—Father’s Lack of Insight into Ongoing Mental Health Issues and Bizarre and Irrational Behavior Placed Children at Imminent Risk of Harm

In related proceedings pursuant to Family Court Act article 10, the father appeals from (1) an order of fact-finding of the Family Court, Queens County (Elenor Reid-Cherry, J.), dated July 31, 2024, and (2) an order of disposition of the same court dated September 4, 2024. The order of fact-finding, after a fact-finding hearing, found that the father neglected the subject children. The order of disposition, upon the order of fact-finding, after a dispositional hearing, and upon the father’s

failure to appear at the dispositional hearing, inter alia, released the children to the custody of the Commissioner of Social Services of Queens County until the completion of the next permanency hearing.

Ordered that the appeal from the order of fact-finding is dismissed, without costs or disbursements, as the order of fact-finding was superseded by the order of disposition and is brought up for review on the appeal from the order of disposition; and it is further,

Ordered that the appeal from the order of disposition is dismissed, without costs and disbursements, except with respect to matters which were the subject of contest (*see* CPLR 5511; *Matter of Justyn H. [Laverne H.]*, 191 AD3d 876, 876 [2021]); and it is further,

Ordered that the order of disposition is affirmed insofar as reviewed, without costs or disbursements.

Since the order of disposition was made upon the father's default, review is limited to matters which were the subject of contest in the Family Court (*see Matter of Justyn H. [Laverne H.]*, 191 AD3d 876, 876 [2021]; *Matter of Yu F. [Fen W.]*, 122 AD3d 761, 762 [2014]). Moreover, any challenge to the order of disposition would be academic inasmuch as the order has expired by its own terms (*see Matter of Angelina G. [Angel G.]*, 220 AD3d 773, 774 [2023]). Accordingly, review is limited to the Family Court's finding that the father neglected the subject children.

The Administration for Children's Services (hereinafter the agency) commenced these proceedings pursuant to Family Court Act article 10, alleging that the father neglected the children. Following a fact-finding hearing, in an order of fact-finding dated July 31, 2024, the Family Court found that the father neglected the children. After a dispositional hearing at which the father failed to appear, the court issued an order of disposition dated September 4, 2024, inter alia, releasing the children to the custody of the Commissioner of Social Services of Queens County until the completion of the next permanency hearing. The father appeals.

"In a child neglect proceeding pursuant to Family Court Act article 10, the petitioner must establish by a preponderance of the evidence that the subject child is neglected" (*Matter of Moshae L. [Angela J.]*, 237 AD3d 821, 822-823 [2025] [internal quotation marks omitted]; *see Matter of Samynee L. [Tashae T.]*, 243 AD3d 569, 570 [2025]). "While parental neglect may be based on mental illness, proof of a parent's mental illness alone will not support a finding of neglect" (*Matter of Nialani T. [Eliz-*

abeth B.], 164 AD3d 1245, 1246 [2018] [internal quotation marks omitted]; see *Matter of Bethany R. [Bethmarie R.]*, 202 AD3d 690, 692 [2022]). “[S]uch evidence may support a neglect determination ‘when the proof further demonstrates that the parent’s condition creates an imminent risk of physical, mental, or emotional harm to the child’” (*Matter of Henry B. [Cynthia M.]*, 180 AD3d 667, 669 [2020], quoting *Matter of Maurice M. [Suzanne H.]*, 158 AD3d 689, 690-691 [2018]; see *Matter of Joseph L. [Cyanne W.]*, 168 AD3d 1055, 1056 [2019]). “A finding [of neglect] may be entered even in the absence of actual harm when a preponderance of the evidence proves that the child’s ‘physical, mental or emotional condition . . . is in imminent danger of becoming impaired as a result of the failure of his [or her] parent . . . to exercise a minimum degree of care’” (*Matter of Kiemiyah M. [Cassiah M.]*, 137 AD3d 1279, 1279 [2016], quoting Family Ct Act § 1012 [f] [i]; see *Matter of Zaria P. [Sade G.]*, 240 AD3d 699, 701 [2025]).

Here, the agency demonstrated, by a preponderance of the evidence, that the father’s lack of insight into his ongoing mental health issues (see *Matter of Precise M. [Tawana M.]*, 215 AD3d 680, 681 [2023]; *Matter of Anthony A.R. [Taicha P.]*, 188 AD3d 697, 698-699 [2020]) and his bizarre and irrational behavior (see *Matter of Khaleef M.S.-P. [Khaleeda M.S.]*, 203 AD3d 1160, 1161 [2022]; *Matter of Jonathan H. [Tamika Q.]*, 156 AD3d 786, 787-788 [2017]) placed the children at imminent risk of harm.

The father’s remaining contention is without merit.

Accordingly, the Family Court properly found that the father neglected the children. Genovesi, J.P., Dowling, Wan and Quirk, JJ., concur.

25 In the Matter of Sivey U. Administration for Children’s Services, Respondent; Inette U.S., Appellant. [— NYS3d —]—

Parent, Child and Family—Abused or Neglected Child—Mother Inflicting Excessive Corporal Punishment

Parent, Child and Family—Abused or Neglected Child—Corroboration of Child’s Out-of-Court Statement—Medical Records and Observations of Caseworker

In a proceeding pursuant to Family Court Act article 10, the mother appeals from an order of fact-finding of the Family Court, Queens County (Emily Ruben, J.), dated May 2, 2025. The order of fact-finding, after a hearing, found that the mother neglected the subject child.

Ordered that the order of fact-finding is affirmed, without costs or disbursements.

The petitioner, Administration for Children's Services (hereinafter ACS), commenced this proceeding pursuant to Family Court Act article 10, alleging that the mother failed to provide the subject child with proper supervision or guardianship by inflicting excessive corporal punishment on her. After a fact-finding hearing, in an order of fact-finding, the Family Court determined that the mother neglected the child by inflicting excessive corporal punishment on her. The mother appeals.

The appeal from the order of fact-finding was not rendered academic by reason of the mother's subsequent execution of a surrender of the child, since that adjudication constitutes a permanent and significant stigma that might indirectly affect the mother's status in future proceedings (*see Matter of Jamiar W. [Malipeng W.]*, 84 AD3d 1386, 1386-1387 [2011]; *Matter of Albert Francis B.*, 66 AD3d 769, 770 [2009]).

"In a child neglect proceeding pursuant to Family Court Act article 10, the petitioner must establish by a preponderance of the evidence that the subject child is neglected" (*Matter of Moshae L. [Angela J.]*, 237 AD3d 821, 822-823 [2025] [internal quotation marks omitted]; *see* Family Ct Act § 1046 [b] [i]; *Matter of Shayla G. [Lakisha C.]*, 233 AD3d 682, 684 [2024]). To establish neglect of a child, the petitioner must demonstrate, by a preponderance of the evidence, (1) that the child's physical, mental, or emotional condition has been impaired or is in imminent danger of becoming impaired, and (2) that the actual or threatened harm to the child is a consequence of the failure of the parent or caretaker to exercise a minimum degree of care in providing the child with proper supervision or guardianship (*see* Family Ct Act §§ 1012 [f] [i] [B]; 1046 [b] [1]; *Matter of Moshae L. [Angela J.]*, 237 AD3d at 823). "Great deference is given to the Family Court's credibility determinations, as it is in the best position to assess the credibility of the witnesses having had the opportunity to view the witnesses, hear the testimony, and observe their demeanor" (*Matter of Ashlyn M. [Robert J.]*, 228 AD3d 939, 941 [2024] [internal quotation marks omitted]).

In neglect proceedings, unsworn out-of-court statements of a child may be received and, if properly corroborated, will support a finding of abuse or neglect (*see* Family Ct Act § 1046 [a] [vi]; *Matter of Nathaniel I.G. [Marilyn A.P.]*, 227 AD3d 806, 807 [2024]; *Matter of Thaddeus R. [Gabrielle V.]*, 198 AD3d 901, 902 [2021]). "Corroboration means any other evidence tending to support the reliability of the previous statements" (*Matter of Nathaniel I.G. [Marilyn A.P.]*, 227 AD3d at 807 [internal quotation marks omitted]; *see* Family Ct Act § 1046

[a] [vi]). “The rule requiring corroboration is flexible, and any other evidence tending to support the reliability of the out-of-court statements is a determination for the Family Court, which saw and heard the witnesses” (*Matter of Thaddeus R. [Gabrielle V.]*, 198 AD3d at 902 [internal quotation marks omitted]; see *Matter of Nathaniel I.G. [Marilyn A.P.]*, 227 AD3d at 807).

“Although parents have a right to use reasonable physical force against a child in order to maintain discipline or to promote the child’s welfare, the use of excessive corporal punishment constitutes neglect” (*Matter of Moshae L. [Angela J.]*, 237 AD3d at 823 [internal quotation marks omitted]; see Family Ct Act § 1012 [f] [1] [B]; *Matter of Alexander S. [Gabriel H.]*, 224 AD3d 907, 910 [2024]). “A single incident of excessive corporal punishment may suffice to sustain a finding of neglect” (*Matter of Thaddeus R. [Gabrielle V.]*, 198 AD3d at 902 [internal quotation marks omitted]; see *Matter of Nathaniel I.G. [Marilyn A.P.]*, 227 AD3d at 807).

Here, the Family Court properly determined that ACS established by a preponderance of the evidence that the mother neglected the child by inflicting excessive corporal punishment on her (see *Matter of Moshae L. [Angela J.]*, 237 AD3d at 822-823, 824; *Matter of Raveena B. [Khrisend R.]*, 209 AD3d 640, 642 [2022]). Deferring to the hearing court’s credibility findings, the evidence at the fact-finding hearing established that the mother had repeatedly physically, verbally, and emotionally abused the child and, on one occasion, had bitten the child’s finger, leaving an infected human bite mark that was visible to an ACS caseworker three days later (see *Matter of Nathaniel I.G. [Marilyn A.P.]*, 227 AD3d at 807). Contrary to the mother’s contention, out-of-court statements of the child were sufficiently corroborated by medical records and observations of the ACS caseworker (see *Matter of Nathaniel I.G. [Marilyn A.P.]*, 227 AD3d at 807; *Matter of Thaddeus R. [Gabrielle V.]*, 198 AD3d at 902).

The mother’s remaining contentions are either without merit or not properly before this Court. Connolly, J.P., Brathwaite Nelson, Warhit and McCormack, JJ., concur.

26 In the Matter of Magulina Volcy-Thelisma, Respondent, v Ogorchukwuka Richard Nwabunor, Appellant. [— NYS3d —]—

Parent, Child and Family—Custody—Award to Mother of Sole Legal and Physical Custody—Mother More Likely to Promote Stability in Child’s Life, Provide for His Overall Well-Being, and Foster Child’s Relationship with Noncustodial Parent

In a proceeding pursuant to Family Court Act article 6, the

father appeals from an order of the Family Court, Suffolk County (Cheryl M. Helfer, Ct. Atty. Ref.), dated May 15, 2024. The order, insofar as appealed from, after a hearing, granted the mother's petition for sole legal and physical custody of the parties' child and denied the father's petition, in effect, for joint physical custody of the child.

Ordered that the order is affirmed insofar as appealed from, without costs or disbursements.

The mother and the father, who were never married, are the parents of one child, born in 2022. In October 2022, the mother filed a petition for sole legal and physical custody of the child. In December 2022, the father filed a petition, in effect, for joint physical custody of the child. In an order dated May 15, 2024, the Family Court, after a hearing, inter alia, granted the mother's petition and denied the father's petition. The father appeals.

In any child custody dispute, the court's paramount concern is to determine, under the totality of the circumstances, what is in the best interests of the child (*see Eschbach v Eschbach*, 56 NY2d 167, 171 [1982]; *Matter of Bell v Pierre*, 239 AD3d 973, 974 [2025]). In determining the child's best interests, the court must consider, among other things, (1) which alternative will best promote stability; (2) the available home environments; (3) the past performance of each parent; (4) each parent's relative fitness, including his or her ability to guide the child, provide for the child's overall well being, and foster the child's relationship with the noncustodial parent; and (5) the child's desires (*see Matter of Watson v Miller*, 238 AD3d 883, 884 [2025]; *Matter of Mendoza v Riera*, 232 AD3d 616, 618 [2024]). The existence or absence of any one factor, however, is not determinative, since custody and parental access determinations must be made based on the totality of the circumstances (*see Matter of Beale v Patterson*, 236 AD3d 900, 901-902 [2025]; *Matter of Haase v Jones*, 230 AD3d 774, 777 [2024]). A Family Court's credibility findings after a hearing on the issue of custody will be accorded great weight on appeal, and its determinations regarding custody and parental access will not be disturbed unless they lack a sound and substantial basis in the record (*see Matter of Steward v Okon*, 238 AD3d 1055, 1057 [2025]; *Matter of Clarke v Clarke*, 222 AD3d 751, 752 [2023]).

Joint custody of a child is inappropriate where the parties are antagonistic toward each other and have demonstrated an inability to cooperate on matters concerning the child (*see Matter of Sookchan v Sookchan*, 234 AD3d 779, 781 [2025]; *Matter of Shields v Shields*, 192 AD3d 691, 692 [2021]).

Here, contrary to the father's contention, the Family Court's conclusion that joint physical custody was not appropriate under the circumstances has a sound and substantial basis in the record (see *Matter of Shields v Shields*, 192 AD3d at 692; *Matter of Laura A.K. v Timothy M.*, 204 AD2d 325, 326 [1994]). Further, the court's determination awarding the mother sole legal and physical custody of the child is supported by a sound and substantial basis in the record. The evidence presented at the hearing demonstrated, among other things, that the mother was more likely to promote stability in the child's life and provide for his overall well-being, as well as more likely to foster the child's relationship with the noncustodial parent (see *Matter of Smisek v DeSantis*, 239 AD3d 867, 870 [2025]; *Matter of Paisley v Moonsammy*, 213 AD3d 941, 941-942 [2023]).

The father's contention that the Family Court should have appointed an attorney for the child is unpreserved for appellate review. In any event, under the circumstances of this case, including the young age of the child and the absence of demonstrable prejudice to the child's interests, the court providently exercised its discretion in not appointing an attorney for the child (see *Matter of Quinones v Quinones*, 139 AD3d 1072, 1074 [2016]).

The father's remaining contentions are either unpreserved for appellate review or without merit. Duffy, J.P., Dowling, Taylor and Love, JJ., concur.

27 The People of the State of New York, Respondent, v Michael Barnett, Appellant. [253 NYS3d 288]—

Crimes—Sentence—Waiver of Surcharge and Fees—Defendant Less than 21 Years Old at Time Crime Committed

Appeal by the defendant from a judgment of the Supreme Court, Richmond County (Alexander Jeong, J., at plea; Marina C. Mundy, J., at sentence), rendered June 21, 2023, convicting him of petit larceny, upon his plea of guilty, and imposing sentence.

Ordered that the judgment is modified, on the law and as a matter of discretion in the interest of justice, by vacating the imposition of a mandatory surcharge and fees; as so modified, the judgment is affirmed.

“Criminal Procedure Law § 420.35 (2-a) permits the waiver of surcharges and fees for individuals, like the defendant, who were less than 21 years old at the time of the subject crime” (*People v Dillon H.*, 229 AD3d 722, 723 [2024] [internal quotation marks omitted]). Pursuant to the exercise of our interest of justice jurisdiction, and as consented to by the People, we

modify the judgment by vacating the mandatory surcharge and fees imposed upon the defendant at sentencing (*see* CPL 420.35 [2-a] [c]; *People v Jean-Jacques*, 236 AD3d 1055 [2025]; *People v Gonzales*, 235 AD3d 897 [2025]; *People v Dillon H.*, 229 AD3d at 723). Genovesi, J.P., Christopher, Wan and Golia, JJ., concur.

28 The People of the State of New York, Respondent, v Denard Brookings, Appellant. [253 NYS3d 320]—Appeal by the defendant from a judgment of the Supreme Court, Kings County (Abena Darkeh, J.), rendered January 12, 2023, convicting him of criminal contempt in the second degree, upon his plea of guilty, and imposing sentence. Assigned counsel has submitted a brief in accordance with *Anders v California* (386 US 738 [1967]), in which she moves for leave to withdraw as counsel for the appellant.

Ordered that the judgment is affirmed.

We are satisfied with the sufficiency of the brief filed by the defendant's assigned counsel pursuant to *Anders v California* (386 US 738 [1967]), and, upon an independent review of the record, we conclude that there are no nonfrivolous issues which could be raised on appeal. Counsel's application for leave to withdraw as counsel is, therefore, granted (*see id.*; *Matter of Giovanni S. [Jasmin A.]*, 89 AD3d 252 [2011]). LaSalle, P.J., Chambers, Taylor and Hom, JJ., concur.

29 The People of the State of New York, Respondent, v Hakeem Clark, Appellant. [— NYS3d —]—

Crimes—Right to Counsel—Effective Representation—Failure to Move to Reopen Suppression Hearing Based on Trial Testimony—Reliability of Witness Identification of Defendant's Voice as One of Perpetrators of Kidnapping
Crimes—Suppression Hearing—Reopening Hearing Based on Discovery of New Facts during Trial

Appeal by the defendant, by permission, from an order of the Supreme Court, Queens County (Ira H. Margulis, J.), dated February 4, 2022, which denied, without a hearing, his motion pursuant to CPL 440.10 to vacate a judgment of the same court (Joel L. Blumenfeld, J.) rendered November 23, 2015, convicting him of kidnapping in the first degree, upon a jury verdict, and imposing sentence.

Ordered that the order is reversed, on the law and the facts, and the matter is remitted to the Supreme Court, Queens County, for a reopened suppression hearing in accordance herewith and a new determination thereafter of the defendant's motion pursuant to CPL 440.10 to vacate the judgment.

The defendant was convicted, upon a jury verdict, of kidnapping in the first degree. The judgment of conviction was af-

firmed by this Court (*see People v Clark*, 194 AD3d 948 [2021]). Subsequently, the defendant moved pursuant to CPL 440.10 to vacate the judgment on the ground of ineffective assistance of counsel. In an order dated February 4, 2022, the Supreme Court denied the defendant's motion without a hearing. A Justice of this Court granted the defendant leave to appeal from the order, and we reverse.

A criminal defendant has a constitutional right to the effective assistance of counsel (*see* NY Const, art I, § 6; US Const 6th Amend). In evaluating a claim of ineffective assistance of counsel under the New York standard, "a court must examine whether 'the evidence, the law, and the circumstances of a particular case, viewed in totality and as of the time of the representation, reveal that the attorney provided meaningful representation'" (*People v Oliveras*, 21 NY3d 339, 346 [2013], quoting *People v Baldi*, 54 NY2d 137, 147 [1981]; *see People v Wright*, 25 NY3d 769, 779 [2015]). Moreover, "[a] single error may qualify as ineffective assistance, but only when the error is sufficiently egregious and prejudicial as to compromise a defendant's right to a fair trial" (*People v Caban*, 5 NY3d 143, 152 [2005]; *see People v Goodluck*, 239 AD3d 674, 675 [2025]).

The defendant contends that trial counsel was ineffective for failing to move to reopen the pretrial suppression hearing on the basis that an individual had testified, during the trial, that he had told the police that the voice of the alleged kidnapper, who the individual had heard speaking on the telephone, was "possibly" that of the defendant, and the individual also admitted to testifying before the grand jury that he identified the voice after being shown a photograph of the defendant. Whereas, the police testimony at the pretrial suppression hearing regarding the same individual's identification of the defendant's voice, which formed the basis for the defendant's arrest, was more definitive and unequivocal, and did not involve the viewing of a photograph. We agree.

Courts have the discretion to reopen a suppression hearing based upon new facts, which could not have been discovered with reasonable diligence before the determination of the suppression motion, pertinent to the suppression issue (*see People v Fuentes*, 53 NY2d 892 [1981]). These new facts need not establish a constitutional violation on their face, but must be facts that would either materially affect, or have affected, the earlier determination (*see People v Clark*, 88 NY2d 552, 555 [1996]; *People v Velez*, 39 AD3d 38, 42 [2007]; *see also* CPL 710.40 [4]). Here, where the reliability of a witness's identification of the defendant's voice as that of one of the perpetrators

of the crime, which primarily formed the basis for the defendant's arrest, was called into question in light of that witness's trial testimony, an issue of fact was raised regarding whether there was probable cause for the defendant's arrest (*cf. Mitchell v City of New York*, 241 AD3d 1165 [2025]). Although motions to reopen suppression hearings are generally denied where the new facts proffered go only to the circumstances surrounding the defendant's arrest, here, the defendant could not be presumed to know the basis of the communications or conduct between police, leading to his arrest (*see People v Velez*, 39 AD3d at 43). The failure of trial counsel to move to reopen the suppression hearing on this ground was therefore both objectively unreasonable as well as prejudicial to the defendant (*see People v Kindell*, 135 AD3d 423, 423-424 [2016]). Contrary to the People's contention, this is not a case in which trial counsel's error can be explained as part of any strategic design (*see People v Clermont*, 22 NY3d 931, 933 [2013]).

Accordingly, we remit the matter to the Supreme Court, Queens County, for a reopened suppression hearing in accordance herewith and a new determination thereafter of the defendant's motion pursuant to CPL 440.10 to vacate the judgment. Genovesi, J.P., Dowling, Wan and Quirk, JJ., concur.

30 The People of the State of New York, Respondent, v Iraef El, Appellant. [— NYS3d —]

Crimes—Search Warrant—Probable Cause

Appeal by the defendant from a judgment of the Supreme Court, Kings County (Sharen D. Hudson, J., at plea; Vincent Del Giudice, J., at sentence), rendered September 4, 2019, convicting him of criminal possession of a weapon in the second degree, upon his plea of guilty, and imposing sentence. The appeal brings up for review the denial (John T. Hecht, J.), without a hearing, of those branches of the defendant's omnibus motion which were, in effect, to controvert a search warrant and to suppress physical evidence obtained in the execution thereof.

Ordered that the judgment is affirmed.

After the issuance of a search warrant based upon information obtained by a confidential informant, the police recovered three loaded firearms in the defendant's home. The defendant moved, inter alia, in effect, to controvert the search warrant and to suppress physical evidence seized in the execution thereof. The Supreme Court, among other things, denied those branches of the defendant's omnibus motion. The defendant thereafter entered a plea of guilty to criminal possession of a weapon in the second degree and was sentenced to a term of imprisonment. The defendant appeals.

We decline to grant the defendant's request to direct the disclosure of the unredacted search warrant application and minutes of an examination pursuant to CPL 690.40 (1) because the Supreme Court properly found that "the redactions to the search warrant application and . . . minutes were necessary to protect the anonymity of the confidential informant and to protect him or her from danger" (*People v Hedrington*, 186 AD3d 1245, 1245-1246 [2020]; see *People v Etienne*, 235 AD3d 894, 894 [2025]).

Moreover, upon a review of the unredacted search warrant application and hearing minutes, we conclude that the Supreme Court properly denied those branches of the defendant's omnibus motion which were, in effect, to controvert the search warrant and to suppress physical evidence seized in the execution thereof. "A search warrant must be supported by probable cause" (*People v Lexune*, 236 AD3d 1060, 1061 [2025]; see CPL 690.40). To establish probable cause, "[t]he search warrant application must provide the court with sufficient information to support a reasonable belief that evidence of illegal activity will be present at the specific time and place of the search" (*People v Rivera*, 210 AD3d 805, 806 [2022] [internal quotation marks omitted]). Here, there was probable cause to issue the subject search warrant (see *People v Fraser*, 210 AD3d 697, 698 [2022]; *People v Rose*, 207 AD3d 664, 665 [2022]; *People v Bryant*, 195 AD3d 744, 745 [2021]). Genovesi, J.P., Christopher, Wan and Golia, JJ., concur.

31 The People of the State of New York, Respondent, v Nico Ferraro, Appellant. [— NYS3d —]

Crimes—Appeal—Invalid Waiver of Right to Appeal

Crimes—Suppression Hearing—Physical Evidence Seized from Vehicle—Motion Papers Conclusory and Failed to Set Forth Sufficient Factual Allegations to Warrant Hearing

Appeal by the defendant from a judgment of the Supreme Court, Queens County (Kenneth C. Holder, J.), rendered April 22, 2019, convicting him of criminal possession of a firearm, upon his plea of guilty, and imposing sentence. The appeal brings up for review the denial (Steven W. Paynter, J.), without a hearing, of that branch of the defendant's omnibus motion which was to suppress physical evidence.

Ordered that the judgment is affirmed.

The defendant was arrested and charged, inter alia, with criminal possession of a firearm, after police officers recovered a firearm from his vehicle during a traffic stop. The defendant filed an omnibus motion, among other things, to suppress phys-

ical evidence on the ground that the traffic stop was unlawful and to suppress the defendant's statements made to law enforcement officials. The Supreme Court, *inter alia*, granted that branch of the omnibus motion which was to suppress the defendant's statements made to law enforcement officials to the extent of directing a *Huntley* hearing (*see People v Huntley*, 15 NY2d 72 [1965]) but denied, without a hearing, that branch of the omnibus motion which was to suppress physical evidence. The defendant subsequently pleaded guilty to criminal possession of a firearm, and sentence was imposed.

Contrary to the People's contention, the defendant's purported waiver of his right to appeal was invalid. The defendant's written waiver of the right to appeal misstated the applicable law and was misleading and further misstated that the defendant was giving up the right to assigned counsel and postconviction remedies (*see People v Nicholson*, 211 AD3d 852, 853 [2022]; *People v Habersham*, 186 AD3d 854 [2020]). Under the circumstances of this case, including the defendant's lack of experience with the criminal justice system, the Supreme Court's oral colloquy—which also included the misstatement that “as a result of this plea, . . . the conviction and sentence will be final”—was insufficient to cure the defects of the written waiver and to demonstrate a knowing, intelligent, and voluntary appeal waiver (*see People v Trigueros-Hernandez*, 243 AD3d 817, 818 [2025]; *People v Gill*, 222 AD3d 660, 661 [2023]; *People v Nicholson*, 211 AD3d at 853).

Since the purported appeal waiver was invalid, it does not preclude appellate review of the defendant's contention that the Supreme Court erred in denying, without a hearing, that branch of his omnibus motion which was to suppress physical evidence (*see People v Muhammad*, 231 AD3d 868, 869 [2024]). However, the defendant's contention is without merit. Although it might have been better practice for the court, in the interest of judicial economy, to have included a *Mapp* hearing (*see Mapp v Ohio*, 367 US 643 [1961]) with the *Huntley* hearing (*see People v Mendoza*, 82 NY2d 415, 429-430 [1993]), it was not error for the court to summarily deny that branch of the omnibus motion which was to suppress physical evidence. The defendant's supporting papers were conclusory and failed to set forth factual allegations sufficient to require a hearing on that branch of the motion (*see People v Cunningham*, 194 AD3d 954, 955 [2021]).

The defendant's contentions that Penal Law § 265.01-b is unconstitutional in light of the decision of the United States Supreme Court in *New York State Rifle & Pistol Assn., Inc. v*

Bruen (597 US 1 [2022]) and as a violation of the right to travel under the Privileges and Immunities Clause of the United States Constitution are unpreserved for appellate review, since he failed to raise those constitutional challenges before the Supreme Court (see *People v Cabrera*, 41 NY3d 35, 42 [2023]). We decline to review the unpreserved contentions in the exercise of our interest of justice jurisdiction.

The parties' remaining contentions are without merit. Iannacci, J.P., Wooten, Ventura and Ottley, JJ., concur.

32 The People of the State of New York, Respondent, v Shawn Fletcher, Appellant. [— NYS3d —]—

**Crimes—Unlawful Search and Seizure—Standing—Abandoned Gun
Crimes—Possession of Weapon—Reasonable Suspicion to Pursue Defendant
and Probable Cause to Arrest
Crimes—Right to Counsel—Effective Representation**

Appeal by the defendant from a judgment of the Supreme Court, Kings County (Eugene M. Guarino, J.), rendered February 7, 2023, convicting him of criminal possession of a weapon in the second degree and criminal possession of a weapon in the third degree, upon a jury verdict, and imposing sentence. The appeal brings up for review the denial, after a hearing, of that branch of the defendant's omnibus motion which was to suppress physical evidence.

Ordered that the judgment is affirmed.

"On a motion by a defendant to suppress physical evidence, the People have the burden of going forward to show the legality of the police conduct in the first instance" (*People v Greenland*, 243 AD3d 587, 588 [2025] [internal quotation marks omitted]; see *People v Johnson*, 243 AD3d 679, 680 [2025]). "The defendant bears the ultimate burden of proving that the evidence should not be used against him or her" (*People v Fasoli*, 242 AD3d 900, 901 [2025]; see *People v Gaddy*, 241 AD3d 578, 579 [2025]). "The hearing court's credibility determinations are entitled to deference on appeal" (*People v Greenland*, 243 AD3d at 588; see *People v Fasoli*, 242 AD3d at 901).

Here, the challenged suppression determinations were proper. The People established that the police officers who arrested the defendant did not pursue or seize him until after they saw him with a gun, at which point they had reasonable suspicion to pursue him and probable cause to arrest him (see *People v Avant*, 216 AD3d 662, 664 [2023]; *People v Sumpter*, 286 AD2d 450, 451 [2001]). Further, the Supreme Court properly determined that the defendant abandoned the gun when he threw it beneath a tree and, thus, that he had no

standing to contest its subsequent seizure and admission into evidence since he failed to demonstrate that he threw the gun away in response to any unlawful police conduct (*see People v White*, 153 AD3d 1369, 1370 [2017]; *People v Amuso*, 44 AD3d 781, 783 [2007]).

The defendant's contention that a particular police officer's testimony at the suppression hearing was incredible as a matter of law and patently tailored to overcome constitutional objections is unpreserved for appellate review (*see* CPL 470.05 [2]; *People v Delgado*, 221 AD3d 909, 910 [2023]; *People v Taylor*, 120 AD3d 519, 520 [2014]). In any event, this contention is without merit. Moreover, upon the exercise of our factual review power (*see* CPL 470.15 [5]), we discern no basis for disturbing the Supreme Court's decision to credit such testimony (*see People v Turner*, 203 AD3d 758, 760 [2022]; *People v Martinez*, 180 AD3d 809, 810 [2020]).

Contrary to the defendant's contention, he was not deprived of the effective assistance of counsel under the New York Constitution based on defense counsel's failure to specifically argue that the police officer's testimony at the suppression hearing was incredible as a matter of law and patently tailored to overcome constitutional objections, since, viewing defense counsel's performance in its totality, counsel provided meaningful representation (*see People v Debellis*, 40 NY3d 431, 436 [2023]; *People v Benevento*, 91 NY2d 708, 712 [1998]). Further, the defendant was not deprived of the effective assistance of counsel under the United States Constitution (*see Strickland v Washington*, 466 US 668 [1984]).

The defendant's contention that he was deprived of a fair trial by improper remarks made by the prosecutor during summation is partially unpreserved for appellate review, since the defendant did not object to the majority of the remarks he now challenges (*see* CPL 470.05 [2]; *People v Hankerson*, 149 AD3d 778, 779 [2017]; *People v Manigat*, 136 AD3d 614, 616 [2016]). In any event, most of the challenged remarks were proper because they were "within the broad bounds of rhetorical comment permissible in closing arguments, constituted a fair response to arguments made by defense counsel in summation, or constituted fair comment on the evidence" (*People v Morales*, 201 AD3d 819, 819-820 [2022]; *see People v Manigat*, 136 AD3d at 616). To the extent that certain remarks were improper, they were not so flagrant or pervasive as to have deprived the defendant of a fair trial (*see People v Anderson*, 213 AD3d 687, 688 [2023]; *People v Ingrassia*, 207 AD3d 751, 752 [2022]). Further, defense counsel's failure to object to those remarks did

not constitute ineffective assistance of counsel (*see People v Hankerson*, 149 AD3d at 779).

The sentence imposed was not excessive (*see People v Suitte*, 90 AD2d 80 [1982]). Iannacci, J.P., Dowling, Ventura and Golia, JJ., concur.

33 The People of the State of New York, Respondent, v Christopher Iregui, Appellant. [252 NYS3d 778]—Appeal by the defendant from a judgment of the Supreme Court, Queens County (Toni M. Cimino, J.), rendered July 24, 2023, convicting him of attempted burglary in the second degree, upon his plea of guilty, and imposing sentence.

Ordered that the judgment is affirmed.

The sentence imposed was not excessive (*see People v Suitte*, 90 AD2d 80 [1982]). Duffy, J.P., Dowling, Taylor and Love, JJ., concur.

34 The People of the State of New York, Respondent, v Davone J., Appellant. [253 NYS3d 317]—Appeal by the defendant from a judgment of the Supreme Court, Kings County (Raymond L. Rodriguez, J.), rendered June 23, 2023, adjudicating him a youthful offender, upon his plea of guilty to criminal possession of a firearm, and imposing sentence.

Ordered that the judgment is affirmed.

The defendant's contentions that his conviction of criminal possession of a firearm is unconstitutional are unpreserved for appellate review, since the defendant failed to raise those constitutional challenges before the Supreme Court (*see People v David*, 41 NY3d 90, 96 [2023]; *People v Cabrera*, 41 NY3d 35, 42 [2023]), and we decline to reach them in the exercise of our interest of justice jurisdiction.

In light of our determination, the defendant's remaining contention need not be reached. Duffy, J.P., Warhit, Ventura and Ottley, JJ., concur.

35 The People of the State of New York, Respondent, v Valery Latouche, Appellant. [— NYS3d —]—

Crimes—Sentence—Resentence under Domestic Violence Survivor's Justice Act—Failure to Submit Corroborating Evidence of Abuse at Time of Offenses or That Abuse was Substantial or Significant Contributing Factor to Offenses

Appeal by the defendant from an order of the County Court, Rockland County (Kevin F. Russo, J.), dated December 10, 2024, which denied, without a hearing, his motion pursuant to CPL 440.47 to vacate his sentences and to be resentenced in accordance with Penal Law § 60.12.

Ordered that the order is modified, on the law and in the exercise of discretion, by adding a provision thereto providing that the denial of the defendant's motion pursuant to CPL 440.47 to vacate his sentences and to be resentenced in accordance with Penal Law § 60.12 is without prejudice; as so modified, the order is affirmed.

On January 19, 2005, the defendant, then 19 years old and displaying a loaded pistol, committed an attempted robbery of a woman at a library parking lot, and a subsequent robbery of a taxicab driver, with an accomplice. The following day, the defendant and two accomplices committed another robbery of a taxicab driver, during the course of which the driver was shot and killed. The defendant was convicted of murder in the second degree, robbery in the first degree, robbery in the second degree, two counts of attempted robbery in the first degree, two counts of attempted robbery in the second degree, criminal possession of a weapon in the second degree, and criminal possession of a weapon in the third degree, upon a jury verdict, and was sentenced on those convictions. On appeal, this Court affirmed the judgment of conviction (*see People v Latouche*, 61 AD3d 702 [2009]).

In 2024, the defendant moved pursuant to CPL 440.47 to vacate his sentences and to be resentenced in accordance with Penal Law § 60.12. The County Court denied the defendant's motion without a hearing, determining that the defendant failed to submit evidence corroborating that he was subject to abuse at the time of the offenses or that the abuse was substantial. The defendant appeals.

The Domestic Violence Survivors Justice Act (DVSJA) “permits courts to sentence defendants to an alternative, less severe sentence if the defendant was a victim of domestic violence and convicted of certain eligible offenses” (*People v Brenda WW.*, 44 NY3d 594, 598 [2025]; *see* Penal Law § 60.12). The DVSJA sets forth a three-prong test for entitlement to resentencing: “(a) at the time of the instant offense, the defendant was a victim of domestic violence subjected to substantial physical, sexual or psychological abuse inflicted by a member of the same family or household as the defendant . . . ; (b) such abuse was a significant contributing factor to the defendant's criminal behavior; (c) having regard for the nature and circumstances of the crime and the history, character[,] and condition of the defendant, that a sentence of imprisonment pursuant to [Penal Law §§ 70.00, 70.02, 70.06, 70.71 (2) or (3)] would be unduly harsh” (Penal Law § 60.12 [1]; *see People v Brenda WW.*, 44 NY3d at 598).

Provided that certain threshold eligibility requirements are met, pertaining to the length of incarceration and the type of offense, among other things (*see* CPL 440.47 [1] [a]), a defendant may move for resentencing in accordance with the DVSJA (*see id.* § 440.47 [1] [c]). Here, the People conceded the eligibility of the defendant's sentences, and thus, the question of whether the threshold eligibility requirements were met is not before this Court. A defendant's motion for resentencing under the DVSJA "must include at least two pieces of evidence corroborating the . . . claim," and "[a]t least one piece of evidence must be either a court record, pre-sentence report, social services record, hospital record, sworn statement from a witness to the domestic violence, law enforcement record, domestic incident report, or order of protection" (*id.* § 440.47 [2] [c]; *see People v Nymeen C.*, — AD3d —, —, 2026 NY Slip Op 00144, *2 [2026]).

Here, the defendant's evidence in support of his motion included affidavits from his sister and a childhood friend, which offered only vague allegations of abuse, and provided no timeline as to the incidents. The defendant additionally submitted in support of his motion a presentence report that included a vague allegation by the defendant that his stepmother was "abusive." Collectively, this evidence failed to corroborate the defendant's allegations that he was a victim of domestic violence subjected to substantial abuse at the time that he committed the subject offenses (*see People v Nymeen C.*, — AD3d at —, 2026 NY Slip Op 00144, *4; *People v White*, 226 AD3d 1054, 1055 [2024]), or that the alleged abuse was a significant contributing factor to the offenses (*see People v White*, 226 AD3d at 1055).

As the defendant failed to meet his burden pursuant to CPL 440.47 (2) (c), the County Court was not required to hold a hearing before denying the motion (*see id.* § 440.47 [2] [d]; *People v Martinez*, 234 AD3d 874, 875-876 [2025]; *People v White*, 226 AD3d at 1055).

The parties' remaining contentions are without merit.

Accordingly, the County Court properly denied the defendant's motion. However, CPL 440.47 (2) (d) provides that if the court denies the motion on the ground that the defendant failed to meet the burden under subdivision (2) (c), the motion should be denied "without prejudice" (*see People v Nymeen C.*, — AD3d at —, 2026 NY Slip Op 00144, *2). Therefore, we modify the order appealed from to specify that the motion is denied "without prejudice" (CPL 440.47 [2] [d]; *see People v Martinez*, 234 AD3d at 876).

Iannacci, J.P., Brathwaite Nelson, Landicino and Goldberg Velazquez, JJ., concur.

36 The People of the State of New York, Respondent, v Orlando Ramsay, Appellant. [253 NYS3d 287]—

Crimes—Plea of Guilty—Forfeiture of Right to Raise Issues on Appeal

Appeals by the defendant from two judgments of the County Court, Nassau County (Teresa K. Corrigan, J.), both rendered July 8, 2024, convicting him of criminal possession of a controlled substance in the first degree and criminal possession of a controlled substance in the third degree under indictment No. 70522/21, and operating as a major trafficker, criminal possession of a controlled substance in the first degree (two counts), criminal possession of a controlled substance in the second degree, criminal possession of a controlled substance in the third degree (six counts), criminal possession of a weapon in the second degree (three counts), criminal possession of a weapon in the third degree (three counts), criminal possession of a firearm (three counts), criminal use of drug paraphernalia in the second degree, and conspiracy in the second degree under indictment No. 70916/21, upon his pleas of guilty, and imposing sentences.

Ordered that the judgments are affirmed.

The defendant's contention that his pleas of guilty were not knowing, voluntary, and intelligent is unpreserved for appellate review, since the defendant did not move to withdraw his pleas or otherwise raise the issue in the County Court (*see People v Lopez*, 71 NY2d 662, 665 [1988]; *People v Escobargarcia*, 237 AD3d 1221, 1222 [2025]). Moreover, the exception to the preservation requirement does not apply here because the defendant's allocution did not cast significant doubt on his guilt as to the crimes to which he pleaded, negate an essential element of any of the crimes, or call into question the voluntariness of his pleas (*see People v Bermudez-Cedillos*, 228 AD3d 681, 682 [2024]). In any event, the record demonstrates that the defendant's pleas of guilty were knowing, voluntary, and intelligent (*see People v Sougou*, 26 NY3d 1052, 1055 [2015]; *People v Escobargarcia*, 237 AD3d at 1222).

By pleading guilty, the defendant forfeited any claim of ineffective assistance of counsel that did not directly involve the plea negotiation process and sentence (*see CPL 30.30; People v Adams*, 237 AD3d 966, 967 [2025]). In any event, the defendant's contention that he received ineffective assistance of counsel is without merit (*see People v McKinnon*, 186 AD3d 1533, 1533 [2020]; *People v Brown*, 170 AD3d 878, 879 [2019]). Duffy, J.P., Dowling, Taylor and Love, JJ., concur.

37 The People of the State of New York, Respondent, v Rahkeem S., Appellant. [253 NYS3d 320]—

Crimes—Sentence—Youthful Offender—Vacatur of Mandatory Surcharges and Crime Victim Assistance Fees

Statutes—Retroactive Application of Statute—Repeal of Imposition of Mandatory Surcharges and Crime Victim Assistance Fees for Youthful Offenders

Appeal by the defendant from a judgment of the Supreme Court, Kings County (Betty J. Williams, J., at plea; Matthew D’Emic, J., at sentence), rendered January 11, 2018, adjudicating him a youthful offender, upon his plea of guilty to attempted robbery in the second degree, and imposing sentence.

Ordered that the judgment is modified, on the law, by vacating the imposition of a mandatory surcharge and crime victim assistance fee; as so modified, the judgment is affirmed.

The mandatory surcharge and crime victim assistance fee imposed upon the defendant (*see* former Penal Law § 60.35 [10]) must be vacated in light of the retroactive application of amendments repealing the imposition of mandatory surcharges and crime victim assistance fees for youthful offenders (*see* L 2020, ch 144, §§ 3, 4; *People v Kahrone H.*, 204 AD3d 693, 694 [2022]). Duffy, J.P., Dowling, Taylor and Love, JJ., concur.

38 The People of the State of New York, Respondent, v Brian Whittaker, Appellant. [— NYS3d —]—

Crimes—Plea of Guilty—Sufficiency of Allocution

Crimes—Indictment—Waiver

Appeal by the defendant from a judgment of the County Court, Westchester County (Evan Inlaw, J.), rendered July 23, 2024, convicting him of reckless endangerment in the first degree and criminal possession of a firearm, upon his plea of guilty, and imposing sentence.

Ordered that the judgment is affirmed.

The record demonstrates that the defendant knowingly, voluntarily, and intelligently waived his right to appeal (*see People v Lopez*, 6 NY3d 248, 256 [2006]; *People v Batista*, 167 AD3d 69, 76-78 [2018]). The defendant’s valid waiver of his right to appeal precludes appellate review of his challenge to the factual sufficiency of the plea allocution (*see People v Heath*, 218 AD3d 693, 694 [2023]; *People v Headley*, 197 AD3d 1329, 1330 [2021]).

To the extent that the defendant contends that the factual insufficiency of the plea allocution rendered his plea involuntary and unintelligent, this contention survives a valid waiver of the right to appeal (*see People v Prenaj*, 239 AD3d 1001, 1001 [2025]; *People v Javiel*, 231 AD3d 967, 967 [2024]).

However, the contention is unpreserved for appellate review, as the defendant did not move to withdraw his plea or otherwise raise this issue before the County Court (*see* CPL 470.05 [2]; *People v Lopez*, 71 NY2d 662, 663 [1988]; *People v Escobargarcia*, 237 AD3d 1221, 1222 [2025]). The exception to the preservation requirement does not apply in this case, because the defendant's allocution did not cast significant doubt on his guilt, negate an essential element of the crime, or call into question the voluntariness of the plea (*see People v Lopez*, 71 NY2d at 666).

In any event, the plea allocution was sufficient. "[A]n allocution based on a negotiated plea need not elicit from a defendant specific admissions as to each element of the charged crime," and a plea allocution is sufficient if it "shows that the defendant understood the charges and made an intelligent decision to enter a plea" (*People v Goldstein*, 12 NY3d 295, 301 [2009]; *see People v Javiel*, 231 AD3d at 967). Here, the record demonstrates that the defendant understood the charges and made a voluntary and intelligent decision to enter the plea.

The defendant's valid waiver of his right to appeal does not preclude appellate review of his contention that he did not knowingly, voluntarily, and intelligently waive his right to be prosecuted by indictment (*see People v Okay*, 172 AD3d 1104, 1105 [2019]; *People v Cardona-Velasquez*, 152 AD3d 618, 618 [2017]). However, the contention is without merit. The record discloses that the defendant signed a valid written waiver of indictment in open court and in the presence of his attorney (*see* NY Const, art I, § 6; CPL 195.20; *People v Cardona-Velasquez*, 152 AD3d at 618), and there is no "record evidence suggesting that [the] defendant's waiver was involuntary, unknowing or unintelligent" (*People v Myers*, 32 NY3d 18, 23 [2018]). The defendant's contentions that he did not have adequate time to review the waiver of indictment and that he did not understand what he was signing are "belied by the record" (*People v Okay*, 172 AD3d at 1105), as the defendant expressly acknowledged that he had an opportunity to read and discuss the waiver of indictment with his attorney before signing it and that he understood the contents of the written waiver (*see People v Giddens*, 172 AD3d 1402, 1402 [2019]; *People v Hickson*, 165 AD3d 1166, 1167 [2018]). Genovesi, J.P., Chambers, Voutsinas and Hom, JJ., concur.

39 The People of the State of New York, Respondent, v Troy Williams, Appellant. [253 NYS3d 289]—Appeal by the defendant from a judgment of the Supreme Court, Kings County (Vincent M. Del Giudice, J.), rendered September 27, 2019, convicting

him of manslaughter in the first degree, upon a jury verdict, and sentencing him to a determinate term of imprisonment of 15 years, to be followed by five years of postrelease supervision.

Ordered that the judgment is modified, as a matter of discretion in the interest of justice, by reducing the sentence imposed from a determinate term of imprisonment of 15 years, to be followed by five years of postrelease supervision, to a determinate term of imprisonment of eight years, to be followed by five years of postrelease supervision; as so modified, the judgment is affirmed.

The defendant was convicted, after a jury trial, of manslaughter in the first degree in connection with a shooting that occurred in Brooklyn on August 27, 2017.

In fulfilling our responsibility to conduct an independent review of the weight of the evidence (*see* CPL 470.15 [5]; *People v Danielson*, 9 NY3d 342 [2007]), we nevertheless accord great deference to the jury's opportunity to view the witnesses, hear the testimony, and observe demeanor (*see People v Mateo*, 2 NY3d 383, 410 [2004]; *People v Bleakley*, 69 NY2d 490, 495 [1987]). Upon reviewing the record here, we are satisfied that the verdict of guilt was not against the weight of the evidence (*see People v Romero*, 7 NY3d 633 [2006]).

The defendant's contention that he was deprived of the effective assistance of counsel is without merit. The record as a whole demonstrates that the defendant received the effective assistance of counsel under both the federal and state constitutional standards (*see Strickland v Washington*, 466 US 668, 688 [1984]; *People v Benevento*, 91 NY2d 708, 712 [1998]).

The defendant's contention that the People withheld certain *Brady* material (*see Brady v Maryland*, 373 US 83 [1963]) is not properly raised on direct appeal and should be raised in a motion pursuant to CPL 440.10 to vacate the judgment, because the facts supporting the defendant's contention are dehors the record (*see People v Abad*, 208 AD3d 892, 894 [2022]; *People v Petion*, 186 AD3d 1410, 1411 [2020]).

The sentence imposed was excessive to the extent indicated herein (*see People v Suitte*, 90 AD2d 80 [1982]).

The defendant's remaining contention is without merit. Connelly, J.P., Brathwaite Nelson, Warhit and McCormack, JJ., concur.

40 The People of the State of New York, Appellant, v Rony Zino, Respondent. [— NYS3d —]

Crimes—Indictment—Criminally Negligent Homicide—Sufficiency of Evi-

dence before Grand Jury**Crimes—Indictment—Reckless Driving—Sufficiency of Evidence before Grand Jury**

Appeal by the People from an order of the Supreme Court, Queens County (Michael Aloise, J.), dated May 28, 2024. The order, insofar as appealed from, granted that branch of the defendant's omnibus motion which was to dismiss the counts of the indictment charging him with criminally negligent homicide and reckless driving on the ground that the evidence presented to the grand jury was legally insufficient.

Ordered that the order is affirmed insofar as appealed from.

On October 11, 2023, a vehicle operated by the defendant allegedly struck a pedestrian crossing the street. The pedestrian died as a result of the injuries sustained in the accident. The defendant was arrested and charged by grand jury indictment with, among other crimes, criminally negligent homicide (Penal Law § 125.10) and reckless driving (Vehicle and Traffic Law § 1212). The defendant moved, inter alia, to dismiss the indictment. In an order dated May 28, 2024, the Supreme Court, among other things, granted that branch of the defendant's omnibus motion which was to dismiss the counts of the indictment charging him with criminally negligent homicide and reckless driving on the ground that the evidence presented to the grand jury was legally insufficient to sustain those charges. The People appeal.

A court reviewing the legal sufficiency of an indictment must view the evidence in the light most favorable to the People and determine whether the evidence, if unexplained and uncontradicted, would be legally sufficient to support a verdict of guilt after trial (*see People v Jensen*, 86 NY2d 248, 251 [1995]; *People v Holloway*, 210 AD3d 1007, 1007 [2022]). In the context of grand jury proceedings, legal sufficiency means prima facie proof of the crimes charged, not proof beyond a reasonable doubt (*see People v Bello*, 92 NY2d 523, 526 [1998]; *People v Dunn*, 232 AD3d 806, 808 [2024]). This Court's inquiry is limited to assessing whether the facts, if proven, and the logical inferences flowing therefrom, supply proof of each element of the charged crimes (*see People v Dunn*, 232 AD3d at 808; *People v Holloway*, 210 AD3d at 1008). The existence of innocent inferences arising from the evidence has no bearing upon the legal sufficiency inquiry (*see People v Deegan*, 69 NY2d 976, 979 [1987]; *People v Castro*, 202 AD3d 815, 816 [2022]).

"A person is guilty of criminally negligent homicide when, with criminal negligence, he [or she] causes the death of an-

other person” (Penal Law § 125.10). A person acts with criminal negligence in this context when that person “fails to perceive a substantial and unjustifiable risk” that death will result (*id.* § 15.05 [4]; see *People v Gaworecki*, 37 NY3d 225, 230 [2021]). “[T]he carelessness required for criminal negligence is appreciably more serious than that for ordinary civil negligence, and . . . the carelessness must be such that its seriousness would be apparent to anyone who shares the community’s general sense of right and wrong” (*People v Boutin*, 75 NY2d 692, 695-696 [1990]). “Moreover, criminal negligence requires a defendant to have engaged in some blameworthy conduct creating or contributing to a substantial and unjustifiable risk of a proscribed result; nonperception of a risk, even if the proscribed result occurs, is not enough” (*People v Conway*, 6 NY3d 869, 872 [2006] [brackets and internal quotation marks omitted]; see *People v Cabrera*, 10 NY3d 370, 376 [2008]). Here, the evidence presented to the grand jury, viewed in the light most favorable to the People, did not demonstrate that the defendant’s conduct rose to the level of moral blameworthiness required to sustain a charge of criminally negligent homicide (see *People v McGranham*, 12 NY3d 892, 894 [2009]; *People v Cabrera*, 10 NY3d at 377).

In addition, the Supreme Court properly dismissed the count of the indictment charging the defendant with reckless driving (see Vehicle and Traffic Law § 1212). The evidence, viewed in the light most favorable to the People, was legally insufficient to support the charge that the defendant operated his vehicle “under such circumstances as to show a reckless disregard of the consequences” (*People v Grogan*, 260 NY 138, 144 [1932]; see *People v Pino*, 162 AD3d 910, 912 [2018]).

Accordingly, the Supreme Court properly granted that branch of the defendant’s omnibus motion which was to dismiss the counts of the indictment charging him with criminally negligent homicide and reckless driving on the ground that the evidence presented to the grand jury was legally insufficient. Genovesi, J.P., Ford, Voutsinas and Golia, JJ., concur.

41 The People of the State of New York, Respondent, v Benjamin Williams, Appellant. [— NYS3d —]—

Crimes—Sex Offenders—Sex Offender Registration Act—Length of Time Defendant Had Been Viewing Child Pornography, Number and Nature of Images and Video Files Possessed, and Defendant’s Sharing of Material with Others, Militated against Downward Departure

Appeal by the defendant from an order of the Supreme Court, Kings County (Michael D. Kitsis, J.), dated February 17, 2022, which, after a hearing, designated him a level two sex offender pursuant to Correction Law article 6-C.

Ordered that the order is affirmed, without costs or disbursements.

The defendant was convicted, upon his plea of guilty, of possessing a sexual performance by a child. After a hearing pursuant to the Sex Offender Registration Act (SORA) (Correction Law art 6-C), the Supreme Court assessed the defendant a total of 80 points on the risk assessment instrument, denied the defendant's application for a downward departure from the presumptive risk level, and designated him a level two sex offender. The defendant appeals.

“ ‘A defendant seeking a downward departure from the presumptive risk level has the initial burden of (1) identifying, as a matter of law, an appropriate mitigating factor, namely, a factor which tends to establish a lower likelihood of reoffense or danger to the community and is of a kind, or to a degree, that is otherwise not adequately taken into account by the . . . Guidelines; and (2) establishing the facts in support of its existence by a preponderance of the evidence’ ” (*People v Coleman*, 225 AD3d 792, 794 [2024] [internal quotation marks omitted], quoting *People v Downes*, 216 AD3d 1183, 1183-1184 [2023]; see Sex Offender Registration Act: Risk Assessment Guidelines and Commentary at 4 [2006] [hereinafter Guidelines]; *People v Gillotti*, 23 NY3d 841, 860 [2014]). “ ‘If the defendant makes that twofold showing, the SORA court must exercise its discretion by weighing the mitigating factor to determine whether the totality of the circumstances warrants a departure to avoid an over-assessment of the defendant's dangerousness and risk of sexual recidivism’ ” (*People v Coleman*, 225 AD3d at 794 [internal quotation marks omitted], quoting *People v Downes*, 216 AD3d at 1184; see *People v Gillotti*, 23 NY3d at 861).

Contrary to the defendant's contention, the Supreme Court providently exercised its discretion in denying his application for a downward departure. Although it has been recognized that the assessment of points under risk factor 3 (number of victims) and risk factor 7 (relationship with victim) may result in an overassessment of the risk posed to the community by certain offenders whose crime was the possession of images of child sexual abuse (see *People v Gillotti*, 23 NY3d at 861; *People v Oyola*, 217 AD3d 791, 792 [2023]), a downward departure is not warranted under the circumstances here (see *People v Smith*, 187 AD3d 1228, 1229 [2020]). The length of time the defendant had been viewing child pornography, the number and nature of the images and video files he possessed, and the defendant's sharing of that material with others, all militated against a downward departure (see *People v Fernandez*, 219

AD3d 760, 763 [2023]; *People v Smith*, 187 AD3d at 1229; *People v Goldman*, 150 AD3d 905, 907 [2017]).

Contrary to the defendant's further contention, the fact that the total of 80 points fell on the lower end of the risk level two designation does not warrant a downward departure (*see People v Rucano*, 213 AD3d 709, 711 [2023]).

The defendant's contention that he was entitled to a downward departure based upon certain other alleged mitigating factors, including a lack of a prior criminal history, is unpreserved for appellate review, as he failed to raise these alleged mitigating factors as a ground for a downward departure at the SORA hearing (*see People v Infantino*, 215 AD3d 768, 770-771 [2023]). In any event, the defendant's lack of prior criminal history was adequately taken into account by the Guidelines (*see id.* at 771; *People v Bigelow*, 175 AD3d 1443, 1444 [2019]). The other alleged mitigating factors identified by the defendant, including his acceptance of responsibility, and the strict supervision he will be under on probation, a condition of which includes participation in a sex offender treatment program, were also adequately taken into account by the Guidelines (*see People v Laskaris*, 231 AD3d 1173, 1174 [2024]; *People v Infantino*, 215 AD3d at 771; *People v Peoples*, 189 AD3d 1282, 1282-1283 [2020]).

Accordingly, the Supreme Court properly denied the defendant's application for a downward departure and designated the defendant a level two sex offender. Genovesi, J.P., Christopher, Wan and Golia, JJ., concur.

42 George Anthony Reichenbach, Appellant, v Garden City Public Schools et al., Respondents. [— NYS3d —]

Employment Relationships—Respondeat Superior—Negligent Hiring, Retention, and Supervision of Employee—Public Schools Lacked Actual or Constructive Notice of Teacher's Abusive Propensities and Conduct

In an action, inter alia, to recover damages for negligence, the plaintiff appeals from an order of the Supreme Court, Nassau County (Leonard D. Steinman, J.), dated January 31, 2024. The order, insofar as appealed from, granted that branch of the defendants' motion which was for summary judgment dismissing the amended complaint insofar as asserted against the defendant Garden City Public Schools.

Ordered that the order is affirmed insofar as appealed from, with costs.

The plaintiff commenced this action pursuant to the Child Victims Act (*see* CPLR 214-g) to recover damages he allegedly sustained as a result of the defendants' negligent failure to

prevent sexual abuse perpetrated by a teacher employed by the defendants. The defendants moved, inter alia, for summary judgment dismissing the amended complaint insofar as asserted against the defendant Garden City Public Schools (hereinafter Public Schools) on the ground that Public Schools lacked actual or constructive notice of the teacher's alleged propensity to engage in sexual abuse or of the abuse that the teacher allegedly perpetrated. By order dated January 31, 2024, the Supreme Court, among other things, granted that branch of the defendants' motion. The plaintiff appeals.

“When an employer has notice of its employee's propensity to engage in tortious conduct, yet retains and fails to reasonably supervise such employee, the employer may become liable for injuries thereafter proximately caused by its negligent supervision and retention” (*Nellenback v Madison County*, 44 NY3d 329, 334 [2025], quoting *Moore Charitable Found. v PJT Partners, Inc.*, 40 NY3d 150, 157 [2023]). “For prior conduct to provide notice of an employee's propensity to commit a tort, that conduct must be similar to the . . . injury-causing act” (*Moore Charitable Found. v PJT Partners, Inc.*, 40 NY3d at 159 [internal quotation marks omitted]).

“Where the complaint alleges negligent supervision due to injuries related to an individual's intentional acts, the plaintiff generally must allege that the [school] knew or should have known of the individual's propensity to engage in such conduct, such that the individual's acts could be anticipated or were foreseeable” (*Brauner v Locust Val. Cent. Sch. Dist.*, 234 AD3d 914, 916 [2025], quoting *Kwitko v Camp Shane, Inc.*, 224 AD3d 895, 896 [2024]; see *Nellenback v Madison County*, 44 NY3d at 334). “Therefore, actual or constructive notice to the school of prior similar conduct generally is required” (*Brauner v Locust Val. Cent. Sch. Dist.*, 234 AD3d at 916 [internal quotation marks omitted]; see *Moore Charitable Found. v PJT Partners, Inc.*, 40 NY3d at 159).

Here, the defendants established their prima facie entitlement to judgment as a matter of law dismissing the amended complaint insofar as asserted against Public Schools by submitting, inter alia, the teacher's personnel file, which demonstrated that Public Schools had no actual knowledge that the teacher had previously committed or had any propensity to commit sexual abuse (see *Nellenback v Madison County*, 44 NY3d at 334). Although the teacher was once accused of sexually inappropriate behavior with a fellow teacher (hereinafter the accusing teacher), his personnel file demonstrated that Public Schools investigated that accusation when the accusa-

tion was made and determined that the allegation was unfounded.

In opposition, the plaintiff failed to raise a triable issue of fact. The plaintiff's contentions that the investigation was biased or that there was a conspiracy to silence the accusing teacher are entirely speculative and therefore insufficient to raise a triable issue of fact (*see id.* at 335-337).

Accordingly, the Supreme Court properly granted that branch of the defendants' motion which was for summary judgment dismissing the amended complaint insofar as asserted against Public Schools.

The plaintiff's remaining contention is without merit. Genovesi, J.P., Christopher, Wan and Golia, JJ., concur.

43 Luis Rios, Appellant, v New York City Transit Authority et al., Respondents. (And a Third-Party Action.) [— NYS3d —]—In an action to recover damages for personal injuries, the plaintiff appeals from a judgment of the Supreme Court, Kings County (Gina Abadi, J.), dated July 13, 2023. The judgment, upon a jury verdict in favor of the defendants on the issue of liability, is in favor of the defendants and against the plaintiff, in effect, dismissing the complaint.

Ordered that the judgment is affirmed, with costs.

The plaintiff allegedly was injured as a passenger in a vehicle driven by Christoffe Cintron (hereinafter the Cintron vehicle), when it collided with a public bus operated by the defendant Loraine Lord. The plaintiff commenced this action against Lord and the defendants New York City Transit Authority, Metropolitan Transportation Authority, and MTA Bus Company. Two other passengers in the Cintron vehicle commenced separate personal injury actions that were joined with this action for the purposes of a trial on the issue of liability (*see Garcia v New York City Tr. Auth.*, 248 AD3d —, 2026 NY Slip Op 02393 [2026] [decided herewith]; *Cruz v Metropolitan Transp. Auth.*, 248 AD3d —, 2026 NY Slip Op 02389 [2026] [decided herewith]).

Following the trial on the issue of liability, the jury returned a verdict finding that Lord's negligence in operating the bus was not a substantial factor in causing the accident, that Christoffe Cintron was negligent in operating the Cintron vehicle, and, in effect, that his negligence was the sole proximate cause of the accident. Thereafter, the plaintiff moved, inter alia, pursuant to CPLR 4404 (a) to set aside, as against the weight of the evidence, so much of the jury's verdict as found that Lord's negligence was not a substantial factor in causing

the accident. The Supreme Court, among other things, denied that branch of the plaintiff's motion. The court issued a judgment dated July 13, 2023, in favor of the defendants and against the plaintiff, in effect, dismissing the complaint. The plaintiff appeals.

For the reasons set forth in our decision and order on a related appeal (*see Garcia v New York City Tr. Auth.*, 248 AD3d —, 2026 NY Slip Op 02393 [2026] [decided herewith]), the jury's verdict was not contrary to the weight of the evidence.

Any error in the admission of certain expert testimony proffered by the defendants is harmless, as we are satisfied that the result would have been the same if the alleged errors had not occurred (*see* CPLR 2002; *Ramrattan v Resorts World Casino*, 221 AD3d 629, 629 [2023]; *Simon v Granite Bldg. 2, LLC*, 170 AD3d 1227, 1233 [2019]). Brathwaite Nelson, J.P., Ford, Wan and Love, JJ., concur.

44 Yelena Sharbani et al., Appellants, v Francis Alter et al., Defendants, and Town of North Hempstead, Respondent. [— NYS3d —]—

Municipal Corporations—Sidewalks—Prior Notice of Defective Condition—Failure to Raise Triable Issue of Fact as to Affirmative Negligence Exception

In an action to recover damages for personal injuries, etc., the plaintiffs appeal from an order of the Supreme Court, Nassau County (Randy Sue Marber, J.), entered July 10, 2023. The order granted the motion of the defendant Town of North Hempstead for summary judgment dismissing the complaint insofar as asserted against it.

Ordered that the order is affirmed, with costs.

On November 28, 2020, Yelena Sharbani (hereinafter the injured plaintiff) allegedly was injured when she tripped and fell on an uneven sidewalk in the Town of North Hempstead. In July 2021, the injured plaintiff, and her husband suing derivatively, commenced this action against, among others, the Town. Thereafter, the Town moved for summary judgment dismissing the complaint insofar as asserted against it, arguing, *inter alia*, that it lacked prior written notice of the alleged defective condition. In an order entered July 10, 2023, the Supreme Court granted the Town's motion. The plaintiffs appeal.

"Where, as here, a municipality has enacted a prior written notice statute, it may not be subjected to liability for a defect within the scope of the law unless it has received prior written notice of the defect or an exception to the prior written notice requirement applies" (*Sales v City of New York*, 241 AD3d 1378,

1378 [2025]). “To be entitled to summary judgment, the municipality must first establish that it lacked prior written notice of the alleged defect. Once that showing is made, the burden shifts to the plaintiff to demonstrate the applicability of one of two recognized exceptions to the rule—that the municipality affirmatively created the defect through an act of negligence or that a special use resulted in a special benefit to the locality” (*Canaday v Village of Wappingers Falls*, 220 AD3d 731, 732 [2023] [citation and internal quotation marks omitted]; see *Yarborough v City of New York*, 10 NY3d 726, 728 [2008]). “The affirmative negligence exception is limited to work done by a municipality ‘that immediately results in the existence of a dangerous condition’ ” (*Wilson v Incorporated Vil. of Freeport*, 212 AD3d 870, 871 [2023] [emphasis omitted], quoting *Oboler v City of New York*, 8 NY3d 888, 889 [2007]). “Even if a municipality performs a negligent repair, where the defect develops over time with environmental wear and tear, the affirmative negligence exception is inapplicable” (*id.* [internal quotation marks omitted]; see *Yarborough v City of New York*, 10 NY3d at 728).

Here, the Town established, *prima facie*, that it did not receive prior written notice of the alleged defect by submitting, among other things, affidavits from the Town Superintendent of Highways, the Acting Commissioner of the Town’s Department of Public Works, and the Town Clerk, each of whom averred that a records search failed to reveal any written notice of a defective condition at the subject location prior to the date of the accident (see *Discepolo v County of Nassau*, 226 AD3d 646, 647 [2024]; *Grady v Town of Hempstead*, 223 AD3d 885, 886 [2024]). To the extent the plaintiffs contend that the Town, in order to establish its *prima facie* entitlement to judgment as a matter of law, was required to demonstrate that it did not create the alleged defect through an affirmative act of negligence, the plaintiffs have misstated the applicable law (see *Goodman v City of New York*, 230 AD3d 1115, 1117 [2024]; *Smith v City of New York*, 210 AD3d 53, 55-56, 69 [2022]).

Thus, the burden shifted to the plaintiffs to raise a triable issue of fact as to the applicability of the affirmative negligence or special use exceptions to the prior written notice rule (see *Yarborough v City of New York*, 10 NY3d at 728). The plaintiffs did not argue that the special use exception was applicable and failed to raise a triable issue of fact as to the affirmative negligence exception (see *Grady v Town of Hempstead*, 223 AD3d at 886).

The plaintiffs’ remaining contentions are without merit.

Accordingly, the Supreme Court properly granted the Town's motion for summary judgment dismissing the complaint insofar as asserted against it. Barros, J.P., Wooten, Taylor and McCormack, JJ., concur.

45 Amparo Tapia, Appellant, v Olson E. Van Rossum et al., Respondents, et al., Defendant. [— NYS3d —]—

Motions and Orders—Reargument or Renewal—Leave to Renew—Lack of Reasonable Justification for Not Including Purported New Evidence in Support of Original Summary Judgment Motion on Issue of Liability

In an action to recover damages for personal injuries, the plaintiff appeals from an order of the Supreme Court, Kings County (Caroline Piela Cohen, J.), dated September 5, 2024. The order, insofar as appealed from, denied that branch of the plaintiff's motion which was for leave to renew her motion for summary judgment on the issue of liability against the defendant Olson E. Van Rossum, which had been denied in an order of the same court (Delores J. Thomas, J.) dated July 21, 2023, and, upon reargument, adhered to the original determination in the order dated July 21, 2023.

Ordered that the order dated September 5, 2024, is affirmed insofar as appealed from, with one bill of costs to the respondents appearing separately and filing separate briefs.

The plaintiff commenced this action against, among others, the defendant Olson E. Van Rossum (hereinafter the defendant) to recover damages for personal injuries that she allegedly sustained when she was struck by the defendant's vehicle as she was crossing a street. The plaintiff moved for summary judgment on the issue of liability against the defendant. In an order dated July 21, 2023, the Supreme Court denied the plaintiff's motion. The plaintiff subsequently moved for leave to renew and reargue her motion for summary judgment on the issue of liability against the defendant. In an order dated September 5, 2024, the court denied that branch of the plaintiff's motion which was for leave to renew, granted that branch of the plaintiff's motion which was for leave to reargue, and, upon reargument, adhered to its original determination. The plaintiff appeals.

A motion for leave to renew shall be based upon new facts not offered on the prior motion that would change the prior determination (*see* CPLR 2221 [e] [2]) and shall contain reasonable justification for the failure to present such facts on the prior motion (*see id.* § 2221 [e] [3]; *Groman v Fleyshmakher*, 221 AD3d 789, 790 [2023]). “The new or additional facts either must have not been known to the party seeking renewal or

may, in the Supreme Court's discretion, be based on facts known to the party seeking renewal at the time of the original motion" (*Ok Sun Chong v Scheelje*, 218 AD3d 691, 692 [2023] [internal quotation marks omitted]; see *Seegopaul v MTA Bus Co.*, 210 AD3d 715, 716 [2022]). Here, the plaintiff failed to offer a reasonable justification for not including the purported new evidence in support of her original motion, and accordingly, the Supreme Court providently exercised its discretion in denying that branch of the plaintiff's motion which was for leave to renew (see *Groman v Fleyshmakher*, 221 AD3d at 790; *Ok Sun Chong v Scheelje*, 218 AD3d at 692).

Upon reargument, the Supreme Court properly adhered to its original determination denying the plaintiff's motion for summary judgment on the issue of liability against the defendant. "A plaintiff in a negligence action moving for summary judgment on the issue of liability must establish, prima facie, that the defendant breached a duty owed to the plaintiff and that the defendant's negligence was a proximate cause of the alleged injuries" (*Tsyganash v Auto Mall Fleet Mgt., Inc.*, 163 AD3d 1033, 1033-1034 [2018]; see *Rodriguez v City of New York*, 31 NY3d 312 [2018]). "To be entitled to summary judgment on the issue of a defendant's liability, a plaintiff does not bear the burden of establishing the absence of his or her own comparative negligence" (*Valerio v City of New York*, 238 AD3d 943, 944 [2025] [internal quotation marks omitted]; see *Rodriguez v City of New York*, 31 NY3d at 312; *Tsyganash v Auto Mall Fleet Mgt., Inc.*, 163 AD3d at 1034).

Here, the evidence submitted by the plaintiff in support of her motion for summary judgment failed to establish her prima facie entitlement to judgment as a matter of law on the issue of liability against the defendant (see *Gomez v City of New York*, 186 AD3d 1494, 1495 [2020]). Accordingly, upon reargument, the Supreme Court properly adhered to its original determination denying the plaintiff's motion for summary judgment on the issue of liability against the defendant regardless of the sufficiency of the opposition papers (see *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]).

The parties' remaining contentions are either without merit or not properly before this Court. Barros, J.P., Chambers, Christopher and McCormack, JJ., concur.

46 U.S. Bank, National Association, Respondent, v New York City Transit Adjudication Bureau et al., Defendants. John Evelyn, Nonparty Appellant. [— NYS3d —]

**Deficiency Judgment against Borrower Who No Longer Owned Property
Pleading—Caption—Amendment**

In an action to foreclose a mortgage, John Evelyn appeals from an order and judgment of foreclosure and sale (one paper) of the Supreme Court, Kings County (Lawrence Knipel, J.), dated July 26, 2023. The order and judgment of foreclosure and sale, insofar as appealed from, upon an order of the same court dated October 28, 2022, inter alia, in effect, denying the cross-motion of John Evelyn pursuant to CPLR 3215 (c) to dismiss the amended complaint insofar as asserted against him as abandoned, and upon an order of the same court dated November 4, 2022, granting that branch of the motion of the plaintiff's predecessor in interest which was pursuant to CPLR 1003 to "drop" John Evelyn as a named defendant and to amend the caption accordingly, directed the sale of the subject property.

Ordered that the order and judgment of foreclosure and sale is affirmed insofar as appealed from, with costs.

In 2006, John Evelyn executed a note that was secured by a mortgage on certain residential property located in Brooklyn. Evelyn allegedly defaulted on his obligations under the note and mortgage, and in March 2008, LaSalle Bank, N.A. (hereinafter LaSalle), commenced this action to foreclose the mortgage against Evelyn, among others. By deed dated March 16, 2015, Evelyn transferred his interest in the property to nonparty 9228 Management, LLC.

In 2022, LaSalle moved, inter alia, to substitute U.S. Bank, National Association (hereinafter U.S. Bank), as the plaintiff, and for an order of reference. Evelyn cross-moved pursuant to CPLR 3215 (c) to dismiss the amended complaint insofar as asserted against him as abandoned. LaSalle then moved, among other things, pursuant to CPLR 1003 to "drop" Evelyn as a named defendant on the ground that he was no longer a necessary party, and to amend the caption accordingly. LaSalle waived the right to seek a deficiency judgment against Evelyn. Evelyn opposed the motion.

In an order dated October 28, 2022, the Supreme Court granted LaSalle's motion, inter alia, to substitute U.S. Bank as the plaintiff and for an order of reference, and, in effect, denied Evelyn's cross-motion. In an order dated November 4, 2022, the court granted that branch of LaSalle's motion which was pursuant to CPLR 1003 to "drop" Evelyn as a named defendant and to amend the caption accordingly. Subsequently, U.S. Bank moved, among other things, for a judgment of foreclosure and sale. In an order and judgment of foreclosure and sale dated

July 26, 2023, the court granted U.S. Bank’s motion and, *inter alia*, directed the sale of the property. Evelyn appeals.

Pursuant to CPLR 1003, “[p]arties may be dropped by the court, on motion of any party or on its own initiative, at any stage of the action and upon such terms as may be just.” A mortgagor who has made an absolute conveyance of all his or her interest in the mortgaged premises is not a necessary party to a foreclosure action unless a deficiency judgment is sought (*see Citimortgage, Inc. v Warsi*, 212 AD3d 592, 594 [2023]; *Nationstar Mtge., LLC v Foltishen Inst.*, 199 AD3d 1011, 1012 [2021]; *PNC Bank, N.A. v Lefkowitz*, 185 AD3d 1069, 1070 [2020]). Here, in support of its motion, LaSalle established that Evelyn had conveyed his interest in the mortgaged property, and LaSalle waived the right to seek a deficiency judgment against Evelyn. Thus, Evelyn was no longer a necessary party to this foreclosure action, and the Supreme Court properly granted that branch of LaSalle’s motion which was pursuant to CPLR 1003 to “drop” Evelyn as a named defendant and to amend the caption accordingly (*see Nationstar Mtge., LLC v Foltishen Inst.*, 199 AD3d at 1012; *DLJ Mtge. Capital, Inc. v 44 Brushy Neck, Ltd.*, 51 AD3d 857, 859 [2008]).

The parties’ remaining contentions are either without merit or academic in light of our determination. Connolly, J.P., Brathwaite Nelson, Warhit and Ventura, JJ., concur.

47 US Bank Trust National Association, Appellant, v 972 Gates Avenue, LLC, Respondent, et al., Defendants. [— NYS3d —]—

Limitation of Actions—Commencement of Action after Termination of Prior Action—Foreclosure Abuse Prevention Act—Plaintiff Not Entitled to Benefit of Six-Month Savings Provision of CPLR 205-a

In an action to foreclose a mortgage, the plaintiff appeals from an order of the Supreme Court, Kings County (Larry D. Martin, J.), dated January 2, 2024. The order granted that branch of the motion of the defendant 972 Gates Avenue, LLC, which was for summary judgment dismissing the complaint insofar as asserted against it as time-barred.

Ordered that the order is affirmed, with costs.

On February 17, 2006, Felix Alberto Barzola (hereinafter the borrower) executed a note in the amount of \$600,000 in favor of Alliance Mortgage Banking Corp. (hereinafter Alliance). The note was secured by a mortgage on certain real property located in Brooklyn.

In August 2010, Chase Home Finance, LLC (hereinafter Chase), Alliance’s successor in interest, commenced an action

to foreclose the mortgage against the borrower, among others (hereinafter the first foreclosure action). In an order dated April 13, 2022, the Supreme Court granted the borrower's motion for summary judgment dismissing the complaint in the first foreclosure action based on Chase's failure to strictly comply with RPAPL 1304.

In June 2022, the plaintiff, US Bank Trust National Association, commenced this action to foreclose the mortgage against the defendant 972 Gates Avenue, LLC (hereinafter the defendant), among others. In September 2023, the defendant moved, *inter alia*, for summary judgment dismissing the complaint insofar as asserted against it as time-barred. The plaintiff opposed the motion, contending that it had timely commenced this action pursuant to the six-month savings provision in CPLR 205 (a). In reply, the defendant contended that Chase and the plaintiff were different entities and, thus, the plaintiff was not entitled to the benefit of the savings provision. In an order dated January 2, 2024, the Supreme Court granted that branch of the defendant's motion. The plaintiff appeals.

An action to foreclose a mortgage is governed by a six-year statute of limitations (*see* CPLR 213 [4]; *Lubonty v U.S. Bank N.A.*, 34 NY3d 250, 261 [2019]; *U.S. Bank N.A. v Medianik*, 223 AD3d 935, 937 [2024]). "[E]ven if a mortgage is payable in installments, once a mortgage debt is accelerated, the entire amount is due and the Statute of Limitations begins to run on the entire debt" (*BHMPW Funding, LLC v Lloyd-Lewis*, 194 AD3d 780, 782 [2021] [internal quotation marks omitted]; *see GMAT Legal Title Trust 2014-1 v Kator*, 213 AD3d 915, 916 [2023]). "Acceleration occurs, *inter alia*, by the commencement of a foreclosure action wherein the [holder of the note] elects in the complaint to call due the entire amount secured by the mortgage" (*GMAT Legal Title Trust 2014-1 v Kator*, 213 AD3d at 916; *see U.S. Bank N.A. v Medianik*, 223 AD3d at 937).

Here, the six-year statute of limitations began to run in August 2010, when Chase commenced the first foreclosure action and elected in the complaint to call due the entire amount secured by the mortgage (*see U.S. Bank N.A. v Medianik*, 223 AD3d at 938). This action was commenced in June 2022, more than 11 years after the commencement of the first foreclosure action.

Under CPLR 205 (a), where an action is timely commenced and is terminated for any reason other than those specified in the statute, "the plaintiff . . . may commence a new action upon the same transaction or occurrence . . . within six months after the termination provided that the new action

would have been timely commenced at the time of commencement of the prior action and that service upon defendant is effected within such six-month period” (*Deutsche Bank Natl. Trust Co. v Pena*, 240 AD3d 475, 477 [2025] [internal quotation marks omitted]). However, the Foreclosure Abuse Prevention Act (FAPA) (L 2022, ch 821 [eff Dec. 30, 2022]) created a new statute, CPLR 205-a, which is specific to real property actions (*see id.*). CPLR 205-a (a) (1) states that “a successor in interest or an assignee of the original plaintiff shall not be permitted to commence the new action, unless pleading and proving that such assignee is acting on behalf of the original plaintiff” (*Deutsche Bank Natl. Trust Co. v Pena*, 240 AD3d at 477).

FAPA “replaced the savings provision of CPLR 205 (a) with CPLR 205-a” in mortgage foreclosure actions (*Pryce v U.S. Bank, N.A.*, 226 AD3d 711, 713 [2024]; *see* CPLR 205 [c]). Here, the plaintiff has not pleaded or proved that it is acting on behalf of Chase. Therefore, the plaintiff is not entitled to the benefit of the savings provision of CPLR 205-a (*see Deutsche Bank Natl. Trust Co. v Pena*, 240 AD3d at 477; *Johnson v Cascade Funding Mtge. Trust 2017-1*, 220 AD3d 929, 932 [2023]).

The plaintiff’s arguments challenging FAPA’s retroactive application and constitutionality under the state and federal constitutions are without merit (*see Deutsche Bank Natl. Trust Co. v Pena*, 240 AD3d at 477; *Deutsche Bank Natl. Trust Co. v Vista Holding, LLC*, 239 AD3d 830, 834 [2025]). Chambers, J.P., Dowling, McCormack and Quirk, JJ., concur.

48 Myles Watson, Appellant, v Metropolitan Transit Authority et al., Respondents. [— NYS3d —]—

Civil Rights—Discrimination in Employment—Disability—Denial of Reasonable Accommodation for Use of Medical Marijuana in Safety-Sensitive Position

Release—Validity—Questions of Fact as to Whether Release Signed under Circumstances Indicating Unfairness

Civil Rights—Discrimination in Employment—Disability—Hostile Work Environment

In an action, inter alia, to recover damages for employment discrimination on the basis of disability in violation of the New York State Human Rights Law and the New York City Human Rights Law, the plaintiff appeals from an order of the Supreme Court, Kings County (Ingrid Joseph, J.), dated November 14, 2023. The order granted the defendants’ motion pursuant to CPLR 3211 (a) to dismiss the complaint.

Ordered that the order is affirmed, with costs.

The plaintiff began working for the defendant New York City

Transit Authority (hereinafter the NYCTA) in 2015, in a safety-sensitive position as a telephone maintainer. In March 2019, the plaintiff tested positive for marijuana as part of a random drug test performed and was required by the NYCTA to attend a drug counseling program. In October 2020, the plaintiff again tested positive for marijuana. After the plaintiff's second positive drug test, he was suspended without pay, and the NYCTA instituted a disciplinary proceeding. The plaintiff obtained a medical marijuana card and presented it to the NYCTA to request a reasonable accommodation, which was denied. In December 2020, the plaintiff executed a release in favor of the NYCTA as to any and all claims he may have had in connection with the underlying disciplinary proceeding. Thereafter, upon completion of a drug rehabilitation program, the plaintiff was reinstated to a non-safety-sensitive position as a station cleaner.

In June 2022, the plaintiff commenced this action against the defendants, Metropolitan Transit Authority and the NYCTA, inter alia, to recover damages for employment discrimination on the basis of disability in violation of the New York State Human Rights Law (NYSHRL) (Executive Law § 296) and the New York City Human Rights Law (NYCHRL) (Administrative Code of City of NY § 8-107). The defendants moved pursuant to CPLR 3211 (a) to dismiss the complaint, contending, among other things, that the action was barred by the release. They also contended that the plaintiff failed to state causes of actions under the NYSHRL and the NYCHRL. In an order dated November 14, 2023, the Supreme Court granted the defendants' motion on the ground that the action was barred by the release. The plaintiff appeals.

"Generally, a valid release constitutes a complete bar to an action on a claim which is the subject of the release" (*Centro Empresarial Cempresa S.A. v América Móvil, S.A.B. de C.V.*, 17 NY3d 269, 276 [2011] [internal quotation marks omitted]; see *Applewhite v 112 Liberty Assoc., LLC*, 233 AD3d 834, 834 [2024]). "A release may be invalidated, however, for any of the traditional bases for setting aside written agreements, namely, duress, illegality, fraud, or mutual mistake" (*Applewhite v 112 Liberty Assoc., LLC*, 233 AD3d at 834 [internal quotation marks omitted]; see *Wei Qiang Huang v Llerena-Salazar*, 222 AD3d 1033, 1033 [2023]). "[A] signed release shifts the burden . . . to the [plaintiff] to show that there has been fraud, duress or some other fact which will be sufficient to void the release" (*Centro Empresarial Cempresa S.A. v América Móvil, S.A.B. de C.V.*, 17 NY3d at 276 [internal quotation marks omitted]; see *Ming Long Liu v Kirkwood*, 222 AD3d 861, 862 [2023]).

“In resolving a motion for dismissal pursuant to CPLR 3211 (a) (5), the plaintiff’s allegations are to be treated as true, all inferences that reasonably flow therefrom are to be resolved in his or her favor, and where, as here, the plaintiff has submitted an affidavit in opposition to the motion, it is to be construed in the same favorable light” (*Applewhite v 112 Liberty Assoc., LLC*, 233 AD3d at 835 [internal quotation marks omitted]; see *Wei Qiang Huang v Llerena-Salazar*, 222 AD3d at 1034).

Here, in support of their motion, the defendants submitted, inter alia, a copy of the release signed by the plaintiff, the NYCTA, and the plaintiff’s union representative, which, by its terms, barred this action against the defendants (see *Wei Qiang Huang v Llerena-Salazar*, 222 AD3d at 1034). In opposition, however, the allegations in the plaintiff’s affidavit were sufficient to raise questions of fact as to whether the release was signed by the plaintiff under circumstances that indicate unfairness and whether it was not “fairly and knowingly” made (*Sacchetti-Virga v Bonilla*, 158 AD3d 783, 784 [2018] [internal quotation marks omitted]). The plaintiff averred, among other things, that he “did not sign [the] agreement voluntarily,” “was not given a chance to thoroughly read the agreement before [he] signed it,” “was never told that the agreement would somehow bar [him] from bringing claims of discrimination or failure to accommodate based on [his] medical marijuana prescription,” and “was not told to consult with an attorney, nor was [he] given time to contact an attorney.” Accordingly, the Supreme Court should not have granted the defendants’ motion pursuant to CPLR 3211 (a) to dismiss the complaint on the ground that the action was barred by the release.

However, the Supreme Court should have granted the defendants’ motion pursuant to CPLR 3211 (a) to dismiss the complaint on the ground that it failed to state a cause of action (see *id.* § 3211 [a] [7]).

The NYSHRL prohibits discrimination by an employer on the basis of disability (see Executive Law § 296 [1] [a]). “A complaint states a cause of action to recover damages for employment discrimination on the basis of disability in violation of the NYSHRL if it alleges that the plaintiff suffers from a disability and that the disability engendered the behavior for which they were discriminated against in the terms, conditions, or privileges of their employment or refusal to hire” (*Brouillard v Sunrun, Inc.*, 219 AD3d 560, 561-562 [2023]; see *Jacobsen v New York City Health & Hosps. Corp.*, 22 NY3d 824, 834 [2014]). “To state a claim under the [NYS]HRL, the complaint and supporting documentation must set forth factual

allegations sufficient to show that, upon the provision of reasonable accommodations, [the employee] could perform the essential functions of [his or] her job' ” (*Brouillard v Sunrun, Inc.*, 219 AD3d at 561-562 [internal quotation marks omitted], quoting *Romanello v Intesa Sanpaolo, S.p.A.*, 22 NY3d 881, 884 [2013]). “ ‘However, bare legal conclusions are not entitled to the benefit of the presumption of truth and are not accorded every favorable inference’ ” (*Dutra v Sunday Riley Modern Skincare, LLC*, 210 AD3d 640, 641 [2022], quoting *Morris v Morris*, 306 AD2d 449, 451 [2003]).

Here, the complaint alleged employment discrimination on the basis of disability in violation of the NYSHRL. However, the complaint failed to set forth factual allegations, which, if true, would be sufficient to show that, upon the provision of reasonable accommodations, the plaintiff could perform the essential functions of his job (*see Brouillard v Sunrun, Inc.*, 219 AD3d at 562). Accordingly, the Supreme Court properly directed dismissal of the cause of action to recover damages for employment discrimination on the basis of disability in violation of the NYSHRL.

The NYCHRL also prohibits employment discrimination on the basis of disability (*see* Administrative Code § 8-107 [1] [a]). “ ‘Unlike the [NYS]HRL, the [NYC]HRL’s definition of “disability” does not include “reasonable accommodation” or the ability to perform a job in a reasonable manner,’ ” but rather “ ‘defines “disability” solely in terms of impairments’ ” (*Jacobsen v New York City Health & Hosps. Corp.*, 22 NY3d at 834-835, quoting *Romanello v Intesa Sanpaolo, S.p.A.*, 22 NY3d at 885). Pursuant to the NYCHRL, the burden is on “the employer to show the unavailability of any safe and reasonable accommodation and to show that any proposed accommodation would place an undue hardship on its business” (*id.* at 835; *see Romanello v Intesa Sanpaolo, S.p.A.*, 22 NY3d at 885; *Brouillard v Sunrun, Inc.*, 219 AD3d at 562).

Where evidentiary material is submitted and considered on a motion to dismiss a complaint pursuant to CPLR 3211 (a) (7), and the motion is not converted into one for summary judgment, the question becomes whether the plaintiff has a cause of action, not whether the plaintiff has stated one and, unless it has been shown that a material fact as claimed by the plaintiff to be one is not a fact at all and unless it can be said that no significant dispute exists regarding it, dismissal should not eventuate (*see Guggenheimer v Ginzburg*, 43 NY2d 268, 274-275 [1977]). Here, the defendants submitted evidence conclusively establishing the unavailability of any safe and

reasonable accommodation and showing that any proposed accommodation would create an undue hardship on them (*see Jacobsen v New York City Health & Hosps. Corp.*, 22 NY3d at 835; *Alvarez v New York City Tr. Auth.*, 230 AD3d 541, 542 [2024]). Accordingly, the Supreme Court properly directed dismissal of the cause of action to recover damages for employment discrimination on the basis of disability in violation of the NYCHRL.

Likewise, the Supreme Court should have directed dismissal of the cause of action alleging hostile work environment, as the plaintiff failed to sufficiently plead that he was treated “less well than other employees” because of his disability (*see Acala v Mintz Levin Cohn Ferris Glowsky & Popeo, P.C.*, 222 AD3d 706, 708 [2023]; *see generally Reichman v City of New York*, 179 AD3d 1115, 1118 [2020]) or that he was subjected to inferior terms, conditions, or privileges on the basis of his disability (*see Polite v Marquis Marriot Hotel*, 195 AD3d 965, 967 [2021]).

The plaintiff’s remaining contentions are without merit LaSalle, P.J., Connolly, Ventura and Goldberg Velazquez, JJ., concur.

(April 29, 2026)

1 166 North 7 St., LLC, Respondent, v Sung Kyu Khim et al., Appellants. [— NYS3d —]

Judgments—Default Judgment—Vacatur—Reasonable Excuse
Judgments—Enforcement—Restraining Notices

In an action to recover damages for breach of contract, commenced by motion for summary judgment in lieu of complaint pursuant to CPLR 3213, the defendants appeal from an order of the Supreme Court, Kings County (Loren Baily-Schiffman, J.), dated January 21, 2021. The order denied the defendants’ motion pursuant to CPLR 5015 (a) (1) to vacate a judgment of the same court dated November 25, 2020, entered upon the defendants’ failure to appear or oppose the motion for summary judgment in lieu of complaint, and pursuant to CPLR 5240 for a protective order.

Ordered that the order is affirmed, with costs.

In 2020, the plaintiff commenced this action against the defendants, Sung Kyu Khim and Su Lim Khim, the owners of a business, Khims Organic, Inc., to recover damages for breach of contract by motion for summary judgment in lieu of complaint pursuant to CPLR 3213. According to the plaintiff,

in 2010, it entered into a 10-year commercial lease agreement with Khims Organic, Inc., for a commercial storefront located in Brooklyn (hereinafter the premises). The plaintiff alleged that, in conjunction with the lease, the defendants signed a guaranty obligating them to be jointly and severally liable for the full performance of all agreements in the lease. According to the plaintiff, in August 2018, Khims Organic, Inc., ceased operations and vacated the premises. Khims Organic, Inc., and the defendants made no rental payments after Khims Organic, Inc., vacated the premises. The Supreme Court granted the motion for summary judgment in lieu of complaint upon the defendants' default in failing to appear or oppose the motion and, in November 2020, issued a judgment in favor of the plaintiff and against the defendants in the principal sum of \$739,903.31 (hereinafter the November 2020 judgment). The plaintiff thereafter served information subpoenas and restraining notices upon the defendants' bank to enforce the November 2020 judgment. Thereafter, the defendants moved pursuant to CPLR 5015 (a) (1) to vacate the November 2020 judgment and pursuant to CPLR 5240 for a protective order vacating the restraining notices. The plaintiff opposed the defendants' motion. In an order dated January 21, 2020, the Supreme Court denied the defendants' motion. The defendants appeal.

The Supreme Court properly denied that branch of the defendants' motion which was pursuant to CPLR 5015 (a) (1) to vacate the November 2020 judgment. "In order to vacate a default in opposing a motion pursuant to CPLR 5015 (a) (1), the moving party is required to demonstrate a reasonable excuse for the default and a potentially meritorious opposition to the motion" (*Zlobec v Bank of N.Y. Mellon*, 241 AD3d 606, 609 [2025], quoting *HSBC Bank USA, N.A. v Joseph*, 209 AD3d 633, 634 [2022]). "The determination of what constitutes a reasonable excuse lies within the sound discretion of the Supreme Court" (*Wells Fargo Bank, N.A. v Elsman*, 240 AD3d 936, 937 [2025] [internal quotation marks omitted]; see *Nationstar Mtge., LLC v Ramnarine*, 172 AD3d 886, 887 [2019]). Here, the defendants failed to provide a reasonable excuse for their default, as ignorance of the law, failure to retain an attorney, and confusion about the date of a conference do not constitute reasonable excuses (see *Cox v Marshall*, 161 AD3d 1140, 1141 [2018]; *Martinez v Otis El. Co.*, 213 AD2d 523, 524 [1995]). Since the defendants failed to proffer a reasonable excuse for their default, this Court need not address whether they demonstrated a potentially meritorious opposition to the motion (see *Wells Fargo Bank, N.A. v Elsman*, 240 AD3d at 937-938).

"CPLR 5240 grants the courts broad discretionary power to

alter the use of procedures set forth in CPLR article 52” (*Matter of Lew v Sobel*, 192 AD3d 799, 800 [2021] [internal quotation marks omitted]; see *Lisogor v Nature’s Delight, Inc.*, 189 AD3d 1386, 1388 [2020]) “to prevent ‘unreasonable annoyance, expense, embarrassment, disadvantage or other prejudice’” (*Technology Multi Sources, S.A. v Stack Global Holdings, Inc.*, 44 AD3d 931, 932 [2007], quoting *Paz v Long Is. R.R.*, 241 AD2d 486, 487 [1997]). Here, the Supreme Court providently exercised its discretion in denying that branch of the defendants’ motion which was pursuant to CPLR 5240 for a protective order vacating the restraining notices on the bank accounts, as the injunction they imposed was necessary to secure enforcement of the November 2020 judgment (see *Gryphon Dom. VI, LLC v APP Intl. Fin. Co., B.V.*, 41 AD3d 25, 38 [2007]; *Ricatto v Ricatto*, 4 AD3d 514, 516 [2004]).

The defendants’ remaining contention is without merit. Duffy, J.P., Wooten, Hom and Goldberg Velazquez, JJ., concur.

2 Mansoor Alam, Appellant, v State of New York, Respondent. [— NYS3d —]

Courts—Jurisdiction—Review of Administrative Agency Determination

In a claim, inter alia, to recover damages for violation of 42 USC § 1983 and intentional infliction of emotional distress, the claimant appeals from an order of the Court of Claims (Javier E. Vargas, J.), dated March 27, 2023. The order granted the defendant’s motion pursuant to CPLR 3211 (a) (2) to dismiss the claim for lack of subject matter jurisdiction.

Ordered that the order is affirmed, with costs.

In or around November 2021, the claimant filed an application with the New York City Department of Social Services (hereinafter NYC DSS) for Medicaid to pay for medical bills. By notice dated December 22, 2021, NYC DSS accepted the claimant’s application to pay for medical bills only in excess of his monthly spenddown amount as indicated.

In September 2022, the claimant commenced this claim against the defendant, inter alia, to recover damages for the deprivation of his rights under the United States Constitution and various federal laws in violation of 42 USC § 1983 and for intentional infliction of emotional distress, alleging that the decision by NYC DSS to accept his application to pay for medical bills only in excess of his monthly spenddown amount left him without enough money to pay for his necessary living expenses. The defendant moved pursuant to CPLR 3211 (a) (2) to dismiss the claim for lack of subject matter jurisdiction. The claimant opposed the motion. In an order dated March 27,

2023, the Court of Claims granted the defendant's motion. The claimant appeals.

"Regardless of how a claim is characterized, one that requires, as a threshold matter, the review of an administrative agency's determination falls outside the subject matter jurisdiction of the Court of Claims" (*Pratow Corp. v State of New York*, 148 AD3d 1065, 1065-1066 [2017] [alterations and internal quotation marks omitted]; see *Polanco v State of New York*, 130 AD3d 1494, 1495 [2015]; *Davis v State of New York*, 129 AD3d 1353, 1353-1354 [2015]). A challenge to the final action of an administrative agency is reviewable in the Supreme Court via a CPLR article 78 proceeding (see *Pratow Corp. v State of New York*, 148 AD3d at 1066; *Davis v State of New York*, 129 AD3d at 1354).

Here, the adjudication of the claim requires review of NYC DSS's administrative determination of the spenddown requirement applicable to the claimant's accepted Medicaid application to pay for medical bills. As such, the Court of Claims properly granted the defendant's motion pursuant to CPLR 3211 (a) (2) to dismiss the claim for lack of subject matter jurisdiction (see *Pratow Corp. v State of New York*, 148 AD3d at 1066; see also *Polanco v State of New York*, 130 AD3d at 1495; *Davis v State of New York*, 129 AD3d at 1354).

In light of the foregoing, we need not reach the parties' remaining contentions, which relate to alternative grounds for affirmance. Genovesi, J.P., Christopher, Wan and Golia, JJ., concur.

3 Atlantica, LLC, Respondent, v Cheryl Hunte, Also Known as Cheryl Ann Hunte, and Another, Appellant, et al., Defendants. [— NYS3d —]—

Process—Affidavit of Service—Presumption of Proper Service

In an action to foreclose a mortgage, the defendant Cheryl Hunte appeals from (1) an order of the Supreme Court, Suffolk County (Thomas F. Whelan, J.), dated July 27, 2022, and (2) an order and judgment of foreclosure and sale (one paper) of the same court also dated July 27, 2022. The order, insofar as appealed from, granted those branches of the plaintiff's motion which were to confirm a referee's report and for a judgment of foreclosure and sale and denied those branches of the cross-motion of the defendant Cheryl Hunte which were pursuant to CPLR 5015 (a) to vacate an order of the same court dated January 18, 2019, granting the plaintiff's motion, inter alia, for leave to enter a default judgment and for an order of reference, and thereupon to dismiss the complaint insofar as asserted

against her for lack of personal jurisdiction. The order and judgment of foreclosure and sale, insofar as appealed from, granted the same relief to the plaintiff, denied the same relief to the defendant Cheryl Hunte, confirmed the referee's report, and directed the sale of the subject property.

Ordered that the appeal from the order dated July 27, 2022, is dismissed; and it is further,

Ordered that the order and judgment of foreclosure and sale is reversed insofar as appealed from, on the law, so much of the order dated July 27, 2022, as granted those branches of the plaintiff's motion which were to confirm the referee's report and for a judgment of foreclosure and sale and denied those branches of the cross-motion of the defendant Cheryl Hunte which were pursuant to CPLR 5015 (a) to vacate the order dated January 18, 2019, and thereupon to dismiss the complaint insofar as asserted against her for lack of personal jurisdiction is vacated, and the matter is remitted to the Supreme Court, Suffolk County, for a hearing to determine the validity of service of process upon the defendant Cheryl Hunte and for a new determination thereafter of those branches of the plaintiff's motion which were to confirm the referee's report and for a judgment of foreclosure and sale and those branches of the cross-motion of the defendant Cheryl Hunte which were pursuant to CPLR 5015 (a) to vacate the order dated January 18, 2019, and thereupon to dismiss the complaint insofar as asserted against her for lack of personal jurisdiction; and it is further,

Ordered that one bill of costs is awarded to the defendant Cheryl Hunte.

The appeal from the order dated July 27, 2022, must be dismissed because the right of direct appeal therefrom terminated with the entry of the order and judgment of foreclosure and sale in the action (*see Matter of Aho*, 39 NY2d 241, 248 [1976]). The issues raised on the appeal from the order are brought up for review and have been considered on the appeal from the order and judgment of foreclosure and sale (*see* CPLR 5501 [a] [1]; *Matter of Aho*, 39 NY2d at 248).

In November 2017, the plaintiff commenced this action against the defendant Cheryl Hunte (hereinafter the defendant), among others, to foreclose a mortgage on certain real property located in Medford. The defendant failed to interpose an answer or otherwise timely appear in the action, and in an order dated January 18, 2019, the Supreme Court granted the plaintiff's motion, inter alia, for leave to enter a default judgment and for an order of reference.

In 2021, the plaintiff moved, among other things, to confirm the referee's report and for a judgment of foreclosure and sale. The defendant opposed the motion and cross-moved, *inter alia*, pursuant to CPLR 5015 (a) to vacate the order dated January 18, 2019, and thereupon to dismiss the complaint insofar as asserted against her for lack of personal jurisdiction. In an order dated July 27, 2022, the Supreme Court, among other things, granted those branches of the plaintiff's motion and denied those branches of the defendant's cross-motion. In an order and judgment of foreclosure and sale dated July 27, 2022, the court, *inter alia*, granted the same relief to the plaintiff, denied the same relief to the defendant, confirmed the referee's report, and directed the sale of the subject property. The defendant appeals.

Pursuant to CPLR 5015 (a) (4), "[t]he court which rendered a judgment or order may relieve a party from it upon such terms as may be just, on motion of any interested person . . . upon the ground of . . . lack of jurisdiction to render the judgment or order." "Where, as here, a defendant seeking to vacate a default judgment raises a jurisdictional objection pursuant to CPLR 5015 (a) (4), and seeks a discretionary vacatur pursuant to CPLR 5015 (a) (1), a court is required to resolve the jurisdictional question before determining whether it is appropriate to grant a discretionary vacatur of the default under CPLR 5015 (a) (1)." (*Chachere v Poulos*, 234 AD3d 920, 921 [2025], quoting *Kondaur Capital Corp. v McAuliffe*, 156 AD3d 778, 779 [2017]; see *115 Essex St., LLC v Tenth Ward, LLC*, 227 AD3d 640, 642 [2024]).

"Ordinarily, a process server's affidavit of service gives rise to a presumption of proper service" (*Chachere v Poulos*, 234 AD3d at 921, quoting *U.S. Bank N.A. v 22-33 Brookhaven, Inc.*, 219 AD3d 657, 662 [2023]). "Bare and unsubstantiated denials of receipt of the summons and complaint are insufficient to rebut the presumption of service" (*id.*, quoting *115 Essex St., LLC v Tenth Ward, LLC*, 227 AD3d at 642). "However, a sworn denial of service containing specific facts generally rebuts the presumption of proper service established by the affidavit of service and necessitates a hearing" (*id.*, quoting *Rosemark Contrs., Inc. v Ness*, 149 AD3d 1115, 1116 [2017]). "If an issue regarding service turns upon a question of credibility, a hearing should be held to render a determination on this issue" (*id.*; see *115 Essex St., LLC v Tenth Ward, LLC*, 227 AD3d at 642).

Here, a process server's affidavit of service on the defendant constituted *prima facie* evidence of proper service and, as such,

gave rise to a presumption of proper service (see *Matter of Rockman v Nassau County Sheriff's Dept.*, 224 AD3d 758 [2024]; *Wilmington Trust, NA v Daddi*, 203 AD3d 1112, 1114 [2022]). However, the defendant demonstrated her entitlement to a hearing on the issue of service by submitting an affidavit with attached documentation, whereby she provided specific facts sufficient to rebut the presumption of proper service (see *Chachere v Poulos*, 234 AD3d at 921; *U.S. Bank N.A. v 22-33 Brookhaven, Inc.*, 219 AD3d at 662).

Accordingly, we remit the matter to the Supreme Court, Suffolk County, for a hearing to determine the validity of service of process upon the defendant and for a new determination thereafter of those branches of the plaintiff's motion which were to confirm the referee's report and for a judgment of foreclosure and sale and those branches of the defendant's cross-motion which were pursuant to CPLR 5015 (a) to vacate the order dated January 18, 2019, and thereupon to dismiss the complaint insofar as asserted against her for lack of personal jurisdiction.

The parties' remaining contentions need not be reached in light of our determination. Dillon, J.P., Wooten, Landicino and Golia, JJ., concur.

Appeals from an order and judgment (one paper) and an order of the Supreme Court, Suffolk County, both dated July 27, 2022. Motion by the respondent, inter alia, to dismiss the appeal from stated portions of the order. By decision and order on motion of this Court dated April 24, 2024, that branch of the motion which is to dismiss the appeal from stated portions of the order was held in abeyance and referred to the panel of Justices hearing the appeals for determination upon the argument or submission thereof.

Upon the papers filed in support of the motion and the papers filed in opposition thereto, and upon the argument of the appeals, it is

Ordered that the branch of the motion which is to dismiss the appeal from stated portions of the order is denied as academic. Dillon, J.P., Wooten, Landicino and Golia, JJ., concur.

4 Authority Fleet Services Corp. et al., Respondents, v Amtrust North America, Inc., Appellant. [— NYS3d —]

Insurance—Duty to Defend and Indemnify—Reasonable Possibility of Coverage

In an action, inter alia, for a judgment declaring that the defendant is obligated to defend and indemnify the plaintiffs in an underlying action entitled *Devito v Patalan 200, LLC*, pend-

ing in the Supreme Court, Suffolk County, under index No. 601138/23, the defendant appeals from an order and judgment (one paper) of the Supreme Court, Suffolk County (Maureen T. Liccione, J.), dated July 11, 2024. The order and judgment, insofar as appealed from, granted that branch of the plaintiffs' motion which was for summary judgment declaring that the defendant is obligated to defend the plaintiffs in the underlying action, and denied the defendant's cross-motion for summary judgment dismissing the complaint and, in effect, declaring that the defendant has no obligation to defend or indemnify the plaintiffs in the underlying action, and declared that the defendant is obligated to defend the plaintiffs in the underlying action.

Ordered that the order and judgment is affirmed insofar as appealed from, with costs.

On September 30, 2022, Joshua Devito and Brian Guilfoil allegedly were injured in a construction accident. Devito and Guilfoil later commenced an action (hereinafter the underlying action) against the plaintiffs and another party to recover damages for their injuries related to the accident. According to the complaint and bill of particulars in the underlying action, Devito and Guilfoil worked for 1-888-Junk-Demo, Inc., which had a contract with the plaintiffs at the time of the accident. However, the complaint also alleged that the plaintiffs supervised, managed, controlled, and directed the work being performed.

The plaintiffs later notified the defendant of the underlying action and requested a determination of coverage pursuant to a workers' compensation and employers' liability insurance policy issued by the defendant to the plaintiff Authority Fleet Services Corp.

Thereafter, the plaintiffs commenced this action, inter alia, for a judgment declaring that the defendant is obligated to defend and indemnify the plaintiffs in the underlying action. The plaintiffs later moved, among other things, for summary judgment declaring that the defendant is obligated to defend the plaintiffs in the underlying action. The defendant opposed and cross-moved for summary judgment dismissing the complaint and, in effect, declaring that the defendant has no obligation to defend or indemnify the plaintiffs in the underlying action.

In an order and judgment dated July 11, 2024, the Supreme Court, inter alia, granted that branch of the plaintiffs' motion which was for summary judgment declaring that the defendant is obligated to defend the plaintiffs in the underlying action,

denied the defendant's cross-motion, and declared that the defendant is obligated to defend the plaintiffs in the underlying action. The defendant appeals.

"A duty to defend is triggered by the allegations contained in the underlying complaint" (*Cumberland Farms, Inc. v Tower Group, Inc.*, 137 AD3d 1068, 1070 [2016] [internal quotation marks omitted]). "An insurer's duty to defend is broader than the duty to indemnify and arises whenever the allegations of the complaint against the insured, liberally construed, potentially fall within the scope of the risks undertaken by the insurer" (*id.* [internal quotation marks omitted]; see 523 BWAY, LLC v Erie & Niagara Ins. Assn., 236 AD3d 841, 843 [2025]). "Nonetheless, 'an insurer can be relieved of its duty to defend if it establishes as a matter of law that there is no possible factual or legal basis on which it might eventually be obligated to indemnify its insured under any policy provision'" (*Cumberland Farms, Inc. v Tower Group, Inc.*, 137 AD3d at 1070, quoting *Allstate Ins. Co. v Zuk*, 78 NY2d 41, 45 [1991]).

"In determining a dispute over insurance coverage, we first look to the language of the policy" (*Gem-Quality Corp. v Colony Ins. Co.*, 209 AD3d 986, 990 [2022] [internal quotation marks omitted]). "As with any contract, unambiguous provisions of an insurance contract must be given their plain and ordinary meaning" (*id.* [internal quotation marks omitted]).

Here, the plaintiffs demonstrated that the complaint in the underlying action suggested a reasonable possibility of coverage for the plaintiffs (see *Durant v State of New York*, 195 AD3d 796, 798 [2021]; *Cumberland Farms, Inc. v Tower Group, Inc.*, 137 AD3d at 1071; see also Labor Law § 861-c [1] [a]; *Matter of Ovadia v Office of the Indus. Bd. of Appeals*, 19 NY3d 138, 145 [2012]). In opposition, the defendant failed to raise a triable issue of fact (see *Durant v State of New York*, 195 AD3d at 798; *Cumberland Farms, Inc. v Tower Group, Inc.*, 137 AD3d at 1071).

Accordingly, the Supreme Court properly granted that branch of the plaintiffs' motion which was for summary judgment declaring that the defendant is obligated to defend the plaintiffs in the underlying action and declared that the defendant is obligated to defend the plaintiffs in the underlying action.

In light of the foregoing, we need not consider the plaintiffs' remaining contention. Iannacci, J.P., Chambers, Wan and Taylor, JJ., concur.

5 Bank of America, N.A., Respondent, v Muhammad Sarwar et al., Appellants, et al., Defendants. [253 NYS3d 738]—

Disclosure—Penalty for Failure to Disclose—Conditional Order of Preclusion—Relief from Adverse Impact
Principal and Agent—Apparent Authority—Mortgage Loan Application

In an action to foreclose a mortgage, the defendants Muhammad Sarwar and Zubaida Sarwar appeal from an order of the Supreme Court, Suffolk County (George Nolan, J.), dated January 22, 2024. The order, insofar as appealed from, granted those branches of the plaintiff's motion which were for summary judgment on the complaint insofar as asserted against those defendants, to strike their first affirmative defense and twenty-third affirmative defense/third counterclaim, and for an order of reference.

Ordered that the order is affirmed insofar as appealed from, with costs.

On March 26, 2010, the defendant Muhammad Sarwar (hereinafter Muhammad) executed a note in the amount of \$657,305 in favor of the plaintiff, Bank of America, N.A. The note was secured by a mortgage on certain real property located in Suffolk County. The mortgage was signed by Muhammad and the defendant Zubaida Sarwar (hereinafter together the defendants).

On October 11, 2012, the plaintiff commenced this action to foreclose the mortgage against the defendants, among others. In their answer, the defendants alleged in their first affirmative defense that they "are the victims of a conspiracy to commit fraud and grand larceny in order to fund possible international nefarious, terrorist activities financed by a mortgage loan obtained without reasonable due diligence, and arranged through false pretenses, duress and repeated misrepresentations by employees and agents of the Plaintiff herein." The defendants' twenty-third affirmative defense/third counterclaim alleged that "Plaintiff's representatives, specifically . . . Shamveel Pasha [and] Peter Costa, . . . had sufficient notice to give rise to an inference that the bank actually knew or should have known that it was providing financial services for illegal activities." Muhammad submitted an affidavit in support of the answer and counterclaims, in which he stated that nonparty Ali Naderi arranged for the defendants to apply for a mortgage loan with the plaintiff for the purposes of investing in a business deal to acquire nine Dunkin Donuts stores. Muhammad stated that the loan application was originally denied, but that Naderi then introduced him to Pasha, purportedly as a representative of the plaintiff, at a Starbucks coffee shop. Muhammad stated that he also met with Costa during the closing of the loan and mortgage. Muhammad stated that

he received \$632,335.90 from “Bank of America, N.A.” on March 31, 2010. Muhammad stated that, “[u]pon information and belief, the Business Deal [for the Dunkin Donuts stores] was never consummated and most of the funds we deposited in this business account were absconded and stolen by Naderi and his co-conspirators, including employees, representatives and agents of the Plaintiff.”

Muhammad appeared for his deposition on May 1, 2019, May 2, 2019, December 9, 2020, and December 10, 2020. However, his deposition was not completed during that time. In an order dated June 13, 2022 (hereinafter the conditional preclusion order), the Supreme Court denied the defendants’ motion pursuant to CPLR 3109 to direct that Muhammad’s examination before trial be taken on written questions, and granted the plaintiff’s cross-motion to compel Muhammad to appear for and complete his deposition. The conditional preclusion order stated that “[t]he defendants have been given numerous opportunities to provide this court with legitimate and necessary medical documentation supporting the allegation that [the] defendant Muhammad Sarwar’s health issues prevent him from appearing at a deposition.” The conditional preclusion order directed that, if Muhammad failed to complete his deposition within 30 days of the conditional preclusion order, he would be precluded from testifying at trial. Muhammad did not complete his deposition.

On February 23, 2023, the plaintiff moved, *inter alia*, for summary judgment on the complaint insofar as asserted against the defendants, to strike their first affirmative defense and twenty-third affirmative defense/third counterclaim, and for an order of reference. In support, the plaintiff submitted, among other things, an affidavit of Ryan Dansby, a vice president of the plaintiff. Dansby stated that he was familiar with the plaintiff’s records and record-keeping practices. Dansby stated that Pasha was employed by Merrill Lynch Wealth Management, a subsidiary of the plaintiff, as a financial advisor in 2010, but that “BANA’s records show no connection between Shamveel Pasha and the Loan, Borrower, or Borrower’s family or that Shamveel Pasha had any contact of any kind with Defendants for any purpose at any time.” Dansby attached a computer printout regarding Pasha’s employment with the plaintiff. Dansby further stated that the records showed that Peter D. Costa was “employed as a Global Commercial Banking (‘GCB’) Senior Relationship Manager (2007-2011) for the Middle Market Banking Group which serves middle market companies and institutions with annual revenues of up to \$2

billion who need financial services or products. He had no responsibilities for consumer transactions nor residential mortgage loans and would not have had authority to represent Plaintiff with respect to consumer (as opposed to commercial) lending transactions. Peter Costa's job responsibilities covered the region of Connecticut, Massachusetts and Rhode Island—not New York." Dansby also attached a computer printout regarding Costa's employment with the plaintiff.

In opposition, the defendants submitted another affidavit from Muhammad. The defendants further submitted a transcript of the deposition testimony of Aqil Muhammad Sarwar (hereinafter Aqil), the defendants' son, who testified that he and Muhammad met with Pasha, not at the offices of the plaintiff, but at a Starbucks coffee shop. Aqil did not state exactly what Pasha allegedly did to facilitate the mortgage application and approval. The defendants further submitted an email, purportedly from Costa, at a personal email address. The email refers to "what we need" regarding funds to be deposited in a Chase account. The email does not state anything about a mortgage loan.

The defendants further submitted an order of the Supreme Court dated October 27, 2022, appointing Aqil as Muhammad's guardian for property management and personal needs. In an email dated December 22, 2022, the defendants' attorney stated to the plaintiff's attorney that Muhammad consented to this guardianship.

In an order dated January 22, 2024, the Supreme Court, inter alia, granted those branches of the plaintiff's motion which were for summary judgment on the complaint insofar as asserted against the defendants, to strike their first affirmative defense and twenty-third affirmative defense/third counterclaim, and for an order of reference. The court noted that a prior order had "determined that [the] plaintiff BANA made a prima facie showing by demonstrating that it is the owner and/or holder of the loan documents, that there has been a default, and that the default has not been cured by the defendants." The court declined to consider Muhammad's affidavit offered in opposition to the motion. The defendants appeal.

"A conditional order of preclusion requires a party to provide certain discovery by a date certain, or face the sanctions specified in the order" (*Naiman v Fair Trade Acquisition Corp.*, 152 AD3d 779, 780 [2017]). "If the party fails to produce the discovery by the specified date, the conditional order becomes absolute" (*id.*; see *Gibbs v St. Barnabas Hosp.*, 16 NY3d 74,

82-83 [2010]). “To be relieved of the adverse impact of the conditional order of preclusion, a party is required to demonstrate a reasonable excuse for the failure to comply with the order and the existence of a potentially meritorious defense” or cause of action (*Naiman v Fair Trade Acquisition Corp.*, 152 AD3d at 780; *see Gibbs v St. Barnabas Hosp.*, 16 NY3d at 80). Here, after the Supreme Court issued the conditional preclusion order, Muhammad did not complete his deposition and, therefore, was precluded from testifying in support of his affirmative defenses and counterclaims. Under the circumstances presented here, since the defendants failed to submit any medical documentation regarding why Muhammad was unable to complete his deposition, the court properly declined to consider Muhammad’s affidavit offered in opposition to the plaintiff’s motion (*see First London Commodity Options v Shearson Hayden Stone*, 81 AD2d 518, 519 [1981]; *Ok Sun Chong v Scheelje*, 2021 NY Slip Op 34296[U] [Sup Ct, Queens County 2021], *affd* 218 AD3d 693 [2023]).

The Supreme Court also properly granted those branches of the plaintiff’s motion which were for summary judgment on the complaint insofar as asserted against the defendants, to strike their first affirmative defense and twenty-third affirmative defense/third counterclaim, and for an order of reference. “In the absence of actual authority, a principal may still be bound by the actions of a person who has apparent authority” (*Utopia Home Care, Inc. v Revival Home Health Care, Inc.*, 176 AD3d 900, 902 [2019]; *see New York Community Bank v Woodhaven Assoc., LLC*, 137 AD3d 1231, 1233 [2016]). “Essential to the creation of apparent authority are words or conduct of the principal, communicated to a third party, that give rise to the appearance and belief that the agent possesses authority to enter into a transaction” (*Hallock v State of New York*, 64 NY2d 224, 231 [1984]; *see Standard Funding Corp. v Lewitt*, 89 NY2d 546, 551 [1997]; *Heights Props. 1388, LLC v Make Realty Corp.*, 151 AD3d 825, 827 [2017]).

Here, the plaintiff established, *prima facie*, that neither Pasha nor Costa had any authority regarding the defendants’ mortgage loan application or approval. In opposition, the evidence submitted by the defendants failed to raise a triable issue of fact as to whether Pasha or Costa had apparent authority, and, moreover, failed to raise a triable issue of fact as to whether those individuals were even involved in the loan application process (*see Utopia Home Care, Inc. v Revival Home Health Care, Inc.*, 176 AD3d at 902).

The parties’ remaining contentions either are without merit

or need not be reached in light of our determination. Iannacci, J.P., Chambers, Wan and Taylor, JJ., concur.

6 David Beckett et al., Appellants, v Estate of Thomas Beckett, Deceased, et al., Respondents. [— NYS3d —]

**Dismissal and Nonsuit—Dismissal of Complaint—Sua Sponte Dismissal
Injunctions—Preliminary Injunction—Irreparable Injury**

In an action, inter alia, for a judgment declaring that the plaintiffs are entitled to the decedent's 50% interest in certain real property, the plaintiffs appeal from (1) an order of the Supreme Court, Westchester County (Hal B. Greenwald, J.), dated May 26, 2023, and (2) an order of the same court dated August 31, 2023. The order dated May 26, 2023, insofar as appealed from, denied that branch of the plaintiffs' motion which was, in effect, for a preliminary injunction enjoining the defendants from transferring the decedent's 50% interest in the subject property and, sua sponte, directed dismissal of the complaint. The order dated August 31, 2023, denied the plaintiffs' motion for leave to reargue their prior motion, inter alia, in effect, for a preliminary injunction enjoining the defendants from transferring the decedent's 50% interest in the subject property.

Motion by the plaintiffs, inter alia, for leave to appeal to this Court from the orders. By decision and order on motion of this Court dated January 17, 2024, that branch of the motion which is for leave to appeal to this Court from the orders was held in abeyance and referred to the panel of Justices hearing the appeals for determination upon the argument or submission thereof.

Upon the papers filed in support of the motion and the papers filed in opposition thereto, and upon the submission of the appeals, it is

Ordered that the branch of the motion which is for leave to appeal to this Court from so much of the order dated May 26, 2023, as denied that branch of the plaintiffs' motion which was, in effect, for a preliminary injunction enjoining the defendants from transferring the decedent's 50% interest in the subject property is denied as unnecessary (*see* CPLR 5701 [a] [2]); and it is further,

Ordered that the branch of the motion which is for leave to appeal to this Court from so much of the order dated May 26, 2023, as, sua sponte, directed dismissal of the complaint is granted (*see id.* § 5701 [c]); and it is further,

Ordered that the branch of the motion which is for leave to appeal to this Court from the order dated August 31, 2023, is denied; and it is further,

Ordered that the appeal from the order dated August 31, 2023, is dismissed, without costs or disbursements; and it is further,

Ordered that the order dated May 26, 2023, is modified, on the law, by deleting the provision thereof, sua sponte, directing dismissal of the complaint; as so modified, the order dated May 26, 2023, is affirmed insofar as appealed from, without costs or disbursements.

The plaintiffs are the children of Thomas Beckett (hereinafter the decedent) from his first marriage. The plaintiffs commenced this action, alleging that the decedent bequeathed his 50% interest in certain unimproved property located in Martha's Vineyard to the child from his second marriage in violation of a stipulation of settlement that was incorporated but not merged into the judgment of divorce dissolving the first marriage. The plaintiffs sought, inter alia, a judgment declaring that they are entitled to the decedent's 50% interest in the property or, in the alternative, damages.

Simultaneously, the plaintiffs moved, among other things, in effect, for a preliminary injunction enjoining the defendants from transferring the decedent's 50% interest in the property. The Supreme Court issued a temporary restraining order enjoining the defendants from transferring the decedent's 50% interest in the property pending a determination of the motion. The defendants opposed the motion but did not cross-move for any relief.

In an order dated May 26, 2023, the Supreme Court, inter alia, denied that branch of the plaintiffs' motion which was, in effect, for a preliminary injunction and, sua sponte, directed dismissal of the complaint. Thereafter, the plaintiffs moved for leave to reargue their prior motion. In an order dated August 31, 2023, the court denied the plaintiffs' motion for leave to reargue. The plaintiffs appeal from the orders dated May 26, 2023, and August 31, 2023.

The appeal from the order dated August 31, 2023, must be dismissed, as no appeal lies from an order denying reargument (*see Arnav Indus. Inc. Profit Sharing Plan & Trust v 3449-3461 Hamilton Ft, LLC*, 237 AD3d 786, 787 [2025]).

"A court's power to dismiss a complaint sua sponte is to be used sparingly, and only when extraordinary circumstances exist to warrant such a dismissal" (*Wells Fargo Bank, N.A. v St. Louis*, 229 AD3d 116, 119 [2024]; *see Project Guardianship v Chai 91 St. Marks PLC, LLC*, 237 AD3d 1122, 1123 [2025]). Here, no extraordinary circumstances existed warranting dismissal of the complaint (*see Project Guardianship v Chai 91 St.*

Marks PLC, LLC, 237 AD3d at 1123; *Wells Fargo Bank, N.A. v St. Louis*, 229 AD3d at 125). Accordingly, the Supreme Court should not have, sua sponte, directed dismissal of the complaint.

“To obtain a preliminary injunction, a movant must establish (1) a likelihood of success on the merits, (2) irreparable injury absent a preliminary injunction, and (3) a balancing of the equities in the movant’s favor” (*Samaha v Brooklyn Bridge Park Corp.*, 230 AD3d 608, 610 [2024] [internal quotation marks omitted]). “As a general rule, the decision to grant or deny a preliminary injunction lies within the sound discretion of the Supreme Court” (*Miller v 6 Sterling Dr. Trust*, 231 AD3d 1020, 1021 [2024] [alteration and internal quotation marks omitted]; see *Corporate Coffee Sys., LLC v R.U.G. Consulting, LLC*, 235 AD3d 829, 830 [2025]). “Absent unusual or compelling circumstances, appellate courts are reluctant to disturb that determination” (*Miller v 6 Sterling Dr. Trust*, 231 AD3d at 1021 [internal quotation marks omitted]).

Here, although the plaintiffs arguably established their standing to commence this action as the actual and direct beneficiaries of a provision of their parents’ stipulation of settlement (see *Forman v Forman*, 17 NY2d 274, 280 [1966]; *Matter of Panella*, 218 AD3d 1198, 1200 [2023]; *Matter of Revson*, 86 AD2d 872, 874 [1982]; *Matter of Chilson*, 28 AD2d 766, 766 [1967]; *Matter of Horowitz*, 40 Misc 3d 719, 733 [Sur Ct, Nassau County 2013]), the plaintiffs did not demonstrate irreparable injury absent a preliminary injunction (see *Brighton Leasing Corp. v Brighton Realty Corp.*, 233 AD3d 839, 841 [2024]). Accordingly, the Supreme Court providently exercised its discretion in denying that branch of the plaintiffs’ motion which was, in effect, for a preliminary injunction enjoining the defendants from transferring the decedent’s 50% interest in the property. Connolly, J.P., Wooten, Taylor and Landicino, JJ., concur.

7 Marie Campisi, Respondent, v Lutheran Medical Center et al., Appellants, et al., Defendants. [— NYS3d —]

Hospitals—Malpractice—Departure from Accepted Standard of Care—Expert Opinion

In an action, inter alia, to recover damages for medical malpractice, the defendant Steven Athanail appeals, and the defendant Lutheran Medical Center separately appeals, from an amended order of the Supreme Court, Kings County (Bernard J. Graham, J.), dated February 25, 2021. The amended order, insofar as appealed from by the defendant Steven Athanail,

denied that branch of that defendant's motion which was for summary judgment dismissing the cause of action alleging medical malpractice insofar as asserted against him. The amended order, insofar as appealed from by the defendant Lutheran Medical Center, denied that branch of that defendant's motion which was for summary judgment dismissing the cause of action alleging medical malpractice insofar as asserted against it.

Ordered that the amended order is reversed insofar as appealed from, on the law, with one bill of costs, and those branches of the separate motions of the defendants Steven Athanail and Lutheran Medical Center which were for summary judgment dismissing the cause of action alleging medical malpractice insofar as asserted against each of them are granted.

On May 1, 2016, the plaintiff, who had a history of C. difficile colitis and diverticulitis, presented to the emergency department of the defendant Lutheran Medical Center (hereinafter Lutheran) with chief complaints of abdominal pain and vomiting. A CT of the plaintiff's abdomen was performed, which revealed "persistent colonic wall thickening and inflammation involving the distal descending and proximal sigmoid colon" consistent with colitis, acute diverticulitis, and neoplastic lesion. The plaintiff was admitted to Lutheran under the care of the defendant Steven Athanail, an attending physician, diagnosed with diverticulitis and recurrent C. difficile colitis, and treated with antibiotics. The plaintiff reported improving symptoms, including decreasing abdominal pain and increased bowel movements. She was discharged from Lutheran on May 4, 2016, at which time she was tolerating a regular diet, was pain free, and had no diarrhea or fever. Thereafter, on May 20, 2016, the plaintiff presented to Maimonides Medical Center, where a CT of her abdomen revealed an "obstruction at the distal sigmoid colon with perforation," necessitating an emergency laparotomy, among other treatments.

The plaintiff subsequently commenced this action against, among others, Athanail and Lutheran, inter alia, to recover damages for medical malpractice, alleging that Athanail and Lutheran failed to timely diagnose and treat the perforation of the plaintiff's colon. Athanail and Lutheran separately moved, among other things, for summary judgment dismissing the cause of action alleging medical malpractice insofar as asserted against each of them. In an amended order dated February 25, 2021, the Supreme Court, inter alia, denied those branches of the separate motions. Athanail appeals, and Lutheran separately appeals.

“In moving for summary judgment dismissing a cause of action alleging medical malpractice, a defendant must establish, prima facie, that there was no departure or deviation from the accepted standard of care or that such departure or deviation was not a proximate cause of any injury to the plaintiff” (*Mattocks v Ellant*, 231 AD3d 813, 815 [2024] [internal quotation marks omitted]; see *Wijesinghe v Buena Vida Corp.*, 210 AD3d 824, 825 [2022]). “‘Once a defendant makes a prima facie showing, the burden shifts to the plaintiff to demonstrate the existence of a triable issue of fact as to the elements on which the defendant met the prima facie burden’” (*Kielb v Bascara*, 217 AD3d 756, 757 [2023] [internal quotation marks omitted], quoting *Clarke v New York City Health & Hosps.*, 210 AD3d 631, 632 [2022]). “‘Summary judgment is not appropriate in a medical malpractice action where the parties adduce conflicting medical expert opinions. Such credibility issues can only be resolved by a jury’” (*Harris v Montefiore Med. Ctr.*, 240 AD3d 762, 763 [2025], quoting *Gupta v Lescale*, 224 AD3d 668, 669 [2024]). “‘However, a medical expert’s opinion does not raise a triable issue of fact if it is ‘conclusory, speculative, or unsupported by the record’” (*id.*, quoting *McHale v Sweet*, 217 AD3d 666, 668 [2023]). “‘In order not to be considered speculative or conclusory, expert opinions in opposition should address specific assertions made by the movant’s experts, setting forth an explanation of the reasoning and relying on specifically cited evidence in the record’” (*Wijesinghe v Buena Vida Corp.*, 210 AD3d at 825, quoting *Tsitrin v New York Community Hosp.*, 154 AD3d 994, 996 [2017]; see *Templeton v Papathomas*, 208 AD3d 1268, 1270-1271 [2022]).

Here, in opposition to Athanail’s and Lutheran’s prima facie showings that there was no departure or deviation from the accepted standard of care in diagnosing and treating the plaintiff at Lutheran, the plaintiff failed to demonstrate the existence of a triable issue of fact. The affirmation of the plaintiff’s expert submitted in opposition to the separate motions offered merely conclusory and speculative assertions that Athanail and Lutheran departed from the accepted standard of care in failing to perform an exploratory laparotomy or laparoscopy during the plaintiff’s admission at Lutheran between May 1, 2016, and May 4, 2016, and otherwise failed to address the specific assertions made by Athanail’s and Lutheran’s respective experts (see *Harris v Montefiore Med. Ctr.*, 240 AD3d at 763; *McHale v Sweet*, 217 AD3d at 668; *Blau v Benodin*, 190 AD3d 922 [2021]). Accordingly, the Supreme Court should have granted those branches of the separate motions of Athanail and Lutheran which were for summary judgment dismissing

the cause of action alleging medical malpractice insofar as asserted against each of them.

The remaining contentions of Athanail and Lutheran either are without merit or need not be reached in light of our determination. Chambers, J.P., Dowling, McCormack and Quirk, JJ., concur. **[Prior Case History: 2021 NY Slip Op 30768(U).]**

8 Benjamin Capo et al., Appellants, v Peter & Danny Contractors, LLC, et al., Defendants, and Montgomery Realty Associates, Respondent. [— NYS3d —]

Employment Relationships—Respondeat Superior—Vicarious Liability—Independent Contractor

Negligence—Liability for Acts of Independent Contractor—Inherently Dangerous Work

In a consolidated action to recover damages for personal injuries, etc., the plaintiffs appeal from a judgment of the Supreme Court, Queens County (Maurice E. Muir, J.), entered May 3, 2024. The judgment, insofar as appealed from, upon a jury verdict on the issue of liability, and upon the denial of the plaintiffs' motion pursuant to CPLR 4404 (a) to set aside so much of the jury verdict as was in favor of the defendant Montgomery Realty Associates and for judgment as a matter of law on the issue of liability against that defendant, is in favor of the defendant Montgomery Realty Associates and against the plaintiffs, in effect, dismissing the complaints insofar as asserted against that defendant.

Ordered that the judgment is affirmed insofar as appealed from, with costs.

In July 2017, the plaintiffs Benjamin Capo and Erin Capo commenced an action, inter alia, to recover damages for personal injuries against, among others, the defendant Montgomery Realty Associates (hereinafter Montgomery). In April 2018, the plaintiff Michael Moerdyk and the plaintiffs Michael Alexander and Tracie Alexander commenced separate actions, among other things, to recover damages for personal injuries against, among others, Montgomery. The plaintiffs alleged, inter alia, that Montgomery engaged an independent contractor to make repairs on the roof of a building that it owned and that the contractor negligently used a torch and started a fire on the roof of the building during the repairs. Benjamin Capo, Moerdyk, and Michael Alexander were firefighters who allegedly were injured while trying to extinguish the fire. In an order dated October 16, 2018, the three actions were consolidated.

After a trial on the issue of liability, the jury returned a verdict, among other things, in favor of Montgomery. The plaintiffs subsequently moved pursuant to CPLR 4404 (a) to set aside so much of the verdict as was in favor of Montgomery and for judgment as a matter of law on the issue of liability against Montgomery. The Supreme Court denied the motion and, on May 3, 2024, entered a judgment, inter alia, in favor of Montgomery and against the plaintiffs, in effect, dismissing the complaints insofar as asserted against Montgomery. The plaintiffs appeal.

“For a court to conclude as a matter of law that a jury verdict is not supported by sufficient evidence,” it is necessary to “conclude that there is simply no valid line of reasoning and permissible inferences which could possibly lead rational [people] to the conclusion reached by the jury on the basis of the evidence presented at trial” (*Cohen v Hallmark Cards*, 45 NY2d 493, 499 [1978]).

The Supreme Court properly denied the plaintiffs’ motion pursuant to CPLR 4404 (a) to set aside so much of the jury verdict as was in favor of Montgomery and for judgment as a matter of law on the issue of liability against Montgomery. As a general rule, one “who retains an independent contractor, as distinguished from a mere employee or servant, is not liable for the independent contractor’s negligent acts” (*Kleeman v Rheingold*, 81 NY2d 270, 273 [1993]; see *Brothers v New York State Elec. & Gas Corp.*, 11 NY3d 251, 257 [2008]). However, this general rule is subject to exceptions, including when “the employer is under a specific nondelegable duty” (*Shimunov v Ashirov*, 238 AD3d 1088, 1089 [2025] [internal quotation marks omitted]; see *Murray v Community House Hous. Dev. Fund Co., Inc.*, 223 AD3d 675, 677 [2024]). An exception to the general rule against liability exists where a landlord has breached its nondelegable duty under Multiple Dwelling Law § 78 (see *Stagno v 143-50 Hoover Owners Corp.*, 48 AD3d 548, 549 [2008]; *Mercado v Slope Assoc.*, 246 AD2d 581, 581-582 [1998]), which provides that “[e]very multiple dwelling, including its roof or roofs, and every part thereof and the lot upon which it is situated, shall be kept in good repair” (Multiple Dwelling Law § 78 [1]). Multiple Dwelling Law § 78 does not apply, however, where “the accident occurred as a result of the means and methods of the work, not due to a condition of the premises” (*Nelson v E&M 2710 Clarendon LLC*, 129 AD3d 568, 569 [2015]).

Here, the evidence presented at trial established that the accident occurred as a result of the contractor’s use of a torch to

repair a portion of a combustible roof. Therefore, as the accident did not stem from a defective condition of the building or the failure to repair such a defect, but rather from construction work being completed on the building and the means and manner of such work, Multiple Dwelling Law § 78 does not apply to create an exception to the general rule regarding liability for independent contractors (see *Nelson v E&M 2710 Clarendon LLC*, 129 AD3d at 568; *Stagno v 143-50 Hoover Owners Corp.*, 48 AD3d at 549).

Further, contrary to the plaintiffs' contention, the exception for inherently dangerous activity does not apply here. "The exception for inherently dangerous work . . . applies to situations where the employer has assigned work to an independent contractor which the employer knows or has reason to know involves special dangers inherent in the work or dangers which should have been anticipated by the employer" (*Robinson v Jewish Hosp. & Med. Ctr. of Brooklyn*, 275 AD2d 362, 364 [2000] [internal quotation marks omitted]). Here, the contractor's act of repairing a drain in a roof did not involve a risk of harm inherent in the nature of the work itself, nor should Montgomery have recognized a risk in advance of the contract (see *Rosenberg v Equitable Life Assur. Socy. of U.S.*, 79 NY2d 663, 668, 670 [1992]; *Mery v Eginger*, 149 AD3d 827, 828 [2017], *affd* 31 NY3d 1068 [2018]). The trial testimony indicated that the roof could have been repaired without the use of an open flame and that no one at Montgomery was told that the contractor's foreman might use a torch.

Contrary to the plaintiffs' contention, the Supreme Court's jury instructions were not defective in that they adequately conveyed the sum and substance of the applicable law to be charged (see *Kelly v New York City Health & Hosps. Corp.*, 194 AD3d 1032, 1034 [2021]).

The plaintiffs' remaining contention is without merit. Iannacci, J.P., Genovesi, Landicino and Love, JJ., concur.

9 Gabrielle Castellazzo, Appellant, v David's New Beginnings, LLC, Doing Business as Hand & Stone Massage & Facial Spa, Defendant, and Kathleen P. Wallace, Respondent. [253 NYS3d 737]—

Employment Relationships—Respondeat Superior—Separate Claim against Employee

In an action to recover damages for personal injuries, the plaintiff appeals from an order of the Supreme Court, Suffolk County (James F. Quinn, J.), dated June 21, 2024. The order granted the motion of the defendant Kathleen P. Wallace for

summary judgment dismissing the complaint insofar as asserted against her.

Ordered that the order is reversed, on the law, with costs, and the motion of the defendant Kathleen P. Wallace for summary judgment dismissing the complaint insofar as asserted against her is denied.

The plaintiff alleges that she sustained injuries due to the defendants' negligence, when the defendant Kathleen P. Wallace performed a facial treatment upon the plaintiff, in the course of Wallace's employment by the defendant David's New Beginnings, LLC (hereinafter New Beginnings). Wallace moved for summary judgment dismissing the complaint insofar as asserted against her, on the ground that New Beginnings was vicariously liable under the doctrine of respondeat superior for Wallace's alleged negligent acts. In an order dated June 21, 2024, the Supreme Court granted Wallace's motion. The plaintiff appeals.

Contrary to the conclusion of the Supreme Court, the doctrine of respondeat superior does not entitle Wallace to summary judgment dismissing the complaint insofar as asserted against her. "While an employer may be vicariously liable for the torts of its employee while acting within the scope of his or her employment, a claim against the employer does not necessarily preclude a separate claim against the employee" (*Colombini v Westchester County Healthcare Corp.*, 24 AD3d 712, 714 [2005] [citations omitted]; see *Morell v Balasubramanian*, 70 NY2d 297, 302-303 [1987]; *Ott v Barash*, 109 AD2d 254, 261-262 [1985]). "It is ordinarily immaterial to an agent's liability that the agent's tortious conduct may, additionally, subject the principal to liability" (Restatement [Third] of Agency § 7.01 [b]). "It is consistent with encouraging responsible conduct by individuals to impose individual liability on an agent for the agent's torts although the agent's conduct may also subject the principal to liability" (*id.*).

Since Wallace failed to meet her initial burden as the movant, it is not necessary to review the sufficiency of the plaintiff's opposition papers (see *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). Barros, J.P., Chambers, Christopher and McCormack, JJ., concur.

10 Citimortgage, Inc., Respondent, v Ian Smith et al., Defendants, and Brooklyn 7 Realty, Inc., Appellant. [— NYS3d —]—

In an action to foreclose a mortgage, the defendant Brooklyn 7 Realty, Inc., appeals from an order of the Supreme Court, Kings County (Larry D. Martin, J.), dated August 18, 2023. The order, insofar as appealed from, denied those branches of that defendant's motion which were, in effect, for leave to renew its opposition to the plaintiff's prior motion to confirm a referee's report and for a judgment of foreclosure and sale, which had been granted in an order and judgment of foreclosure and sale (one paper) of the same court (Noach Dear, J.) dated March 4, 2019, and, upon renewal, to vacate the order and judgment of foreclosure and sale and to dismiss the complaint insofar as asserted against it as time-barred or, in the alternative, for leave to amend its answer to assert a statute of limitations defense.

Ordered that the order is affirmed insofar as appealed from, with costs.

In July 2005, the defendant Ian Smith (hereinafter the borrower) executed a note in the principal sum of \$491,417, which was secured by a mortgage on certain real property located in Brooklyn.

In 2008, and again in 2010, the plaintiff commenced two prior actions against the borrower to foreclose the subject mortgage. The 2008 action was abandoned and the 2010 action was voluntarily discontinued by the parties. In 2013, title to the subject property was conveyed to the defendant Brooklyn 7 Realty, Inc. (hereinafter the defendant).

In April 2016, the plaintiff commenced this action against the borrower and the defendant, among others, to foreclose the mortgage. The defendant interposed an answer with counterclaims and asserted several affirmative defenses.

Thereafter, the Supreme Court granted the plaintiff's motion for summary judgment on the complaint insofar as asserted against the defendant and for an order of reference. In an order and judgment of foreclosure and sale dated March 4, 2019, the court granted the plaintiff's motion to confirm the referee's report and for a judgment of foreclosure and sale, confirmed the referee's report, and directed the sale of the property. The defendant appealed from the order and judgment of foreclosure and sale, but its appeal was deemed dismissed based on the defendant's failure to timely perfect (*see* 22 NYCRR 1250.10 [a]).

After the sale of the property was noticed for March 2023, the defendant moved, in effect, for leave to renew its opposition to the plaintiff's prior motion to confirm the referee's report and for a judgment of foreclosure and sale and, upon renewal,

to vacate the order and judgment of foreclosure and sale and to dismiss the complaint insofar as asserted against it as time-barred or, in the alternative, for leave to amend its answer to assert a statute of limitations defense. The plaintiff opposed. In an order dated August 18, 2023, the Supreme Court denied the defendant's motion as untimely. The defendant appeals.

"After entry of a final judgment, a motion for leave to renew pursuant to CPLR 2221 (e) (2) based upon 'a change in the law that would change the prior determination' must be made, absent circumstances set forth in CPLR 5015, before the time to appeal the final judgment has expired" (*Matter of Eagle Ins. Co. v Persaud*, 1 AD3d 356, 357 [2003], quoting CPLR 2221 [e] [2]; see *Wilmington Sav. Fund Socy., FSB v Souffrant*, 237 AD3d 1006, 1008 [2025]; *U.S. Bank N.A. v Tong*, 230 AD3d 716, 717 [2024]; *Opalinski v City of New York*, 205 AD3d 917, 919 [2022]; *Dinallo v DAL Elec.*, 60 AD3d 620, 621 [2009]).

Here, the parties do not dispute that the order and judgment of foreclosure and sale was served upon the defendant with notice of entry in April 2019. The defendant moved, in effect, for leave to renew in 2023, "long after [its] time to appeal from the order and judgment of foreclosure and sale expired" (*Wilmington Sav. Fund Socy., FSB v Souffrant*, 237 AD3d at 1008, citing CPLR 5513 [a], [d]). Therefore, the Supreme Court properly denied the defendant's motion as untimely (see *id.*; see also *U.S. Bank N.A. v Tong*, 230 AD3d at 717).

In light of the foregoing, we need not reach the parties' remaining contentions. Barros, J.P., Christopher, Warhit and Voutsinas, JJ., concur.

11 Ziva Cohen, Appellant, v City of New York, Respondent, et al., Defendant. [— NYS3d —]

**Municipal Corporations—Sidewalks—Prior Notice of Defective Condition—
Department of Transportation Records and Maps**

In an action to recover damages for personal injuries, the plaintiff appeals from an order of the Supreme Court, Kings County (Gina Abadi, J.), dated February 28, 2024. The order granted the motion of the defendant City of New York for summary judgment dismissing the amended complaint insofar as asserted against it.

Ordered that the order is affirmed, with costs.

In 2016, the plaintiff commenced this action against, inter alia, the defendant City of New York (hereinafter the City) to recover damages for personal injuries she alleged she sustained when she tripped and fell in a pothole in a crosswalk while crossing East 24th Street at its intersection with Avenue O in

Brooklyn. Following discovery, the City moved for summary judgment dismissing the amended complaint insofar as asserted against it, contending that it did not have the requisite prior written notice of the hazard (*see* Administrative Code of City of NY § 7-201 [c] [2]). The plaintiff opposed. In an order dated February 28, 2024, the Supreme Court granted the City's motion. The plaintiff appeals.

“Administrative Code of the City of New York § 7-201 (c) limits the City's duty of care over municipal streets and sidewalks by imposing liability only for those defects or hazardous conditions which its officials have been actually notified exist at a specified location” (*Katz v City of New York*, 87 NY2d 241, 243 [1995]; *see Cuccia v City of New York*, 22 AD3d 516, 516 [2005]). Where the City establishes that it lacked prior written notice under the Pothole Law (Administrative Code § 7-201 [c] [2]), “the burden shifts to the plaintiff to demonstrate the applicability of one of two recognized exceptions to the rule—that the municipality affirmatively created the defect through an act of negligence or that a special use resulted in a special benefit to the locality” (*Yarborough v City of New York*, 10 NY3d 726, 728 [2008]; *see Goodman v City of New York*, 230 AD3d 1115, 1116-1117 [2024]).

Thus, to be entitled to summary judgment, the City must first establish that it lacked prior written notice of the alleged defect (*see Goodman v City of New York*, 230 AD3d at 1116-1117; *Canaday v Village of Wappingers Falls*, 220 AD3d 731, 732 [2023]). Once that showing is made, the burden shifts to the plaintiff to demonstrate that the City affirmatively created the defect through an act of negligence or that a special use resulted in a special benefit (*see Goodman v City of New York*, 230 AD3d at 1116-1117; *Canaday v Village of Wappingers Falls*, 220 AD3d at 732).

Maps prepared by Big Apple Pothole and Sidewalk Protection Corporation (hereinafter Big Apple) and filed with the City Department of Transportation serve as prior written notice of defective conditions depicted thereon (*see Katz v City of New York*, 87 NY2d at 243; *Nieves v City of New York*, 216 AD3d 800, 801 [2023]). “Big Apple is a corporation established by the New York State Trial Lawyers Association for the purpose of giving notices in compliance with the Pothole Law” (*D’Onofrio v City of New York*, 11 NY3d 581, 584 [2008]; *see Nieves v City of New York*, 216 AD3d at 801). “It does so through maps on which coded symbols are entered to represent defects” (*D’Onofrio v City of New York*, 11 NY3d at 584; *see Nieves v City of New York*, 216 AD3d at 801).

Here, the City established its prima facie entitlement to judgment as a matter of law dismissing the amended complaint insofar as asserted against it by demonstrating, through a search of the City Department of Transportation records and maps served on the City Department of Transportation by Big Apple, that the City did not receive prior written notice of the alleged defect which caused the plaintiff's fall (*see Nieves v City of New York*, 216 AD3d at 801; *Cuccia v City of New York*, 22 AD3d at 516). Contrary to the plaintiff's contention, the defect shown on the relevant Big Apple map was not in the same location as the location alleged by the plaintiff where her fall occurred, and, therefore, the map did not provide the City prior written notice (*see Nieves v City of New York*, 216 AD3d at 801-802; *Cuccia v City of New York*, 22 AD3d at 516). In opposition, the plaintiff failed to raise a triable issue of fact, inter alia, as to whether the City had prior written notice of the alleged defect or whether the City affirmatively created the alleged defect (*see Goodman v City of New York*, 230 AD3d at 1117; *Amer v City of New York*, 166 AD3d 571, 572 [2018]).

Accordingly, the Supreme Court properly granted the City's motion for summary judgment dismissing the amended complaint insofar as asserted against it. Duffy, J.P., Ford, Golia and Quirk, JJ., concur.

12 Deutsche Bank National Trust Company, Respondent, v Andrew Benson, Appellant, et al., Defendants. [— NYS3d —]

Mortgages—Foreclosure—Compliance with RPAPL 1304 Notice—Standard Office Mailing Procedure

In an action to foreclose a mortgage, the defendant Andrew Benson appeals from two orders of the Supreme Court, Westchester County (Alexandra D. Murphy, J.), both dated November 27, 2023. The first order, insofar as appealed from, granted those branches of the plaintiff's motion which were for summary judgment on the complaint insofar as asserted against the defendant Andrew Benson and for an order of reference. The second order, insofar as appealed from, granted the same relief to the plaintiff and appointed a referee to compute the amounts due to the plaintiff.

Ordered that the orders are reversed insofar as appealed from, on the law, with one bill of costs, and those branches of the plaintiff's motion which were for summary judgment on the complaint insofar as asserted against the defendant Andrew Benson and for an order of reference are denied.

In March 2017, the plaintiff commenced this action against, among others, the defendant Andrew Benson (hereinafter the

defendant) to foreclose a mortgage on certain real property located in North Salem. In April 2023, the plaintiff moved, *inter alia*, for summary judgment on the complaint insofar as asserted against the defendant and for an order of reference. In support of the motion, the plaintiff submitted, among other things, an affidavit of mailing of Britney Fisher, a document execution associate of Nationstar Mortgage, LLC (hereinafter Nationstar), the plaintiff's servicer (hereinafter the Fisher affidavit). Fisher stated that the RPAPL 1304 notices were mailed by a third-party vendor named LenderLive, LLC (hereinafter LenderLive). The defendant opposed the motion, arguing, *inter alia*, that the Fisher affidavit was inadmissible hearsay because Fisher was an employee of Nationstar, not LenderLive. Thereafter, the plaintiff withdrew the motion.

In July 2023, the plaintiff again moved, among other things, for summary judgment on the complaint insofar as asserted against the defendant and for an order of reference. In support of the motion, the plaintiff submitted, *inter alia*, an affidavit of Takesha Bryan, another document execution associate of Nationstar, sworn to on June 6, 2023 (hereinafter the Bryan affidavit). Bryan stated that the RPAPL 1304 notices were mailed by Nationstar employees and described the procedures that were followed. The defendant opposed the motion, arguing, among other things, that the Bryan affidavit contradicted the Fisher affidavit, which was submitted with the plaintiff's first motion, *inter alia*, for summary judgment and stated that the RPAPL 1304 notices were mailed by LenderLive. The defendant further argued that the contradiction demonstrated that the Bryan affidavit was unreliable and that a triable issue of fact existed regarding the RPAPL 1304 notices.

In reply, the plaintiff's counsel explained that the plaintiff withdrew the first motion upon learning that the Fisher affidavit had incorrectly stated that the RPAPL 1304 notices were mailed by LenderLive. Counsel further explained that Nationstar does on occasion use LenderLive to mail foreclosure notices, but the notices in this case were mailed in-house by Nationstar.

In an order dated November 27, 2023, the Supreme Court, among other things, granted those branches of the plaintiff's motion which were for summary judgment on the complaint insofar as asserted against the defendant and for an order of reference. In a second order dated November 27, 2023, the court, *inter alia*, granted the same relief to the plaintiff and appointed a referee to compute the amount due to the plaintiff. The defendant appeals.

“Strict compliance with RPAPL 1304 notice to the borrower or borrowers is a condition precedent to the commencement of a foreclosure action, and the plaintiff has the burden of establishing satisfaction of this condition” (*U.S. Bank N.A. v Sansone*, 230 AD3d 1183, 1185 [2024] [internal quotation marks omitted]; see *U.S. Bank N.A. v McQueen*, 221 AD3d 1049, 1050 [2023]). Pursuant to RPAPL 1304 (1), “at least ninety days before a lender, an assignee or a mortgage loan servicer commences legal action against the borrower, or borrowers at the property address and any other address of record, including mortgage foreclosure, such lender, assignee or mortgage loan servicer shall give notice to the borrower.” “RPAPL 1304 (2) requires that the notice be sent by registered or certified mail, and also by first-class mail, to the last known address of the borrower and to the residence that is the subject of the mortgage” (*U.S. Bank N.A. v Sansone*, 230 AD3d at 1185 [internal quotation marks omitted]). “A plaintiff demonstrates its compliance with the statute ‘by proof of the requisite mailing, which can be established [by] proof of the actual mailings, such as affidavits of mailing or domestic return receipts with attendant signatures, or proof of a standard office mailing procedure designed to ensure that items are properly addressed and mailed, sworn to by someone with personal knowledge of the procedure’ ” (*U.S. Bank N.A. v Pickering-Robinson*, 197 AD3d 757, 759 [2021], quoting *Citibank, N.A. v Conti-Scheurer*, 172 AD3d 17, 21 [2019]; see *U.S. Bank N.A. v Sansone*, 230 AD3d at 1185). Where “a defendant raises failure to comply with RPAPL 1304 for the first time in opposition to a summary judgment motion, a plaintiff may establish that it complied with RPAPL 1304 by presenting evidence of compliance in its reply papers” (*U.S. Bank Trust, N.A. v Chiramannil*, 205 AD3d 966, 968 [2022]; see *Citimortgage, Inc. v Espinal*, 134 AD3d 876, 879 [2015]).

Here, the plaintiff submitted, among other things, the Bryan affidavit, wherein Bryan attested that the RPAPL 1304 notices were mailed by Nationstar employees and described the standard office procedure for mailing the notices. Annexed to the Bryan affidavit were copies of four 90-day letters and the comment log printout. The Bryan affidavit, together with the annexed letters and comment log printout, were sufficient to establish “‘proof of a standard office mailing procedure designed to ensure that items are properly addressed and mailed, sworn to by someone with personal knowledge of the procedure’ ” (*U.S. Bank N.A. v Pickering-Robinson*, 197 AD3d at 759, quoting *Citibank, N.A. v Conti-Scheurer*, 172 AD3d at 21; see *U.S. Bank N.A. v Sansone*, 230 AD3d at 1185).

However, in opposition, the defendant raised a triable issue of fact as to whether the plaintiff complied with RPAPL 1304 by showing that the Bryan affidavit contradicted the previously submitted Fisher affidavit. The affirmation submitted in reply by the plaintiff's counsel, who did not allege personal knowledge of Nationstar's mailing procedures, was insufficient to explain the discrepancies between the affidavits and establish strict compliance with RPAPL 1304 (*see Citimortgage, Inc. v Sultan*, 230 AD3d 1292, 1294 [2024]; *Bank of N.Y. Mellon v Gordon*, 171 AD3d 197, 210 [2019]).

The plaintiff's contention regarding CPLR 2001 is improperly raised for the first time on appeal (*see Park Premium Enters., Inc. v Norben Lofts, LLC*, 220 AD3d 661, 662 [2023]).

In light of our determination, we need not reach the defendant's remaining contention.

Accordingly, the Supreme Court should have denied those branches of the plaintiff's motion which were for summary judgment on the complaint insofar as asserted against the defendant and for an order of reference. Connolly, J.P., Christopher, Voutsinas and Hom, JJ., concur.

13 Diesel Funding, LLC, Respondent, v Build Retail, Inc., et al., Appellants. [— NYS3d —]—

**Stipulations—Stipulation of Settlement—Enforcement
Usury—Usurious Agreement—Finite Term—Adjustments to Payments**

In an action, inter alia, to recover damages for breach of contract, the defendants appeal from an order of the Supreme Court, Kings County (Leon Ruchelsman, J.), dated April 18, 2024. The order, insofar as appealed from, denied those branches of the defendants' motion which were to vacate a judgment dated May 25, 2023, in favor of the plaintiff and against the defendants in the total sum of \$1,476,330.68, and a stipulation of settlement.

Ordered that on the Court's own motion, the notice of appeal is deemed to be a notice of appeal by the defendants (*see CPLR 2001; Matter of Tagliaferri v Weiler*, 1 NY3d 605 [2004]); and it is further,

Ordered that the order is affirmed insofar as appealed from, without costs or disbursements.

On or about June 21, 2022, the plaintiff, Diesel Funding, LLC, and the defendant Build Retail, Inc. (hereinafter Build Retail), entered into a written agreement (hereinafter the agreement) pursuant to which Build Retail sold, and the plaintiff purchased, an interest in Build Retail's future receiv-

ables for the sum of \$850,000 (hereinafter the purchase price). In exchange for the purchase price, Build Retail authorized the plaintiff to debit from Build Retail's bank account a percentage of Build Retail's daily sales revenue until the plaintiff received the sum of \$1,274,150 (hereinafter the purchased amount). Build Retail also agreed that in the event of its default under the agreement, the uncollected purchased amount "may become due and payable in full immediately" to the plaintiff. The defendant James Wesley Cashwell executed a personal guaranty of performance of all the representations, warranties, and covenants made by Build Retail in the agreement.

In August 2022, upon the defendants' alleged default on the agreement, the plaintiff commenced this action, inter alia, to recover damages for breach of contract. Shortly thereafter, the parties entered into a stipulation of settlement dated August 22, 2022, which provided that "this action is settled for the sum of \$1,150,740.12." It also provided that "[i]n the event of a default" under the terms of the stipulation of settlement, the "[p]laintiff shall have the right, without any notice to the Defendants and without further application to the court, to enter judgment for \$1,150,740.12 plus fees equating to twenty percent of the then remaining settlement balance, together with costs, interest and disbursements less any amounts paid hereunder." The defendants failed to make any of the payments provided for in the stipulation of settlement. In May 2023, the plaintiff applied to the clerk for a judgment, and a judgment dated May 25, 2023, was entered against the defendants and in favor of the plaintiff in the total sum of \$1,476,330.68.

In March 2024, the defendants moved, among other things, to vacate the judgment and the stipulation of settlement. The plaintiff opposed the motion. In an order dated April 18, 2024, the Supreme Court, inter alia, denied those branches of the motion. The defendants appeal.

"A stipulation of settlement is a contract, enforceable according to its terms" (*Corona Fuel Corp. v Nayci*, 140 AD3d 1004, 1005 [2016] [internal quotation marks omitted]). Here, it is undisputed that the defendants did not comply with the terms of the stipulation of settlement and, under the terms of the stipulation of settlement, the defendants agreed that, in the event of their default, the plaintiff had the right, without any notice to the defendants and without further application to the court, to enter a judgment for a specified amount, plus fees and interest (*see* CPLR 3215 [i] [1]).

The defendants argue that the agreement was a usurious

loan, and therefore, the judgment should be vacated as neither the agreement nor the stipulation of settlement was enforceable. If the agreement was found to be a loan, “criminal usury would be a defense to its enforcement, rendering it void” (*Principis Capital, LLC v I Do, Inc.*, 201 AD3d 752, 754 [2022]; see *Davis v Richmond Capital Group, LLC*, 194 AD3d 516, 517 [2021]). “The rudimentary element of usury is the existence of a loan or forbearance of money, and where there is no loan, there can be no usury, however unconscionable the contract may be” (*LG Funding, LLC v United Senior Props. of Olathe, LLC*, 181 AD3d 664, 665 [2020]). “To determine whether a transaction constitutes a usurious loan, it must be considered in its totality and judged by its real character, rather than by the name, color, or form which the parties have seen fit to give it” (*id.* [internal quotation marks omitted]). “The court must examine whether the plaintiff is absolutely entitled to repayment under all circumstances” (*id.* [internal quotation marks omitted]). “Unless a principal sum advanced is repayable absolutely, the transaction is not a loan” (*id.* at 666). “Usually, courts weigh three factors when determining whether repayment is absolute or contingent: (1) whether there is a reconciliation provision in the agreement; (2) whether the agreement has a finite term; and (3) whether there is any recourse should the merchant declare bankruptcy” (*id.*).

Here, the defendants failed to establish that the transaction set forth in the agreement was a usurious loan. The terms of the agreement specifically provided that the payments would be capped at a specified percentage of daily receivables, allowed for adjustments to the daily payments made by Build Retail to the plaintiff based on changes in Build Retail’s sales, and provided for reconciliation in order to ensure that the amounts collected equaled the specified percentage of receivables. Concomitantly, as the amount of the daily payments could change, the term of the agreement was not finite. Additionally, we note that the defendants did not seek to engage in the agreement’s reconciliation procedure, which precludes our review of the claim that the process was illusory (see *Apollo Funding Co. v Dave Reilly Constr., LLC*, 241 AD3d 1508, 1509 [2025]). Moreover, no contractual provision existed establishing that a declaration of bankruptcy would constitute an event of default (see *id.*; cf. *Davis v Richmond Capital Group, LLC*, 194 AD3d at 517; *LG Funding, LLC v United Senior Props. of Olathe, LLC*, 181 AD3d at 666).

The defendants’ remaining contentions are either improperly raised for the first time on appeal or without merit.

Accordingly, the Supreme Court properly denied those branches of the defendants' motion which were to vacate the judgment and the stipulation of settlement. Genovesi, J.P., Christopher, Wan and Ventura, JJ., concur.

14 Lueray Dowdy, Respondent, v Brooklyn Hospital Center, Appellant. [— NYS3d —]—

Negligence—Maintenance of Premises—Visible and Apparent Dangerous Condition

Trial—Verdict—Setting Verdict Aside

Damages—Inadequate and Excessive Damages—Past and Future Pain and Suffering—Nature and Extent of Injuries

In an action to recover damages for personal injuries, the defendant appeals from (1) a judgment of the Supreme Court, Kings County (Francois A. Rivera, J.), dated August 27, 2020, and (2) an order of the same court dated December 23, 2020. The judgment, upon a jury verdict on the issue of liability finding the defendant 60% at fault in the happening of the accident and the plaintiff 40% at fault, and upon a jury verdict on the issue of damages finding that the plaintiff sustained damages, inter alia, in the sums of \$500,000 for past pain and suffering, \$1,000,000 for future pain and suffering over a period of 25 years, and \$1,100,000 for future medical expenses, is in favor of the plaintiff and against the defendant in the total sum of \$1,953,631.80, and directed that David Resnick & Associates, P.C., the plaintiff's counsel, recover the sum of \$660,947.08 from the defendant as an attorney fee. The order denied the defendant's motion to set aside the jury verdict on the issue of liability and for judgment as a matter of law or, in the alternative, to set aside the jury verdict on the issues of liability and the apportionment of fault as contrary to the weight of the evidence and for a new trial on those issues or, in the alternative, to set aside the jury verdict on the issues of damages for past and future pain and suffering as excessive and contrary to the weight of the evidence and for a new trial on the issues of damages for past and future pain and suffering, to set aside the jury verdict on the issue of damages for future medical expenses as contrary to the weight of the evidence and for a new trial on the issue of damages for future medical expenses, and for a collateral source hearing.

Ordered that the judgment is modified, on the law, by deleting the provision thereof directing that David Resnick & Associates, P.C., recover the sum of \$660,947.08 from the defendant as an attorney fee; as so modified, the judgment is affirmed; and it is further,

Ordered that the order is affirmed; and it is further,

Ordered that one bill of costs is awarded to the plaintiff.

The plaintiff commenced this action to recover damages for personal injuries she alleged she sustained on December 9, 2015, when she slipped and fell on food that had spilled at the interior entrance of a cafeteria located on the defendant's premises. As a result of her fall, the plaintiff sustained, inter alia, injuries to her left hamstring tendon and a herniated disc at L4-L5 for which she underwent fusion surgery. Following a trial on the issue of liability, the jury found the defendant 60% at fault in the happening of the accident and the plaintiff 40% at fault. Following a trial on the issue of damages, the jury, among other things, found that the plaintiff sustained damages in the sums of \$500,000 for past pain and suffering, \$1,000,000 for future pain and suffering over a period of 25 years, and \$1,100,000 for future medical expenses. The Supreme Court entered a judgment in favor of the plaintiff and against the defendant in the total sum of \$1,953,631.80, and directed that the plaintiff's counsel recover the sum of \$660,947.08 from the defendant as an attorney fee.

Thereafter, the defendant moved to set aside the jury verdict on the issue of liability and for judgment as a matter of law or, in the alternative, to set aside the jury verdict on the issues of liability and the apportionment of fault as contrary to the weight of the evidence and for a new trial on those issues or, in the alternative, to set aside the jury verdict on the issues of damages for past and future pain and suffering as excessive and contrary to the weight of the evidence and for a new trial on the issues of damages for past and future pain and suffering, to set aside the jury verdict on the issue of damages for future medical expenses as contrary to the weight of the evidence and for a new trial on the issue of damages for future medical expenses, and for a collateral source hearing. In an order dated December 23, 2020, the Supreme Court denied the defendant's motion. The defendant appeals from the judgment and the order.

"A motion pursuant to CPLR 4401 or 4404 for judgment as a matter of law may be granted only 'where the trial court finds that, upon the evidence presented, there is no rational process by which the fact trier could base a finding in favor of the nonmoving party'" (*Caliendo v Ellington*, 104 AD3d 635, 636 [2013], quoting *Szczerbiak v Pilat*, 90 NY2d 553, 556 [1997]). "In considering such a motion, 'the trial court must afford the party opposing the motion every inference which may properly be drawn from the facts presented, and the facts must be considered in a light most favorable to the nonmovant'" (*Ham-*

ilton v Rouse, 46 AD3d 514, 516 [2007], quoting *Szczerbiak v Pilat*, 90 NY2d at 556).

“In order to establish liability in a slip and fall case, the plaintiff must demonstrate that the defendant either created the dangerous condition complained of, or had actual or constructive notice of it” (*Knight v Certified Oils*, 239 AD2d 391, 392 [1997]; see *Medina v Sears, Roebuck & Co.*, 41 AD3d 798, 799 [2007]). “To constitute constructive notice, a defect must be visible and apparent and it must exist for a sufficient length of time prior to the accident to permit [the] defendant’s employees to discover and remedy it” (*Bernard v Waldbaum, Inc.*, 232 AD2d 596, 597 [1996] [internal quotation marks omitted]; see *Kantlis v 31-08 Cafe Concherto*, 282 AD2d 713, 713 [2001]). “To meet its initial burden on the issue of lack of constructive notice, the defendant must offer some evidence as to when the area in question was last cleaned or inspected relative to the time when the plaintiff fell” (*Piotrowski v Texas Roadhouse, Inc.*, 192 AD3d 1147, 1148 [2021] [internal quotation marks omitted]; see *Schiano v Mijul, Inc.*, 79 AD3d 726, 726 [2010]).

Here, affording the plaintiff every inference which may properly be drawn from the facts presented, the jury could have rationally concluded that the plaintiff slipped on food that had spilled around the entrance of the cafeteria, and that this dangerous condition was visible and apparent and existed for a sufficient period of time to allow the defendant to discover and remedy it (see *Morales v Davidson Apts., LLC*, 193 AD3d 719, 721 [2021]; *Villaurel v City of New York*, 59 AD3d 709, 711-712 [2009]).

“A jury verdict should not be set aside as contrary to the weight of the evidence unless the jury could not have reached the verdict by any fair interpretation of the evidence” (*Tafolla v Aldrich Mgt. Co., LLC*, 220 AD3d 690, 691 [2023] [internal quotation marks omitted]; see *Cruz-Rivera v National Grid Energy Mgt., LLC*, 190 AD3d 687, 688 [2021]). “Issues of credibility are for the jury, which had the opportunity to observe the witnesses and the evidence” (*Lalla v Connolly*, 17 AD3d 322, 323 [2005]; see *Glynn v Altobelli*, 181 AD3d 567, 569 [2020]). “The apportionment of fault among the parties is generally an issue of fact for the jury, and the jury’s apportionment of fault should not be set aside unless it could not have been reached based upon a fair interpretation of the evidence” (*Plazas v Sherlock*, 228 AD3d 788, 790 [2024] [internal quotation marks omitted]; see *Hernandez v Pappco Holding Co., Ltd.*, 136 AD3d 981, 983 [2016]). Here, the jury’s finding that

the defendant was negligent and as to the apportionment of 60% fault to the defendant and 40% fault to the plaintiff was based upon a fair interpretation of the evidence and, therefore, was not contrary to the weight of the evidence (*see McGowan v State of New York*, 79 AD3d 984, 987 [2010]).

A jury's determination with respect to an award for past and future pain and suffering will not be set aside unless the award deviates materially from what would be reasonable compensation (*see* CPLR 5501 [c]; *Quijano v American Tr. Ins. Co.*, 155 AD3d 981, 983 [2017]; *Kayes v Liberati*, 104 AD3d 739, 741 [2013]). "The reasonableness of compensation must be measured against relevant precedent of comparable cases" (*Tarpley v New York City Tr. Auth.*, 177 AD3d 929, 932 [2019] [internal quotation marks omitted]; *see Kayes v Liberati*, 104 AD3d at 741). "Although prior damage awards in cases involving similar injuries are not binding upon the courts, they guide and enlighten them with respect to determining whether a verdict in a given case constitutes reasonable compensation" (*Miller v Weisel*, 15 AD3d 458, 459 [2005]; *see Garcia v CPS 1 Realty, LP*, 164 AD3d 656, 658 [2018]). Here, considering the nature and the extent of the injuries sustained by the plaintiff, the jury's award for past and future pain and suffering did not materially deviate from what would be reasonable compensation (*see* CPLR 5501 [c]; *Petit v Archer*, 218 AD3d 695, 696 [2023]; *Kayes v Liberati*, 104 AD3d at 741; *Guallpa v Key Fat Corp.*, 98 AD3d 650, 651 [2012]).

"'Awards of damages for . . . future medical expenses must be supported by competent evidence which establishes the need for, and the cost of, medical care'" (*Quijano v American Tr. Ins. Co.*, 155 AD3d at 983, quoting *Starkman v City of Long Beach*, 148 AD3d 1070, 1072 [2017]; *see Tarpley v New York City Tr. Auth.*, 177 AD3d at 933). "Evidence submitted at trial that the plaintiff will incur medical expenses when and if future conditions develop that require treatment is speculative, and does not support an award of damages for future medical expenses" (*Pilgrim v Wilson Flat, Inc.*, 110 AD3d 973, 974 [2013]; *see Starkman v City of Long Beach*, 148 AD3d at 1072). Here, the jury's award for future medical expenses was supported by competent evidence, including the plaintiff's life-care plan, which established the need for, and the cost of, the plaintiff's future medical care.

Contrary to the defendant's contention, the Supreme Court properly denied that branch of its motion which was for a collateral source hearing. "[F]or a defendant to be entitled to a collateral source hearing, the defendant must tender some

competent evidence from available sources that the plaintiff's economic losses may in the past have been, or may in the future be, replaced, or the plaintiff indemnified, from collateral sources" (*Firmes v Chase Manhattan Auto. Fin. Corp.*, 50 AD3d 18, 36 [2008]; see *Nunez v City of New York*, 85 AD3d 885, 887 [2011]). Here, the defendant did not submit any evidence that the plaintiff could mitigate future medical expenses by obtaining a health insurance plan under the Patient Protection and Affordable Care Act (cf. *Liciaga v New York City Tr. Auth.*, 231 AD3d 250 [2024]).

However, the Supreme Court improperly directed the plaintiff's counsel to recover an attorney fee directly from the defendant, as this provision of the judgment essentially awarded a money judgment to a nonparty (see *Wright v Long Is. R.R. Co.*, 216 AD2d 460, 461 [1995]). Genovesi, J.P., Christopher, Wan and Ventura, JJ., concur.

15 Marisol Fuentes, Appellant, v Cassandra B. Simmons, Respondent, et al., Defendants. [— NYS3d —]

Physicians and Surgeons—Malpractice—Departure from Accepted Standard of Care—Expert Affirmation

Physicians and Surgeons—Lack of Informed Consent—Disclosure of Risks, Benefits, and Alternatives—Scope of Consent

In an action, inter alia, to recover damages for medical malpractice and lack of informed consent, the plaintiff appeals from an order of the Supreme Court, Westchester County (Lawrence H. Ecker, J.), dated March 7, 2022. The order, insofar as appealed from, granted the motion of the defendant Cassandra B. Simmons for summary judgment dismissing the complaint insofar as asserted against her.

Ordered that the order is affirmed insofar as appealed from, with costs.

On October 11, 2016, the defendant Cassandra B. Simmons performed a cystectomy on the plaintiff at the defendant White Plains Hospital (hereinafter the hospital). The plaintiff was admitted to the hospital for postoperative care, and, on October 17, 2016, during an exploratory laparotomy, two perforations were discovered in the plaintiff's small bowel.

The plaintiff commenced this action, inter alia, to recover damages for medical malpractice and lack of informed consent against Simmons, among others, alleging, among other things, that Simmons was negligent in performing the surgery on October 11, 2016, and in perforating the plaintiff's small bowel during that surgery. Thereafter, Simmons moved for summary judgment dismissing the complaint insofar as asserted against

her. In an order dated March 7, 2022, the Supreme Court, *inter alia*, granted Simmons's motion. The plaintiff appeals.

"The elements of a medical malpractice cause of action are a deviation or departure from accepted community standards of practice, and that such departure was a proximate cause of the plaintiff's injuries" (*Kielb v Bascara*, 217 AD3d 756, 756 [2023] [internal quotation marks omitted]; see *DiLorenzo v Zaso*, 148 AD3d 1111, 1112 [2017]). "To prevail on a motion for summary judgment in a medical malpractice action, the defendant has the initial burden of establishing either that there was no departure from accepted community standards of practice or that any alleged departure was not a proximate cause of the plaintiff's injuries" (*Kielb v Bascara*, 217 AD3d at 756). "Once a defendant makes a *prima facie* showing, 'the burden shifts to the plaintiff to demonstrate the existence of a triable issue of fact' as to the elements on which the defendant met the *prima facie* burden" (*Clarke v New York City Health & Hosps.*, 210 AD3d 631, 632 [2022], quoting *Donnelly v Parikh*, 150 AD3d 820, 822 [2017]). "In order not to be considered speculative or conclusory, expert opinions in opposition should address specific assertions made by the movant's experts, setting forth an explanation of the reasoning and relying on specifically cited evidence in the record" (*Wijesinghe v Buena Vida Corp.*, 210 AD3d 824, 825 [2022] [internal quotation marks omitted]).

Here, Simmons established her *prima facie* entitlement to judgment as a matter of law dismissing the cause of action alleging medical malpractice insofar as asserted against her by submitting, among other things, an affirmation of her medical expert, the plaintiff's medical records, and transcripts of deposition testimony. This evidence demonstrated, *prima facie*, that Simmons did not depart from the applicable standard of care and that any alleged departures were not a proximate cause of the plaintiff's alleged injuries (see *id.* at 826; *Keun Young Kim v Lenox Hill Hosp.*, 156 AD3d 774, 775 [2017]).

In opposition, the plaintiff failed to raise a triable issue of fact. The affirmation of the plaintiff's expert failed to address specific assertions made by Simmons's expert and was otherwise conclusory and speculative (see *Iodice v Giordano*, 170 AD3d 971, 972-973 [2019]; *Keun Young Kim v Lenox Hill Hosp.*, 156 AD3d at 775).

Simmons also established, *prima facie*, her entitlement to judgment as a matter of law dismissing the cause of action alleging lack of informed consent insofar as asserted against her. To establish a cause of action for malpractice based on lack of informed consent, a plaintiff must prove (1) that the person

providing the professional treatment failed to inform the patient of reasonably foreseeable risks and benefits associated with the treatment, and the alternatives thereto, that a reasonable medical practitioner would have disclosed under similar circumstances, (2) that a reasonably prudent patient in the same position would not have undergone the treatment if he or she had been fully informed, and (3) that the lack of informed consent is a proximate cause of the injury (*see* Public Health Law § 2805-d; *Xiao Yan Ye v Din Lam*, 191 AD3d 827, 829 [2021]; *Schussheim v Barazani*, 136 AD3d 787, 789 [2016]). The mere fact that a plaintiff signs a consent form does not establish a defendant's prima facie entitlement to judgment as a matter of law (*see Xiao Yan Ye v Din Lam*, 191 AD3d at 829; *Schussheim v Barazani*, 136 AD3d at 789).

Here, Simmons made a prima facie showing of her entitlement to judgment as a matter of law dismissing the lack of informed consent cause of action insofar as asserted against her through the affidavit of her expert, the plaintiff's medical records, transcripts of deposition testimony, and a written consent form signed by the plaintiff, which demonstrated that Simmons disclosed to the plaintiff the risks, benefits, and alternatives to the procedure (*see Larcy v Kamler*, 185 AD3d 564, 566 [2020]; *Wright v Morning Star Ambulette Servs., Inc.*, 170 AD3d 1249, 1251 [2019]).

In opposition, the plaintiff failed to raise a triable issue of fact. Contrary to the plaintiff's contention, the allegation of her expert, that the procedure performed by Simmons exceeded the scope of the plaintiff's consent because Simmons failed to properly inform the plaintiff "of the low malignancy risk against the high risk of injury," was a new theory that was not discernable from the pleadings or deposition testimony and, therefore, was not entitled to be considered (*see Larcy v Kamler*, 185 AD3d at 566; *Anonymous v Gleason*, 175 AD3d 614, 617 [2019]). In any event, the plaintiff's expert's affirmation offered merely conclusory and speculative statements that failed to raise a triable issue of fact and failed to address or rebut the specific assertions of Simmons's expert that Simmons had obtained the plaintiff's informed consent (*see Iodice v Giordano*, 170 AD3d at 973).

Accordingly, the Supreme Court properly granted Simmons's motion for summary judgment dismissing the complaint insofar as asserted against her. Chambers, J.P., Dowling, McCormack and Quirk, JJ., concur.

16 Joanne Gorelick, Appellant, v Suffolk County Comptroller's Office, Respondent. [— NYS3d —]

Taxation—Hotel and Motel Occupancy Tax—Definition of Hotel or Motel—Inclusion of Rental Property

In a proceeding pursuant to CPLR article 78, which was converted into an action, inter alia, for a judgment declaring that the defendant is prohibited from assessing taxes pursuant to chapter 523, article II, of the Code of Suffolk County on the plaintiff's property in Ocean Beach for rental periods of less than 30 consecutive days, the plaintiff appeals from an order of the Supreme Court, Suffolk County (Joseph A. Santorelli, J.), dated July 5, 2022. The order granted the defendant's motion for summary judgment dismissing the complaint and for a declaration in its favor.

Ordered that the order is affirmed, with costs, and the matter is remitted to the Supreme Court, Suffolk County, for the entry of a judgment, inter alia, declaring that the defendant is not prohibited from assessing taxes pursuant to chapter 523, article II, of the Code of Suffolk County on the plaintiff's property located at 845 Evergreen Walk, Ocean Beach, for rental periods of less than 30 consecutive days.

The plaintiff owns a house in the Village of Ocean Beach, on Fire Island, which she rents to guests for minimum stays of seven days.

In 2016, the defendant, Suffolk County Comptroller's Office (hereinafter the Comptroller), notified the plaintiff that she was required to pay hotel and motel taxes on rentals of the property for periods of less than 30 consecutive days, pursuant to chapter 523, article II, of the Code of Suffolk County (hereinafter the Suffolk County Hotel and Motel Occupancy Tax Law).

In January 2017, the plaintiff commenced this CPLR article 78 proceeding against the Comptroller, inter alia, to prohibit the Comptroller from assessing hotel and motel occupancy taxes on the property. The plaintiff primarily contended that she did not rent the property on an overnight basis and that it was not a hotel. The Supreme Court converted this CPLR article 78 proceeding into an action for a declaratory judgment, pursuant to CPLR 103 (c).

The Comptroller subsequently moved for summary judgment dismissing the complaint and for a judgment declaring that the property is subject to the Suffolk County Hotel and Motel Occupancy Tax Law. The plaintiff opposed the motion. The Supreme Court granted the motion, and the plaintiff appeals.

The Supreme Court did not err in awarding the Comptroller summary judgment dismissing the complaint and in determin-

ing that the Comptroller was entitled to a declaration in its favor as a matter of law. The Legislature authorized Suffolk County to impose a tax upon persons occupying hotel or motel rooms in the County (see Tax Law § 1202-o [1]). This statute granted “broad authority to enact an occupancy tax” (*Expedia, Inc. v City of N.Y. Dept. of Fin.*, 22 NY3d 121, 127 [2013]; see *Matter of Schneider v Schuyler County*, 140 AD3d 1373, 1376 [2016]). The definition of “hotel or motel” in the enabling statute is expansive enough to include the plaintiff’s rental of the property for periods of time less than 30 consecutive days (see Tax Law § 1202-o [1]), and the definition of “hotel or motel” set forth in the Suffolk County Hotel and Motel Occupancy Tax Law (see Code of Suffolk County §§ 523-9, 523-10 [B] [1]) is consistent with the authorizing statutory language (see *Matter of Schneider v Schuyler County*, 140 AD3d at 1376; cf. *County of Nassau v Expedia, Inc.*, 189 AD3d 1346 [2020]).

The plaintiff’s remaining contentions are not properly before this Court. LaSalle, P.J., Connolly, Ventura and Goldberg Velazquez, JJ., concur.

17 Geneta Haimov, Appellant, v Izchak Haimov, Respondent. [— NYS3d —]—

Judgments—Default Judgment—Reasonable Excuse for Default—Affidavits without Personal Knowledge

In an action to recover damages for personal injuries, the plaintiff appeals from an order of the Supreme Court, Nassau County (Francis Ricigliano, J.), entered April 11, 2024. The order denied the plaintiff’s motion for leave to enter a default judgment on the issue of liability against the defendant and granted the defendant’s cross-motion to compel the plaintiff to accept his late answer.

Ordered that the order is reversed, on the law and in the exercise of discretion, with costs, the plaintiff’s motion for leave to enter a default judgment on the issue of liability against the defendant is granted, and the defendant’s cross-motion to compel the plaintiff to accept his late answer is denied.

In September 2019, the plaintiff allegedly was injured when she tripped and fell on an allegedly raised, cracked, and uneven walkway in front of certain real property owned by the defendant. In August 2022, the plaintiff commenced this action. It is undisputed that the defendant did not timely answer the complaint. On June 8, 2023, the defendant served an answer, and on the same date, the plaintiff rejected the defendant’s answer as untimely.

On August 1, 2023, the plaintiff moved for leave to enter a default judgment on the issue of liability against the defendant. The plaintiff's motion was supported by, *inter alia*, the complaint, an affidavit of merit from the plaintiff, an affidavit of service of the summons and complaint, the defendant's untimely answer, and the plaintiff's rejection of that answer. On September 26, 2023, the defendant opposed the plaintiff's motion and cross-moved to compel the plaintiff to accept his untimely answer. Among other things, the defendant's attorney contended that the defendant had a reasonable excuse for his default based upon the delay of his insurance company.

By order entered April 11, 2024, the Supreme Court denied the plaintiff's motion for leave to enter a default judgment on the issue of liability against the defendant and granted the defendant's cross-motion to compel the plaintiff to accept his late answer. The plaintiff appeals.

CPLR 3215 (a) provides that “[w]hen a defendant has failed to appear, plead or proceed to trial . . . the plaintiff may seek a default judgment against him [or her]” (*see US Bank N.A. v Davis*, 196 AD3d 530, 532 [2021]). “On a motion for leave to enter a default judgment, an applicant must submit proof of service of the summons and complaint, proof of the facts constituting the cause of action, and proof of the default” (*Barbetta v NY Auto Find, Inc.*, 221 AD3d 851, 853 [2023]; *see* CPLR 3215 [f]; *B&H Flooring, LLC v Folger*, 228 AD3d 809, 813 [2024]; *Banks v 110-18 198th St. Corp.*, 205 AD3d 869, 869 [2022]). “Since defaulters are deemed to have admitted all factual allegations contained in the complaint and all reasonable inferences that flow from them, when submitting proof of facts constituting a claim, a plaintiff need only set forth enough facts to enable the Supreme Court to determine that the plaintiff alleged a viable cause of action” (*Rosenzweig v Gubner*, 194 AD3d 1086, 1088 [2021] [citation and internal quotation marks omitted]; *see Woodson v Mendon Leasing Corp.*, 100 NY2d 62, 71 [2003]).

“To successfully oppose a facially adequate motion for leave to enter a default judgment . . . on the failure to appear or timely serve an answer, a defendant must demonstrate a reasonable excuse for the delay and a potentially meritorious defense to the action” (*Nowakowski v Stages*, 179 AD3d 822, 823 [2020] [internal quotation marks omitted]; *see Rosenzweig v Gubner*, 194 AD3d at 1089). Likewise, to compel the plaintiff to accept his untimely answer, the defendant was required to demonstrate both a reasonable excuse for the delay and a potentially meritorious defense to the action (*see Goldstein v*

Ilaz, 206 AD3d 976, 976 [2022]; *Belches v City of New York*, 191 AD3d 754, 755 [2021]; *U.S. Bank N.A. v Barr*, 139 AD3d 937, 937 [2016]).

Here, in opposition to the plaintiff's facially adequate motion for leave to enter a default judgment, the defendant failed to demonstrate a reasonable excuse for his default in failing to timely appear or answer the complaint (see *Rosenzweig v Gubner*, 194 AD3d at 1089). The defendant did not submit his own affidavit explaining the reason for the delay, and the defendant's attorney lacked personal knowledge of the delays allegedly occasioned by the defendant's insurance carrier (see *Goldstein v Ilaz*, 206 AD3d at 977; *Rochdale Ins. Co. v Fairview Nursing Care Ctr., Inc.*, 186 AD3d 1425, 1425 [2020]; *Sargsyan v Kaieteur Constr., Inc.*, 171 AD3d 826, 827 [2019]). Although the defendant also submitted the affidavit of Michael Dubyk, a senior claims adjuster at A.G. Risk Management who was assigned to handle the insurance claim in this matter, Dubyk lacked personal knowledge of the lengthy delay prior to April 21, 2023. Further, the defendant provided no reasonable excuse for his more than three-month delay in moving to compel the plaintiff to accept his late answer after it was rejected by the plaintiff as untimely (see *Sargsyan v Kaieteur Constr., Inc.*, 171 AD3d at 827). The absence of a reasonable excuse for the defendant's default renders it unnecessary to determine whether he demonstrated the existence of a potentially meritorious defense (see *Goldstein v Ilaz*, 206 AD3d at 977; *Sargsyan v Kaieteur Constr., Inc.*, 171 AD3d at 827).

Accordingly, the Supreme Court improvidently exercised its discretion in granting the defendant's cross-motion to compel the plaintiff to accept his late answer and denying the plaintiff's motion for leave to enter a default judgment on the issue of liability against the defendant. Connolly, J.P., Chambers, Voutsinas and Goldberg Velazquez, JJ., concur.

18 Clifford Jamieson, Plaintiff, v Noble Construction Group, LLC, et al., Respondents-Appellants. Monolithic Contracting, Inc., Third-Party Defendant- Appellant-Respondent, and Lipopolis Electric, Inc., Third-Party Defendant-Respondent. [—NYS3d —]

Indemnity—Contractual Indemnification—Freedom from Negligence
Indemnity—When Claim for Indemnification Available—Supervision and Control of Work
Contracts—Breach or Performance of Contract—Requirement to Procure Insurance

In an action to recover damages for personal injuries, the third-party defendant Monolithic Contracting, Inc., appeals,

and the defendants third-party plaintiffs cross-appeal, from an order of the Supreme Court, Kings County (Robin K. Sheares, J.), dated August 30, 2021. The order, insofar as appealed from, denied that branch of the cross-motion of the third-party defendant Monolithic Contracting, Inc., which was for summary judgment dismissing the third-party cause of action for contractual indemnification asserted against it. The order, insofar as cross-appealed from, denied those branches of the motion of the defendants third-party plaintiffs which were for summary judgment on their third-party causes of action for contractual indemnification, common-law indemnification, and breach of contract asserted against the third-party defendant Monolithic Contracting, Inc., and for contractual indemnification asserted against the third-party defendant Lippolis Electric, Inc, and granted that branch of the motion of the third-party defendant Lippolis Electric, Inc., which was for summary judgment dismissing the third-party cause of action for contractual indemnification asserted against it.

Ordered that the order is modified, on the law, by deleting the provision thereof granting that branch of the motion of the third-party defendant Lippolis Electric, Inc., which was for summary judgment dismissing the third-party cause of action for contractual indemnification asserted against it, and substituting therefor a provision denying that branch of that motion; as so modified, the order is affirmed insofar as appealed and cross-appealed from, without costs or disbursements.

The plaintiff allegedly was injured while working on a construction site, when vertical safety netting installed around the perimeter of a building under construction, on the edge of the first floor, gave way at the top and the bottom, causing him to fall. The plaintiff commenced this action against the defendants third-party plaintiffs, the construction manager for the project and the owner and tenants of the building (hereinafter collectively the defendants), alleging negligence and violations of Labor Law §§ 200, 240, and 241 (6). The defendants commenced a third-party action against the third-party defendants Monolithic Contracting, Inc. (hereinafter Monolithic), a subcontractor which allegedly installed the netting, and Lippolis Electric, Inc. (hereinafter Lippolis), which was an electrical subcontractor and the plaintiff's employer. The third-party complaint, *inter alia*, asserted causes of action for contractual and common-law indemnification and to recover damages for breach of contract for failure to procure insurance against Monolithic, and for contractual indemnification against Lip-

polis. Lippolis moved, among other things, for summary judgment dismissing the third-party cause of action for contractual indemnification asserted against it. The defendants moved, inter alia, for summary judgment on their third-party causes of action for contractual and common-law indemnification and to recover damages for breach of contract asserted against Monolithic, and for contractual indemnification asserted against Lippolis. Monolithic cross-moved, among other things, for summary judgment dismissing the third-party cause of action for contractual indemnification asserted against it. In an order dated August 30, 2021, the Supreme Court, inter alia, granted that branch of Lippolis's motion, denied those branches of the defendants' motion, and denied that branch of Monolithic's cross-motion. Monolithic appeals, and the defendants cross-appeal.

The Supreme Court erred in granting that branch of Lippolis's motion which was for summary judgment dismissing the third-party cause of action for contractual indemnification asserted against it. "A party [moving] for summary judgment dismissing a claim for contractual indemnification must make a prima facie showing that it was not contractually obligated to indemnify the party asserting the indemnification claim" (*Garcia v Fed LI, LLC*, 239 AD3d 942, 946 [2025] [internal quotation marks omitted]). "This may be accomplished by showing that, under the circumstances, an indemnification clause in the contract between the parties either was not triggered or was otherwise inapplicable" (*Burgos v 14 E. 44 St., LLC*, 203 AD3d 688, 689 [2022]; see *Selis v Town of N. Hempstead*, 213 AD3d 878, 880 [2023]). Here, Lippolis failed to demonstrate that the plaintiff's injuries did not arise out of his work with Lippolis and thus failed to establish, prima facie, that the indemnification clause in the contract between the parties either was not triggered or was otherwise inapplicable (see *Regal Constr. Corp. v National Union Fire Ins. Co. of Pittsburgh, PA*, 15 NY3d 34, 38 [2010]).

"[A] party seeking contractual indemnification [pursuant to a contract subject to General Obligations Law 5-322.1] must prove itself free from negligence, because to the extent its negligence contributed to the accident, it cannot be indemnified therefor" (*Crutch v 421 Kent Dev., LLC*, 192 AD3d 977, 981 [2021] [internal quotation marks omitted]; see *Davies v Simon Prop. Group, Inc.*, 174 AD3d 850, 855 [2019]). The Supreme Court properly denied those branches of the defendants' motion which were for summary judgment on their third-party causes of action for contractual indemnification asserted

against Monolithic and Lippolis, as the defendants failed to establish that they were free from negligence. The defendants failed to demonstrate that they lacked authority to exercise supervisory control over the plaintiff's or Monolithic's work that allegedly caused the plaintiff's injuries (*see Reisman v Bay Shore Union Free School Dist.*, 74 AD3d 772, 774 [2010]; *cf. Cedillo v Nautilus Realty Ltd. Partnership*, 219 AD3d 1300, 1302 [2023]).

The Supreme Court properly denied that branch of Monolithic's cross-motion which was for summary judgment dismissing the third-party cause of action for contractual indemnification asserted against it. Monolithic failed to establish that the plaintiff's accident did not arise out of its work, as it is undisputed that Monolithic was responsible for installing the perimeter netting for protection from falling debris (*see Dow v Consolidated Edison Co. of N.Y., Inc.*, 226 AD3d 648, 649 [2024]). There remains an issue of fact as to whether Monolithic properly installed the netting to provide sufficient fall protection for people and for debris.

The Supreme Court properly denied that branch of the defendants' motion which was for summary judgment on their third-party cause of action for common-law indemnification asserted against Monolithic. "In order to establish a claim for common-law indemnification, a party must prove not only that it was not negligent, but also that the proposed indemnitor's actual negligence contributed to the accident, or, in the absence of any negligence, that the indemnitor had the authority to direct, supervise, and control the work giving rise to the injury" (*Zong Wang Yang v City of New York*, 207 AD3d 791, 796 [2022] [internal quotation marks omitted]; *see Crutch v 421 Kent Dev., LLC*, 192 AD3d at 981). The defendants failed to establish, *prima facie*, that they were not responsible for the supervision and control of the methods of Monolithic's work on the netting installation, which allegedly caused the plaintiff's injuries (*see Caban v Plaza Constr. Corp.*, 153 AD3d 488, 490 [2017]).

The Supreme Court also properly denied that branch of the defendants' motion which was for summary judgment on their third-party cause of action alleging breach of contract for failure to procure insurance asserted against Monolithic. "A party seeking summary judgment based on an alleged failure to procure insurance naming that party as an additional insured must demonstrate that a contract provision required that such insurance be procured and that the provision was not complied with" (*Breland-Marrow v RXR Realty, LLC*, 208 AD3d 627, 629 [2022] [internal quotation marks omitted]; *see Tingling v*

C.I.N.H.R., Inc., 120 AD3d 570, 571 [2014]). The defendants failed to submit any evidence to establish that Monolithic did not comply with its obligation to procure insurance naming Noble Construction Group, LLC, as an additional insured (see *Breland-Marrow v RXR Realty, LLC*, 208 AD3d at 629).

Connolly, J.P., Brathwaite Nelson, Hom and Goldberg Velazquez, JJ., concur.

19 Anthony Johnson, Appellant-Respondent, v Gerard Cremoux et al., Defendants Third-Party Plaintiffs-Respondents, and Scott Bavosa Construction Corp., Defendant Third-Party Defendant-Respondent-Appellant. [— NYS3d —]

Labor—Safe Place to Work—Adequate Protection and Safety—Availability of Safety Device

Affidavits—Sufficiency—Defects

Insurance—Subrogation Rights of Insurer—Bodily Injury Exemption

In an action to recover damages for personal injuries, the plaintiff appeals, and the defendant third-party defendant cross-appeals, from an order of the Supreme Court, Kings County (Lisa S. Ottley, J.), dated January 4, 2022. The order, insofar as appealed from, denied that branch of the plaintiff's motion which was for summary judgment on the issue of liability on the cause of action alleging a violation of Labor Law § 241 (6) and granted that branch of the cross-motion of the defendants third-party plaintiffs which was for summary judgment dismissing that cause of action insofar as asserted against them. The order, insofar as cross-appealed from, denied the motion of the defendant third-party defendant for leave to amend its third-party answer.

Ordered that the order is modified, on the law and in the exercise of discretion, (1) by deleting the provision thereof granting that branch of the cross-motion of the defendants third-party plaintiffs which was for summary judgment dismissing the Labor Law § 241 (6) cause of action insofar as asserted against them, and substituting therefor a provision denying that branch of the cross-motion, and (2) by deleting the provision thereof denying the motion of the defendant third-party defendant for leave to amend its third-party answer, and substituting therefor a provision granting the motion; as so modified, the order is affirmed insofar as appealed and cross-appealed from, with one bill of costs to the defendant third-party defendant payable by the plaintiff and the defendants third-party plaintiffs appearing separately and filing separate briefs.

On November 3, 2016, the plaintiff, an employee of the de-

fendant third-party defendant, Scott Bavosa Construction Corp. (hereinafter Bavosa Corp.), was working on a renovation project at a property owned by the defendants third-party plaintiffs, Gerard Cremoux and Catherine Cremoux (hereinafter together the Cremoux defendants). The plaintiff allegedly was using a table saw to cut a piece of masonite when the saw blade caught on his glove and cut off the middle and index fingers, as well as parts of the pinky and ring fingers, of his left hand.

The plaintiff commenced this action against the Cremoux defendants and Bavosa Corp., alleging, inter alia, a violation of Labor Law § 241 (6). In March 2018, the Cremoux defendants commenced a third-party action against Bavosa Corp. for common-law indemnification. The plaintiff filed a note of issue dated April 21, 2021. Thereafter, the plaintiff moved, inter alia, for summary judgment on the issue of liability on the cause of action alleging a violation of Labor Law § 241 (6), which was predicated upon violations of 12 NYCRR 23-1.5, 23-1.12, and 23-9.2. The Cremoux defendants cross-moved, among other things, for summary judgment dismissing the cause of action alleging a violation of Labor Law § 241 (6) insofar as asserted against them. Bavosa Corp. moved for leave to amend its third-party answer to add an affirmative defense that the third-party complaint is barred by the antisubrogation doctrine. In an order dated January 4, 2022, the Supreme Court, inter alia, denied that branch of the plaintiff's motion, granted that branch of the Cremoux defendants' cross-motion, and denied Bavosa Corp.'s motion. The plaintiff appeals, and Bavosa Corp. cross-appeals.

Labor Law § 241 applies to “[a]ll contractors and owners and their agents, except owners of one and two-family dwellings who contract for but do not direct or control the work.” “The phrase ‘direct or control’ is ‘construed strictly and refers to the situation where the owner supervises the method and manner of the work’” (*Cadena v Kupferstein*, 238 AD3d 973, 974 [2025], quoting *Miller v Shah*, 3 AD3d 521, 522 [2004]; see *Lazo v Ricci*, 178 AD3d 811, 812 [2019]). Additionally, the “homeowner exemption does not apply to property owners who ‘use their one or two-family premises entirely and solely for commercial purposes’” (*Manfredo v Marvin & Mario Constr., Inc.*, 216 AD3d 634, 634 [2023], quoting *Van Amerogen v Donnini*, 78 NY2d 880, 882 [1991]), but it is applicable “when an owner of a one- or two-family dwelling contracts for work that directly relates to the residential use of the home, even if the work also serves a commercial purpose” (*Bartoo v Buell*, 87 NY2d 362,

368 [1996]; see *Manfredo v Marvin & Mario Constr., Inc.*, 216 AD3d at 634-635).

Here, the Supreme Court erred in concluding that the Cremoux defendants were entitled to the homeowner's exemption pursuant to Labor Law § 241 (6). Initially, in support of his motion, the plaintiff failed to eliminate all triable issues of fact as to whether the homeowner's exemption applied. The plaintiff submitted an expert affidavit in which the expert opined that the premises was not a one- or two-family dwelling because, although the Cremoux defendants and the defendant Gerard Cremoux's mother-in-law (hereinafter the mother-in-law) occupied two of the three units, the mother-in-law lived on a separate floor in a unit with a separate entrance, kitchen, and bathroom. However, the plaintiff also submitted transcripts of the deposition testimony of the Cremoux defendants, which established that the mother-in-law bought groceries and cooked for the Cremoux defendants, spent about two hours per day in the Cremoux defendants' unit, would use the Cremoux defendants' entrance half of the time, and did not pay rent. Taken together, this evidence fails to eliminate all triable issues of fact as to whether the Cremoux defendants are entitled to the homeowner's exemption pursuant to Labor Law § 241 (6). In support of their cross-motion, the Cremoux defendants, relying on their deposition testimony, also failed to eliminate all triable issues of fact as to whether the homeowner's exemption applied for the same reasons (see *Hannan v Freeman*, 169 AD3d 1016, 1017 [2019]).

Labor Law § 241 (6) imposes a nondelegable duty upon owners and general contractors to provide reasonable and adequate protection and safety for workers and to comply with the specific safety rules and regulations promulgated by the Commissioner of the Department of Labor (see *Misicki v Caradonna*, 12 NY3d 511, 515 [2009]; *Perez v 286 Scholes St. Corp.*, 134 AD3d 1085, 1086 [2015]). To establish liability under Labor Law § 241 (6), a plaintiff must demonstrate that his or her injuries were proximately caused by a violation of an Industrial Code provision that is applicable under the circumstances of the case (see *Cadena v Kupferstein*, 238 AD3d 973, 975 [2025]; *Zaino v Rogers*, 153 AD3d 763, 764 [2017]).

Here, in support of their cross-motion, the Cremoux defendants relied on deposition testimony of Bavosa Corp.'s owner, in which he could not definitively establish that there was a saw blade guard available to the plaintiff but stated that his employees would often remove the blade guard. This uncertainty does not eliminate all triable issues of fact as to whether the

Cremoux defendants violated the relied-upon Industrial Code provisions. As such, the Cremoux defendants did not meet their prima facie burden and that branch of their cross-motion which was for summary judgment dismissing the cause of action alleging a violation of Labor Law § 241 (6) insofar as asserted against them should have been denied, regardless of the sufficiency of the opposition papers (*see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851 [1985]).

As for that branch of the plaintiff's motion which was for summary judgment on the issue of liability on the cause of action alleging a violation of Labor Law § 241 (6), in an affidavit that he submitted the plaintiff averred that there was no saw blade guard. He also submitted images of the saw from the worksite, which do not depict the saw blade guard on or near the saw. Coupled with Bavosa Corp.'s owner's equivocal testimony as to the availability of the saw blade guard, the plaintiff made a prima facie showing of entitlement to judgment as a matter of law (*see Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]).

However, in opposition, Bavosa Corp. raised a triable issue of fact. Bavosa Corp. submitted affidavits from two of its employees who were at the worksite at the time of the accident, both of whom testified that there was a saw blade guard on the premises that any of the employees could have used. Contrary to the plaintiff's contention, those affidavits may be considered. Although failure to disclose a witness is grounds for precluding that witness's testimony (*see Awai v Benchmark Constr. Serv., Inc.*, 172 AD3d 978, 979 [2019]; *Perez v New York City Hous. Auth.*, 75 AD3d 629, 630 [2010]), these witnesses were disclosed to the plaintiff during the deposition of Bavosa Corp.'s owner. Further, the fact that the affidavits were sworn to in New Jersey and lacked a certificate of conformity is not a fatal defect (*see Willingham v LeJarde*, 218 AD3d 518, 518 [2023]; *Wise v Boyd Bros. Transp., Inc.*, 194 AD3d 1096, 1097 [2021]). Thus, the affidavits of Bavosa Corp.'s employees raised a triable issue of fact as to whether 12 NYCRR 23-1.5, 23-1.12, and 23-9.2 were violated, and the Supreme Court properly denied that branch of the plaintiff's motion which was for summary judgment on the issue of liability on the cause of action alleging a violation of Labor Law § 241 (6) (*see Cadena v Kupferstein*, 238 AD3d 973, 975-976 [2025]; *Cruz v 1142 Bedford Ave., LLC*, 192 AD3d 859, 862-863 [2021]).

Leave to amend a pleading should be freely given "where the amendment is neither palpably insufficient nor patently devoid of merit, and the delay in seeking amendment does not preju-

dice or surprise the opposing party” (*Ulster Sav. Bank v Fiore*, 165 AD3d 734, 736 [2018]; see *HLI Rail & Rigging, LLC v Franklin Exhibit Mgt. Group, LLC*, 237 AD3d 1071, 1072 [2025]). “The burden of demonstrating prejudice or surprise, or that a proposed amendment is palpably insufficient or patently devoid of merit, falls upon the party opposing the motion” (*Matter of Chustckie*, 203 AD3d 820, 822 [2022], quoting *Ditech Fin., LLC v Khan*, 189 AD3d 1360, 1362 [2020]). “In the absence of prejudice or surprise to the opposing party, a motion to amend should be granted unless the proposed amendment is palpably insufficient or patently devoid of merit” (*Deutsche Bank Natl. Trust Co. v Kreitzer*, 203 AD3d 800, 803 [2022]; see *Kennedy v Bracey*, 219 AD3d 889, 890 [2023]).

The Supreme Court should have granted Bavosa Corp.’s motion for leave to amend its third-party answer to add an affirmative defense that the third-party complaint is barred by the antisubrogation doctrine. This doctrine “provides that an insurance company cannot recover from its own insured for the very risk for which the insured was covered” (*Storms v Dominican Coll. of Blauvelt*, 308 AD2d 575, 577 [2003]; see *Homeland Ins. Co. of N.Y. v National Grange Mut. Ins. Co.*, 84 AD3d 737, 739 [2011]).

Here, Bavosa Corp.’s liability insurance policy excluded from its coverage bodily injury to an employee of the insured arising out of and in the course of the employment. Though this exclusion “does not apply to liability assumed by the insured under an ‘insured contract,’ ” Bavosa promised in its construction contract with the Cremoux defendants to indemnify the Cremoux defendants against, among other things, all liabilities, causes of action, and claims. Thus, the bodily injury exemption does not apply, and Bavosa Corp. was insured for the risk for which it now seeks to prevent subrogation. Therefore, Bavosa Corp.’s proposed amendment to its third-party answer was neither palpably insufficient nor patently devoid of merit (*cf. Porter v Annabi*, 65 AD3d 1322, 1322 [2009]; *Blanco v CVS Corp.*, 18 AD3d 685, 686 [2005]), and the Supreme Court should have granted Bavosa Corp.’s motion.

The plaintiff’s remaining contentions are without merit. Brathwaite Nelson, J.P., Ford, Wan and Love, JJ., concur.

20 JPMorgan Chase Bank, National Association, Respondent, v Benzion Joseph Reinhold et al., Appellants, et al., Defendants. [— NYS3d —]

Judgments—Default Judgment—Vacatur—Law Office Failure as Reasonable Excuse

In an action to foreclose a mortgage, the defendants Benzion Joseph Reinhold and Beila Reizel Reinhold appeal from an order of the Supreme Court, Kings County (Cenceria P. Edwards, J.), dated April 3, 2024. The order, insofar as appealed from, denied that branch of those defendants' motion which was pursuant to CPLR 5015 (a) to vacate an order of the same court dated March 23, 2022, granting the plaintiff's unopposed motion, inter alia, for leave to enter a default judgment against those defendants upon their failure to answer the complaint.

Ordered that the order dated April 3, 2024, is affirmed insofar as appealed from, with costs.

In February 2008, the defendant Benzion Joseph Reinhold (hereinafter Benzion) obtained a home equity line of credit (hereinafter the HELOC) from the plaintiff, JPMorgan Chase Bank, National Association, in the amount of \$488,000. The HELOC was secured by a mortgage on certain real property located in Brooklyn (hereinafter the mortgage). The mortgage was executed by Benzion and Beila Reizel Reinhold (hereinafter together the defendants). In January 2011, Benzion allegedly defaulted on his obligations under the HELOC by failing to make monthly payments due. In June 2016, the plaintiff sent a notice of default.

In December 2016, the plaintiff commenced this action to foreclose the mortgage against, among others, the defendants. In November 2017, the defendants' counsel filed a notice of appearance. Although the defendants' counsel participated in at least one foreclosure settlement conference, the defendants failed to interpose an answer.

In August 2019, the plaintiff moved, inter alia, for leave to enter a default judgment against the defendants and for an order of reference. It is undisputed that the defendants failed to oppose the motion. By order dated March 23, 2022 (hereinafter the March 2022 order), the Supreme Court granted the plaintiff's motion. In November 2022, the defendants moved, among other things, pursuant to CPLR 5015 (a) to vacate the March 2022 order. The plaintiff opposed the motion. The court, inter alia, denied that branch of the defendants' motion. The defendants appeal.

A party seeking to vacate an order entered upon their default in opposing a motion must demonstrate both a reasonable excuse for the default and a potentially meritorious opposition to the motion (*see Deutsche Bank Natl. Trust Co. v Alpert*, 241 AD3d 1265 [2025]; *U.S. Bank N.A. v Stathakis*, 202 AD3d 1026, 1028 [2022]). Similarly, a party seeking to vacate a default in an action pursuant to CPLR 5015 (a) (1) must demonstrate a

reasonable excuse for the failure to appear and answer the complaint and a potentially meritorious defense to the action (see *HSBC Bank USA, N.A. v Scivoletti*, 212 AD3d 600, 603 [2023]; *Deutsche Bank Natl. Trust Co. v Hossain*, 187 AD3d 986, 987 [2020]). “Although the court has discretion to accept law office failure as a reasonable excuse, a pattern of willful default and neglect should not be excused” (*Prudence v White*, 144 AD3d 655, 656 [2016]). Specifically, “[l]aw office failure should not be excused where a default results not from an isolated, inadvertent mistake, but from repeated neglect” (*Rudsky v Schechtman*, 219 AD3d 1453, 1454 [2023], quoting *GMAC Mtge., LLC v Guccione*, 127 AD3d 1136, 1138 [2015]). Moreover, a “claim of law office failure must be supported by a detailed and credible explanation of the default at issue, as mere neglect is not a reasonable excuse” (*Lee v Latendorf*, 162 AD3d 1002, 1003 [2018]; see *Rudsky v Schechtman*, 219 AD3d 1453 [2023]).

Here, the defendants proffered, in effect, law office failure as an excuse for both their failure to interpose an answer to the complaint and their failure to oppose the plaintiff’s motion, inter alia, for leave to enter a default judgment against them. The defendants’ contentions that they should not be held responsible for the actions of their prior counsel, whom the defendants contend “duped” them and caused the defaults, were insufficient to establish a reasonable excuse, as the defendants submitted no evidence to support their contention that these failures were the product of law office failure (see *U.S. Bank N.A. v Stathakis*, 202 AD3d at 1028). Other than Benzion’s conclusory affidavit, which failed to provide any details as to the relationship between the defendants and their prior counsel, the defendants submitted no evidence to support their contention that their prior counsel “duped” them as to the progress of the litigation. Since the defendants failed to demonstrate a reasonable excuse for their defaults, this Court need not consider whether the defendants demonstrated the existence of potentially meritorious defenses to the action (see *Chase Bank USA, N.A. v Laroche*, 208 AD3d 845, 847 [2022]; *Wells Fargo Bank, N.A. v Singh*, 204 AD3d 732 [2022]; *U.S. Bank N.A. v Stathakis*, 202 AD3d at 1028).

Accordingly, the Supreme Court properly denied that branch of the defendants’ motion which was pursuant to CPLR 5015 (a) to vacate the March 2022 order. Genovesi, J.P., Christopher, Wan and Ventura, JJ., concur.

21 Eli Karp et al., Appellants, v Madison Realty Capital, L.P., et al., Respondents. [— NYS3d —]

Release—Duress—Fairness of Circumstances—Pressure to Enter into Agreement
Pleading—Sufficiency of Pleading—Fraud—False Representations

In an action to recover damages for fraud, breach of contract, and breach of the covenant of good faith and fair dealing, the plaintiffs appeal from an order of the Supreme Court, Kings County (Leon Ruchelsman, J.), dated November 15, 2021. The order, insofar as appealed from, granted the defendants' motion pursuant to CPLR 3211 (a) to dismiss the complaint.

Ordered that the order is reversed insofar as appealed from, on the law, with costs, and the defendants' motion pursuant to CPLR 3211 (a) to dismiss the complaint is denied.

The plaintiffs commenced this action to recover damages for fraud, breach of contract, and breach of the covenant of good faith and fair dealing, alleging that the defendants are predatory lenders that engaged in a "loan to own" scheme to improperly seize ownership of certain real property the plaintiffs were developing. The defendants moved pursuant to CPLR 3211 (a) to dismiss the complaint, based on, among other things, a waiver and release clause contained in a forbearance agreement, which followed the failure of the borrower, the plaintiff Hello Nostrand, LLC (hereinafter Hello Nostrand), to pay the monthly installment due. In response, the plaintiffs, inter alia, filed an amended summons and complaint and opposed the defendants' motion. In an order dated November 15, 2021, the Supreme Court, upon declining to consider the amended complaint, among other things, granted the defendants' motion, determining that the waiver and release clause barred the causes of action to recover damages for breach of contract and breach of the covenant of good faith and fair dealing and that the plaintiffs failed to adequately plead a cause of action to recover damages for fraud. The plaintiffs appeal.

The plaintiffs correctly contend that the Supreme Court erred in determining that the plaintiffs required leave of court to amend the complaint. "Pursuant to CPLR 3211 (f), service by the defendant[s] of the pre-answer motion pursuant to CPLR 3211 (a) to dismiss the complaint extended the [defendants'] time to answer the complaint until 10 days after service of notice of entry of the order determining the motion, and therefore extended the time in which the [plaintiffs] could amend the complaint as of right" (*Rosas v Petkovich*, 218 AD3d 814, 816 [2023]; see CPLR 3025 [a]; *Estate of Feenin v Bombace Wine & Spirits, Inc.*, 188 AD3d 1001, 1003 [2020]). Although the original complaint was no longer viable (see *Rosas v Petkovich*, 218 AD3d at 815-816), the defendants, in effect, elected in their

reply to apply their motion to the amended complaint. Accordingly, the court should have considered the defendants' motion to be directed against the amended complaint (*see Ofman v Tenenbaum Berger & Shivers, LLP*, 217 AD3d 960, 961 [2023]; *Estate of Feenin v Bombace Wine & Spirits, Inc.*, 188 AD3d at 1003).

“Generally, a valid release constitutes a complete bar to an action on a claim which is the subject of the release” (*Applewhite v 112 Liberty Assoc., LLC*, 233 AD3d 834, 834 [2024] [internal quotation marks omitted], quoting *Wei Qiang Huang v Llerena-Salazar*, 222 AD3d 1033, 1033 [2023]). “A release may be invalidated, however, for any of the traditional bases for setting aside written agreements, namely, duress, illegality, fraud, or mutual mistake” (*Wei Qiang Huang v Llerena-Salazar*, 222 AD3d at 1033 [internal quotation marks omitted]). “In addition, a release may be set aside on the ground that it was not fairly and knowingly made” (*id.* [internal quotation marks omitted]; *see Farber v Breslin*, 47 AD3d 873 [2008]). “This basis for setting aside a release may be applied in situations falling far short of actual fraud such as when, because the releasor has had little time for investigation or deliberation, or because of the existence of overreaching or unfair circumstances, it was deemed inequitable to allow the release to serve as a bar to the claim of an injured party” (*Wei Qiang Huang v Llerena-Salazar*, 222 AD3d at 1033-1034 [internal quotation marks omitted]). “Although a defendant has the initial burden of establishing that it has been released from any claims, a signed release shifts the burden going forward . . . to the [plaintiff] to show that there has been fraud, duress or some other fact which will be sufficient to void the release” (*Applewhite v 112 Liberty Assoc., LLC*, 233 AD3d at 835 [internal quotation marks omitted]).

“In resolving a motion to dismiss pursuant to CPLR 3211 (a) (5), the plaintiff's allegations are to be treated as true, and all inferences that reasonably flow therefrom are to be resolved in his or her favor” (*Schneier v Clermont York Assoc., LLC*, 240 AD3d 922, 923 [2025] [alteration and internal quotation marks omitted]).

Here, in support of their motion, the defendants submitted, inter alia, a copy of the forbearance agreement signed by the plaintiff Eli Karp, which contained a waiver and release clause (hereinafter the release). The plaintiffs' allegations were sufficient, however, to raise a question of fact as to whether the release was obtained under circumstances that indicate unfairness and whether the release was not fairly or knowingly given

(see *Applewhite v 112 Liberty Assoc., LLC*, 233 AD3d at 835-836; *Farber v Breslin*, 47 AD3d at 877). Specifically, the plaintiffs alleged that as part of the “loan to own” scheme, the defendants created economic pressure in order to place the plaintiffs in a position where they had to enter into the forbearance agreement to avoid foreclosure and that the plaintiffs’ attorney participated in this scheme by providing the plaintiffs with only signature pages of the closing documents and failing to discuss or explain the release. Accordingly, the Supreme Court should have denied those branches of the defendants’ motion which were pursuant to CPLR 3211 (a) (5) to dismiss the causes of action to recover damages for breach of contract and breach of the covenant of good faith and fair dealing.

“The elements of a cause of action sounding in fraud are a material misrepresentation of an existing fact, made with knowledge of the falsity, an intent to induce reliance thereon, justifiable reliance upon the misrepresentation, and damages” (*Neckles Bldrs., Inc. v Turner*, 117 AD3d 923, 925 [2014] [internal quotation marks omitted]). “Where the gravamen of the alleged fraud does not arise from the mere failure of a promisor to perform his or her obligations under a contract, but arises from a promisor’s successful attempts to induce a promisee to enter into a contractual relationship despite the fact that the promisor harbored an undisclosed intention not to perform under the contract, a proper cause of action sounding in fraud may be stated” (*id.*). “Where a cause of action or defense is based upon misrepresentation, fraud, mistake, wilful default, breach of trust or undue influence, the circumstances constituting the wrong shall be stated in detail” (CPLR 3016 [b]).

Here, the plaintiffs set forth in the amended complaint detailed allegations that the defendants Madison Capital, Joshua B. Zegen, and Mark Gormley made false representations that they would provide funding with the intent of delaying funding to cause Hello Nostrand to default and that those defendants further made false representations to cause the plaintiffs to forego opportunities to refinance with the ultimate purpose of foreclosing upon the property. These allegations were sufficient to state a cause of action to recover damages for fraud (see *Neckles Bldrs., Inc. v Turner*, 117 AD3d at 926). Accordingly, the Supreme Court should have denied that branch of the defendants’ motion which was pursuant to CPLR 3211 (a) (7) to dismiss the cause of action to recover damages for fraud.

The defendants’ remaining contentions are without merit. Chambers, J.P., Dowling, McCormack and Quirk, JJ., concur.

22 Thomas Kenny, Respondent, v Matthew Hellerman, Defendant, and Eric Gulkis et al., Appellants. [— NYS3d —]

Intoxicating Liquors—Dram Shop Act—Intoxication Requirement—Testimony

In an action to recover damages for personal injuries, the defendants Eric Gulkis and Leslie Gulkis appeal from an order of the Supreme Court, Nassau County (Rhonda E. Fischer, J.), dated March 25, 2025. The order, insofar as appealed from, denied that branch of the motion of those defendants which was for summary judgment dismissing the cause of action alleging a violation of General Obligations Law § 11-100 insofar as asserted against them.

Ordered that the order is reversed insofar as appealed from, on the law, with costs, and that branch of the motion of the defendants Eric Gulkis and Leslie Gulkis which was for summary judgment dismissing the cause of action alleging a violation of General Obligations Law § 11-100 insofar as asserted against them is granted.

The plaintiff allegedly was assaulted by the defendant Matthew Hellerman on the front lawn of the home of the defendants Eric Gulkis and Leslie Gulkis (hereinafter together the Gulkis defendants). The plaintiff and Hellerman were both attending a party at the Gulkis defendants' home, which was hosted by the Gulkis defendants' teenage daughter.

The plaintiff commenced this action to recover damages for personal injuries against Hellerman and the Gulkis defendants. The plaintiff alleged, inter alia, that the Gulkis defendants violated General Obligations Law § 11-100. Following discovery, the Gulkis defendants moved, among other things, for summary judgment dismissing the cause of action alleging a violation of General Obligations Law § 11-100 insofar as asserted against them. The plaintiff opposed. In an order dated March 25, 2025, the Supreme Court, inter alia, denied that branch of the Gulkis defendants' motion.

“General Obligations Law § 11-101 (1), known as the Dram Shop Act, provides that any person who shall be injured in person, property, means of support, or otherwise by any intoxicated person, or by reason of the intoxication of any person, . . . shall have a right of action against any person who shall, by unlawful selling to or unlawfully assisting in procuring liquor for such intoxicated person, have caused or contributed to such intoxication” (*Heins v Vanbourgondien*, 180 AD3d 1019, 1024 [2020] [brackets and internal quotation marks omitted]). In 1983, the Legislature supplemented the Dram Shop Act by adding General Obligations Law § 11-100,

which applies to any provider unlawfully furnishing alcoholic beverages for minors (*see Rust v Reyer*, 91 NY2d 355, 359 [1998]; *Filc v 221 Someplace Else, Ltd.*, 219 AD3d 1487, 1488 [2023]). “‘Liability under General Obligations Law § 11-100 may be imposed only on a person who knowingly causes intoxication by furnishing alcohol to (or assisting in the procurement of alcohol for) persons known or reasonably believed to be underage’” (*Filc v 221 Someplace Else, Ltd.*, 219 AD3d at 1488 [brackets and internal quotation marks omitted], quoting *Ferber v Olde Erie Brew Pub & Grill, LLC*, 161 AD3d 1142, 1143 [2018]; *see Sherman v Robinson*, 80 NY2d 483, 487-488 [1992]).

The Gulkis defendants established their *prima facie* entitlement to judgment as a matter of law dismissing the cause of action alleging a violation of General Obligations Law § 11-100 insofar as asserted against them. The Gulkis defendants established that Hellerman, who was then under the legal drinking age, was not intoxicated at the time of the alleged assault (*see Gaige v Kepler*, 303 AD2d 626, 628 [2003]). The Gulkis defendants submitted transcripts of deposition testimony, including Hellerman’s own testimony that he did not consume alcohol for 24 hours prior to the incident. Therefore, the Gulkis defendants met their burden and established that the plaintiff cannot recover under the statute (*see Nelson v Neng*, 297 AD2d 313, 314 [2002]; *Guercia v Carter*, 274 AD2d 553, 554 [2000]).

In opposition, the plaintiff failed to raise a triable issue of fact. Although the record includes conflicting testimony as to whether Hellerman consumed alcohol prior to the incident, there is no testimony to support the plaintiff’s assertion that Hellerman was “intoxicated,” as required by the statute. The witnesses do not describe Hellerman as intoxicated, nor do they imply that he appeared intoxicated, such that his language was slurred or demeanor sloppy (*cf. Kelly v P.B.L. Enters.*, 228 AD2d 414, 415 [1996]).

The plaintiff’s conclusory speculation is insufficient to defeat that branch of the Gulkis defendants’ motion which was for summary judgment dismissing the cause of action alleging a violation of General Obligations Law § 11-100 insofar as asserted against them (*see Guercia v Carter*, 274 AD2d at 554). Accordingly, the Supreme Court should have granted that branch of the motion (*see Nelson v Neng*, 297 AD2d at 314; *Guercia v Carter*, 274 AD2d at 554).

The Gulkis defendants’ remaining contentions need not be reached in light of our determination. Genovesi, J.P., Dowling, Wan and Quirk, JJ., concur.

23 Kingstone Insurance Company, Plaintiff, and Alejandro Perez Barranco, Appellant-Respondent, v Marat Fronshtein et al., Respondents-Appellants. [253 NYS3d 742]—

Labor—Safe Place to Work—Homeowner's Exemption

Workers' Compensation—Exclusiveness of Remedy—Acting within Scope of Employment

In an action to recover damages for personal injuries, the plaintiff Alejandro Perez Barranco appeals, and the defendants cross-appeal, from a judgment of the Supreme Court, Kings County (Carl J. Landicino, J.), dated January 7, 2022. The judgment, insofar as appealed from, upon an order of the same court dated November 8, 2021, inter alia, granting those branches of the defendants' motion which were for summary judgment dismissing the causes of action alleging violations of Labor Law §§ 240 (1) and 241 (6), is in favor of the defendants and against the plaintiff Alejandro Perez Barranco dismissing those causes of action. The judgment, insofar as cross-appealed from, brings up for review so much of the order as denied those branches of the defendants' motion which were pursuant to CPLR 3025 (b) for leave to amend their answer to assert the affirmative defenses of collateral estoppel and res judicata.

Ordered that the judgment is affirmed insofar as appealed from; and it is further,

Ordered that the cross-appeal is dismissed as academic in light of our determination on the appeal; and it is further,

Ordered that one bill of costs is awarded to the defendants.

On October 21, 2017, while employed by LSM Electrical Contracting, Inc. (hereinafter LSM), the plaintiff Alejandro Perez Barranco (hereinafter the injured plaintiff) allegedly was injured when he fell from a ladder while performing work on the outside wall of a one-family residence in Brooklyn owned by the defendants. The defendant Marina Fronshtein (hereinafter Marina) was married to the defendant Marat Fronshtein (hereinafter Marat), who was the owner of LSM.

In November 2017, the injured plaintiff commenced this action against the defendants, alleging, inter alia, violations of Labor Law §§ 240 (1) and 241 (6). Thereafter, the defendants moved, among other things, for summary judgment dismissing the causes of action alleging violations of Labor Law §§ 240 (1) and 241 (6) and pursuant to CPLR 3025 (b) for leave to amend their answer to assert the affirmative defenses of collateral estoppel and res judicata.

In an order dated November 8, 2021, the Supreme Court, inter alia, granted those branches of the defendants' motion

which were for summary judgment dismissing the causes of action alleging violations of Labor Law §§ 240 (1) and 241 (6), and denied those branches of the defendants' motion which were pursuant to CPLR 3025 (b) for leave to amend their answer to assert the affirmative defenses of collateral estoppel and res judicata. On January 7, 2022, the court issued a judgment, among other things, in favor of the defendants and against the injured plaintiff dismissing the causes of action alleging violations of Labor Law §§ 240 (1) and 241 (6). The injured plaintiff appeals, and the defendants cross-appeal, from the judgment.

"In order for a defendant to receive the protection of the homeowner's exemption [from liability under Labor Law §§ 240 (1) and 241 (6)], the defendant must show that (1) the premises consisted of a one- or two-family residence, and (2) the owner did not direct or control the work being performed" (*Cadena v Kupferstein*, 238 AD3d 973, 974 [2025] [internal quotation marks omitted]; see *Bartoo v Buell*, 87 NY2d 362, 369 [1996]; *Walsh v Kenny*, 219 AD3d 1555, 1556 [2023]; *Chowdhury v Rodriguez*, 57 AD3d 121, 126-127 [2008]). "The phrase 'direct or control' is construed strictly and refers to the situation where the owner supervises the method and manner of the work" (*Hicks v Aibani*, 157 AD3d 870, 871 [2018] [internal quotation marks omitted]; see *Miller v Shah*, 3 AD3d 521, 522 [2004]).

Here, the defendants established, prima facie, that the property where the accident occurred was a one-family residence and that Marina did not supervise the method or manner of the injured plaintiff's work (see *Bartoo v Buell*, 87 NY2d at 367; *Cadena v Kupferstein*, 238 AD3d at 974; *Hicks v Aibani*, 157 AD3d at 871; *Chowdhury v Rodriguez*, 57 AD3d at 127). In opposition, the injured plaintiff failed to raise a triable issue of fact. Contrary to the injured plaintiff's contention, the defendants were not required to demonstrate that Marina "contract[ed] for" the work in order for her to receive the protection of the homeowner's exemption (see *Bartoo v Buell*, 87 NY2d at 367; *Cadena v Kupferstein*, 238 AD3d at 974; *Walsh v Kenny*, 219 AD3d at 1556; *Chowdhury v Rodriguez*, 57 AD3d at 126-127). Accordingly, the Supreme Court properly granted those branches of the defendants' motion which were for summary judgment dismissing the causes of action alleging violations of Labor Law §§ 240 (1) and 241 (6) insofar as asserted against Marina.

"The Workers' Compensation Law 'is designed to insure that an employee injured in course of employment will be made whole and to protect a coemployee who, acting within the scope

of his [or her] employment caused the injury' ” (*Power v Frasier*, 131 AD3d 461, 462 [2015], quoting *Maines v Cronomer Val. Fire Dept.*, 50 NY2d 535, 544 [1980]). “Workers’ compensation qualifies as an exclusive remedy when both the plaintiff and the defendant are acting within the scope of their employment, as coemployees, at the time of injury” (*Macchirole v Giamboi*, 97 NY2d 147, 150 [2001]; see *Maines v Cronomer Val. Fire Dept.*, 50 NY2d at 543; *McNulty v Port Wash. Police Dist.*, 191 AD3d 659, 659 [2021]). “Thus, the Workers’ Compensation Law ‘offers the only remedy for injuries caused by [a] coemployee’s negligence’ in the course of employment” (*McNulty v Port Wash. Police Dist.*, 191 AD3d at 660, quoting *Tikhonova v Ford Motor Co.*, 4 NY3d 621, 624 [2005]). “[A] defendant, to have the protection of the exclusivity provision, must have been acting within the scope of employment and not have been engaged in a willful or intentional tort” (*Macchirole v Giamboi*, 97 NY2d at 150 [alterations and internal quotation marks omitted]; see *Maines v Cronomer Val. Fire Dept.*, 50 NY2d at 543; *McNulty v Port Wash. Police Dist.*, 191 AD3d at 659). “Parties are coemployees in ‘all matters arising from and connected with their employment’ ” (*Macchirole v Giamboi*, 97 NY2d at 150, quoting *Heritage v Van Patten*, 59 NY2d 1017, 1019 [1983]). Further, “coemployee status survives ‘[r]egardless of [the employer’s] status as owner of the premises where the injury occurred’ ” (*id.*, quoting *Heritage v Van Patten*, 59 NY2d at 1019), and thus, “a corporate principal’s ownership of the premises does not negate the coemployee relationship” (*id.*).

Here, the defendants established, *prima facie*, that both Marat and the injured plaintiff were coemployees acting within the scope of their employment at the time the injured plaintiff allegedly was injured, and therefore, the claims asserted against Marat were barred by the exclusivity provisions of the Workers’ Compensation Law (see *id.* at 151; *Heritage v Van Patten*, 59 NY2d at 1019; *Youseff v Malik*, 112 AD3d 617, 619 [2013]; *Roman v Ainechi*, 15 AD3d 562, 562 [2005]; *Lozado v Felice*, 8 AD3d 633, 633-634 [2004]; *Sojka v Romeo*, 293 AD2d 522, 523 [2002]). In opposition, the injured plaintiff failed to raise a triable issue of fact. Accordingly, the Supreme Court properly granted those branches of the defendants’ motion which were for summary judgment dismissing the causes of action alleging violations of Labor Law §§ 240 (1) and 241 (6) insofar as asserted against Marat.

In light of our determination on the appeal, the cross-appeal has been rendered academic.

The parties’ remaining contentions either need not be

reached in light of our determination or are without merit. Barros, J.P., Wooten, Love and Quirk, JJ., concur.

24 James D. Kropp, Respondent, v Gregory Neil Pimentel, Jr., et al., Appellants. [— NYS3d —]—

Motor Vehicles—Collision—Rear-End Collision—Contributory Negligence

In an action to recover damages for personal injuries, the defendants appeal from an order of the Supreme Court, Suffolk County (Maureen T. Liccione, J.), dated June 10, 2024. The order, insofar as appealed from, granted those branches of the plaintiff's motion which were for summary judgment on the issue of liability and dismissing the defendants' affirmative defense alleging comparative negligence.

Ordered that the order is affirmed insofar as appealed from, with costs.

The plaintiff commenced this action against the defendants to recover damages for personal injuries. The plaintiff alleged that the rear of his vehicle was struck by a vehicle operated by the defendant Gregory Neil Pimentel, Jr. (hereinafter the defendant driver), and owned by the defendant Islip Car & Truck Recycling, Inc. The plaintiff moved, inter alia, for summary judgment on the issue of liability and dismissing the defendants' affirmative defense alleging comparative negligence, contending that negligence of the defendant driver in striking the rear of the plaintiff's vehicle was the sole proximate cause of the accident. In an order dated June 10, 2024, the Supreme Court, among other things, granted those branches of the plaintiff's motion. The defendants appeal.

"A driver of a vehicle approaching another vehicle from the rear is required to maintain a reasonably safe distance and rate of speed under the prevailing conditions to avoid colliding with the other vehicle" (*Yonghong Xia v Zhao Xian Zeng*, 219 AD3d 914, 915 [2023] [internal quotation marks omitted]). A rear-end collision with a stopped or stopping vehicle establishes a prima facie case of negligence on the part of the operator of the rear vehicle, thereby requiring that operator to rebut the inference of negligence by providing a nonnegligent explanation for the collision (*see Fischetti v Simonovsky*, 227 AD3d 670, 671 [2024]; *Yawagyentsang v Safeway Constr. Enters., LLC*, 225 AD3d 827 [2024]). Although "[a] plaintiff is no longer required to show freedom from comparative fault to establish her or his prima facie entitlement to judgment as a matter of law on the issue of liability, the issue of a plaintiff's comparative negligence may be decided in the context of a summary judgment motion where the plaintiff moves for summary judg-

ment dismissing a defendant's affirmative defense alleging comparative negligence . . . on the part of the plaintiff" (*Grecco v Altice USA, Inc.*, 230 AD3d 655, 656 [2024] [citations and internal quotation marks omitted]).

Here, the plaintiff established his prima facie entitlement to judgment as a matter of law on the issue of liability by submitting his own affirmation, which demonstrated that his vehicle was slowing down for a red traffic light ahead when his vehicle was struck in the rear by the defendants' vehicle (*see Mahmud v Feng Ouyang*, 208 AD3d 861, 862 [2022]; *Lopez v Dobbins*, 164 AD3d 776, 777 [2018]). The plaintiff's affirmation also established his prima facie entitlement to judgment as a matter of law dismissing the defendants' affirmative defense alleging comparative negligence by demonstrating that he was not negligent in the happening of the accident (*see Mahmud v Feng Ouyang*, 208 AD3d at 862; *Lopez v Dobbins*, 164 AD3d at 777).

In opposition, the defendants failed to raise a triable issue of fact. The defendant driver's assertion in his affirmation that the plaintiff's vehicle made a sudden stop and that, as a result, the defendant driver's vehicle skidded on the wet pavement during heavy rain was an insufficient nonnegligent explanation to rebut the inference of negligence since he failed to demonstrate that his vehicle's skid was unavoidable. The defendant driver's affirmation also failed to raise a triable issue of fact as to whether the plaintiff contributed to the happening of the accident (*see Mosquera v Roach*, 151 AD3d 1056, 1057 [2017]).

Accordingly, the Supreme Court properly granted those branches of the plaintiff's motion which were for summary judgment on the issue of liability and dismissing the defendants' affirmative defense alleging comparative negligence.

Connolly, J.P., Brathwaite Nelson, Hom and Goldberg Velazquez, JJ., concur.

25 Judy Lustig, Appellant, v Volvie Brown, Defendant, and Lucy M. Mark et al., Respondents. [253 NYS3d 763]—

Motor Vehicles—Collision—Admissibility of Police Report

Motor Vehicles—Collision—Fault—Conflicting Testimony

In an action, inter alia, to recover damages for personal injuries, the plaintiff appeals from an order of the Supreme Court, Kings County (Joy F. Campanelli, J.), dated January 17, 2024. The order, insofar as appealed from, granted that branch of the motion of the defendants Lucy M. Mark and Hilbert Tunstall which was for summary judgment dismissing the complaint insofar as asserted against them on the ground that they were not at fault in the happening of the subject accident.

Ordered that the order is reversed insofar as appealed from, on the law, with costs, and that branch of the motion of the defendants Lucy M. Mark and Hilbert Tunstall which was for summary judgment dismissing the complaint insofar as asserted against them on the ground that they were not at fault in the happening of the subject accident is denied.

The plaintiff commenced this action, inter alia, to recover damages for personal injuries she allegedly sustained in May 2017 when a vehicle she was operating was involved in an accident with a vehicle owned and operated by the defendant Volvie Brown and a vehicle owned by the defendant Lucy M. Mark and operated by the defendant Hilbert Tunstall. The plaintiff alleged that Brown and Tunstall were negligent in the operation of their vehicles.

Mark and Tunstall moved, among other things, for summary judgment dismissing the complaint insofar as asserted against them on the ground that they were not at fault in the happening of the accident. In support of their motion, they submitted, inter alia, the deposition transcripts of the plaintiff, Brown, Tunstall, and a nonparty eyewitness, as well as an uncertified police accident report. In an order dated January 17, 2024, the Supreme Court, among other things, granted that branch of the motion. The plaintiff appeals.

A defendant moving for summary judgment in a negligence action has the burden of establishing, prima facie, that she or he was not at fault in the happening of the accident (*see Kouzine v Strutsinskiy*, 241 AD3d 810, 811 [2025]; *Laborde v Creative Closet & Design, Inc.*, 240 AD3d 678, 678 [2025]). “There can be more than one proximate cause of an accident” (*Estate of Cook v Gomez*, 138 AD3d 675, 676-677 [2016]), and, “[g]enerally, it is for the trier of fact to determine the issue of proximate cause” (*Kalland v Hungry Harbor Assoc., LLC*, 84 AD3d 889, 889 [2011]; *see Bermejo v Khaydarov*, 155 AD3d 597, 597 [2017]). A motion for summary judgment “should not be granted where the facts are in dispute, where conflicting inferences may be drawn from the evidence, or where there are issues of credibility” (*Ruiz v Griffin*, 71 AD3d 1112, 1115 [2010] [internal quotation marks omitted]; *see Smith-Joyner v Barahona*, 227 AD3d 924, 926 [2024]).

As an initial matter, the police accident report, which was not certified and thus not in admissible form, should not have been considered by the Supreme Court (*see Lawrence v Sparks*, 218 AD3d 670, 671 [2023]). Moreover, it is unclear from the statements in the report who provided information regarding how the accident occurred to the officer who authored the

report. As such, the report also was not admissible on that ground (see *Yassin v Blackman*, 188 AD3d 62, 66 [2020]; *Memenza v Cole*, 131 AD3d 1020, 1022 [2015]).

In addition, the testimonial evidence, when viewed in the light most favorable to the plaintiff as the nonmoving party (see *Stukas v Streiter*, 83 AD3d 18, 22 [2011]), failed to establish, prima facie, that Tunstall was free from fault in the happening of the accident and that Brown's actions were the sole proximate cause of the accident. This evidence presented conflicting accounts about the happening of the accident, raising issues of credibility, and revealed factual disputes as to how the accident occurred. The evidence therefore failed to eliminate all triable issues of fact as to whether Tunstall was at fault in the happening of the accident (see *Smith-Joyner v Barahona*, 227 AD3d at 927; *Schmitz v Pinto*, 220 AD3d 681, 682-683 [2023]; see also Vehicle and Traffic Law § 1128 [a]).

Accordingly, since Mark and Tunstall failed to establish their prima facie entitlement to judgment as a matter of law dismissing the complaint insofar as asserted against them on the ground that they were not at fault in the happening of the accident, the Supreme Court should have denied that branch of their motion which was for summary judgment dismissing the complaint insofar as asserted against them on the ground that they were not at fault in the happening of the accident without regard to the sufficiency of the plaintiff's opposition papers (see *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). Duffy, J.P., Wooten, Hom and Goldberg Velazquez, JJ., concur.

26 Carmen Mosca, Appellant, v Lalezarian Properties, LLC, Defendant, and Con-Kel Landscaping, Inc., Respondent. [— NYS3d —]

Motions and Orders—Reargument or Renewal—Raised Argument for First Time

In an action to recover damages for personal injuries, the plaintiff appeals from an order of the Supreme Court, Queens County (Carmen R. Velasquez, J.), dated June 29, 2021. The order, insofar as appealed from, granted that branch of the motion of the defendant Con-Kel Landscaping, Inc., which was for leave to reargue that branch of its prior motion which was for summary judgment dismissing the amended complaint insofar as asserted against it, which had been denied in an order of the same court dated March 13, 2020, and, upon reargument, in effect, vacated so much of the order dated March 13, 2020, as denied that branch of that defendant's prior motion, and

thereupon, granted that branch of that defendant's prior motion.

Ordered that the order dated June 29, 2021, is reversed insofar as appealed from, on the law, with costs, and that branch of the motion of the defendant Con-Kel Landscaping, Inc., which was for leave to reargue that branch of its prior motion which was for summary judgment dismissing the amended complaint insofar as asserted against it is denied.

In January 2016, the plaintiff, who was employed as a security guard, allegedly was injured when she slipped on "black ice" in an underground parking garage where she was working. The plaintiff commenced this personal injury action in December 2016 against, among others, the defendant Con-Kel Landscaping, Inc. (hereinafter Con-Kel), the snow removal contractor at the building where the incident occurred.

In an order dated March 25, 2019 (hereinafter the March 2019 order), after the plaintiff failed to comply with multiple previous discovery orders and stipulations, the Supreme Court directed the plaintiff to disclose outstanding discovery. The March 2019 order further stated that if the plaintiff failed to comply, she would be precluded from offering testimony at trial.

In August 2019, Con-Kel moved, among other things, for summary judgment dismissing the amended complaint insofar as asserted against it, arguing that it did not have notice of the hazardous condition and that it did not owe the plaintiff a duty of care. The plaintiff opposed the motion. In an order dated March 13, 2020, the Supreme Court, *inter alia*, denied that branch of Con-Kel's motion without prejudice to renew upon the completion of discovery.

In November 2020, instead of moving for leave to renew, Con-Kel moved, among other things, for leave to reargue that branch of its prior motion which was for summary judgment dismissing the amended complaint insofar as asserted against it. Con-Kel argued, *inter alia*, that the Supreme Court overlooked a material issue of fact and misapprehended the law with respect to the plaintiff's preclusion from testifying at trial, arguing that the March 2019 order prevented the plaintiff from making her *prima facie* case.

In an order dated June 29, 2021, the Supreme Court, among other things, granted Con-Kel leave to reargue and, upon reargument, in effect, vacated so much of the order dated March 13, 2020, as denied that branch of its prior motion which was for summary judgment dismissing the amended complaint insofar as asserted against it, and thereupon, granted that

branch of the prior motion. The court determined that the plaintiff would be unable to make out a prima facie case as to liability if she was unable to testify at trial. The plaintiff appeals.

“A motion for leave to reargue ‘shall be based upon matters of fact or law allegedly overlooked or misapprehended by the court in determining the prior motion, but shall not include any matters of fact not offered on the prior motion’” (*Garcia v Cali CW Realty Assoc., L.P.*, 230 AD3d 1231, 1232 [2024], quoting CPLR 2221 [d] [2]). “It is well settled that a motion to reargue is not available to advance a new theory of liability, or to present arguments different from those originally asserted” (*Blair v Allstate Indem. Co.*, 124 AD3d 1224, 1224-1225 [2015] [citations omitted]; see *Angel v Strulovich*, 240 AD3d 647, 650 [2025]).

Here, Con-Kel did not raise any argument with respect to the plaintiff’s preclusion from testifying at trial in its original motion for summary judgment, and thus, improperly raised this argument for the first time in support of its motion for leave to reargue (see *Angel v Strulovich*, 240 AD3d at 650).

Accordingly, the Supreme Court should have denied that branch of Con-Kel’s motion which was for leave to reargue that branch of its prior motion which was for summary judgment dismissing the amended complaint insofar as asserted against it based upon the argument that the plaintiff was precluded from testifying at trial. Brathwaite Nelson, J.P., Ford, Wan and Love, JJ., concur.

27 Carmen Mosca, Appellant, v Lalezarian Properties, LLC, Respondent, et al., Defendant. [— NYS3d —]—

Negligence—Maintenance of Premises—Dangerous Condition—Ownership

In an action to recover damages for personal injuries, the plaintiff appeals from an order of the Supreme Court, Queens County (Carmen R. Velasquez, J.), dated June 29, 2021. The order, insofar as appealed from, granted that branch of the motion of the defendant Lalezarian Properties, LLC, which was for leave to reargue that branch of its prior motion which was for summary judgment dismissing the amended complaint insofar as asserted against it, which had been denied in an order of the same court dated March 13, 2020, and, upon reargument, in effect, vacated so much of the order dated March 13, 2020, as denied that branch of that defendant’s prior motion, and thereupon, granted that branch of that defendant’s prior motion.

Ordered that the order dated June 29, 2021, is affirmed insofar as appealed from, with costs.

In January 2016, the plaintiff, who was employed as a security guard, allegedly was injured when she slipped on “black ice” in an underground parking garage where she was working. The plaintiff commenced this personal injury action in December 2016 against, among others, the defendant Lalezarian Properties, LLC (hereinafter Lalezarian), the alleged property owner of the building complex.

In August 2019, Lalezarian moved, among other things, for summary judgment dismissing the amended complaint insofar as asserted against it, arguing, inter alia, that it did not own, manage, maintain, operate, or control the property where the plaintiff’s accident occurred. In support of its motion, Lalezarian submitted a deed to the property indicating that it was owned by Nassau County Industrial Development Agency, and an affidavit of Lalezarian’s authorized agent indicating that Lalezarian did not own, manage, operate, control, or maintain the property. The plaintiff opposed the motion. In an order dated March 13, 2020, the Supreme Court, among other things, denied that branch of Lalezarian’s motion without prejudice to renew upon the completion of discovery.

In October 2020, Lalezarian moved, inter alia, for leave to reargue that branch of its prior motion which was for summary judgment dismissing the amended complaint insofar as asserted against it, arguing that the Supreme Court overlooked a material issue of fact and misapprehended the law with respect to, among other things, Lalezarian’s alleged ownership of the property.

In an order dated June 29, 2021, the Supreme Court, inter alia, granted Lalezarian leave to reargue and, upon reargument, in effect, vacated so much of the order dated March 13, 2020, as denied that branch of its prior motion which was for summary judgment dismissing the amended complaint insofar as asserted against it, and thereupon, granted that branch of the prior motion. The court determined, among other things, that there was no evidence that Lalezarian owned the property where the plaintiff’s accident occurred. The plaintiff appeals.

“Motions for reargument are addressed to the sound discretion of the court which decided the prior motion and may be granted upon a showing that the court overlooked or misapprehended the facts or law or for some other reason mistakenly arrived at its earlier decision” (*Kinard v New York City Tr. Auth.*, 233 AD3d 665, 666 [2024] [internal quotation marks omitted]; see *Hallett v City of New York*, 219 AD3d 809, 810 [2023]). “As a general rule, liability for a dangerous condition on real property must be predicated upon ownership, oc-

cupancy, control, or special use of the property” (*Misa v Town of Brookhaven*, 212 AD3d 804, 805-806 [2023]; *see Deutsch v Green Hills [USA], LLC*, 202 AD3d 909, 911 [2022]). “Where none of these factors are present, a party cannot be held liable for injuries caused by the allegedly defective condition” (*Deutsch v Green Hills [USA], LLC*, 202 AD3d at 911 [internal quotation marks omitted]; *see Kennedy v Hennessey*, 211 AD3d 833, 833 [2022]).

Here, Lalezarian established its prima facie entitlement to judgment as a matter of law dismissing the amended complaint insofar as asserted against it. In this regard, Lalezarian established that it did not own the property where the accident occurred (*see Misa v Town of Brookhaven*, 212 AD3d at 805-806; *Deutsch v Green Hills [USA], LLC*, 202 AD3d at 911). Accordingly, Lalezarian cannot be held liable for injuries allegedly caused by a hazardous condition therein as a matter of law (*see Kennedy v Hennessey*, 211 AD3d at 833; *Deutsch v Green Hills [USA], LLC*, 202 AD3d at 911). In opposition, the plaintiff failed to raise a triable issue of fact.

The plaintiff’s remaining contentions either are without merit or need not be reached in light of our determination.

Accordingly, the Supreme Court, upon reargument, properly granted that branch of Lalezarian’s prior motion which was for summary judgment dismissing the amended complaint insofar as asserted against it. Brathwaite Nelson, J.P., Ford, Wan and Love, JJ., concur.

28 In the Matter of American Transit Insurance Company, Respondent, v Bay Ridge Surgi-Center, LLC, as Assignee of MD Ashrafuzzama, Appellant. [— NYS3d —]

Motions and Orders—Reargument or Renewal

Attorney and Client—Compensation—Award of Attorneys’ Fees

In a proceeding pursuant to CPLR article 75 to vacate a master arbitration award dated June 28, 2022, Bay Ridge Surgi-Center, LLC, appeals from a judgment of the Supreme Court, Kings County (Ingrid Joseph, J.), dated April 26, 2024. The judgment, insofar as appealed from, upon so much of an order of the same court dated November 21, 2023, as failed to award Bay Ridge Surgi-Center, LLC, additional attorneys’ fees pursuant to 11 NYCRR 65-4.10 (j) (4), and upon so much of an order of the same court dated April 17, 2024, as denied that branch of the motion of Bay Ridge Surgi-Center, LLC, which was pursuant to CPLR 5015 (a) (1) to vacate so much of the order dated November 21, 2023, issued upon the default of Bay Ridge Surgi-Center, LLC, in appearing for oral argument, as

failed to award Bay Ridge Surgi-Center, LLC, additional attorneys' fees pursuant to 11 NYCRR 65-4.10 (j) (4) and, in effect, upon reargument, adhered to so much of the prior determination in the order dated November 21, 2023, as failed to award Bay Ridge Surgi-Center, LLC, additional attorneys' fees pursuant to 11 NYCRR 65-4.10 (j) (4), did not award Bay Ridge Surgi-Center, LLC, additional attorneys' fees pursuant to 11 NYCRR 65-4.10 (j) (4).

Ordered that the judgment is affirmed insofar as appealed from, with costs.

In September 2022, American Transit Insurance Company (hereinafter the petitioner) commenced this proceeding pursuant to CPLR article 75 to vacate a master arbitration award dated June 28, 2022, confirming an arbitration award entered in favor of Bay Ridge Surgi-Center, LLC (hereinafter Bay Ridge). Bay Ridge opposed the petition.

In an order dated November 21, 2023 (hereinafter the November 2023 order), the Supreme Court, upon Bay Ridge's failure to appear for oral argument, *inter alia*, denied the petition on the merits and confirmed the master arbitration award. In addition, as relevant to this appeal, the November 2023 order failed to award Bay Ridge additional attorneys' fees pursuant to 11 NYCRR 65-4.10 (j) (4).

In December 2023, Bay Ridge moved, among other things, pursuant to CPLR 5015 (a) (1) to vacate so much of the November 2023 order, issued upon Bay Ridge's default in appearing for oral argument, as failed to award Bay Ridge additional attorneys' fees pursuant to 11 NYCRR 65-4.10 (j) (4) and for "leave to reargue the branch of the [November 2023 order] denying [Bay Ridge] its attorney fee, . . . and, upon reargument, vacating the order and granting [Bay Ridge] its attorney fee, pursuant to 11 NYCRR 65-4.10 (j) (4)." In an order dated April 17, 2024, the Supreme Court, *inter alia*, denied that branch of Bay Ridge's motion which was pursuant to CPLR 5015 (a) (1) to vacate so much of the November 2023 order, issued upon Bay Ridge's default in appearing for oral argument, as failed to award Bay Ridge additional attorneys' fees pursuant to 11 NYCRR 65-4.10 (j) (4) and, in effect, upon reargument, adhered to so much of the prior determination in the November 2023 order as failed to award Bay Ridge additional attorneys' fees pursuant to 11 NYCRR 65-4.10 (j) (4). The court noted that while Bay Ridge failed to appear at oral argument on the petition, the November 2023 order determined the petition on the merits in Bay Ridge's favor. The court further noted that the November 2023 order had not addressed

the issue of additional attorneys' fees pursuant to 11 NYCRR 65-4.10 (j) (4) because Bay Ridge had not requested such relief and that to the extent that Bay Ridge was seeking such relief in the first instance, Bay Ridge had failed to include an affirmation of attorneys' fees in support of its application. Thereafter, in a judgment dated April 26, 2024, the court, among other things, did not award Bay Ridge additional attorneys' fees pursuant to 11 NYCRR 65-4.10 (j) (4). Bay Ridge appeals.

The Supreme Court properly denied that branch of Bay Ridge's motion which was pursuant to CPLR 5015 (a) (1) to vacate so much of the November 2023 order, issued upon Bay Ridge's default in appearing for oral argument, as failed to award Bay Ridge additional attorneys' fees pursuant to 11 NYCRR 65-4.10 (j) (4), as Bay Ridge opposed the petition and the court determined the petition on the merits and not upon default (*see* CPLR 5015 [a] [1]; *Cole-Hatchard v Eggers*, 132 AD3d 718, 719 [2015]).

Further, Bay Ridge's contention that it was entitled to an award of additional attorneys' fees pursuant to 11 NYCRR 65-4.10 (j) (4) was raised for the first time in connection with that branch of its motion which was for reargument. A motion for leave to reargue is not designed to provide an unsuccessful party with successive opportunities to reargue issues previously decided or to present arguments different from those originally presented (*see FPG CH 94 Amity, LLC v Pizzarotti, LLC*, 218 AD3d 651, 653 [2023]; *Flanagan v Delaney*, 194 AD3d 694, 698 [2021]). In any event, on the merits, the Supreme Court did not err in declining to award Bay Ridge additional attorneys' fees pursuant to 11 NYCRR 65-4.10 (j) (4). That regulation provides, in pertinent part, that "[t]he attorney's fee for services rendered in connection with . . . a court appeal from a master arbitration award and any further appeals, shall be fixed by the court adjudicating the matter" (*id.*). The court's determination of an award of attorneys' fees "must be based upon a demonstration of the hours reasonably expended on the litigation and what is reasonable compensation for the attorney based upon the prevailing rate for similar work in the community" (*RMP Capital Corp. v Victory Jet, LLC*, 139 AD3d 836, 839-840 [2016]). "The attorney bears the burden of establishing the reasonable value of the services rendered through contemporaneous time records specifying the date, hours expended, and nature of the work performed" (*Hershfield v Davidoff*, 233 AD3d 923, 924 [2024] [internal quotation marks omitted]). Here, where the petitioner neither made a timely application for an award of additional attorneys' fees pursuant to 11

NYCRR 65-4.10 (j) (4) prior to the determination of the petition nor submitted any documentation of the additional attorneys' fees incurred, the court properly declined to award such fees (*see Matter of Country-Wide Ins. Co. v Bay Needle Care Acupuncture, P.C.*, 220 AD3d 461 [2023]). Connolly, J.P., Chambers, Voutsinas and Goldberg Velazquez, JJ., concur.

29 In the Matter of American Transit Insurance Company, Respondent, v Citimed Surgery Center, LLC, as Assignee of Cruz Marroquin, Appellant. [— NYS3d —]—

Motions and Orders—Timeliness of Motion—Filed Outside of Filing Period

In a proceeding pursuant to CPLR article 75 to vacate a master arbitration award dated January 26, 2023, in which Citimed Surgery Center, LLC, as assignee of Cruz Marroquin, cross-petitioned, among other things, pursuant to 11 NYCRR 65-4.10 (j) (4) for an award of additional attorneys' fees, Citimed Surgery Center, LLC, appeals from a judgment of the Supreme Court, Kings County (Robin K. Sheares, J.), dated April 2, 2024. The judgment, insofar as appealed from, upon so much of an order of the same court dated May 11, 2023, as granted that branch of the cross-petition of Citimed Surgery Center, LLC, which was pursuant to 11 NYCRR 65-4.10 (j) (4) for an award of additional attorneys' fees to the extent of directing Citimed Surgery Center, LLC, to submit a motion for an award of additional attorneys' fees with supporting affirmation within 30 days, and upon an order of the same court dated March 7, 2024, denying the motion of Citimed Surgery Center, LLC, pursuant to 11 NYCRR 65-4.10 (j) (4) for an award of additional attorneys' fees, failed to award Citimed Surgery Center, LLC, additional attorneys' fees pursuant to 11 NYCRR 65-4.10 (j) (4).

Ordered that the judgment is affirmed insofar as appealed from, with costs.

American Transit Insurance Company commenced this proceeding pursuant to CPLR article 75 to vacate a master arbitration award dated January 26, 2023, confirming an arbitration award entered in favor of Citimed Surgery Center, LLC (hereinafter Citimed). Citimed cross-petitioned, among other things, to confirm the master arbitration award and pursuant to 11 NYCRR 65-4.10 (j) (4) for an award of additional attorneys' fees. In an order dated May 11, 2023, the Supreme Court, inter alia, upon its determination that Citimed was entitled to additional attorneys' fees pursuant to 11 NYCRR 65-4.10 (j) (4) granted that branch of the cross-petition which was pursuant to 11 NYCRR 65-4.10 (j) (4) for an award of ad-

ditional attorneys' fees to the extent of directing Citimed to "submit a motion for attorney's fees with supporting affirmation within thirty (30) days and allow Petitioner to oppose motion, and the Court can decide reasonable attorney fees after the submission of papers and oral argument."

Citimed did not file its motion pursuant to 11 NYCRR 65-4.10 (j) (4) for an award of additional attorneys' fees with supporting affirmation until July 13, 2023, and failed to acknowledge or explain its tardiness. In an order dated December 7, 2023, the Supreme Court denied Citimed's motion "due to the non-appearance of the Movant at the first and second calendar calls." In December 2023, Citimed filed a second motion pursuant to 11 NYCRR 65-4.10 (j) (4) for an award of additional attorneys' fees (hereinafter Citimed's second motion), which made no reference to the prior motion for the same relief and again failed to acknowledge or explain Citimed's tardiness in moving for such relief. In an order dated March 7, 2024, the court denied Citimed's second motion as untimely. Thereafter, the court issued a judgment, among other things, failing to award Citimed additional attorneys' fees pursuant to 11 NYCRR 65-4.10 (j) (4). CitiMed appeals.

Contrary to Citimed's contentions, the Supreme Court properly denied Citimed's second motion as untimely. The Court of Appeals has made it clear that court-ordered time frames are to be taken seriously (*see Miceli v State Farm Mut. Auto. Ins. Co.*, 3 NY3d 725, 726 [2004]; *Kihl v Pfeffer*, 94 NY2d 118, 123 [1999]). "If the credibility of court orders and the integrity of our judicial system are to be maintained, a litigant cannot ignore court orders with impunity" (*Kihl v Pfeffer*, 94 NY2d at 123). Here, Citimed's second motion was filed beyond the court-ordered 30-day filing period, thereby rendering Citimed's second motion untimely (*see Miceli v State Farm Mut. Auto. Ins. Co.*, 3 NY3d at 726; *Thomsen v Suffolk County Police Dept.*, 50 AD3d 1015, 1017 [2008]).

Citimed's remaining contention is without merit.

As the Supreme Court properly denied Citimed's second motion as untimely, we affirm the judgment insofar as appealed from. Connolly, J.P., Chambers, Voutsinas and Goldberg Velazquez, JJ., concur.

30 In the Matter of American Transit Insurance Company, Respondent, v Smart Choice Medical, P.C., as Assignee of Kingsley Parker, Appellant. [— NYS3d —]

Motions and Orders—Reargument or Renewal—New Information—Reasonable Justification for Failure to Submit in First Instance

In a proceeding pursuant to CPLR article 75 to vacate a master arbitration award dated December 29, 2022, in which Smart Choice Medical, P.C., as assignee of Kingsley Parker, cross-petitioned, *inter alia*, pursuant to 11 NYCRR 65-4.10 (j) (4) for an award of reasonable attorneys' fees, Smart Choice Medical, P.C., appeals from a judgment of the Supreme Court, Kings County (Francois A. Rivera, J.), dated May 7, 2024. The judgment, insofar as appealed from, upon so much of an order of the same court dated April 22, 2024, as denied that branch of the motion of Smart Choice Medical, P.C., which was for leave to renew its application for an award of additional attorneys' fees pursuant to 11 NYCRR 65-4.10 (j) (4), which had been denied in an order of the same court dated November 30, 2023, failed to award Smart Choice Medical, P.C., additional attorneys' fees pursuant to 11 NYCRR 65-4.10 (j) (4).

Ordered that the judgment is affirmed insofar as appealed from, with costs.

American Transit Insurance Company (hereinafter the petitioner) commenced this proceeding pursuant to CPLR article 75 to vacate a master arbitration award dated December 29, 2022, confirming an arbitration award entered in favor of Smart Choice Medical, P.C. (hereinafter Smart Choice). Smart Choice cross-petitioned, *inter alia*, to confirm the master arbitration award and pursuant to 11 NYCRR 65-4.10 (j) (4) for an award of additional attorneys' fees. In an order dated August 23, 2023 (hereinafter the August 2023 order), the Supreme Court, among other things, upon its determination that Smart Choice was entitled to an award of additional attorneys' fees pursuant to 11 NYCRR 65-4.10 (j) (4), set forth a briefing schedule for Smart Choice to submit an affirmation on the issue of the amount of attorneys' fees to be awarded (hereinafter the affirmation of attorneys' fees) and for the petitioner to submit opposition thereto.

Thereafter, Smart Choice filed the affirmation of attorneys' fees. The petitioner opposed Smart Choice's application for an award of additional attorneys' fees pursuant to 11 NYCRR 65-4.10 (j) (4), *inter alia*, on the ground that the affirmation of attorneys' fees was not timely filed in accordance with the court-ordered briefing schedule. In reply, Smart Choice admitted that the affirmation of attorneys' fees was "tardy," and attributed the tardiness to law office error in the use of case management tracking software, but asked the Supreme Court to excuse the tardiness on the ground that the petitioner was not prejudiced. In an order dated November 30, 2023, the court denied Smart Choice's application for an award of additional

attorneys' fees pursuant to 11 NYCRR 65-4.10 (j) (4) on the ground that Smart Choice failed to comply with the court's briefing schedule and, thus, filed the affirmation of attorneys' fees late.

In December 2023, Smart Choice moved, among other things, for leave to renew its application for an award of additional attorneys' fees pursuant to 11 NYCRR 65-4.10 (j) (4). In support of renewal, Smart Choice argued for the first time that it could not comply with the Supreme Court's briefing schedule because Smart Choice's deadline for submitting the affirmation of attorneys' fees had already passed by the time the August 2023 order setting forth the briefing schedule was signed and uploaded to the court's electronic case filing system. The petitioner opposed Smart Choice's motion, contending that Smart Choice had not offered new information that was unavailable when the court made its initial determination to deny Smart Choice's application and submitted a copy of an email from Smart Choice to the court demonstrating that Smart Choice was aware of the deadline for submitting the affirmation of attorneys' fees in time to comply. In an order dated April 22, 2024, the court, *inter alia*, denied that branch of Smart Choice's motion. Thereafter, in a judgment dated May 7, 2024, the court, among other things, failed to award Smart Choice additional attorneys' fees pursuant to 11 NYCRR 65-4.10 (j) (4). Smart Choice appeals from the judgment.

"A motion for leave to renew is addressed to the sound discretion of the court" (*Carmike Holding I, LLC v Smith*, 180 AD3d 744, 747 [2020] [internal quotation marks omitted]). Pursuant to CPLR 2221 (e), a motion for leave to renew shall be based upon new facts not offered on the prior motion that would change the prior determination (*see* CPLR 2221 [e] [2]) and shall contain reasonable justification for the failure to present such facts on the prior motion (*see* CPLR 2221 [e] [3]). "The new or additional facts either must have not been known to the party seeking renewal or may, in the Supreme Court's discretion, be based on facts known to the party seeking renewal at the time of the original motion" (*Carmike Holding I, LLC v Smith*, 180 AD3d at 747 [internal quotation marks omitted]; *see Seror v Clearview Operating Co., LLC*, 235 AD3d 1023, 1025 [2025]). "However, in either instance, a reasonable justification for the failure to present such facts on the original motion must be presented" (*Cioffi v S.M. Foods, Inc.*, 129 AD3d 888, 891 [2015] [internal quotation marks omitted]; *see Carmike Holding I, LLC v Smith*, 180 AD3d at 747). Reasonable justification does not exist where "the 'new evidence'

consists of documents which the [moving party] knew existed, and were in fact in his own possession at the time the initial motion was made” (*Rowe v NYCPD*, 85 AD3d 1001, 1003 [2011]; see *Cioffi v S.M. Foods, Inc.*, 129 AD3d at 891).

Here, the purported new information that Smart Choice relied upon was available to it prior to the date it filed its motion, and it failed to set forth a reasonable justification for its failure to submit this information in the first instance (see *Seror v Clearview Operating Co., LLC*, 235 AD3d at 1025; *Carmike Holding I, LLC v Smith*, 180 AD3d at 747; *Deutsche Bank Trust Co. v Ghaness*, 100 AD3d 585, 586 [2012]; *Jovanovic v Jovanovic*, 96 AD3d 1019, 1020 [2012]; *Rowe v NYCPD*, 85 AD3d at 1003). Accordingly, the Supreme Court properly denied that branch of Smart Choice’s motion which was for leave to renew its application for an award of additional attorneys’ fees pursuant to 11 NYCRR 65-4.10 (j) (4).

Smart Choice’s remaining contention is without merit. Connelly, J.P., Chambers, Voutsinas and Goldberg Velazquez, JJ., concur.

31 In the Matter of Kimora Baldwin, Respondent, v Malcolm A. Peterkin, Appellant. [— NYS3d —]

Parent, Child and Family—Support—Willful Failure to Comply—Waiver of Right to Counsel

In a proceeding pursuant to Family Court Act article 4, the father appeals from (1) an order of the Family Court, Queens County (Connie Gonzalez, J.), dated March 10, 2025, and (2) an order of commitment of the same court also dated March 10, 2025. The order confirmed an order of disposition of the same court (Serena Rosario, S.M.) dated September 4, 2024, made after a hearing, finding that the father willfully violated a prior order of child support. The order of commitment, in effect, confirmed the order of disposition and committed the father to the custody of the New York City Department of Correction for a period of 60 days unless he paid a purge amount of \$7,500.

Ordered that the appeal from so much of the order of commitment as committed the father to the custody of the New York City Department of Correction for a period of 60 days unless he paid the purge amount of \$7,500 is dismissed as academic, without costs or disbursements, as the period of incarceration has expired (see *Matter of Nestor v Nestor*, 236 AD3d 794, 794 [2025]; *Matter of Stein-Zimic v Zimic*, 194 AD3d 823, 824 [2021]); and it is further

Ordered that the order is reversed, on the law, without costs

or disbursements, the order of disposition is vacated, and the matter is remitted to the Family Court, Queens County, for a new hearing on the violation petition and a new determination thereafter in accordance herewith; and it is further,

Ordered that the order of commitment is reversed insofar as reviewed, on the law, without costs or disbursements.

In March 2024, the mother commenced this proceeding pursuant to Family Court Act article 4, alleging that the father was in willful violation of a prior order of child support. At the initial appearance before a Support Magistrate on April 3, 2024, the father was assigned counsel. At a subsequent proceeding on July 30, 2024, the Support Magistrate relieved the father's assigned counsel upon the father's request.

At the next proceeding on August 28, 2024, the father appeared without counsel and indicated that he had not been assigned a new attorney. The Support Magistrate advised the father that a hearing on the mother's violation petition was scheduled for that date and asked the father if he intended to "present a defense on [his] own, . . . not participat[e], or hir[e] an attorney." After the father gave a nonresponsive answer, the Support Magistrate stated that "the Court will proceed on the [father's] default." The father again protested that he did not have an attorney. The Support Magistrate then found that the father "is choosing not to participate in the proceedings." In an order of disposition dated September 4, 2024, the Support Magistrate found that the father willfully violated the prior order of child support.

In an order dated March 10, 2025, the Family Court confirmed the order of disposition. In an order of commitment, also dated March 10, 2025, the Family Court in effect, confirmed the order of disposition and committed the father to the custody of the New York City Department of Correction for a period of 60 days unless he paid a purge amount of \$7,500. The father appeals.

Although the appeal from so much of the order of commitment as committed the father to the custody of the New York City Department of Correction for a period of 60 days must be dismissed as academic, the appeal from so much of the order of commitment as, in effect, confirmed the finding that the father willfully violated the child support order is not academic in light of the enduring consequences that could flow from the determination that he violated his support obligations (*see Matter of Nestor v Nestor*, 236 AD3d at 795; *Matter of Stein-Zimic v Zimic*, 194 AD3d at 824).

"An individual has a constitutional right to counsel in any

proceeding in which incarceration is a possibility. Moreover, a parent has the statutory right to counsel in a proceeding in which it is alleged that he or she has willfully failed to comply with a prior child support order” (*Matter of Sylvester v Goffe*, 202 AD3d 970, 972 [2022] [citation omitted]; see Family Ct Act § 262 [a] [vi]). “Although this right may be waived, the waiver must be knowing, voluntary, and intelligent” (*Matter of Sylvester v Goffe*, 202 AD3d at 972; see *Matter of Mercado v Arzola*, 212 AD3d 815, 816 [2023]). The deprivation of a party’s fundamental right to counsel in a custody or visitation proceeding is a denial of due process which requires reversal, regardless of the merits of the unrepresented party’s position (see *Matter of Abigail M.A. [James A.]*, 222 AD3d 973, 976 [2023]; *Matter of Tarnai v Buchbinder*, 132 AD3d 884, 886 [2015]).

Here, the record demonstrates that the father “did not wish to proceed pro se, but was forced to do so” (*Matter of Tarnai v Buchbinder*, 132 AD3d at 887 [internal quotation marks omitted]). At the proceeding on August 28, 2024, the father repeatedly protested that he did not have an attorney, and the Support Magistrate did not conduct an inquiry to determine whether the father was waiving his right to counsel or address the possibility of assigning new counsel to the father (see *Matter of Rosof v Mallory*, 88 AD3d 802, 802-803 [2011]). Moreover, although the Support Magistrate had previously cautioned the father against self-representation when the father’s former assigned counsel was relieved, the Support Magistrate at no point conducted a sufficiently searching inquiry to ensure that the father was knowingly, voluntarily, and intelligently waiving his right to counsel (see *Matter of Lherisson v Goffe*, 198 AD3d 965, 967 [2021]; *Matter of Means v Miller*, 175 AD3d 498, 500 [2019]). The deprivation of the father’s fundamental right to counsel requires reversal, without regard to the merits of his position, especially where, as here, the record demonstrates that the father did not have a basic understanding of court proceedings (see *Matter of Pugh v Pugh*, 125 AD3d 663, 664 [2015]).

Accordingly, we remit the matter to the Family Court, Queens County, for a determination of whether the father wishes to waive his right to counsel, the assignment of new counsel if warranted, and a new hearing on the petition and a new determination thereafter (see *Matter of Tarnai v Buchbinder*, 132 AD3d at 887). Dillon, J.P., Wooten, Ventura and Ottley, JJ., concur.

32 In the Matter of Elizabeth Battipaglia, Appellant, v Linda Battipaglia et al., Respondents. (Proceeding No. 1.) In

the Matter of Linda Battipaglia, Respondent, v Elizabeth Johnson, Appellant, and Robert Battipaglia, Respondent. (Proceeding No. 2.) [— NYS3d —]

Parent, Child and Family—Custody—Nonparent—Extraordinary Circumstances

Parent, Child and Family—Custody—Nonparent—Best Interests of Child

In related proceedings pursuant to Family Court Act article 6, the mother appeals from (1) an order of the Family Court, Richmond County (Janet L. McFarland, J.), dated October 2, 2024, and (2) an order of the same court dated October 3, 2024. The order dated October 2, 2024, insofar as appealed from, after a hearing, in effect, granted the petition of the paternal aunt for custody of the subject child and awarded the paternal aunt sole residential and legal custody of the child, and denied the mother's petition for custody of the child. The order dated October 3, 2024, insofar as appealed from, in effect, granted the same relief to the paternal aunt and denied the same relief to the mother.

Ordered that the orders are affirmed insofar as appealed from, without costs or disbursements.

Elizabeth Battipaglia is the mother of the subject child, who was born in 2013. The mother resided with the child and the child's father until approximately 2018, when the mother was arrested and incarcerated for a period of eight months. The child has continuously resided with Linda Battipaglia, who is the child's paternal aunt, since February 2018, when the mother placed the child in the aunt's care.

In October 2018, the aunt filed a petition against the mother and the father seeking custody of the child. In September 2021, the mother filed a petition seeking custody of the child. In an order dated October 2, 2024, the Family Court, after a hearing, inter alia, in effect, granted the aunt's petition and awarded her sole residential and legal custody of the child, and denied the mother's petition. In an order dated October 3, 2024, the court, in effect, granted the same relief to the aunt and denied the same relief to the mother. The mother appeals.

"As between a parent and a nonparent, the parent has the superior right to custody that cannot be denied unless the nonparent establishes that the parent has relinquished that right due to surrender, abandonment, persistent neglect, unfitness, or other like extraordinary circumstances" (*Matter of Madelyn E.P. [Christine L.-B.—Kevin O.]*, 196 AD3d 489, 490 [2021] [internal quotation marks omitted]; see *Matter of Bennett v Jeffreys*, 40 NY2d 543, 549 [1976]; *Matter of Brooks v Martinez*, 218 AD3d 568, 568 [2023]). "The burden of proof is

on the nonparent to prove the existence of extraordinary circumstances in order to demonstrate standing when seeking custody against a child's parent" (*Matter of Brooks v Martinez*, 218 AD3d at 568; see *Matter of Grosso v Lamb*, 195 AD3d 710, 711 [2021]). Here, the aunt established extraordinary circumstances based upon, among other things, volatility in the parents' home (see *Matter of King v King*, 191 AD3d 881, 882 [2021]; *Matter of Sofia S.S. [Goldie M.—Elizabeth C.]*, 145 AD3d 787, 789 [2016]; *Matter of Antionette M. v Paul Seth G.*, 202 AD2d 429, 429 [1994]).

"Once there is a finding of extraordinary circumstances, a best interests determination is triggered" (*Matter of Brooks v Martinez*, 218 AD3d at 568). "Factors to be considered when determining best interests include which alternative will best promote stability for the child; the home environment with each party; and each party's past performance, relative fitness, and ability to guide and provide for the child's overall well-being" (*id.* at 569; see *Matter of Mooney v Mooney*, 198 AD3d 784, 786 [2021]; *Matter of Boyko v Boyko*, 170 AD3d 828, 828 [2019]). "Since custody determinations depend to a great extent upon an assessment of the character and credibility of the parties and witnesses, deference is accorded to the trial court's findings, and such findings will not be disturbed unless they lack a sound and substantial basis in the record" (*Matter of King v King*, 191 AD3d at 882 [alterations and internal quotation marks omitted]; see *Matter of Boyko v Boyko*, 170 AD3d at 829).

Here, the Family Court's determination that the best interests of the child would be served by an award of sole residential and legal custody to the aunt is supported by a sound and substantial basis in the record, based upon the aunt's ability to provide for the child's financial, educational, emotional, and medical needs (see *Matter of Camacho v Romero-Vanegas*, 238 AD3d 1028, 1028-1030 [2025]; *Matter of Brittany N. v Anthony D.*, 202 AD3d 1086, 1088 [2022]; *Matter of King v King*, 191 AD3d at 882).

The mother's remaining contention is without merit.

Accordingly, the Family Court properly, in effect, granted the aunt's petition for custody of the child and awarded the aunt sole residential and legal custody of the child, and properly, in effect, denied the mother's petition for custody of the child. Genovesi, J.P., Dowling, Wan and Quirk, JJ., concur.

33 In the *Matter of BKP Harrison, LLC, Respondent, v Town/Village of Harrison et al., Appellants.* [— NYS3d —]

Municipal Corporations—Planning—Site Plan Approval—Planning Board Determination

In a proceeding pursuant to CPLR article 78 to review a determination of the Town/Village of Harrison Planning Board dated January 25, 2022, which, after a hearing, denied the petitioner's application for an amended site plan approval, the Town/Village of Harrison and the Town/Village of Harrison Planning Board appeal from a judgment of the Supreme Court, Westchester County (Susan Cacace, J.), dated August 17, 2022. The judgment granted the petition, annulled the determination, and directed the Town/Village of Harrison Planning Board to grant the application for an amended site plan approval.

Ordered that the judgment is affirmed, without costs or disbursements.

The petitioner submitted an application to the Town/Village of Harrison Planning Board (hereinafter the planning board) for an amended site plan approval to replace an existing restaurant with a new restaurant and drive-through. After meetings and public hearings, in a determination dated January 25, 2022, the planning board denied the application. The petitioner commenced this proceeding pursuant to CPLR article 78 to review the determination. In a judgment dated August 17, 2022, the Supreme Court granted the petition, annulled the determination, and directed the planning board to grant the application. This appeal ensued.

“A local planning board has broad discretion in deciding applications for site plan approvals, and judicial review is limited to determining whether the board's action was illegal, arbitrary and capricious, or an abuse of discretion” (*Matter of 7-Eleven, Inc. v Town of Hempstead*, 205 AD3d 909, 910 [2022]; see CPLR 7803 [3]).

Here, the Supreme Court properly concluded that the planning board's determination was arbitrary and capricious and did not have a rational basis in the record. The planning board's determination was based, in part, on speculative predictions that motorists would not obey certain traffic signals and subjective concerns that the petitioner would not honor its commitment to limit deliveries to certain hours. Moreover, even though “[p]lanning boards are without power to interpret the local zoning law, as that power is vested exclusively in local code enforcement officials and the zoning board of appeals” (*Matter of Swantz v Planning Bd. of Vil. of Cobleskill*, 34 AD3d 1159, 1160 [2006]; see *Matter of O'Malley v Town of New Windsor Planning Bd.*, 227 AD3d 808, 810 [2024]), the planning board based its denial, in part, on the conclusion that the

petitioner would need a zoning variance for the width of its entrance driveways. Further, the planning board improperly relied on a study it conducted that the petitioner was not made aware of until the planning board referred to it in the determination (see *Matter of Bali Two, LLC v Pascale*, 225 AD3d 691, 692 [2024]; *Matter of Sunset Sanitation Serv. Corp. v Board of Zoning Appeals of Town of Smithtown*, 172 AD2d 755 [1991]).

Accordingly, the Supreme Court properly granted the petition, annulled the determination, and directed the planning board to grant the application. Dillon, J.P., Christopher, Warhit and Landicino, JJ., concur.

34 In the Matter of Flushing Main Street Improvements Project, Respondent Appellant. [— NYS3d —]—

Constitutional Law—Taking of Property—Compensation for Condemnation—Determination of Capitalization Rate

In a condemnation proceeding, the condemnor, Metropolitan Transportation Authority, appeals from a judgment of the Supreme Court, Queens County (Carmen R. Velasquez, J.), entered June 21, 2021. The judgment, upon a decision of the same court dated April 30, 2021, made after a nonjury trial, awarded the claimant the sum of \$15,508,705 as just compensation for the taking of the subject property and \$12,286.65 in costs and disbursements.

Ordered that the judgment is affirmed, with costs.

On June 12, 2015, as a result of required elevator renovations to the Long Island Rail Road's Flushing Main Street Station, the condemnor, Metropolitan Transportation Authority (hereinafter the MTA), took title to the subject property located in Queens in fee simple. The subject property contained a one-story retail building with a cellar, built in 1931. After the condemnation, the claimant filed a notice of claim demanding just compensation for the property. At a nonjury trial on the issue of compensation, the claimant's appraiser presented evidence that the highest and best use of the subject property was one story retail with development potential. Based upon that assessment, the claimant's appraiser, employing an income capitalization approach to value and relying heavily on a sale of a property (hereinafter lot 56) immediately adjacent to the subject property, determined that the capitalization rate for the subject property was 2.5%. Based upon this capitalization rate, the claimant's appraiser opined that the value of the subject property was \$15,430,000.

In contrast, the MTA presented evidence that the highest and best use for the subject property was the development of a

multi-story commercial building constructed to the greatest density permissible under the current zoning regulations. Employing the income capitalization approach, the MTA relied on a PricewaterhouseCoopers National Strip Shopping Center Market Report as well as a local market transaction survey of properties in Queens to determine that the subject property's capitalization rate was 6.5%. Ultimately, the MTA's appraiser valued the subject property at \$5,100,000.

The Supreme Court accepted the claimant's appraisal and rejected the MTA's appraisal, determining that the claimant was entitled to compensation in the amount of \$15,430,000. A judgment entered June 21, 2021, upon a decision dated April 30, 2021, made after the nonjury trial, awarded the claimant the sum of \$15,508,705 as just compensation for the taking of the subject property and \$12,286.65 in costs and disbursements. The MTA appeals, and we affirm.

"An owner whose property has been taken in condemnation is entitled to just compensation" (*Matter of New Cr. Bluebelt, Phase 4 [Galarza—City of New York]*, 205 AD3d 808, 810 [2022]; see US Const, 5th Amend; NY Const, art I, § 7 [a]; Eminent Domain Procedure Law § 101). "Just compensation for property taken in condemnation is determined by the property's market value at the time of the taking, that is, the price a willing buyer would have paid a willing seller for the property" (*J. Nazzaro Partnership, L.P. v State of New York*, 205 AD3d 690, 692 [2022] [internal quotation marks omitted]; see *Matter of Town of Islip [Mascioli]*, 49 NY2d 354, 360 [1980]). "The property must be valued based on its highest and best use on the effective date of the taking, irrespective of whether it is being put to that use" (*J. Nazzaro Partnership, L.P. v State of New York*, 205 AD3d at 692; see *Matter of Village of Haverstraw [Ray Riv. Co., Inc.]*, 191 AD3d 994, 995-996 [2021]).

"In determining an award to an owner of condemned property, the findings must either be within the range of the expert testimony or be supported by other evidence and adequately explained by the court" (*Matter of Board of Commr. of Great Neck Park Dist. of Town of N. Hempstead v Kings Point Hgts., LLC*, 74 AD3d 804, 805-806 [2010], quoting *Matter of City of New York [Reiss]*, 55 NY2d 885, 886 [1982]; see *Matter of Queens W. Dev. Corp. [Nixbot Realty Assoc.]*, 139 AD3d 863, 865 [2016]). "In condemnation cases, the authority of this Court to review findings of fact after a nonjury trial is as broad as that of the trial court" (*Matter of Chynn v County of Suffolk*, 204 AD3d 905, 908 [2022]; see *Matter of Town of Oyster Bay v 55 Motor Ave. Co., LLC*, 187 AD3d 760, 761 [2020]). "This court

may render the judgment it finds warranted by the facts, taking into account that in a close case the trial court had the advantage of seeing and hearing the witnesses” (*Matter of City of New York [Eman Realty Corp.]*, 197 AD3d 705, 707 [2021] [internal quotation marks omitted]). However, “[w]here the trial court’s explanation of its award is supported by the evidence, it is entitled to deference and will not be disturbed on appeal” (*20 Rewe St., Ltd. v State of New York*, 208 AD3d 1140, 1142 [2022] [internal quotation marks omitted]; see *Matter of Metropolitan Transp. Auth. [Washed Aggregate Resources, Inc.]*, 102 AD3d 787, 791 [2013]).

Here, the Supreme Court found that the claimant was entitled an amount of compensation which was within the range of the expert testimony and was supported by the evidence presented at trial. “The best evidence of value . . . is a recent sale of the subject property between a seller under no compulsion to sell and a buyer under no compulsion to buy” (*Matter of Allied Corp. v Town of Camillus*, 80 NY2d 351, 356 [1992]; see *Matter of Colonie Ctr. v Town of Colonie*, 209 AD3d 1214, 1216 [2022]). Although there was not a recent sale of the subject property, there was a sale of a property directly adjacent, which shared significant characteristics with the subject property. Accordingly, while the sale of that property, lot 56, occurred four months after the date of the taking, given the similarities it shared with the subject property, the claimant’s appraiser properly considered its sale in determining the capitalization rate for the subject property.

The properties that the MTA analyzed in determining the capitalization rate, however, were not sufficiently comparable to the subject property. The MTA’s stated reliance on national trends, rather than local trends, rendered its capitalization rate unreliable (see *Matter of Colonie Ctr. v Town of Colonie*, 209 AD3d at 1220). The MTA also improperly categorized the subject property as a strip shopping center and analyzed properties that were not located in the same area and did not share the characteristics of the subject property.

In its decision after trial, the Supreme Court thoroughly explained its findings (see *Matter of Village of Haverstraw [Ray Riv. Co., Inc.]*, 191 AD3d at 995-996). Because the court’s explanation of its award is supported by the evidence, it is entitled to deference and will not be disturbed on appeal (see *20 Rewe St., Ltd. v State of New York*, 208 AD3d at 1142; *Elpa Bldrs., Inc. v State of New York*, 196 AD3d 541, 543 [2021]).

The MTA’s remaining contentions are without merit. Accordingly, we affirm the judgment.

Brathwaite Nelson, J.P., Ford, Dowling and Goldberg Velazquez, JJ., concur.

35 In the Matter of Integrated Specialty ASC, LLC, Formerly Known as Health Plus Surgery Center, LLC, as Assignee of Mayra Machuca, Appellant, v American Transit Insurance Company, Respondent. [— NYS3d —]—

Attorney and Client—Compensation—Services Rendered to Confirm Arbitration Award—Affirmation of Fees

In a proceeding pursuant to CPLR article 75 to confirm a master arbitration award dated August 1, 2023, Integrated Specialty ASC, LLC, appeals from a judgment of the Supreme Court, Nassau County (Thomas A. Rademaker, J.), entered January 12, 2024. The judgment, insofar as appealed from, upon an order of the same court entered November 17, 2023, granting the petition, awarded Integrated Specialty ASC, LLC, attorneys' fees pursuant to 11 NYCRR 65-4.6 (d) in the sum of only \$1,000 and did not award Integrated Specialty ASC, LLC, additional attorneys' fees pursuant to 11 NYCRR 65-4.10 (j) (4).

Ordered that the judgment is reversed insofar as appealed from, on the law and the facts, with costs, Integrated Specialty ASC, LLC, is awarded attorneys' fees pursuant to 11 NYCRR 65-4.6 (d) in the sum of \$1,360, and the matter is remitted to the Supreme Court, Nassau County, for a determination of the amount of additional attorneys' fees pursuant to 11 NYCRR 65-4.10 (j) (4) to be awarded to Integrated Specialty ASC, LLC, and thereafter for the entry of an appropriate amended judgment in accordance herewith.

Integrated Specialty ASC, LLC (hereinafter Integrated Specialty), as assignee of Mayra Machuca, is a medical provider which made a claim for no-fault benefits from American Transit Insurance Company (hereinafter American Transit). American Transit denied the claim. Integrated Specialty submitted the claim to arbitration, and in an award dated May 8, 2023, the arbitrator awarded Integrated Specialty the sum of \$15,219.04, plus interest. In a determination dated August 1, 2023 (hereinafter the master arbitration award), the master arbitrator affirmed the arbitration award.

In October 2023, Integrated Specialty commenced this proceeding to confirm the master arbitration award. The petition sought, inter alia, awards of attorneys' fees pursuant to 11 NYCRR 65-4.6 (d) in the sum of 20% of the principal award, plus interest, and additional attorneys' fees pursuant to 11 NYCRR 65-4.10 (j) (4) in an amount to be determined on affir-

mation. American Transit did not answer or oppose the petition. In an order entered November 17, 2023 (hereinafter the November 2023 order), the Supreme Court, among other things, granted the unopposed petition. The November 2023 order also awarded Integrated Specialty attorneys' fees pursuant to 11 NYCRR 65-4.6 (d) in the sum of 20% of the principal award, plus interest, and additional attorneys' fees pursuant to 11 NYCRR 65-4.10 (j) (4) in an amount to be determined on submission of an affirmation of attorneys' fees.

In a judgment entered January 12, 2024, the Supreme Court, upon the November 2023 order, *inter alia*, awarded Integrated Specialty attorneys' fees pursuant to 11 NYCRR 65-4.6 (d) in the sum of \$1,000 and did not award Integrated Specialty additional attorneys' fees pursuant to 11 NCYRR 65-4.10 (j) (4). Integrated Specialty appeals.

Pursuant to 11 NYCRR 65-4.6 (d), attorneys' fees for an arbitration and a master arbitration in which a petitioner ultimately prevailed are limited to "20 percent of the total amount of first-party benefits and any additional first-party benefits, plus interest thereon for each applicant per arbitration or court proceeding, subject to a maximum fee of \$1,360." As conceded by American Transit, the Supreme Court erroneously awarded Integrated Specialty \$1,000 instead of \$1,360 pursuant to 11 NYCRR 65-4.6 (d). Accordingly, the court should have awarded Integrated Specialty attorneys' fees pursuant to 11 NYCRR 65-4.6 (d) in the sum of \$1,360 (*see id.*).

Moreover, Integrated Specialty was entitled to an award of additional attorneys' fees pursuant to 11 NYCRR 65-4.10 (j) (4) for services rendered in connection with this CPLR article 75 proceeding, as a proceeding to confirm an arbitration award is a "court appeal" for the purposes of 11 NYCRR 65-4.10 (j) (4) (*see Matter of John T. Mather Memorial Hosp v Am. Transit Ins. Co.*, 247 AD3d 1188 [2026]; *Matter of GEICO Ins. Co. v AAAMG Leasing Corp.*, 148 AD3d 703, 705 [2017]). In the November 2023 order, the Supreme Court properly determined that Integrated Specialty was entitled to such fees and directed Integrated Specialty to submit an affirmation of attorneys' fees for the court to determine the amount of additional fees to be awarded, but the judgment did not award such fees, and the record reflects no apparent basis for that omission (*see Matter of American Tr. Ins. Co. v Rutland Med. PC*, 224 AD3d 531, 532 [2024]; *Matter of GEICO Ins. Co. v AAAMG Leasing Corp.*, 148 AD3d at 706). Contrary to American Transit's contention, the record sufficiently demonstrates that Integrated Specialty properly submitted an affirmation of attorneys' fees to the

court. The record has been properly certified by Integrated Specialty's attorney as an accurate copy of the papers on file with the court (*see* CPLR 2105), and, moreover, we take judicial notice of the fact that Integrated Specialty filed an affirmation of attorneys' fees with the proposed judgment on the New York State Courts Electronic Filing System (*see Wells Fargo Bank, N.A. v Ballard*, 172 AD3d 1440, 1442 [2019]).

Accordingly, we remit this matter to the Supreme Court, Nassau County, for a determination of the amount of additional attorneys' fees pursuant to 11 NYCRR 65-4.10 (j) (4) to be awarded to Integrated Specialty and thereafter for the entry of an appropriate amended judgment (*see Matter of American Tr. Ins. Co. v Comfort Choice Chiropractic, P.C.*, 236 AD3d 782, 783 [2025]; *Matter of GEICO Ins. Co. v AAAMG Leasing Corp.*, 148 AD3d at 705).

The parties' remaining contentions are without merit. Connelly, J.P., Chambers, Voutsinas and Goldberg Velazquez, JJ., concur.

36 In the Matter of Kiyoshi J.-E. Administration for Children's Services, Respondent; Jusinta J.-E., Appellant. (Proceeding No. 1.) In the Matter of Brycen J.-E. Administration for Children's Services, Respondent; Jusinta J.-E., Appellant. (Proceeding No. 2.) [— NYS3d —]

Parent, Child and Family—Abused or Neglected Child—Excessive Corporal Punishment—Fundamental Defect in Understanding Duties of Parenthood

In a proceeding pursuant to Family Court Act article 10, and related proceedings pursuant to Family Court Act article 6, the mother appeals from (1) an order of fact-finding of the Family Court, Queens County (Joan L. Piccirillo, J.), dated August 13, 2021, (2) an amended order of disposition of the same court dated February 23, 2024 and (3) an order of dismissal of the same court, also dated February 23, 2024. The order of fact-finding, after a hearing, found that the mother neglected the child Brycen J.-E. and derivatively neglected the child Kiyoshi J.-E. The amended order of disposition, insofar as appealed from, released the subject children to the nonrespondent father, placed the mother under the supervision of the Administration for Children's Services through February 23, 2024, at 5:00 p.m., and directed the mother to submit to a comprehensive mental health evaluation. The order of dismissal dismissed the mother's petitions for custody and visitation of the subject children without prejudice.

Motion by the attorney for the children to dismiss so much of the appeals as challenge the release of the subject children to

the nonrespondent father and dismissed the custody and visitation petitions on the ground the those issues have been rendered academic by subsequent orders. By decision and order on motion of this Court dated December 18, 2024, the motion was held in abeyance and referred to the panel of Justices hearing the appeals for determination upon the argument or submission thereof.

Upon the papers filed in support of the motion and the papers filed in opposition thereto, and upon the submission of the appeals, it is

Ordered that the motion is granted; and it is further,

Ordered that the appeal from so much of the amended order of disposition as released the subject children to the nonrespondent father and placed the mother under the supervision of the Administration for Children's Services through February 23, 2024, at 5:00 p.m., is dismissed as academic, without costs or disbursements; and it is further,

Ordered that the appeal from the order of dismissal is dismissed as academic, without costs or disbursements; and it is further,

Ordered that the appeal from the order of fact-finding is dismissed, without costs or disbursements, as the order of fact-finding was superseded by the amended order of disposition and is brought up for review on the appeal from the amended order of disposition; and it is further,

Ordered that the amended order of disposition is affirmed insofar as reviewed, without costs or disbursements.

The appeal from the order of dismissal, which dismissed the mother's petitions for custody and visitation, must be dismissed as academic, as it has been superseded by an order of the Petersburg, Virginia Juvenile and Domestic Relations District Court, dated July 19, 2024, granting sole legal and physical custody of the subject children to the paternal grandparents (hereinafter the Virginia custody order).

The appeal from so much of the amended order of disposition as released the children to the nonrespondent father must be dismissed as academic as it has been superseded by the Virginia custody order granting sole legal and physical custody of the children to the paternal grandparents.

The appeal from so much of the amended order of disposition as placed the mother under the supervision of the Administration for Children's Services through February 23, 2024, at 5:00 p.m. must be dismissed as academic, as the period of supervision has expired by its own terms (*see Matter of Leah S. [Barnett V.]*, 228 AD3d 667 [2024]).

The appeal from so much of the amended order of disposition as brings up for review the finding that the mother neglected the child Brycen J.-E. and derivatively neglected the child Kiyoshi J.-E. is not academic, since the adjudication of neglect constitutes a permanent and significant stigma, which might indirectly affect the mother's status in future proceedings (see *Matter of Janiyah S. [Pedro H.]*, 226 AD3d 909 [2024]; *Matter of Eliora B. [Kennedy B.]*, 146 AD3d 772 [2017]).

“In a child protective proceeding pursuant to Family Court Act article 10, the petitioner has the burden of proving neglect by a preponderance of the evidence” (*Matter of Janiyah S. [Pedro H.]*, 226 AD3d at 910; see Family Ct Act § 1046 [b] [i]; *Matter of Jada W. [Fanatay W.]*, 219 AD3d 732, 737 [2023]). “[A] party seeking to establish neglect must show, by a preponderance of the evidence, first, that a child’s physical, mental or emotional condition has been impaired or is in imminent danger of becoming impaired and second, that the actual or threatened harm to the child is a consequence of the failure of the parent or caretaker to exercise a minimum degree of care in providing the child with proper supervision or guardianship” (*Nicholson v Scoppetta*, 3 NY3d 357, 368 [2004] [citation omitted]; see Family Ct Act §§ 1012 [f] [i] [B]; 1046 [b] [i]; *Matter of Xierra N. [Lewis N.]*, 226 AD3d 790, 790-791 [2024]). “Great deference is given to the Family Court’s credibility determinations, as it is in the best position to assess the credibility of the witnesses having had the opportunity to view the witnesses, hear the testimony, and observe their demeanor” (*Matter of Kishanda S. [Stephan S.]*, 190 AD3d 747, 748 [2021] [internal quotation marks omitted]; see *Matter of Alexander S. [Gabriel H.]*, 224 AD3d 907, 909 [2024]).

“Although parents have a right to use reasonable physical force against a child in order to maintain discipline or to promote the child’s welfare, the use of excessive corporal punishment constitutes neglect” (*Matter of Kishanda S. [Stephan S.]*, 190 AD3d at 748 [internal quotation marks omitted]; see Family Ct Act § 1012 [f] [i] [B]; *Matter of Elisa V. [Hung V.]*, 159 AD3d 827, 828 [2018]). “A single incident of excessive corporal punishment may suffice to sustain a finding of neglect” (*Matter of Kishanda S. [Stephan S.]*, 190 AD3d at 748 [internal quotation marks omitted]; see *Matter of Elisa V. [Hung V.]*, 159 AD3d at 828).

“Where a person’s conduct toward one child demonstrates a fundamental defect in the parent’s understanding of the duties of parenthood, or demonstrates such an impaired level of parental judgment as to create a substantial risk of harm for

any child in his or her care, an adjudication of derivative neglect with respect to the other children is warranted” (*Matter of Zephaniah Z. [Charlene F.]*, 220 AD3d 800, 801 [2023] [internal quotation marks omitted]; see *Matter of Faith A.M. [Faith M.]*, 191 AD3d 884, 884-885 [2021]). “[P]roof of the abuse or neglect of one child shall be admissible evidence on the issue of the abuse or neglect of any other child of, or the legal responsibility of, the respondent” (Family Ct Act § 1046 [a] [i]; see *Matter of Faith A.M. [Faith M.]*, 191 AD3d at 885).

Here, a preponderance of the evidence supported the Family Court’s finding that the mother neglected the child Brycen J.-E. by inflicting excessive corporal punishment on him and leaving bruising on his face (see Family Ct Act §§ 1012 [f] [i] [B]; 1046 [b] [i]; see also *Matter of Zaniah T. [Deshaun T.]*, 216 AD3d 1173, 1175 [2023]; *Matter of Samantha B.*, 5 AD3d 590, 591 [2004]). There is no basis for disturbing the court’s credibility determinations, which are entitled to great deference (see *Matter of Zaniah T. [Deshaun T.]*, 216 AD3d at 1175). Moreover, the infliction of excessive corporal punishment on the child Brycen J.-E. evinced a fundamental defect in the understanding of the duties of parenthood and were sufficient to support the court’s finding that the mother derivatively neglected the child Kiyoshi J.-E. (see *Matter of Delehia J. [Tameka J.]*, 93 AD3d 668, 669 [2012]; *Matter of Samantha B.*, 5 AD3d at 591).

The mother’s challenges to so much of the amended order of disposition as directed her to submit to a comprehensive mental health evaluation is not academic (see *Matter of Victoria B. [Jonathan M.]*, 164 AD3d 578, 580 [2018]). With respect to that portion of the amended order of disposition, we agree with the Family Court that the challenged directive was in the children’s best interest (see *Bobby J.C. [Faith C.]*, 124 AD3d 648 [2015]). LaSalle, P.J., Chambers, Taylor and Hom, JJ., concur.

37 In the *Matter of Simon V. Kinsella*, Petitioner, v New York State Public Service Commission et al., Respondents. [— NYS3d —]

Parties—Necessary Parties

Proceeding pursuant to Public Service Law § 128 and CPLR article 78, inter alia, to review a determination of the respondent New York State Public Service Commission dated March 18, 2021, which, after a hearing, adopted a joint proposal and granted the application of the respondent South Fork Wind, LLC, for a certificate of environmental compatibility and public need with respect to the construction and operation of a

submarine export cable in connection with a certain offshore wind farm project. Motion by the respondents New York State Public Service Commission and New York State Department of Public Service to dismiss the petition for failure to timely join the respondent South Fork Wind, LLC, as a necessary party to the proceeding. Separate motion by the respondent South Fork Wind, LLC, to dismiss the petition for failure to timely join the respondent South Fork Wind, LLC, as a necessary party to the proceeding.

Upon the petition, and the papers filed in support of the motions and the papers filed in opposition thereto, it is

Ordered that the motion of the respondents New York State Public Service Commission and New York State Department of Public Service and the separate motion of the respondent South Fork Wind, LLC, to dismiss the petition for failure to timely join the respondent South Fork Wind, LLC, as a necessary party to the proceeding are granted; and it is further,

Adjudged that the proceeding is dismissed, without costs or disbursements.

On March 18, 2021, the respondent New York State Public Service Commission (hereinafter the Commission) issued a determination adopting a joint proposal which granted South Fork Wind, LLC (hereinafter South Fork), then known as Deepwater Wind South Fork, LLC, a certificate of environmental compatibility and public need pursuant to Public Service Law article 7 for a South Fork export cable project. The petitioner commenced this proceeding to review this determination.

The petitioner failed to timely join South Fork as a necessary party within the 30-day statute of limitations period after issuance of a final order by the Commission (*see* Public Service Law § 128; *Matter of 2214 Rt 208, LLC v Town of Montgomery Zoning Bd. of Appeals*, 246 AD3d 904, 906-907 [2026]; *Matter of Greens at Half Hollow, LLC v Suffolk County Dept. of Pub. Works*, 147 AD3d 942, 944 [2017]; *Matter of Incorporated Vil. of E. Williston v Public Serv. Commn. of State of N.Y.*, 153 AD2d 943 [1989]). Dillon, J.P., Wooten, Ventura and Ottley, JJ., concur.

38 In the Matter of Coleen Lord, Appellant, v Nicholas Carter, Respondent. (Proceeding No. 1.) In the Matter of Nicholas Carter, Respondent, v Coleen Lord, Appellant. (Proceeding No. 2.) [— NYS3d —]—

Parent, Child and Family—Custody—Best Interests of Child—School District

In related proceedings pursuant to Family Court Act article

6, the mother appeals from an order of the Family Court, Suffolk County (Catherine E. Miller, Ct. Atty. Ref.), dated January 10, 2024. The order, after a hearing, granted that branch of the father's petition which sought to enroll the parties' child in the South Huntington Union Free School District, and denied that branch of the mother's petition which sought to enroll the child in the Hauppauge Union Free School District.

Ordered that the order is affirmed, without costs or disbursements.

The parties, who have one child together, each petitioned for custody of the child. The parties subsequently entered into a so-ordered stipulation which, inter alia, provided for joint legal custody and alternating weekly parental access with each parent. However, the parties, who reside in different school districts, were unable to come to an agreement as to where the child should attend school. The Family Court conducted a hearing on the issue of school district enrollment for the child. After the hearing, in an order dated January 10, 2024, the Family Court granted that branch of the father's petition which sought to enroll the child in the South Huntington Union Free School District and denied that branch of the mother's petition which sought to enroll the child in the Hauppauge Union Free School District. The mother appeals.

"The court's paramount concern in any custody dispute is to determine, under the totality of the circumstances, what is in the best interests of the child" (*Verfenstein v Verfenstein*, 171 AD3d 841, 842 [2019]; see *Eschbach v Eschbach*, 56 NY2d 167, 171 [1982]). The Family Court's determination in that regard will not be set aside unless it lacks a sound and substantial basis in the record (see *Matter of McCall v McCandlish*, 207 AD3d 725, 726 [2022]).

Contrary to the mother's contention, the Family Court's determination that it was in the best interests of the child to be enrolled in the South Huntington Union Free School District, as opposed to the Hauppauge Union Free School District, is supported by a sound and substantial basis in the record. Among other things, the evidence demonstrated that the child's well-being would be fostered by the diverse, multicultural environment he would enjoy in the South Huntington Union Free School District and that the father was likely to continue to reside in that school district, providing the child with stability and continuity in his education (see *Matter of McCall v McCandlish*, 207 AD3d at 727; see also *Verfenstein v Verfenstein*, 171 AD3d at 842).

Accordingly, we affirm the order appealed from. Barros, J.P., Iannacci, Golia and Ottley, JJ., concur.

39 In the Matter of Jennifer Mortimer, Respondent, v Martin Mortimer, Appellant. (Proceeding Nos. 1 and 2.) In the Matter of Martin Mortimer, Appellant, v Jennifer Mortimer, Respondent. (Proceeding No. 3.) [— NYS3d —]

Parent, Child and Family—Custody—Right to Counsel—Eligibility for Court-Appointed Counsel
Judges—Bias or Hostility of Trial Judge

In related proceedings pursuant to Family Court Act articles 6 and 8, the father appeals from an order of the Family Court, Putnam County (Anthony R. Molé, J.), dated December 2, 2022. The order, insofar as appealed from, after a hearing, granted those branches of the mother's petition which were to modify the custody and parental access provisions of the parties' judgment of divorce dated February 27, 2017, which incorporated but did not merge a stipulation of settlement dated September 30, 2016, so as to award her final decision-making authority with regard to the parties' child and to limit the father's parental access with the child to therapeutic supervised parental access, denied the father's petition to modify the custody and parental access provisions of the judgment of divorce, found that the father committed against the child the family offenses of assault in the third degree, menacing in the second degree, and menacing in the third degree, and directed the issuance of an order of protection in favor of the child and against the father for a period of two years.

Ordered that the order is affirmed insofar as appealed from, with costs to the mother payable by the father.

The parties are the divorced parents of one child, born in 2010. Pursuant to a stipulation of settlement dated September 30, 2016, which was incorporated but not merged into the parties' judgment of divorce dated February 27, 2017, the parties were awarded joint legal custody of the child, the mother was awarded residential custody of the child, and the father was awarded certain parental access.

In October 2021, the mother filed a family offense petition against the father, alleging that he committed the family offenses of harassment in the first or second degree, menacing in the second or third degree, reckless endangerment, and assault in the second or third degree against her and the child. Also in October 2021, the mother filed a petition to modify the custody and parental access provisions of the judgment of divorce, *inter alia*, so as to award her sole legal custody of the child and to suspend the father's parental access. In November 2021, the father filed a petition to modify the custody and parental access provisions of the judgment of divorce, among other things,

so as to award him sole legal and residential custody of the child and to limit the mother's parental access to supervised parental access.

After a hearing at which the father proceeded pro se and an in camera interview with the child, the Family Court, inter alia, found that the father committed against the child the family offenses of assault in the third degree, menacing in the second degree, and menacing in the third degree, directed the issuance of an order of protection in favor of the child and against the father for a period of two years, granted those branches of the mother's petition which were to modify the custody and parental access provisions of the judgment of divorce so as to award her final decision-making authority with regard to the child and to limit the father's parental access to therapeutic supervised parental access, and denied the father's petition to modify the custody and parental access provisions of the judgment of divorce. The father appeals.

A respondent in a custody proceeding has the right to be represented by counsel (*see* Family Ct Act § 262 [a] [iii], [v]; *Matter of Moiseeva v Sichkin*, 129 AD3d 974, 975 [2015]). Family Court Act § 262 (a) provides that such a respondent shall be advised of "the right to have counsel assigned by the court in any case where he or she is financially unable to obtain the same." When a party who is entitled to be represented by counsel indicates an inability to retain private counsel, the court must make inquiry to determine whether the party is eligible for court-appointed counsel (*see Matter of Alphonse v Alphonse*, 189 AD3d 1028, 1029 [2020]; *Matter of Goodine v Evans*, 183 AD3d 649, 651 [2020]).

Here, the Family Court specifically informed the father that assigned counsel would represent him if he was eligible, advised the father of the dangers and disadvantages of proceeding without counsel, and adjourned the hearing to permit the father to find counsel. The father applied to be represented by the Putnam County Legal Aid Society, which determined that he did not qualify for its representation, and the father proceeded pro se at the hearing. Thus, the father failed to establish that he was deprived of his right to counsel (*see Matter of Alphonse v Alphonse*, 189 AD3d at 1029).

The father's contention that the Family Court was biased against him is unpreserved for appellate review (*see Matter of Perlman v Kolodny*, 236 AD3d 1038, 1043-1044 [2025]; *Matter of Remsen v Remsen*, 198 AD3d 658, 661 [2021]). In any event, when a claim of bias is raised, the inquiry on appeal is limited to whether the court's bias, if any, unjustly affected the result

to the detriment of the complaining party (*see Matter of Perlman v Kolodny*, 236 AD3d at 1043-1044; *Matter of Goundan v Goundan*, 210 AD3d 1087, 1089 [2022]). A review of the record here shows that the court listened to the testimony, treated the parties fairly, and did not have a predetermined outcome of the case in mind during the hearing (*see Matter of Perlman v Kolodny*, 236 AD3d at 1043-1044; *Matter of Goundan v Goundan*, 210 AD3d at 1089; *Matter of Remsen v Remsen*, 198 AD3d at 661).

The father's remaining contentions are either unpreserved for appellate review, without merit, or otherwise not properly before this Court. Genovesi, J.P., Dowling, Wan and Quirk, JJ., concur.

40 In the Matter of Jieying Pan, Appellant, v Yingying Chen, Respondent. [253 NYS3d 744]—

Appeal—Matters Reviewable—Order Entered on Default

In a proceeding pursuant to Family Court Act article 8, the petitioner appeals from an order of the Family Court, Kings County (Gregory L. Gliedman, J.), dated January 27, 2025. The order granted the respondent's unopposed motion to dismiss the petition for lack of subject matter jurisdiction.

Ordered that the appeal is dismissed, with costs.

In December 2023, the petitioner commenced this proceeding pursuant to Family Court Act article 8 against the respondent, who was her landlord and roommate. The respondent thereafter moved, inter alia, pursuant to Family Court Act § 812 (1) (e) to dismiss the petition for lack of subject matter jurisdiction on the ground that the parties did not have an intimate relationship within the meaning of Family Court Act § 812 (1) (e). In an order dated January 27, 2025, the Family Court granted the unopposed motion and dismissed the petition. The petitioner appeals.

No appeal lies from an order entered upon the default of the appealing party (*see* CPLR 5511). The proper procedure for obtaining review of an order entered on default is to move to vacate the default and, if necessary, appeal from the order deciding that motion (*see Matter of Louissaint v Williams*, 235 AD3d 873, 873 [2025]; *U.S. Bank N.A. v Tenenbaum*, 228 AD3d 701, 701 [2024]).

Here, the appeal must be dismissed, as the order appealed from was entered upon the petitioner's default (*see* CPLR 5511; *Matter of Louissaint v Williams*, 235 AD3d at 873; *Matter of Ramirez v Colon*, 225 AD3d 704, 705 [2024]). Connolly, J.P., Christopher, Warhit and Golia, JJ., concur.

41 In the Matter of Carilyn S. et al., Respondents, v Theresa S., Appellant, et al., Respondent. [— NYS3d —]

Parent, Child and Family—Custody—Failure to Ensure Valid Waiver of Right to Counsel—Effect on Ultimate Outcome

Parent, Child and Family—Custody—Forfeiture of Right to Counsel—Egregious Conduct

In a proceeding pursuant to Family Court Act article 6, the mother appeals from an order of the Family Court, Queens County (Joan L. Piccirillo, J.), dated May 19, 2023. The order, insofar as appealed from, after a hearing, granted the petition of the father and the maternal aunt for joint custody of the subject child.

Ordered that the order is affirmed insofar as appealed from, without costs or disbursements.

In 2015, the Administration for Children’s Services commenced a neglect proceeding against the mother of the subject child, born in 2009, alleging, inter alia, educational neglect. The child was placed with the maternal aunt. In 2022, after a trial discharge to the mother had failed, the father and the maternal aunt filed a petition for joint custody of the child. After a combined permanency and fact-finding hearing, the Family Court granted the petition. The mother appeals.

The parent of any child seeking custody or contesting the substantial infringement of his or her right to custody of such child has the right to the assistance of counsel (*see* Family Ct Act § 262 [a] [v]). A party may waive that right and proceed without counsel provided he or she makes a knowing, voluntary, and intelligent waiver of the right to counsel (*see Matter of Means v Miller*, 175 AD3d 498, 499-500 [2019]). In order to determine whether a party has validly waived the right to counsel, a court must conduct a “searching inquiry” to ensure that the waiver has been made knowingly, voluntarily, and intelligently (*People v Arroyo*, 98 NY2d 101, 103 [2002] [internal quotation marks omitted]; *Matter of Cecile D. [Kassia D.]*, 189 AD3d 1036, 1037 [2020] [internal quotation marks omitted]; *Matter of Means v Miller*, 175 AD3d at 500 [internal quotation marks omitted]). While there is no rigid formula to be followed in such an inquiry, and the approach is flexible, the record must demonstrate that the party was aware of the dangers and disadvantages of proceeding without counsel (*see Matter of McGregor v Bacchus*, 54 AD3d 678, 679 [2008]). “For example, the court may inquire about the litigant’s age, education, occupation, previous exposure to legal procedures[,] and other relevant factors bearing on a competent, intelligent, voluntary waiver” (*Matter of Abigail M.A. [James A.]*, 222 AD3d 973, 976 [2023] [internal quotation marks omitted]).

Here, the Family Court did not conduct a searching inquiry on May 9, 2023, when the mother's counsel's motion to be relieved as counsel was granted, and the record shows that the mother did not want to proceed pro se on May 17, 2023. Nonetheless, under the circumstances of this case, the court's error does not warrant reversal and remittal (*see Matter of Moses M. [Melissa M.]*, 237 AD3d 825, 826 [2025]). Since the testimony offered in the period in which the mother failed to appear was sufficient to establish that the mother neglected the child and that releasing the child to the custody of the maternal aunt was in the child's best interests, the court's failure to ensure that the mother validly waived her right to counsel at the combined permanency and fact-finding hearing would not have affected the ultimate outcome of the proceeding to award custody of the child to the father and the maternal aunt (*see id.*).

A party may forfeit the fundamental right to counsel by engaging in egregious conduct, but only as a matter of extreme, last resort (*see Matter of Sa'Nai F.B.M.A. [Chaniece T.]*, 232 AD3d 597, 599 [2024]). A party may forfeit the right to counsel by engaging in a "persistent pattern of threatening, abusive, obstreperous, and uncooperative behavior with successive assigned counsel" (*People v Sloane*, 262 AD2d 431, 432 [1999]). "[M]ere raised voices, vociferous disagreement with an attorney over strategy, or accusations of incompetence do not rise to the level of egregious conduct constituting forfeiture of the right to counsel" (*People v Shanks*, 37 NY3d 244, 254 [2021]).

Here, the Family Court noted that the mother failed to appear for approximately half of the scheduled court dates, i.e., 19 out of 42, in the neglect proceeding and had at least six different attorneys who represented her. In addition, the court detailed that several of the mother's previously assigned attorneys sought to be relieved. The mother's apparent inability to cooperate with counsel and her conduct during the course of the proceeding, which caused delay, are sufficient to establish the validity of her waiver of the right to counsel even without the "searching inquiry" (*see Matter of Holder v Francis*, 67 AD3d 679, 680 [2009]). The record reflects that the mother engaged in the sort of egregious conduct that would justify a finding that she forfeited her right to assigned counsel.

The mother's remaining contentions either are not properly before this Court, need not be reached in light of our determination, or are without merit. Dillon, J.P., Wooten, Ventura and Ottley, JJ., concur.

42 In the Matter of Shau Chung Hu, Respondent, v Lowbet Realty Corp. et al., Respondents/Defendants, and Margaret Liu, Respondent/Defendant-Appellant. [— NYS3d —]

**Judgments—Default Judgment—Vacatur—Reasonable Excuse
Appearances—Effect of Appearance—Equivalence to Personal Service**

In a hybrid proceeding, inter alia, pursuant to Business Corporation Law article 11 and action, among other things, for rescission of the sale of real property, the respondent/defendant Margaret Liu appeals from an order of the Supreme Court, Kings County (Larry D. Martin, J.), dated December 1, 2020. The order denied the motion of the respondent/defendant Margaret Liu pursuant to CPLR 317 and 5015 (a) (1) to vacate a judgment of the same court (Sylvia Ash, J.) dated November 21, 2018, which is in favor of the petitioner/plaintiff and against the respondent/defendant Margaret Liu in the sum of \$1,480,636.50.

Ordered that the order is affirmed, with costs.

Shau Chung Hu (hereinafter the petitioner) commenced this hybrid proceeding and action seeking, inter alia, a declaration that he owns a 75% interest in Lowbet Realty Corp. (hereinafter Lowbet), the sole asset of which was an apartment building located at 973 44th Street in Brooklyn, to wind up Lowbet's affairs, and to rescind the sale of the property predicated on fraud (*see Matter of Shau Chung Hu v Lowbet Realty Corp.*, 161 AD3d 986, 987 [2018]). Margaret Liu (hereinafter the appellant) appeared in this matter and, among other things, opposed the petition/complaint, but subsequently stopped participating in the litigation. Thereafter, a default judgment dated November 21, 2018, was issued in favor of the petitioner and against the appellant in the sum of \$1,480,636.50 (hereinafter the 2018 judgment). In June 2020, the appellant moved pursuant to CPLR 317 and 5015 (a) (1) to vacate the 2018 judgment. By order dated December 1, 2020, the Supreme Court denied the appellant's motion. This appeal ensued.

Generally, a “‘defendant seeking to vacate a default pursuant to CPLR 5015 (a) (1) must demonstrate a reasonable excuse for the default and a potentially meritorious defense’” (*Nico v Olajitan*, 229 AD3d 561, 562 [2024], quoting *Barnett v Diamond Fin. Co., Inc.*, 202 AD3d 651, 652 [2022]). “The determination of what constitutes a reasonable excuse lies within the Supreme Court’s discretion” (*Codrington v Churcher*, 209 AD3d 626, 627 [2022]; *see Nico v Olajitan*, 229 AD3d at 562). “A motion to vacate a default judgment pursuant to CPLR 5015 (a) (1) on the ground of excusable default must be made within one year after service upon the moving party of a copy of the

judgment, with notice of its entry” (*Barnett v Diamond Fin. Co., Inc.*, 202 AD3d at 652; *see* CPLR 5015 [a] [1]).

Here, that branch of the appellant’s motion which was pursuant to CPLR 5015 (a) (1) to vacate the 2018 judgment was untimely, as it was made more than one year after a copy of the 2018 judgment was served upon the appellant with notice of entry (*see Nurhan v Harley*, 237 AD3d 728, 731 [2025]). In any event, the appellant’s contention that her default was excused because she was not personally served with the petition/complaint is without merit. The appellant filed a notice of appearance in the hybrid proceeding and action, “which is ‘equivalent to personal service of the summons upon [her], unless an objection to jurisdiction under [CPLR 3211 (a) (8)] is asserted by motion or in the answer as provided in [CPLR] 3211’” (*Deutsche Bank Natl. Trust Co. v Carnevale*, 221 AD3d 963, 964 [2023], quoting CPLR 320 [b]; *see Yihye v Blumenberg*, 260 AD2d 371, 371-372 [1999]). Here, the appellant failed to dispute jurisdiction prior to filing the instant motion to vacate the 2018 judgment. Since the appellant failed to demonstrate a reasonable excuse for her default, this Court need not consider whether she demonstrated the existence of any potentially meritorious defenses (*see HSBC Bank USA, N.A. v Scivoletti*, 212 AD3d 600, 603 [2023]). Therefore, the Supreme Court properly denied that branch of the appellant’s motion which was pursuant to CPLR 5015 (a) (1) to vacate the 2018 judgment.

Likewise, the appellant was not entitled to relief pursuant to CPLR 317, as the appellant appeared in this hybrid proceeding and action (*see Chondrite Asset Trust v 34 Dr. Corp.*, 240 AD3d 657, 658 [2025]; *JPMorgan Chase Bank, N.A. v Dewar*, 239 AD3d 718, 721 [2025]). Thus, the Supreme Court properly denied that branch of the appellant’s motion which was pursuant to CPLR 317 to vacate the 2018 judgment.

The appellant’s remaining contentions are either without merit or not properly before this Court. Genovesi, J.P., Christopher, Wan and Ventura, JJ., concur.

43 In the Matter of Westchester Plaza Tenants Coalition, Appellant, v New York State Division of Housing and Community Renewal et al., Respondents. [253 NYS3d 746]—

Landlord and Tenant—Rent Regulation—Essential Services—Maintenance of Facilities
Administrative Law—Judicial Review—Grounds Invoked by Agency in Making Decision

In a proceeding pursuant to CPLR article 78 to review a de-

termination of a Deputy Commissioner of the New York State Division of Housing and Community Renewal dated April 23, 2021, which upheld a determination of a Rent Administrator dated December 10, 2019, the petitioner appeals from a judgment of the Supreme Court, Westchester County (Anne E. Minihan, J.), dated December 22, 2021. The judgment denied the petition and dismissed the proceeding.

Ordered that the judgment is reversed, on the law, with costs, the proceeding is reinstated, the petition is granted, the determination dated April 23, 2021, is annulled, and the matter is remitted to the New York State Division of Housing and Community Renewal for a new determination in accordance herewith.

In June 2021, the petitioner, a coalition of tenants from several rent-stabilized apartment buildings, commenced this CPLR article 78 proceeding to review a determination of a Deputy Commissioner of the New York State Division of Housing and Community Renewal (hereinafter the DHCR) dated April 23, 2021. The determination upheld a Rent Administrator's determination dated December 10, 2019, which was in favor of the property owner, the defendant Westchester Plaza Holdings, LLC (hereinafter the owner), in connection with the owner's application for modification of essential services, namely, a swimming pool and related facilities. In a judgment dated December 22, 2021, the Supreme Court denied the petition and dismissed the proceeding. The petitioner appeals.

"Judicial review of an administrative determination is generally limited to whether the determination was made in violation of lawful procedure, was affected by an error of law, or was arbitrary and capricious or an abuse of discretion" (*Matter of Jamaica Seven, LLC v New York State Div. of Hous. & Community Renewal*, 235 AD3d 753, 754 [2025] [internal quotation marks omitted]; see *Matter of Kings Park 148, LLC v New York State Div. of Hous. & Community Renewal*, 235 AD3d 754, 755 [2025]). "In applying the arbitrary and capricious standard, a court inquires whether the determination under review had a rational basis" (*Matter of Gibson v Commissioner of the N.Y. State Dept. of Motor Vehs.*, 223 AD3d 667, 667-668 [2024] [internal quotation marks omitted]; see *Matter of Troiano v Schroeder*, 232 AD3d 801, 802 [2024]).

With respect to properties which are rent-stabilized pursuant to the Emergency Tenant Protection Act of 1974 (ETPA) (McKinney's Uncons Laws of NY § 8621 *et seq.*), the DHCR's regulations provide that "[a]n owner may file an application to decrease essential services for a reduction of the legal regulated

rent, or to modify or substitute essential services at no change in the legal regulated rent,” on specified grounds (9 NYCRR 2502.4 [d]). “Essential services” are “[t]hose services which the landlord was maintaining, or which he was obligated to maintain, on May 29, 1974. These may include, for example, any or all of the following: repairs, decorating and maintenance, the furnishing of light, heat, hot and cold water, telephone, elevator service, janitor service, removal of refuse, and garage and parking facilities” (*id.* § 2500.3 [e]).

“DHCR’s interpretation of its own governing regulations is typically entitled to ‘considerable deference’” (*Matter of LL 410 E. 78th St. LLC v Division of Hous. & Community Renewal*, 44 NY3d 232, 237 [2025], quoting *Matter of Murphy v New York State Div. of Hous. & Community Renewal*, 21 NY3d 649, 654 [2013]). “However, that deference is not without limitation: courts may not defer to an agency’s interpretation of its own regulations that is ‘irrational or unreasonable’” (*id.*, quoting *Matter of Dworman v New York State Div. of Hous. & Community Renewal*, 94 NY2d 359, 371 [1999]). The starting point for interpretation of any statute or regulation “‘must always be the language itself, giving effect to the plain meaning thereof’” (*Esposito v Isaac*, 240 AD3d 750, 751 [2025], quoting *North Shore Cent. Sch. Dist. v Glen Cove City Sch. Dist.*, 236 AD3d 806, 812 [2025]).

Here, the Deputy Commissioner was correct that the DHCR had not previously found that the swimming pool, in and of itself, constituted an essential service. However, the DHCR’s determination that the Rent Administrator did not err in finding that the pool facilities were not an essential service was arbitrary and capricious, since the record established that the landlord was maintaining the pool facilities on May 29, 1974. While the DHCR had a rational basis to find that tenants’ use of the pool facilities was contingent upon club membership, the record contained no evidence that club membership required anything beyond the payment of fees by participating tenants. The plain meaning of the ETPA and of the DHCR’s governing regulations do not support the conclusion that such fees bring the pool facilities outside the scope of essential services (*see* 9 NYCRR 2500.3 [e]; *Matter of Sterling Ridge Realty Co. v New York State Div. of Hous. & Community Renewal*, 185 AD2d 354, 355 [1992]).

“Judicial review of an administrative determination is limited to the grounds invoked by the agency in making its decision” (*Matter of Rodriguez v Weiss*, 149 AD3d 842, 843 [2017] [internal quotation marks omitted]; *see Matter of Save Amer-*

ica's Clocks, Inc. v City of New York, 33 NY3d 198, 209 [2019]). “If those grounds are inadequate or improper, the court is powerless to affirm the administrative [determination] by substituting what it considers to be a more adequate or proper basis” (*Matter of Costco Wholesale Corp. v New York State Liq. Auth.*, 125 AD3d 775, 776 [2015] [internal quotation marks omitted]; see *Matter of Ibhawa v New York State Div. of Human Rights*, 42 NY3d 744, 750 [2024]). Since the DHCR’s termination invoked only the aforementioned grounds, only those issues were properly before the Supreme Court for review (see *Matter of Costco Wholesale Corp. v New York State Liq. Auth.*, 125 AD3d at 776; *Matter of Filipowski v Zoning Bd. of Appeals of Vil. of Greenwood Lake*, 77 AD3d 831, 832 [2010]). Genovesi, J.P., Ford, Ventura and Quirk, JJ., concur.

44 Nationstar Mortgage, LLC, Respondent, v Arthur Klamm, Appellant. [— NYS3d —]—

Courts—Jurisdiction—Waiver of Personal Jurisdiction—Raising Affirmative Defense of Lack of Personal Jurisdiction
Process—Service of Process—Service upon Attorney

In an action to foreclose a mortgage, the defendant appeals from an order and judgment of foreclosure and sale (one paper) of the Supreme Court, Suffolk County (Derrick J. Robinson, J.), entered December 21, 2021. The order and judgment of foreclosure and sale granted the plaintiff’s motion, among other things, to confirm a referee’s report and for a judgment of foreclosure and sale, denied the defendant’s cross-motion, inter alia, in effect, pursuant to CPLR 5015 (a) (4) to vacate two orders of the same court, both dated April 12, 2021, and thereupon pursuant to CPLR 3211 (a) (8) to dismiss the complaint for lack of personal jurisdiction, confirmed the referee’s report, and directed the sale of the subject property.

Ordered that the order and judgment of foreclosure and sale is reversed, on the law, with costs, the plaintiff’s motion, among other things, to confirm the referee’s report and for a judgment of foreclosure and sale is denied, those branches of the defendant’s cross-motion which were, in effect, pursuant to CPLR 5015 (a) (4) to vacate the orders dated April 12, 2021, and thereupon pursuant to CPLR 3211 (a) (8) to dismiss the complaint for lack of personal jurisdiction are granted, and the remaining branches of the defendant’s cross-motion are denied as academic.

In October 2015, the plaintiff commenced this action to foreclose a mortgage on certain real property located in Islip. The defendant purportedly was served with the summons,

complaint, and RPAPL 1303 notice by delivery to his former attorney at his former attorney's office. Thereafter, the defendant filed a verified answer, inter alia, asserting an affirmative defense of lack of personal jurisdiction, and the plaintiff rejected the defendant's answer.

In March 2016, the plaintiff moved for leave to enter a default judgment against the defendant and for an order of reference. The defendant opposed the motion, arguing, among other things, that his answer was timely. In an order dated June 25, 2018, the Supreme Court denied the plaintiff's motion, deemed the defendant's opposition to be a motion to compel acceptance of his answer, and thereupon directed the plaintiff to accept the defendant's answer. The court additionally granted the defendant 60 days to raise any objections to service of process.

On August 6, 2018, the plaintiff moved, among other things, for summary judgment on the complaint and for an order of reference. On August 22, 2018, the defendant opposed the motion and cross-moved, inter alia, pursuant to CPLR 3211 (a) (8) to dismiss the complaint for lack of personal jurisdiction. In an order dated December 19, 2019 (hereinafter the December 2019 order), the Supreme Court, among other things, denied those branches of the plaintiff's motion with leave to renew within 120 days of the entry of the December 2019 order and denied the defendant's cross-motion. In March 2020, the plaintiff moved for summary judgment on the complaint and for an order of reference. The defendant opposed the motion. In an order dated April 12, 2021, the court granted the plaintiff's motion, and in a second order also dated April 12, 2021, the court, inter alia, granted the same relief to the plaintiff and appointed a referee to compute the amount due to the plaintiff.

In August 2021, the plaintiff moved, among other things, to confirm the referee's report and for a judgment of foreclosure and sale. The defendant opposed the motion and cross-moved, inter alia, in effect, pursuant to CPLR 5015 (a) (4) to vacate the orders dated April 12, 2021, and thereupon pursuant to CPLR 3211 (a) (8) to dismiss the complaint for lack of personal jurisdiction. In an order and judgment of foreclosure and sale entered December 21, 2021, the Supreme Court granted the plaintiff's motion, denied the defendant's cross-motion, confirmed the referee's report, and directed the sale of the property. The defendant appeals.

"A defendant may waive the issue of lack of personal jurisdiction by appearing in an action, either formally or informally, without raising the defense of lack of personal jurisdiction in

an answer or pre-answer motion to dismiss” (*Cadlerock Joint Venture, L.P. v Kierstedt*, 119 AD3d 627, 628 [2014]; see CPLR 320 [b]; *Bayview Loan Servicing, LLC v Zelyakovsky*, 202 AD3d 738, 741 [2022]). “A defendant ‘may appear informally by actively litigating the action before the court’ ” (*Wells Fargo Bank, N.A. v Hosseinipour*, 235 AD3d 699, 700 [2025] [internal quotation marks omitted], quoting *Eastern Sav. Bank, FSB v Campbell*, 167 AD3d 712, 714 [2018]). Here, the defendant appeared in the action when he opposed the plaintiff’s March 2016 motion for leave to enter a default judgment against him and for an order of reference. However, in the order dated June 25, 2018, the Supreme Court directed the plaintiff to accept the defendant’s answer, which contained the affirmative defense of lack of personal jurisdiction, and granted the defendant 60 days to raise any objections to service of process (see *Fried v Jacob Holding, Inc.*, 110 AD3d 56, 66 [2013]). As the defendant cross-moved, among other things, pursuant to CPLR 3211 (a) (8) to dismiss the complaint for lack of personal jurisdiction within that time period, the defendant did not waive the issue of lack of personal jurisdiction.

“Service of process must be made in strict compliance with statutory methods for effecting personal service upon a natural person pursuant to CPLR 308” (*Washington Mut. Bank v Murphy*, 127 AD3d 1167, 1174 [2015] [internal quotation marks omitted]; see *Bank of Am., N.A. v Genzler*, 188 AD3d 634, 635 [2020]). CPLR 308 (3) permits service upon an individual to be made “by delivering the summons within the state to the agent for service of the person to be served designated under rule 318” (*Broman v Stern*, 172 AD2d 475, 476 [1991] [internal quotation marks omitted]). “An attorney is not automatically considered the agent of his client for the purposes of the service of process” (*id.*; see *Redbridge Bedford, LLC v 159 N. 3rd St. Realty Holding Corp.*, 175 AD3d 1569, 1571 [2019]). “[A]n attorney who agrees to accept service on behalf of individual defendants does not automatically become an agent for the acceptance of process, in the absence of proof that his clients actually knew of that representation” (*Broman v Stern*, 172 AD2d at 476-477 [citation, alterations, and internal quotation marks omitted]). Here, the plaintiff served the summons and complaint upon the defendant’s former attorney, who lacked authority to accept service on behalf of the defendant. Thus, personal jurisdiction over the defendant was never obtained.

Accordingly, the Supreme Court should have denied the plaintiff’s motion, inter alia, to confirm the referee’s report and for a judgment of foreclosure and sale and granted those

branches of the defendant's cross-motion which were, in effect, pursuant to CPLR 5015 (a) (4) to vacate the orders dated April 12, 2021, and thereupon pursuant to CPLR 3211 (a) (8) to dismiss the complaint for lack of personal jurisdiction.

The defendant's remaining contentions need not be reached in light of our determination. Dillon, J.P., Warhit, Landicino and Hom, JJ., concur.

45 Jeremy L. Orlando et al., Appellants, v Jose A. Garcia Gonzalez et al., Respondents. [— NYS3d —]

Insurance—No-Fault Automobile Insurance—Serious Injury—Permanent Consequential and Significant Limitations of Use
Insurance—No-Fault Automobile Insurance—Serious Injury—Cause of Injuries

In an action to recover damages for personal injuries, etc., the plaintiffs appeal from an order of the Supreme Court, Suffolk County (Paul M. Hensley, J.), dated April 10, 2024. The order, insofar as appealed from, upon reargument, in effect, vacated an order of the same court dated February 13, 2024, denying the defendants' motion for summary judgment dismissing the complaint on the ground that the plaintiff Jeremy L. Orlando did not sustain a serious injury within the meaning of Insurance Law § 5102 (d) as a result of the subject accident, and thereupon granted the motion.

Ordered that the order dated April 10, 2024, is affirmed insofar as appealed from, with costs.

The plaintiff Jeremy L. Orlando (hereinafter the injured plaintiff), and his wife suing derivatively, commenced this action, inter alia, to recover damages for personal injuries that the injured plaintiff allegedly sustained in a motor vehicle accident. The defendants moved for summary judgment dismissing the complaint on the ground that the injured plaintiff did not sustain a serious injury within the meaning of Insurance Law § 5102 (d) as a result of the subject accident. In an order dated February 13, 2024, the Supreme Court denied the motion.

Thereafter, the defendants moved for leave to reargue their prior motion. In an order dated April 10, 2024, the Supreme Court granted leave to reargue, and, upon reargument, in effect, vacated the February 13, 2024 order denying the defendants' prior motion, and thereupon, granted the defendants' prior motion. The Supreme Court determined, inter alia, that the defendants established, prima facie, that the injured plaintiff did not sustain a serious injury within the meaning of Insurance Law § 5102 (d) under the permanent consequential

limitation of use and significant limitation of use categories and that the plaintiffs failed to raise a triable issue of fact in opposition. The plaintiffs appeal. We affirm, albeit on different grounds.

The defendants met their prima facie burden of demonstrating that the injured plaintiff did not sustain a serious injury within the meaning of Insurance Law § 5102 (d) as a result of the accident (*see Toure v Avis Rent A Car Sys.*, 98 NY2d 345 [2002]; *Gaddy v Eyler*, 79 NY2d 955, 956-957 [1992]). The defendants demonstrated, prima facie, that the injured plaintiff did not sustain a serious injury under permanent consequential limitation of use and significant limitation of use categories of Insurance Law § 5102 (d) (*see Staff v Yshua*, 59 AD3d 614 [2009]). In opposition, the plaintiffs raised a triable issue of fact as to whether the injured plaintiff sustained serious injuries to the cervical region of his spine and to his left shoulder under the significant limitation of use category of Insurance Law § 5102 (d) (*see Perl v Meher*, 18 NY3d 208 [2011]). Contrary to the Supreme Court's determination, the plaintiffs were not required to submit evidence of contemporaneous quantitative measurements to raise a triable issue of fact as to whether the injured plaintiff sustained a serious injury under the significant limitation of use category (*see id.* at 217; *De Castillo v Reado*, 230 AD3d 565, 567 [2024]).

The defendants assert, as an alternative ground for affirmance (*see Parochial Bus Sys. v Board of Educ. of City of N.Y.*, 60 NY2d 539, 545-546 [1983]), that the plaintiffs failed to raise a triable issue of fact as to causation. The record demonstrates that the defendants' medical evidence established, prima facie, that the injured plaintiff's alleged injuries were preexisting and degenerative in nature and not caused by the accident (*see Amirova v JND Trans, Inc.*, 206 AD3d 601, 602 [2022]; *Gash v Miller*, 177 AD3d 950 [2019]; *Gouvea v Lesende*, 127 AD3d 811 [2015]). In opposition, the plaintiffs failed to raise a triable issue of fact. Contrary to the plaintiffs' contention, their expert failed to address the findings of the defendants' experts that the injured plaintiff's alleged injuries were degenerative in nature (*see Ramos v Jahar*, 233 AD3d 999, 1000 [2024]; *Amirova v JND Trans, Inc.*, 206 AD3d at 602; *Mnatcakanova v Elliot*, 174 AD3d 798, 800 [2019]).

The parties' remaining contentions need not be addressed in light of our determination. Genovesi, J.P., Brathwaite Nelson, Dowling and Hom, JJ., concur.

46 Parabit Realty, LLC, et al., Respondents, v Charles Levine et al., Appellants. [— NYS3d —]

Corporations—Disregarding Corporate Entity—Piercing of Corporate Veil—Exercise of Complete Dominion

Fraudulent Conveyances—Transfer in Fraud of Creditors—Fair Consideration

Fraudulent Conveyances—Transfer in Fraud of Creditors—Badges of Fraud

In an action, inter alia, to enforce a judgment of the Supreme Court, Nassau County, entered April 22, 2016, in an action entitled *Parabit Realty, LLC v Town of Hempstead*, commenced under index No. 7250/09, the defendants appeal from (1) an order of the Supreme Court, Nassau County (Denise L. Sher, J.), entered August 22, 2022, (2) an order of the same court entered March 29, 2023, and (3) a judgment of the same court entered March 29, 2023. The order entered August 22, 2022, insofar as appealed from, denied the defendants' motion for summary judgment dismissing the amended complaint. The order entered March 29, 2023, after a nonjury trial, directed that all transfers made between the defendants be set aside to the extent necessary to satisfy the judgment entered April 22, 2016. The judgment entered March 29, 2023, after the nonjury trial, is in favor of the plaintiffs and against the defendants, jointly and severally, on the first and second causes of action in the total sum of \$1,393,214.26, and, in effect, in favor of the plaintiffs and against the defendants on the third through sixth causes of action setting aside all transfers made between the defendants to the extent necessary to satisfy the judgment entered April 22, 2016.

Ordered that the appeals from the orders are dismissed; and it is further,

Ordered that the judgment entered March 29, 2023, is modified, on the facts, (1) by deleting the provision thereof in favor of the plaintiffs and against the defendants, jointly and severally, on the first and second causes of action in the total sum of \$1,393,214.26, and substituting therefor a provision in favor of the defendants and against the plaintiffs dismissing the first and second causes of action, and (2) by deleting the provision thereof, in effect, setting aside all transfers made between the defendants to the extent necessary to satisfy the judgment entered April 22, 2016, and substituting therefor a provision setting aside the transfer between the defendants of a white 2000 Mack truck, VIN# 1M2P267C5YM054289, transferred from the defendant B & A Demolition and Removal, Inc., on or about December 31, 2013, and a green 2001 Peterbilt truck, VIN# 1NPAXU0XX1N553479, acquired by the defendant B & A Demolition and Removal, Inc., on or about October 9, 2007, and transferred from the defendant B & A Demolition and Removal, Inc., on or about December 31, 2013; as so modified, the

judgment entered March 29, 2023, is affirmed, and the order entered March 29, 2023, is modified accordingly; and it is further,

Ordered that one bill of costs is awarded to the defendants.

The appeals from the orders entered August 22, 2022, and March 29, 2023, must be dismissed in light of the entry of the judgment on March 29, 2023, in the action (*see Matter of Aho*, 39 NY2d 241, 248 [1976]). The issues raised on the appeal from the order entered August 22, 2022, are not brought up for review on the appeal from the judgment entered March 29, 2023, since that order did not necessarily affect that judgment (*see* CPLR 5501 [a] [1]; *Bonczar v American Multi-Cinema, Inc.*, 38 NY3d 1023, 1025 [2022]). The issues raised on the appeal from the order entered March 29, 2023, are brought up for review and have been considered on the appeal from that judgment (*see* CPLR 5501 [a] [1]).

In April 2009, the plaintiffs commenced an action against the defendant B & A Demolition and Removal, Inc. (hereinafter B&A Demo), for an injunction and to recover damages based upon allegations that the plaintiffs' property was damaged as a result of work performed by B&A Demo at an adjacent property (hereinafter the underlying action). In April 2014, the plaintiffs obtained a default judgment against B&A Demo, and on April 22, 2016, a judgment was entered in favor of the plaintiffs and against B&A Demo in the principal sum of \$820,375.

In 2013, B&A Demo was dissolved. In March 2019, the plaintiffs commenced the instant action against the defendants, B&A Demo, Charles Levine, B&A Demo's sole owner and shareholder, King Metal Corp. (hereinafter King Metal), which Levine formed in 2011 and is the sole shareholder of, and B & A Commercial, Inc. (hereinafter B&A Commercial), a corporation formed by Levine's wife in 2015 and operated by Levine. The plaintiffs subsequently amended the complaint in April 2019. The first and second causes of action sought to enforce the judgment in the underlying action against the defendants under piercing the corporate veil and alter ego theories, respectively. The amended complaint also sought to set aside the transfer of assets between the defendants pursuant to Debtor and Creditor Law former §§ 273, 273-a, 274, 275, and 276, and for attorneys' fees pursuant to Debtor and Creditor Law former § 276-a.

After a nonjury trial, the Supreme Court determined that the corporate veil should be pierced. In an order entered March 29, 2023, the court directed "that all transfers made between

the Defendants be set aside to the extent necessary to satisfy the Plaintiffs' Judgment in this matter, including the transfers between the Defendants of a white 2000 Mack truck . . . and a green 2001 [Peterbilt] truck." The court entered a judgment on March 29, 2023, in favor of the plaintiffs and against the defendants, jointly and severally, on the first and second causes of action in the total sum of \$1,383,214.26, which sum included attorneys' fees and costs and, in effect, in favor of the plaintiffs and against the defendants on the third through sixth causes of action setting aside all transfers made between the defendants to the extent necessary to satisfy the judgment entered April 22, 2016. The defendants appeal.

"In reviewing a determination made after a nonjury trial, the power of this Court is as broad as that of the trial court, and we may render a judgment we find warranted by the facts, bearing in mind that in a close case, the trial judge had the advantage of seeing the witnesses" (*Americore Drilling & Cutting, Inc. v EMB Contr. Corp.*, 198 AD3d 941, 945-946 [2021] [internal quotation marks omitted]; see *Northern Westchester Professional Park Assoc. v Town of Bedford*, 60 NY2d 492, 499 [1983]; *Vivir of L I, Inc. v Ehrenkranz*, 145 AD3d 834, 835 [2016]).

"The general rule . . . is that a corporation exists independently of its owners, who are not personally liable for its obligations, and that individuals may incorporate for the express purpose of limiting their liability" (*Bonanni v Horizons Invs. Corp.*, 179 AD3d 995, 1001 [2020] [internal quotation marks omitted], quoting *Sky-Track Tech. Co. Ltd. v HSS Dev., Inc.*, 167 AD3d 964, 964 [2018]; see *Sterling Park Devs., LLC v China Perfect Constr. Corp.*, 185 AD3d 1082, 1083 [2020]). "The concept of piercing the corporate veil is an exception to this general rule, permitting, in certain circumstances, the imposition of personal liability on owners for the obligations of their corporation" (*Sterling Park Devs., LLC v China Perfect Constr. Corp.*, 185 AD3d at 1084 [internal quotation marks omitted]; see *Matter of Morris v New York State Dept. of Taxation & Fin.*, 82 NY2d 135, 140-141 [1993]). "Broadly speaking, the courts will disregard the corporate form, or, to use accepted terminology, pierce the corporate veil, whenever necessary to prevent fraud or to achieve equity" (*Cortlandt St. Recovery Corp. v Bonderman*, 31 NY3d 30, 47 [2018] [internal quotation marks omitted]; see *Matter of Morris v New York State Dept. of Taxation & Fin.*, 82 NY2d at 140). "While the 'decision whether to pierce the corporate veil in a given instance will necessarily depend on the attendant facts and equities . . . [g]enerally

. . . piercing the corporate veil requires a showing that: (1) the owners exercised complete domination of the corporation [or LLC] in respect to the transaction attacked; and (2) that such domination was used to commit a fraud or wrong against the [party seeking to pierce the corporate veil] which resulted in [the party's] injury' ” (*Matter of DePetris v Traina*, 211 AD3d 939, 941 [2022], quoting *Matter of Morris v New York State Dept. of Taxation & Fin.*, 82 NY2d at 141). “ ‘Additionally, the corporate veil will be pierced to achieve equity, even absent fraud, when a corporation has been so dominated by an individual or another corporation and its separate entity so ignored that it primarily transacts the dominator’s business instead of its own and can be called the other’s alter ego’ ” (*Americore Drilling & Cutting, Inc. v EMB Contr. Corp.*, 198 AD3d at 946, quoting *Olivieri Constr. Corp. v WN Weaver St., LLC*, 144 AD3d 765, 767 [2016]).

Here, upon our independent review of the evidence presented at trial, we find that the plaintiffs failed to establish that Levine exercised complete domination over B&A Demo, King Metal, and B&A Commercial. Although Levine was the sole shareholder and/or operator of all three corporations, which also shared a common workspace owned by Levine and employees, the evidence at trial established that he ran real businesses with employees and customers, and the plaintiff presented no evidence demonstrating that Levine used corporate funds for personal use (*see Matter of DePetris v Traina*, 211 AD3d at 942). Additionally, the corporations kept separate bank accounts and books and records, were incorporated at different times for legitimate business purposes, and filed separate tax returns (*see Fantazia Intl. Corp. v CPL Furs N.Y., Inc.*, 67 AD3d 511, 512-513 [2009]). Moreover, the plaintiffs failed to show that Levine’s actions, including dissolving B&A Demo and forming King Metal, were for the purpose of perpetrating a wrong against the plaintiffs (*see Matter of DePetris v Traina*, 211 AD3d at 942; *Americore Drilling & Cutting, Inc. v EMB Contr. Corp.*, 198 AD3d at 947).

Pursuant to the version of Debtor and Creditor Law § 273 (a) applicable at the time of the subject conveyances, “[e]very conveyance made and every obligation incurred by a person who is or will be thereby rendered insolvent is fraudulent as to creditors without regard to his actual intent if the conveyance is made or the obligation is incurred without fair consideration” (*see Cheek v Brooks*, 188 AD3d 785, 786 [2020]). Under Debtor and Creditor Law former § 273-a, “[e]very conveyance made without fair consideration when the person making it is a de-

defendant in an action for money damages or a judgment in such an action has been docketed against him, is fraudulent as to the plaintiff in that action without regard to the actual intent of the defendant if, after final judgment for the plaintiff, the defendant fails to satisfy the judgment.” Additionally, pursuant to the Debtor and Creditor Law former § 274, “[e]very conveyance made without fair consideration when the person making it is engaged or is about to engage in a business or transaction for which the property remaining in his hands after the conveyance is an unreasonably small capital, is fraudulent as to creditors . . . without regard to his actual intent” (see *Palmerone v Staples*, 195 AD3d 736, 737-738 [2021]). Pursuant to the version of Debtor and Creditor Law § 275 applicable at the time of the subject conveyances, “[e]very conveyance made and every obligation incurred without fair consideration when the person making the conveyance or entering into the obligation intends or believes that he will incur debts beyond his ability to pay as they mature, is fraudulent as to both present and future creditors” (see *JDI Display Am., Inc. v Jaco Elecs., Inc.*, 188 AD3d 844, 845 [2020]).

“The good faith of both the transferor and transferee is an indispensable element of fair consideration and preferential transfers of corporate funds to directors, officers, and shareholders of insolvent corporations in derogation of the rights of general creditors do not fulfill the requirement of good faith” (*id.* [citations omitted]; see *American Panel Tec v Hyrise, Inc.*, 31 AD3d 586, 587-588 [2006]). “Transfers to a controlling shareholder, officer or director of an insolvent corporation are deemed to be lacking in good faith and are presumptively fraudulent” (*Matter of CIT Group/Commercial Servs., Inc. v 160-09 Jamaica Ave. Ltd. Partnership*, 25 AD3d 301, 303 [2006]). “Fair consideration can include satisfaction of an antecedent debt” (*Corning Fed. Credit Union v Georgilis*, 217 AD3d 828, 830 [2023]; see *Bridgehampton Natl. Bank v D & G Partners, L.P.*, 186 AD3d 1310, 1311-1312 [2020]).

“Debtor and Creditor Law former § 276 provides that ‘[e]very conveyance made . . . with actual intent . . . to hinder, delay, or defraud either present or future creditors, is fraudulent’ ” (*Bridgehampton Natl. Bank v D & G Partners, L.P.*, 186 AD3d at 1312). “The requisite intent required by this section need not be proven by direct evidence, but may be inferred from the circumstances surrounding the allegedly fraudulent transfer’ ” (*JDI Display Am., Inc. v Jaco Elecs., Inc.*, 188 AD3d at 845-846, quoting *Matter of Steinberg v Levine*, 6 AD3d 620, 621 [2004]). “In determining whether a conveyance was fraudulent,

the courts will consider badges of fraud, which are circumstances that accompany fraudulent transfers so commonly that their presence gives rise to an inference of intent” (*id.* at 846 [internal quotation marks omitted]). “The common ‘badges of fraud’ include ‘a close relationship between the parties to the alleged fraudulent transaction; a questionable transfer not in the usual course of business; inadequacy of the consideration; the transferor’s knowledge of the creditor’s claim and the inability to pay it; and retention of control of the property by the transferor after the conveyance’” (*Goldenberg v Friedman*, 191 AD3d 641, 643-644 [2021], quoting *Wall St. Assoc. v Brodsky*, 257 AD2d 526, 529 [1999]).

Here, the Supreme Court’s determination to set aside the transfer of the two trucks from B&A Demo to Levine, and later from Levine to King Metal and B&A Commercial, was supported by the record. The evidence at trial failed to establish the fair market value of the trucks and that the value of the two trucks transferred from B&A Demo to Levine to King Metal was offset against an officer loan Levine purportedly made to B&A Demo (*see Joslin v Lopez*, 309 AD2d 837, 838 [2003]; *Prudential Farms of Nassau County v Morris*, 286 AD2d 323, 323 [2001]; *see also Matter of CIT Group/Commercial Servs., Inc. v 160-09 Jamaica Ave. Ltd. Partnership*, 25 AD3d at 303). Even if the defendants demonstrated that the transfer of the trucks from B&A Demo to Levine was to satisfy an antecedent debt, B&A Demo’s preferential repayment of debt to Levine, its sole shareholder, did not fulfill the obligation of good faith and, thus, did not constitute fair consideration (*see American Panel Tec v Hyrise, Inc.*, 31 AD3d at 588). Moreover, the plaintiffs established the existence of several “badges of fraud” to support the cause of action under Debtor and Creditor Law former § 276, including that Levine was the sole shareholder of B&A Demo, that B&A Demo was aware of the underlying action when it made the transfers, and that Levine retained control of the trucks after the transfer (*see Matter of Setters v AI Props. & Devs. [USA] Corp.*, 139 AD3d 492, 493-494 [2016]; *Prudential Farms of Nassau County v Morris*, 286 AD2d at 324). The testimony of Kenneth Neu, B&A Demo’s accountant, that the IRS approved the transfer, by itself and in light of the badges of fraud present, did not “negate the inference [of] intent” (*Matter of CIT Group/Commercial Servs., Inc. v 160-09 Jamaica Ave. Ltd. Partnership*, 25 AD3d at 303).

However, the evidence at trial did not warrant setting aside any additional transfers made between the defendants (*see generally Northern Westchester Professional Park Assoc. v Town of Bedford*, 60 NY2d at 499).

As the plaintiffs established their entitlement to judgment on the Debtor and Creditor Law former § 276 cause of action, they also established their entitlement to attorneys' fees pursuant to Debtor and Creditor Law former § 276-a (*see Corning Fed. Credit Union v Georgilis*, 217 AD3d at 831; *Goldenberg v Friedman*, 191 AD3d at 644). Barros, J.P., Ford, Ventura and Golia, JJ., concur.

47 The People of the State of New York, Respondent, v Angel Berrios, Appellant. [253 NYS3d 751]—Appeal by the defendant from a judgment of the Supreme Court, Kings County (John T. Hecht, J.), rendered March 14, 2022, convicting him of attempted criminal possession of a weapon in the second degree, upon his plea of guilty, and imposing sentence.

Ordered that the judgment is affirmed.

The defendant's contentions regarding the validity of the waiver of his right to appeal are without merit (*see People v Lopez*, 6 NY3d 248, 256 [2006]; *People v Cheristin*, 239 AD3d 670, 670-671 [2025], *lv granted* 44 NY3d 1050 [2025]). The defendant's valid waiver of his right to appeal precludes appellate review of his challenge to the hearing court's denial of his motion to suppress certain statements he made to law enforcement officials and physical evidence (*see People v Camacho*, 179 AD3d 831, 831-832 [2020]; *People v Garcia*, 175 AD3d 612, 613 [2019]). Dillon, J.P., Duffy, Landicino and Goldberg Velazquez, JJ., concur.

48 The People of the State of New York, Respondent, v Johnnie Corbett, Appellant. [— NYS3d —]—

Crimes—Appeal—Preservation of Issue for Review

Crimes—Right to Counsel—Effective Representation—Voluntariness of Plea

Appeals by the defendant from four judgments of the Supreme Court, Kings County (Dineen Ann Riviezzo, J.), all rendered July 16, 2024, convicting him of grand larceny in the second degree and conspiracy in the fourth degree under Indictment No. 2669/19, robbery in the third degree under indictment No. 1125/20, burglary in the third degree under indictment No. 70938/22, and grand larceny in the third degree under indictment No. 72219/24, upon his pleas of guilty, and imposing sentences.

Ordered that the judgments are affirmed.

The record demonstrates that the defendant knowingly, voluntarily, and intelligently waived his right to appeal (*see People v Sanders*, 25 NY3d 337, 341 [2015]; *People v Lopez*, 6 NY3d 248, 254 [2006]). The defendant's valid waiver of his right to

appeal precludes appellate review of his contention that the sentences imposed were excessive (see *People v Lopez*, 6 NY3d at 255-256).

The defendant's contention that his pleas were not knowing, voluntary, and intelligent survives his valid appeal waiver (see *People v Brown*, 170 AD3d 878, 879 [2019]). However, this contention is unpreserved for appellate review, since the defendant did not move to vacate his pleas or otherwise raise this issue before the Supreme Court (see CPL 470.05 [2]; *People v McDonnell*, 214 AD3d 826, 827 [2023]; *People v Marinos*, 209 AD3d 875, 875 [2022]). Moreover, "the 'rare case' exception to the preservation requirement does not apply here because the defendant's allocution did not cast significant doubt on his guilt, negate an essential element of the crime, or call into question the voluntariness of his plea" (*People v Ramos*, 164 AD3d 922, 922-923 [2018], quoting *People v Lopez*, 71 NY2d 662, 666 [1988]). In any event, the defendant's contention is without merit, as the record establishes that the defendant's pleas were made knowingly, voluntarily, and intelligently (see *People v McIntyre*, 208 AD3d 1365, 1366 [2022]).

By pleading guilty, the defendant forfeited any claims of ineffective assistance of counsel that did not directly involve the plea-negotiation process (see *People v Brown*, 170 AD3d at 879). Moreover, "the defendant's valid waiver of his right to appeal precludes review of his claim of ineffective assistance of counsel, except to the extent that the alleged ineffective assistance of counsel may have affected the voluntariness of his pleas" (*id.*; see *People v Bennett*, 115 AD3d 973, 974 [2014]). Thus, the defendant's waiver precludes our review of the defendant's claim of ineffective assistance of counsel to the extent that it is based upon counsel's handling of two motions, inter alia, to controvert search warrants (see *People v Smith*, 178 AD3d 965, 966 [2019]). To the extent that the defendant contends that the ineffective assistance of counsel affected the voluntariness of his pleas, the record demonstrates that the defendant received a very advantageous plea, and nothing in the record casts doubt on the apparent effectiveness of counsel (see *People v McIntyre*, 208 AD3d at 1366; *People v Brown*, 170 AD3d at 879). The defendant's contention that he was coerced into pleading guilty by his attorney's ineffectiveness is belied by his statements during the plea proceeding, in which he acknowledged under oath that he was satisfied with his counsel's representation, that he had not been forced into pleading guilty, and that he was entering the pleas freely and voluntarily (see *People v Bennett*, 115 AD3d at 974; *People v*

Douglas, 83 AD3d 1092, 1093 [2011]). Brathwaite Nelson, J.P., Wooten, Love and McCormack, JJ., concur.

49 The People of the State of New York, Respondent, v Nelson DeJesus, Appellant. [253 NYS3d 752]—

Crimes—Right of Confrontation—Testimony Regarding DNA Analysis

Appeal by the defendant from a judgment of the Supreme Court, Queens County (John F. Zoll, J.), rendered December 15, 2022, convicting him of attempted assault in the first degree (two counts) and criminal possession of a weapon in the second degree (two counts), upon a jury verdict, and imposing sentence.

Ordered that the judgment is affirmed.

The defendant's contention that the Supreme Court violated his Sixth Amendment right to confrontation by admitting into evidence two laboratory files related to DNA analysis performed by the Office of the Chief Medical Examiner of the City of New York and the accompanying testimony of an analyst from that office is only partially preserved for appellate review (*see* CPL 470.05 [2]; *People v Cabrera*, 243 AD3d 672, 674 [2025]; *People v Bostic*, 236 AD3d 1051, 1054 [2025]). To the extent that the issue is preserved, the admission of the files and testimony did not violate the Confrontation Clause because the analyst who testified performed the generation of the relevant DNA profiles and conducted the relevant analysis (*see People v Rodriguez*, 242 AD3d 1124, 1125 [2025]; *People v Pascall*, 164 AD3d 1265, 1266 [2018]).

Contrary to the defendant's contention, his counsel was not ineffective (*see People v Wright*, 237 AD3d 758, 759 [2025]; *People v Tirado*, 221 AD3d 834, 835 [2023]).

The remaining issues raised by the defendant are unpreserved for appellate review, and we decline to exercise our interest of justice jurisdiction to review those unpreserved issues (*see People v Hernandez*, 209 AD3d 672 [2022]). Connolly, J.P., Christopher, Warhit and Goldberg Velazquez, JJ., concur.

50 The People of the State of New York, Respondent, v Darius Drummond, Appellant. [253 NYS3d 753]—Appeal by the defendant, as limited by his motion, from a sentence of the Supreme Court, Kings County (Jane C. Tully, J.), imposed February 16, 2024, upon his plea of guilty, on the ground that the sentence was excessive.

Ordered that the sentence is affirmed.

The defendant's contentions regarding the validity of the waiver of the right to appeal are without merit (*see People v*

Lopez, 6 NY3d 248, 256 [2006]; *People v Annunziata*, 246 AD3d 755 [2026]). The defendant's valid waiver of his right to appeal precludes appellate review of his contention that the sentence imposed was excessive (see *People v Lopez*, 6 NY3d at 255-256; *People v Annunziata*, 246 AD3d 755 [2026]). Duffy, J.P., Chambers, Dowling, Landicino and Hom, JJ., concur.

51 The People of the State of New York, Respondent, v Kwauhuru Govan, Appellant. [— NYS3d —]

Crimes—Verdict—Sufficiency of Evidence

Crimes—Right of Confrontation—Testimony of Criminalist

Appeal by the defendant from a judgment of the Supreme Court, Kings County (Joanne Quinones, J.), rendered September 7, 2018, convicting him of murder in the second degree and kidnapping in the first degree, upon a jury verdict, and imposing sentence.

Ordered that the judgment is affirmed.

Viewing the evidence in the light most favorable to the prosecution (see *People v Contes*, 60 NY2d 620, 621 [1983]), we find that it was legally sufficient to establish the defendant's guilt beyond a reasonable doubt. Moreover, in fulfilling our responsibility to conduct an independent review of the weight of the evidence (see CPL 470.15 [5]; *People v Danielson*, 9 NY3d 342, 348 [2007]), we nevertheless accord great deference to the jury's opportunity to view the witnesses, hear the testimony, and observe demeanor (see *People v Mateo*, 2 NY3d 383, 410 [2004]; *People v Bleakley*, 69 NY2d 490, 495 [1987]). Upon reviewing the record here, we are satisfied that the verdict of guilt was not against the weight of the evidence (see *People v Romero*, 7 NY3d 633, 644 [2006]).

The defendant's contention that his rights under the Confrontation Clause of the Sixth Amendment to the United States Constitution were violated by the admission of testimony of a criminalist employed by the Office of the Chief Medical Examiner of the City of New York is unpreserved for appellate review (see *People v Battle*, 239 AD3d 764, 766 [2025]; *People v Bostic*, 236 AD3d 1051, 1054 [2025]). In any event, the contention is without merit as the criminalist's testimony established that he conducted his own independent analysis of the results and, therefore, he did not merely function as a conduit for the conclusions of others (see *People v Battle*, 239 AD3d at 766; *People v Bostic*, 236 AD3d at 1054; *People v Sirleaf*, 231 AD3d 969, 971 [2024]).

The defendant's contention that he was denied a fair trial due to certain comments made by the prosecutor during sum-

mation is unpreserved for appellate review (*see* CPL 470.05 [2]; *People v Manning*, 239 AD3d 887, 889 [2025]; *People v Battle*, 239 AD3d at 766) and, in any event, without merit (*see People v Escalona*, 237 AD3d 968, 970 [2025]; *People v Dubarry*, 215 AD3d 689, 691 [2023]).

The defendant's contention that he was deprived of the effective assistance of counsel is without merit. The evidence, the law, and the circumstances of this case, viewed in totality and as of the time of the representation, reveal that defense counsel provided meaningful representation (*see People v Escalona*, 237 AD3d at 970; *People v Russell*, 216 AD3d 1111, 1113 [2023]).

The defendant's remaining contentions do not warrant reversal. Dillon, J.P., Brathwaite Nelson, Wan and Hom, JJ., concur.

52 The People of the State of New York, Respondent, v Darrel Greenlee, Appellant. [253 NYS3d 745]—Appeal by the defendant, as limited by his motion, from a sentence of the Supreme Court, Kings County (Danny K. Chun, J.), imposed January 31, 2024, sentencing him to a determinate term of imprisonment of nine years, to be followed by a period of postrelease supervision of five years, upon his conviction of assault in the first degree, upon his plea of guilty, on the ground that the sentence was excessive.

Ordered that the sentence is modified, as a matter of discretion in the interest of justice, by reducing the sentence imposed from a determinate term of imprisonment of nine years, to be followed by a period of postrelease supervision of five years, to a determinate term of imprisonment of seven years, to be followed by a period of postrelease supervision of five years; as so modified, the sentence is affirmed.

The sentence imposed was excessive to the extent indicated herein (*see People v Suitte*, 90 AD2d 80 [1982]). Duffy, J.P., Chambers, Dowling, Landicino and Hom, JJ., concur.

53 The People of the State of New York, Respondent, v Lucious Griffin, Appellant. [— NYS3d —]—

Crimes—Right to Speedy Trial—Certificate of Compliance—Due Diligence

Appeal by the defendant from a judgment of the Supreme Court, Nassau County (Howard E. Sturim, J.), rendered May 8, 2023, convicting him of criminal sale of a controlled substance in the third degree (two counts), criminal possession of a controlled substance in the third degree (three counts), and criminally using drug paraphernalia in the second degree (two counts), upon a jury verdict, and imposing sentence.

Ordered that the judgment is affirmed.

After a jury trial, the defendant was convicted of two counts of criminal sale of a controlled substance in the third degree, three counts of criminal possession of a controlled substance in the third degree, and two counts of criminally using drug paraphernalia in the second degree under a consolidated indictment. The defendant was sentenced under the consolidated indictment, and appeals from the judgment.

The defendant contends that the Supreme Court erred in denying his motion, among other things, to dismiss the consolidated indictment on the ground that the defendant was deprived of the statutory right to a speedy trial pursuant to CPL 30.30. The defendant asserts that the People's initial certificate of compliance (hereinafter COC) was improper because, prior to filing the COC, the People failed to disclose, *inter alia*, the defendant's prisoner movement log. The defendant's contention is without merit.

"Absent an individualized finding of special circumstances, 'the prosecution shall not be deemed ready for trial for purposes of [CPL 30.30] until it has filed a valid [COC]' " (*People v Sombillo*, 244 AD3d 873, 874 [2025], quoting CPL 245.50 [3]). "When a defendant moves pursuant to CPL 30.30 to dismiss the indictment on the ground that the People failed to exercise due diligence and therefore did not file a proper COC, the People bear the burden of establishing that they did, in fact, exercise due diligence and made reasonable inquiries prior to filing the initial COC despite a belated or missing disclosure" (*People v Gonzalez*, 244 AD3d 1229, 1230 [2025] [internal quotation marks omitted]; see *People v Bay*, 41 NY3d 200, 213 [2023]). " '[A] valid [COC] and readiness declaration will not be rendered illusory by subsequent diligent disclosures made in good faith' " (*People v Sombillo*, 244 AD3d at 874, quoting *People v Macaluso*, 230 AD3d 1158, 1159 [2024]).

Here, contrary to the defendant's contention, the People's initial COC was proper. The record demonstrates that the People "exercised due diligence and acted in good faith in making reasonable inquiries and efforts to obtain and provide the discovery required by [CPL 245.20 (1)]" (CPL 245.50 [1]) as evidenced by the extensive, voluminous documents provided to the defendant with the initial COC and statement of readiness. The People established that their initial failure to disclose the missing materials "was inadvertent and without bad faith or a lack of due diligence" (*People v Deas*, 226 AD3d 823, 826 [2024]; see *People v Sombillo*, 244 AD3d at 874) as substantiated by the fact that the People immediately disclosed the prisoner

movement log once they ascertained that it had not been initially turned over (*see People v Sombillo*, 244 AD3d at 874; *People v McMahon*, 237 AD3d 746, 751 [2025]). Notably, the defense requested no additional sanctions or accommodations based upon the delayed disclosure short of dismissal of the indictment (*see* CPL 245.80; *People v Macaluso*, 230 AD3d at 1160). Accordingly, inasmuch as the People's initial COC was proper and the statement of trial readiness, therefore, was not illusory, the Supreme Court properly denied the defendant's motion to dismiss the consolidated indictment on the ground that he was deprived of his statutory right to a speedy trial.

The defendant's contention that the Supreme Court should have dismissed the consolidated indictment based on the People's failure to file a valid COC with respect to pole camera footage is unpreserved for appellate review, as the defendant did not move to dismiss the consolidated indictment on that ground (*see People v Sombillo*, 244 AD3d at 874).

The defendant's contention that the Supreme Court should have given a missing witness charge is unpreserved for appellate review, since the defendant's arguments on appeal were not raised before the trial court (*see People v Morris*, 207 AD3d 477, 478 [2022]; *People v Dragani*, 204 AD3d 690, 692 [2022]). Moreover, the defendant's contention that his Fourth Amendment rights were violated by the placement of the pole camera outside of his apartment building is also unpreserved for appellate review (*see* CPL 470.05 [2]; *see generally People v Biggs*, 208 AD3d 1340, 1344 [2022]). Genovesi, J.P., Warhit, Golia and Hom, JJ., concur.

54 The People of the State of New York, Respondent, v Tyshaun Holloway, Appellant. [253 NYS3d 768]—Appeal by the defendant, as limited by his motion, from a sentence of the Supreme Court, Kings County (Jane C. Tully, J.), imposed October 27, 2023, upon his plea of guilty, on the ground that the sentence was excessive.

Ordered that the sentence is affirmed.

The record demonstrates that the defendant knowingly, voluntarily, and intelligently waived his right to appeal (*see People v Thomas*, 34 NY3d 545 [2019]; *People v Lopez*, 6 NY3d 248 [2006]). The defendant's valid waiver of his right to appeal precludes appellate review of his contention that the sentence imposed was excessive (*see People v Lopez*, 6 NY3d at 255). Barros, J.P., Brathwaite Nelson, Warhit, Ventura and Quirk, JJ., concur.

55 The People of the State of New York, Respondent, v Clyde Johnson, Appellant. [— NYS3d —]—

Crimes—Verdict—Sufficiency of Evidence**Crimes—Fair Trial—Prosecutor's Remarks****Crimes—Information—Continuing Crime—Reasonably Specific Time Period**

Appeal by the defendant from a judgment of the Supreme Court, Kings County (Laura R. Johnson, J.), rendered December 18, 2019, convicting him of forcible touching (three counts) and sexual abuse in the third degree, upon a jury verdict, and imposing sentence.

Ordered that the judgment is affirmed.

The defendant's contention that the evidence was legally insufficient to support his convictions is unpreserved for appellate review (*see* CPL 470.05 [2]; *People v Hawkins*, 11 NY3d 484, 492 [2008]). In any event, viewing the evidence in the light most favorable to the prosecution (*see People v Contes*, 60 NY2d 620, 621 [1983]), we find that it was legally sufficient to establish the defendant's guilt beyond a reasonable doubt. Moreover, in fulfilling our responsibility to conduct an independent review of the weight of the evidence (*see* CPL 470.15 [5]; *People v Danielson*, 9 NY3d 342 [2007]), we nevertheless accord great deference to the jury's opportunity to view the witnesses, hear the testimony, and observe demeanor (*see People v Mateo*, 2 NY3d 383, 410 [2004]; *People v Bleakley*, 69 NY2d 490, 495 [1987]). Upon reviewing the record here, we are satisfied that the verdict of guilt was not against the weight of the evidence (*see People v Romero*, 7 NY3d 633 [2006]).

Contrary to the defendant's contention, he was not deprived of the effective assistance of counsel under the New York Constitution, since, viewing defense counsel's performance in its totality, counsel provided meaningful representation (*see People v Benevento*, 91 NY2d 708, 712 [1998]). Further, the defendant was not deprived of the effective assistance of counsel under the United States Constitution (*see Strickland v Washington*, 466 US 668 [1984]).

The defendant's contention that he was deprived of a fair trial by alleged prosecutorial misconduct based upon the prosecutor's comments during her summation is unpreserved for appellate review, as defense counsel either failed to object to the challenged comments or failed to object with sufficient specificity (*see* CPL 470.05 [2]; *People v Adorno*, 210 AD3d 113, 121 [2022]). In any event, the challenged comments were fair comment on the evidence and the reasonable inferences to be drawn therefrom, fair response to defense counsel's summation, or constituted harmless error, and did not deprive the defendant of a fair trial (*see People v Murphy*, 218 AD3d 795, 797 [2023]; *People v Evans*, 127 AD3d 780, 782 [2015]).

The defendant's contention that the prosecution failed to provide him with fair notice as to the forcible touching counts relating to one of the complainants is without merit. "As pertinent to this case, when a defendant is 'charged with a crime that is perpetrated by commission of a single act and time is not a substantive element of the crime charged, the allegation of when that act was committed must be reasonably specific in light of all the circumstances of the particular case'" (*People v Atta*, 126 AD3d 713, 715 [2015], quoting *People v Shack*, 86 NY2d 529, 540 [1995]; see CPL 200.50 [6]). "Although an allegation of a designated period of time may suffice for the purposes of CPL 200.50 (6), any such period must be reasonable" (*People v Atta*, 126 AD3d at 715; see *People v Morris*, 61 NY2d 290, 295 [1984]; *People v Vogt*, 172 AD2d 864, 865 [1991]). Here, in light of all the relevant circumstances, the time period alleged was reasonable and the defendant was sufficiently apprised of the conduct charged so as to enable him to prepare an adequate defense (see CPL 200.50 [6]; cf. *People v Atta*, 126 AD3d at 715). Duffy, J.P., Wooten, Love and Quirk, JJ., concur.

56 The People of the State of New York, Respondent, v Andrew Jointe, Appellant. [253 NYS3d 748]—

Crimes—Sentence—Postrelease Supervision

Appeal by the defendant, as limited by his motion, from a sentence of the Supreme Court, Kings County (Danny Chun, J.), imposed October 25, 2023, sentencing him to concurrent determinate terms of imprisonment of 3½ years, to be followed by 10 years of postrelease supervision, upon his convictions of rape in the third degree and attempted sex trafficking of a child, upon his plea of guilty, on the ground that the periods of postrelease supervision imposed as part of the sentence were excessive.

Ordered that the sentence is modified, on the law, by reducing the period of postrelease supervision on the conviction of attempted sex trafficking of a child from a period of 10 years to a period of five years; as so modified, the sentence is affirmed.

The period of postrelease supervision imposed with respect to the conviction of attempted sex trafficking of a child was illegal. "Although the issue was not raised before the sentencing court or on appeal, we cannot allow an illegal sentence to stand" (*People v McAvoy*, 181 AD3d 888, 889 [2020] [internal quotation marks omitted]; see *People v Singh*, 109 AD3d 1010, 1013 [2013]). Accordingly, we reduce the sentence to the extent indicated herein.

The periods of postrelease supervision imposed, as modified,

were not excessive (*see People v Sanchez*, 221 AD3d 734 [2023]; *People v Suitte*, 90 AD2d 80 [1982]). Barros, J.P., Brathwaite Nelson, Warhit, Ventura and Quirk, JJ., concur.

57 The People of the State of New York, Respondent, v Mario Lazu, Appellant. [253 NYS3d 767]—Appeal by the defendant, as limited by his motion, from a sentence of the Supreme Court, Kings County (Abena Darkeh, J.), imposed June 27, 2023, upon his plea of guilty, on the ground that the sentence was excessive.

Ordered that the sentence is affirmed.

The record demonstrates that the defendant knowingly, voluntarily, and intelligently waived his right to appeal (*see People v Thomas*, 34 NY3d 545 [2019]; *People v Lopez*, 6 NY3d 248 [2006]). The defendant's valid waiver of his right to appeal precludes appellate review of his contention that the sentence imposed was excessive (*see People v Lopez*, 6 NY3d at 255).

Connolly, J.P., Christopher, Voutsinas, Love and Goldberg Velazquez, JJ., concur.

58 The People of the State of New York, Respondent, v Treaston M., Appellant. [253 NYS3d 749]—Appeal by the defendant from a judgment of the Supreme Court, Kings County (Danny Chun, J.), rendered June 14, 2023, adjudicating him a youthful offender, upon his plea of guilty to criminal possession of a weapon in the second degree, and imposing sentence.

Ordered that the judgment is affirmed.

The defendant contends that his adjudication as a youthful offender, upon his plea of guilty to criminal possession of a weapon in the second degree, violated the Second and Fourteenth Amendments to the United States Constitution for several reasons. None of the defendant's contentions in this regard are preserved for appellate review (*see People v David*, 41 NY3d 90, 96 [2023]; *People v Cabrera*, 41 NY3d 35, 38-39 [2023]; *People v Davidson*, 98 NY2d 738, 739 [2002]; *People v Luperon*, 85 NY2d 71, 78 [1995]), and we decline to reach them in the exercise of our interest of justice jurisdiction. LaSalle, P.J., Christopher, Landicino and McCormack, JJ., concur.

59 The People of the State of New York, Respondent, v Daryl K. Miller, Appellant. [253 NYS3d 749]—Appeal by the defendant from a judgment of the County Court, Dutchess County (Edward T. McLoughlin, J.), rendered January 6, 2023, convicting him of attempted sexual abuse in the first degree, upon his plea of guilty, and imposing sentence.

Ordered that the judgment is affirmed.

The record demonstrates that the defendant knowingly, voluntarily, and intelligently waived his right to appeal (*see People v Thomas*, 34 NY3d 545 [2019]). The defendant's valid waiver of his right to appeal precludes appellate review of his contention that the sentence imposed was excessive (*see People v Lopez*, 6 NY3d 248, 255 [2006]). LaSalle, P.J., Connolly, Taylor and Goldberg Velazquez, JJ., concur.

60 The People of the State of New York, Respondent, v Jaquan Oden, Appellant. [253 NYS3d 750]—

Crimes—Trial—Mistrial—Improper Comment

Appeal by the defendant from a judgment of the County Court, Nassau County (Howard E. Sturim, J.), rendered May 30, 2023, convicting him of disorderly conduct, upon a jury verdict, and imposing sentence.

Ordered that the judgment is affirmed.

The defendant was charged by indictment with multiple counts of disorderly conduct, including for violating Penal Law § 240.20 (3), predicated on the alleged conduct of using abusive or obscene language or making an obscene gesture in a public place, and Penal Law § 240.20 (6), predicated on the alleged conduct of congregating with other persons in a public place and refusing to comply with a lawful order of the police to disperse. The defendant was convicted of disorderly conduct in violation of Penal Law § 240.20 (3) and acquitted on the charge of disorderly conduct in violation of Penal Law § 240.20 (6). On appeal, the defendant argues that his conviction was based on legally insufficient evidence and was against the weight of the evidence because the People failed to prove the existence of a lawful order to disburse. Since the defendant was acquitted on the charge of disorderly conduct in violation of Penal Law § 240.20 (6), and the existence of a lawful order to disburse is not an element of the charge of which he was convicted, the defendant's contentions on appeal regarding the legal sufficiency and weight of the evidence do not present a basis for disturbing his conviction.

The defendant's contention that he was deprived of the effective assistance of counsel is without merit, as the record reveals that defense counsel provided meaningful representation (*see People v Benevento*, 91 NY2d 708, 712 [1998]), and the defendant was not deprived of the effective assistance of counsel under the United States Constitution (*see Strickland v Washington*, 466 US 668 [1984]).

Contrary to the defendant's contention, the County Court providently exercised its discretion in denying his motion for a

mistrial on the ground that the prosecutor made an improper comment during summation. “The decision to declare a mistrial rests within the sound discretion of the trial court, which is in the best position to determine if this drastic remedy is necessary to protect the defendant’s right to a fair trial” (*People v Rodriguez*, 202 AD3d 999, 999 [2022] [internal quotation marks omitted]; see *People v Redmon*, 81 AD3d 752 [2011]). Here, while the challenged comment was improper, the error was not so egregious as to deprive the defendant of a fair trial (see *People v Rodriguez*, 202 AD3d 999 [2022]; *People v Ellis*, 166 AD3d 993, 996 [2018], *affd* 34 NY3d 1092 [2019]), particularly in light of the court’s immediate curative instructions to the jury, which the jury is presumed to have followed (see *People v Stewart*, 244 AD3d 762, 766 [2025]). Iannacci, J.P., Dowling, Ventura and Golia, JJ., concur.

61 The People of the State of New York, Respondent, v Olivia Raimo, Appellant. [— NYS3d —]

Crimes—Right to Counsel—Withdrawal—Sufficiency of Brief

Appeal by the defendant from a judgment of the Supreme Court, Westchester County (Barry E. Warhit, J.), rendered January 13, 2022, convicting her of attempted murder in the second degree, upon her plea of guilty, and imposing sentence. Assigned counsel has submitted a brief in accordance with *Anders v California* (386 US 738 [1967]), in which he moves for leave to withdraw as counsel for the appellant.

Ordered that the motion of Jason M. Bernheimer for leave to withdraw as counsel for the appellant is granted, and Jason M. Bernheimer is directed to turn over all papers in his possession to new counsel assigned herein; and it is further,

Ordered that Gerald Zuckerman, PO Box 392, Croton-On-Hudson, NY 10520, is assigned as counsel to prosecute the appeal; and it is further,

Ordered that the respondent is directed to furnish a copy of the certified transcript of the proceedings to the appellant’s new assigned counsel; and it is further,

Ordered that new counsel shall serve and file a brief on behalf of the appellant within 90 days of the date of this decision and order on motion, and the respondent shall serve and file its brief within 30 days after the brief on behalf of the appellant is served and filed. By prior decision and order on motion of this Court dated March 5, 2025, the appellant was granted a waiver of costs, fees, and expenses and the assignment of counsel, with the appeal to be heard on the original papers, including a certified transcript of the proceedings, and

on the briefs of the parties. The parties are directed to upload, through the digital portal on this Court's website, digital copies of their respective briefs, with proof of service of one hard copy on each other (*see* 22 NYCRR 670.9 [a]).

In reviewing an attorney's motion to be relieved pursuant to *Anders v California* (386 US 738 [1967]), this Court must first "satisfy itself that the attorney has provided the client with a diligent and thorough search of the record for any arguable claim that might support the client's appeal" (*Matter of Giovanni S. [Jasmin A.]*, 89 AD3d 252, 255 [2011] [emphasis omitted], quoting *Penson v Ohio*, 488 US 75, 83 [1988]). "An adequate *Anders* brief 'must, at a minimum, draw the Court's attention to the relevant evidence, with specific references to the record; identify and assess the efficacy of any significant objections, applications, or motions; and identify possible issues for appeal, with reference to the facts of the case and relevant legal authority'" (*People v Anthony*, 245 AD3d 821, 822 [2026], quoting *Matter of Giovanni S. [Jasmin A.]*, 89 AD3d at 258; *see People v Murray*, 169 AD3d 227, 231-232 [2019]). "[W]here counsel has failed in his or her role as advocate by filing a deficient brief, on this basis alone, new counsel will be assigned to represent the appellant on the appeal" (*Matter of Giovanni S. [Jasmin A.]*, 89 AD3d at 258; *see People v Anthony*, 245 AD3d at 822).

Here, the brief submitted by assigned counsel pursuant to *Anders v California* is deficient because it fails to properly review all the facts, including those contained in the presentence investigation report, fails to analyze potential appellate issues, and does not discuss the basis of certain conclusions, including the conclusory assertion that the appeal waiver was valid (*see People v Anthony*, 245 AD3d at 822-823; *People v Collins*, 239 AD3d 990, 991 [2025]; *People v Ramirez*, 236 AD3d 822, 824 [2025]).

Further, upon this Court's independent review of the record, we conclude that nonfrivolous issues exist, including, but not necessarily limited to, whether the defendant's waiver of her right to appeal was valid (*see People v Thomas*, 34 NY3d 545 [2019]) and whether the defendant's sentence was excessive (*see People v Suitte*, 90 AD2d 80 [1982]). Iannacci, J.P., Dowling, Ventura and Golia, JJ., concur.

62 The People of the State of New York, Appellant, v Omarny Williams, Respondent. [— NYS3d —]

Appeal by the People from an order of the Supreme Court, Queens County (Karen Gopee, J.), dated December 12, 2023. The order, insofar as appealed from, upon reargument, adhered to the original determination in an order of the same court dated October 12, 2023, made after a hearing, granting that branch of the defendant's motion which was pursuant to CPL 440.10 to vacate a judgment of the same court (Charles S. Lopresto, J.) rendered September 13, 2017, convicting him of robbery in the first degree, upon his plea of guilty, and imposing sentence, and, in effect, granting that branch of the defendant's motion which was, in effect, pursuant to CPL 440.20 to set aside the sentence. The notice of appeal from the order dated October 12, 2023, is deemed to be a premature notice of appeal from the order dated December 12, 2023 (*see* CPL 460.10 [6]).

Ordered that the order dated December 12, 2023, is modified, on the law, by deleting the provision thereof, upon reargument, adhering to the determination in the order dated October 12, 2023, granting that branch of the defendant's motion which was pursuant to CPL 440.10 to vacate the judgment, and substituting therefor a provision, upon reargument, vacating that determination in the order dated October 12, 2023, and thereupon denying that branch of the motion; as so modified, the order dated December 12, 2023, is affirmed insofar as appealed from, and the matter is remitted to the Supreme Court, Queens County, for resentencing in accordance herewith.

In July 2016, the defendant was indicted under Queens County Indictment No. 1721/16 (hereinafter the subject indictment) for, among other things, robbery in the first degree. In 2017, the defendant, a citizen of Jamaica and lawful permanent resident of the United States, pleaded guilty to robbery in the first degree in full satisfaction of the indictment and in exchange for a promised sentence of eight years' imprisonment, to be followed by five years of postrelease supervision. During the plea proceeding, the Supreme Court asked the defendant whether he was a citizen of the United States, to which the defendant answered "Yes." The court did not provide any instruction to the defendant concerning the potential immigration consequences of his guilty plea. On September 13, 2017, the defendant was sentenced, as promised, to eight years' imprisonment, to be followed by five years of postrelease supervision. During the sentencing proceeding, the court stated that it was required to consider whether the defendant should be afforded youthful offender treatment. The court then determined the

following: “So based upon the fact-fact that according to the statute he was not eligible for Y.O. treatment because he’s been convicted of a felony and he’s [pleaded] guilty, so Y.O. would not be warranted. I’ve considered it and denied it.”

In 2022, the United States Department of Homeland Security initiated a removal proceeding against the defendant on the ground that the defendant had been convicted of robbery in the first degree under the subject indictment. Thereafter, the defendant moved pursuant to CPL 440.10 to vacate the judgment and, in effect, pursuant to CPL 440.20 to set aside the sentence. The defendant contended that trial counsel was ineffective for failing to advise the defendant about the immigration consequences of his guilty plea and for failing to advocate for youthful offender treatment. The defendant also contended that “[r]egardless of [trial] counsel’s actions or inactions, the [Supreme] Court failed to advise the Defendant of any immigration consequences.” The defendant also contended that the court’s failure to properly determine his eligibility for youthful offender treatment required that the sentence be set aside.

In an order dated October 12, 2023, the Supreme Court, following a hearing, determined that the defendant received the effective assistance of counsel. Nonetheless, the court granted that branch of the defendant’s motion which was pursuant to CPL 440.10 to vacate the judgment on the ground that the court had failed to advise him that the plea of guilty might result in his deportation. The court also, in effect, granted that branch of the defendant’s motion which was, in effect, pursuant to CPL 440.20 to set aside the sentence on the ground that the court erred by not properly considering whether the defendant was eligible for youthful offender treatment.

Thereafter, the People moved for leave to reargue their opposition to the defendant’s motion. In an order dated December 12, 2023, the Supreme Court, upon reargument, adhered to its prior determination. The People appeal.

The Supreme Court improperly granted that branch of the defendant’s motion which was pursuant to CPL 440.10 to vacate the judgment on the ground that the court had erred in failing to apprise the defendant of the risk of deportation in connection with his plea. Pursuant to *People v Peque* (22 NY3d 168, 197 [2013]), “to protect the rights of the large number of noncitizen defendants pleading guilty to felonies in New York, trial courts must now make all defendants aware that, if they are not United States citizens, their felony guilty pleas may ex-

pose them to deportation.” Here, the record of the plea proceeding establishes that after the court asked the defendant if he was a United States citizen, the defendant replied that he was, and the court did not thereafter apprise him of any immigration consequences of his plea. The facts relevant to this claim appear on the face of the record of the plea proceeding and were, therefore, subject to review on direct appeal, and the defendant failed to establish that his failure to take an appeal from the judgment was justifiable (*see* CPL 440.10 [2] [c]; *People v Samaroo*, 205 AD3d 822, 825 [2022]; *People v Terrero*, 198 AD3d 930, 931 [2021]; *People v Malik*, 166 AD3d 650, 653 [2018]).

Moreover, whether the Supreme Court apprised the defendant of any immigration consequences of his plea did not present a “‘mixed claim’ of ineffective assistance” (*People v DeMicheli*, 129 AD3d 743, 744 [2015], quoting *People v Maxwell*, 89 AD3d 1108, 1109 [2011]; *see People v Evans*, 16 NY3d 571, 575 n 2 [2011]). As the defendant’s claim is based on the face of the record, it is “not cognizable on a CPL article 440 motion, notwithstanding that a *Peque* claim may lead to additional fact-finding” (*People v Young*, 150 AD3d 429, 429 [2017]; *see People v Hernandez*, 214 AD3d 900, 901 [2023]; *People v Jones*, 200 AD3d 713 [2021]).

Accordingly, the Supreme Court, upon reargument, should have vacated so much of the order dated October 12, 2023, as granted that branch of the defendant’s motion which was pursuant to CPL 440.10 to vacate the judgment and thereupon denied that branch of the defendant’s motion.

However, the Supreme Court correctly determined that the sentencing court did not make an appropriate determination regarding the defendant’s eligibility for youthful offender treatment (*see* CPL 720.10 [2] [a] [ii]; [3]). “Criminal Procedure Law § 720.20 (1) requires a court to make a youthful offender determination in every case where the defendant is eligible, even where the defendant fails to request it, or agrees to forego it as part of a plea agreement” (*People v Kimble*, 228 AD3d 886, 886 [2024] [brackets and internal quotation marks omitted]; *see People v Rudolph*, 21 NY3d 497, 501 [2013]). As relevant here, CPL 720.10 (1) defines “youth” as “a person charged with a crime alleged to have been committed when he [or she] was at least sixteen years old and less than nineteen years old.” An “eligible youth” means “a youth who is eligible to be found a youthful offender” (*id.* § 720.10 [2]). “Every youth is so eligible unless[,]” among other reasons, “such youth has previously been convicted and sentenced for a felony” (*id.* § 720.10 [2] [b]).

Here, although it is undisputed that the defendant was 18 years old at the time of the offense, the Supreme Court determined that the defendant was not an “eligible youth” based upon the court’s incorrect determination the defendant had previously “been convicted of a felony and he’s [pleaded] guilty.” However, it is undisputed that although the defendant had previously pleaded guilty to a felony in an unrelated case, he had not yet been sentenced thereon (*see id.*).

Accordingly, the Supreme Court, upon reargument, properly adhered to so much of the determination in the order dated October 12, 2023, as, in effect, granted that branch of the defendant’s motion which was, in effect, pursuant to CPL 440.20 to set as aside the sentence. Therefore, the matter must be remitted to the Supreme Court, Queens County, for new sentencing proceedings consistent with this purpose (*see People v Steele*, 244 AD3d 57 [2025]; *People v Khan*, 184 AD3d 864 [2020]; *see also People v Middlebrooks*, 25 NY3d 516, 527 [2015]; *People v Rosado*, 148 AD3d 1058 [2017]). Chambers, J.P., Wooten, Wan and Hom, JJ., concur.

63 The People of the State of New York, Respondent, v Daniel Morrison, Appellant. [253 NYS3d 765]—

Crimes—Sex Offenders—Sex Offender Registration Act—Downward Departure

Appeal by the defendant from an order of the County Court, Rockland County (Kevin F. Russo, J.), dated May 19, 2025, which, after a hearing, designated him a level three sex offender pursuant to Correction Law article 6-C.

Ordered that the order is affirmed, without costs or disbursements.

The defendant was convicted, after a jury trial, inter alia, of sexual abuse in the first degree (Penal Law § 130.65 [1]) and two counts of murder in the second degree (*id.* § 125.25 [1], [3]). After a hearing conducted pursuant to the Sex Offender Registration Act (SORA) (Correction Law art 6-C), the County Court applied an automatic override to a presumptive risk level three designation and designated the defendant a level three sex offender. The defendant appeals.

The defendant’s contention that a downward departure from his presumptive risk level is warranted based on purported mitigating factors is unpreserved for appellate review, since he did not request a downward departure at the SORA hearing (*see People v Franco*, 234 AD3d 723, 724 [2025]; *People v Pomavilla-Loja*, 230 AD3d 1359, 1359 [2024]). In any event, the defendant failed to establish that a downward departure is

warranted (*see People v Gillotti*, 23 NY3d 841, 861 [2014]; *People v Godek*, 237 AD3d 761, 762-763 [2025]). Genovesi, J.P., Ford, Voutsinas and Golia, JJ., concur.

64 The People of the State of New York, Respondent, v Joshua Stewart, Appellant. [253 NYS3d 766]—

**Crimes—Sex Offenders—Sex Offender Registration Act—Risk Assessment
Crimes—Sex Offenders—Sex Offender Registration Act—Downward
Departure**

Appeal by the defendant from an order of the County Court, Suffolk County (Karen M. Wilutis, J.), dated December 4, 2024, which, after a hearing, designated him a level three sexually violent offender pursuant to Correction Law article 6-C.

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

The defendant was convicted in New Jersey of, inter alia, promoting child prostitution in violation of NJSA 2C:34-1 (b) (3). After the defendant moved to New York, the County Court, after a hearing, designated the defendant a level three sexually violent offender pursuant to the Sex Offender Registration Act (Correction Law art 6-C). The defendant appeals.

Contrary to the defendant's contention, the County Court properly assessed 25 points under risk factor two and 20 points under risk factor 4 of the risk assessment instrument. The defendant could be assessed points under a theory of accessorial liability for the three or more sexual acts, including at least one act of sexual intercourse, committed by the men who paid for sexual activity with the victim over a period of at least two weeks (*see Sex Offender Registration Act: Risk Assessment Guidelines and Commentary* [hereinafter *Guidelines*] at 7, 9-10 [2006]; Penal Law § 20.00; *People v Marte*, 236 AD3d 938, 939 [2025]; *People v Greenridge*, 224 AD3d 852, 854 [2024]).

The County Court providently exercised its discretion in denying the defendant's application for a downward departure from his presumptive risk level three designation. The defendant's family support and employment were adequately taken into account by risk factor 15 (living/employment situation), for which the defendant was not scored any points (*see People v Wagers*, 243 AD3d 931, 934 [2025]; *People v Emery*, 204 AD3d 944, 945 [2022]). To the extent that the defendant demonstrated the existence of other mitigating factors not adequately

taken into account by the Guidelines, the totality of the circumstances did not warrant a departure to avoid an overassessment of the defendant's dangerousness and risk of sexual recidivism (*see People v Gillotti*, 23 NY3d 841, 861 [2014]).

The defendant was designated a sexually violent offender pursuant to Correction Law § 168-a (3) (b) because his New Jersey conviction required him to register as a sex offender in New Jersey. As the People concede, if the defendant had committed the same conduct in New York, he could not have been designated a sexually violent offender. Under the circumstances, Correction Law § 168-a (3) (b) is unconstitutional as applied to the defendant (*see People v Edwards*, 246 AD3d 37, 44-47 [2025]). LaSalle, P.J., Chambers, Taylor and Hom, JJ., concur.

65 Joseph Procopio, Appellant, v John Eichle, Defendant, and Kim Eichle, Respondent. Joseph Russo, Third-Party Defendant-Respondent. [253 NYS3d 761]—

Intoxicating Liquors—Dram Shop Act—Serving of Alcohol to Visibly Intoxicated Individual

Negligence—Maintenance of Premises—Cause of Fall

In an action to recover damages for personal injuries, the plaintiff appeals from an order of the Supreme Court, Suffolk County (Linda J. Kevins, J.), dated January 18, 2022. The order, insofar as appealed from, granted the motion of the defendant Kim Eichle for summary judgment dismissing the amended complaint insofar as asserted against her and granted those branches of the third-party defendant's motion which were for summary judgment dismissing the first and second causes of action insofar as asserted against the defendant Kim Eichle.

Ordered that the order is affirmed insofar as appealed from, with one bill of costs.

In the early morning of January 1, 2018, the plaintiff's son (hereinafter the infant) allegedly was injured after being punched outside of a New Year's Eve party hosted at the home of the defendant Kim Eichle (hereinafter the defendant). After leaving the party, and while outside the defendant's home, the infant and the third-party defendant, Joseph Russo, exchanged words, after which Russo punched the infant causing him to fall onto the concrete sidewalk and hit his head.

The plaintiff, as parent and natural guardian of the infant, and individually, commenced this action against the defendant, and another defendant, alleging, inter alia, that the defendant violated New York General Obligations Law §§ 11-100 and

11-101. After depositions were held, the plaintiff amended the complaint to add an additional cause of action alleging premises liability. The defendant commenced a third-party action against Russo, alleging, among other things, that Russo was negligent during the confrontation with the infant and that if the defendant was found liable for the infant's injuries, the defendant was entitled to contribution from Russo.

Russo subsequently moved, *inter alia*, for summary judgment dismissing the first and second causes of action insofar as asserted against the defendant. The defendant then moved for summary judgment dismissing the amended complaint insofar as asserted against her. In an order dated January 18, 2022, the Supreme Court, among other things, granted the defendant's motion and those branches of Russo's motion. The plaintiff appeals.

General Obligations Law § 11-101 (1), otherwise known as the Dram Shop Act, provides that “[a]ny person who shall be injured in person, property, means of support, or otherwise by any intoxicated person, or by reason of the intoxication of any person, . . . shall have a right of action against any person who shall, by unlawful selling to or unlawfully assisting in procuring liquor for such intoxicated person, have caused or contributed to such intoxication.” The Legislature supplemented the Dram Shop Act by adding General Obligations Law § 11-100, which imposes liability “‘only on a person who knowingly causes intoxication by furnishing alcohol to (or assisting in the procurement of alcohol for) persons known or reasonably believed to be underage’” (*Ferber v Olde Erie Brew Pub & Grill, LLC*, 161 AD3d 1142, 1143 [2018], quoting *Sherman v Robinson*, 80 NY2d 483, 487-488 [1992]; see *Filc v 221 Someplace Else, Ltd.*, 219 AD3d 1487, 1488 [2023]; *Heins v Vanbourgondien*, 180 AD3d 1019, 1025 [2020]). “[F]or a defendant to establish its prima facie entitlement to judgment as a matter of law dismissing a cause of action under the Dram Shop Act, it is required to establish either that it did not serve alcohol to the person while he or she was visibly intoxicated or that its sale of alcohol to him or her had no reasonable or practical connection to the resulting damages’” (*Simmons v Vecchiano*, 233 AD3d 724, 725 [2024], quoting *Flynn v Bulldogs Run Corp.*, 171 AD3d 1136, 1137 [2019]).

Here, the defendant established her prima facie entitlement to judgment as a matter of law dismissing the causes of action alleging a violation of the Dram Shop Act by demonstrating that she did not serve alcohol to any visibly intoxicated individual, nor did she procure or furnish alcohol to any of the

minors at her home, including Russo (*see Franco v Half Moon Riv. Club, LLC*, 214 AD3d 956, 957 [2023]; *Soler v Jaccarino*, 189 AD3d 1106, 1107 [2020]; *Fantuzzo v Attridge*, 291 AD2d 871, 872 [2002]). In opposition, the plaintiff failed to raise a triable issue of fact.

“‘Ordinarily, a defendant moving for summary judgment in a trip-and-fall case has the burden of establishing that it did not create the hazardous condition that allegedly caused the fall, and did not have actual or constructive notice of that condition for a sufficient length of time to discover and remedy it. However, a defendant can make its prima facie showing of entitlement to judgment as a matter of law by establishing that the plaintiff cannot identify the cause of his or her fall without engaging in speculation’” (*Grande v Won Hee Lee*, 171 AD3d 877, 878 [2019], quoting *Mitgang v PJ Venture HG, LLC*, 126 AD3d 863, 863-864 [2015]). “[A] plaintiff’s inability to identify the cause of the fall is fatal to the cause of action, because a finding that the defendant’s negligence, if any, proximately caused the plaintiff’s injuries would be based on speculation” (*Lucas v Genting N.Y., LLC*, 227 AD3d 795, 795 [2024]).

Here, the defendant established her prima facie entitlement to judgment as a matter of law by submitting a transcript of the deposition testimony of the infant, which demonstrated that the infant was unable to identify if the allegedly icy sidewalk played a role in his fall without engaging in speculation (*see Osmolska v Giuseppa Morreale Family Trust*, 230 AD3d 594, 595 [2024]). In opposition, the plaintiff failed to raise a triable issue of fact.

The plaintiff’s remaining contention is improperly raised for the first time on appeal.

Therefore, the Supreme Court properly granted the defendant’s motion for summary judgment dismissing the amended complaint insofar as asserted against her and those branches of Russo’s motion which were for summary judgment dismissing the first and second causes of action insofar as asserted against the defendant.

Brathwaite Nelson, J.P., Ford, Dowling and Goldberg Velazquez, JJ., concur.

66 Remede Consulting Group, Inc., Respondent, v Jason Pitter, Appellant, et al., Defendants [— NYS3d —]—

Contracts—Breach or Performance of Contract—Execution of Agreement
 Torts—Conversion—Use of Funds in Unauthorized Manner
 Principal and Agent—Existence of Relation—Breach of Fiduciary Duty

In an action, *inter alia*, to recover damages for breach of contract, the defendant Jason Pitter appeals from a judgment of the Supreme Court, Nassau County (R. Bruce Cozzens, Jr., J.), dated December 12, 2023. The judgment, upon an order of the same court entered December 11, 2023, granting the plaintiff's motion for summary judgment on the issue of liability on so much of the causes of action alleging breach of contract, conversion, and breach of fiduciary duty as alleged misuse of a corporate credit card insofar as asserted against the defendant Jason Pitter and on the issue of damages to the extent of awarding the plaintiff the principal sum of \$135,246.77, is in favor of the plaintiff and against the defendant Jason Pitter in the principal sum of \$135,246.77. The notice of appeal from the order is deemed to be a notice of appeal from the judgment (*see* CPLR 5512 [a]).

Ordered that the judgment is reversed, on the law, without costs or disbursements, that branch of the plaintiff's motion which was for summary judgment on the issue of damages to the extent of awarding the plaintiff the principal sum of \$135,246.77 is denied, and the order is modified accordingly.

The plaintiff, Remede Consulting Group, Inc., commenced this action against, among others, the defendant Jason Pitter, *inter alia*, to recover damages for breach of contract, conversion, and breach of fiduciary duty. The plaintiff alleged, among other things, that Pitter had entered into a contract with the plaintiff, Pitter's employer, regarding Pitter's use of a corporate credit card he had been issued, and that Pitter had breached that contract, converted company funds, and breached his fiduciary duty by using the corporate credit card for personal expenses. It is not disputed that Pitter used the corporate credit card for personal expenses. Rather, Pitter contends that his use was authorized by Jerome Daniel, the plaintiff's president.

The plaintiff moved for summary judgment on the issue of liability on so much of the causes of action alleging breach of contract, conversion, and breach of fiduciary duty as alleged misuse of the corporate credit card insofar as asserted against Pitter and on the issue of damages to the extent of awarding the plaintiff the principal sum of \$135,246.77. In an order entered December 11, 2023, the Supreme Court granted the plaintiff's motion. On December 12, 2023, the court issued a judgment in favor of the plaintiff and against Pitter in the principal sum of \$135,246.77. Pitter appeals.

"The elements for a cause of action to recover damages for breach of contract are 'the existence of a contract, the plaintiff's performance pursuant to the contract, the defendant's breach

of its contractual obligations, and damages resulting from the breach’ ” (*JER Realty, LLC v Pick & Pack Hub, LLC*, 236 AD3d 1004, 1005 [2025], quoting *Fuoco Group, LLP v Weisman & Co.*, 222 AD3d 619, 621 [2023]).

Here, the plaintiff met its prima facie burden as to Pitter’s liability on so much of the breach of contract cause of action as alleged misuse of the corporate credit card by establishing that Pitter had received a copy of the plaintiff’s corporate credit card policy, which expressly limited use of the corporate credit card to authorized business expenses, and that Pitter had executed an agreement acknowledging the policy and agreeing to abide by its terms. Under the circumstances, Pitter’s contention that there was an oral agreement between himself and Daniel authorizing Pitter’s use of the corporate credit card for personal expenses was insufficient to raise a triable issue of fact (*see Mallad Constr. Corp. v County Fed. Sav. & Loan Assn.*, 32 NY2d 285, 290 [1973]; *Gallagher v Long Is. Plastic Surgical Group, P.C.*, 113 AD3d 652, 653 [2014]).

“To establish a cause of action to recover damages for conversion, a plaintiff must show legal ownership or an immediate superior right of possession to a specific identifiable thing and must show that the defendant exercised an unauthorized dominion over the thing in question to the exclusion of the plaintiff’s rights’ ” (*RD Legal Funding Partners, LP v Worby Groner Edelman & Napoli Bern, LLP*, 195 AD3d 968, 969 [2021], quoting *National Ctr. for Crisis Mgt., Inc. v Lerner*, 91 AD3d 920, 920 [2012]). “ ‘Conversion occurs when funds designated for a particular purpose are used for an unauthorized purpose’ ” (*Petrone v Davidoff Hutcher & Citron, LLP*, 150 AD3d 776, 777 [2017] [alteration omitted], quoting *East Schodack Fire Co., Inc. v Milkewicz*, 140 AD3d 1255, 1256 [2016]).

Here, the plaintiff met its prima facie burden as to Pitter’s liability on so much of the conversion cause of action as alleged misuse of the corporate credit card by showing that he used the plaintiff’s funds in an unauthorized manner (*see RD Legal Funding Partners, LP v Worby Groner Edelman & Napoli Bern, LLP*, 195 AD3d at 969-970; *World Ambulette Transp., Inc. v Lee*, 161 AD3d 1028, 1031 [2018]). In opposition, Pitter failed to raise a triable issue of fact.

“The elements of a cause of action to recover damages for breach of fiduciary duty are (1) the existence of a fiduciary relationship, (2) misconduct by the defendant, and (3) damages directly caused by the defendant’s misconduct’ ” (*WMC Realty Corp. v City of Yonkers*, 193 AD3d 1018, 1023 [2021], quoting

Litvinoff v Wright, 150 AD3d 714, 715 [2017]). “ ‘A fiduciary relationship exists between two persons when one of them is under a duty to act for or to give advice for the benefit of another upon matters within the scope of the relation’ ” (*id.*, quoting *AG Capital Funding Partners, L.P. v State St. Bank & Trust Co.*, 11 NY3d 146, 158 [2008]). “ ‘Agency is a legal relationship between a principal and an agent. It is a fiduciary relationship which results from the manifestation of consent of one person to allow another to act on his or her behalf and subject to his or her control, and consent by the other so to act’ ” (*Sneider v Great S. Bay Surgical Assoc. & Vascular Lab, LLP*, 235 AD3d 685, 687 [2025], quoting *Faith Assembly v Titledge of N.Y. Abstract, LLC*, 106 AD3d 47, 58 [2013]).

The plaintiff met its prima facie burden as to Pitter’s liability on so much of the breach of fiduciary duty cause of action as alleged misuse of the corporate credit card by showing the existence of a principal-agent relationship between the plaintiff and Pitter, and that Pitter breached his corresponding fiduciary duties to the plaintiff by improperly using the corporate credit card for personal gain. In opposition, Pitter failed to raise a triable issue of fact.

Accordingly, the Supreme Court properly granted those branches of the plaintiff’s motion which were for summary judgment on the issue of liability on so much of the causes of action alleging breach of contract, conversion, and breach of fiduciary duty as alleged misuse of the corporate credit card insofar as asserted against Pitter.

However, the plaintiff failed to establish a precise determination of the amount of money owed to it as a result of Pitter’s misuse of the corporate credit card (*see Spilman v Matyas*, 212 AD3d 859, 860 [2023]; *RMP Capital Corp. v Victory Jet, LLC*, 139 AD3d 836, 838 [2016]). Since there are triable issues of fact with respect to the amount of damages, the Supreme Court should have denied that branch of the plaintiff’s motion which was for summary judgment on the issue of damages (*see Ben Ciccone, Inc. v Naber Elec. Corp.*, 214 AD3d 936, 938 [2023]; *Spilman v Matyas*, 212 AD3d at 861). Iannacci, J.P., Chambers, Wan and Taylor, JJ., concur.

67 RJK Auto Brokers, LLC, Appellant, v Dream Carz, Inc., et al., Defendants, and Herold Motor Cars, Inc., et al., Respondents. [— NYS3d —]—

Sales—Good-Faith Purchaser—Title to Vehicles
 Contracts—Breach or Performance of Contract—Privity
 Torts—Prima Facie Tort—Legitimate Motive

In an action, *inter alia*, to recover damages for breach of contract, the plaintiff appeals from an order of the Supreme Court, Nassau County (Diccia T. Pineda-Kirwan, J.), entered September 2, 2021. The order, insofar as appealed from, granted the motion of the defendant Lakeview Auto Sales and Service, Inc., for summary judgment dismissing the complaint insofar as asserted against it, granted that branch of the motion of the defendants Herold Motor Cars, Inc., and John C. Herold which was for summary judgment dismissing the complaint insofar as asserted against them, and denied the plaintiff's cross-motion for summary judgment on the complaint insofar as asserted against the defendants Lakeview Auto Sales and Service, Inc., Herold Motor Cars, Inc., and John C. Herold.

Ordered that the order is affirmed insofar as appealed from, with one bill of costs to the respondents appearing separately and filing separate briefs.

The plaintiff was in the business of purchasing and selling vehicles. In December 2017, the plaintiff purportedly purchased nine vehicles from the defendant Dream Carz, Inc. (hereinafter Dream Carz), which represented to the plaintiff that Dream Carz was the legal title holder of the vehicles. The plaintiff paid Dream Carz \$156,700 for the vehicles and took possession of the vehicles, but Dream Carz failed to transfer title to the vehicles to the plaintiff. The plaintiff entered into contracts to sell eight of the vehicles and delivered the eight vehicles to various third parties. Thereafter, the plaintiff learned that Dream Carz was not the legal title owner of the vehicles. The defendant Lakeview Auto Sales and Service, Inc. (hereinafter Lakeview), had obtained the nine vehicles as trade-ins and had sold the vehicles to the defendant Herold Motor Cars, Inc. (hereinafter Herold Motor). Dream Carz took possession of the vehicles from Herold Motor with the intention of purchasing the vehicles from Herold Motor. However, Dream Carz never paid Herold Motor for the vehicles, and title to the vehicles was never transferred to Dream Carz. The plaintiff subsequently paid Herold Motor \$161,000 in order to obtain title to the eight vehicles it had sold to third parties and returned the other vehicle to Herold Motor.

Thereafter, the plaintiff commenced this action against Herold Motor, the defendant John C. Herold (hereinafter together the Herold defendants), and Lakeview, among others, asserting causes of action sounding in breach of contract, fraud, unjust enrichment, and *prima facie* tort/economic duress, and sought punitive damages in connection with the causes of action alleging fraud and *prima facie* tort/economic duress. The

plaintiff alleged, inter alia, that Lakeview and Herold Motor had entrusted the vehicles to Dream Carz; that Dream Carz was authorized by Lakeview and Herold Motor to sell the nine vehicles to the plaintiff in the ordinary course of business; that the plaintiff purchased the nine vehicles from Dream Carz as Herold Motor's trustee pursuant to UCC 2-403 (2), and as a result, the plaintiff had acquired good title to the vehicles; and that the plaintiff acquired good title to the vehicles as a good faith purchaser pursuant to UCC 2-403 (1). Lakeview moved for summary judgment dismissing the complaint insofar as asserted against it, and the Herold defendants moved, among other things, for summary judgment dismissing the complaint insofar as asserted against them. The plaintiff opposed the motions and cross-moved for summary judgment on the complaint insofar as asserted against Lakeview and the Herold defendants (hereinafter together the moving defendants). In an order entered September 2, 2021, the Supreme Court, inter alia, granted Lakeview's motion and that branch of the Herold defendants' motion, and denied the plaintiff's cross-motion. The plaintiff appeals.

"A purchaser of goods acquires all title which his [or her] transferor had or had power to transfer except that a purchaser of a limited interest acquires rights only to the extent of the interest purchased. A person with voidable title has power to transfer a good title to a good-faith purchaser for value" (UCC 2-403 [1]). "Any entrusting of possession of goods to a merchant who deals in goods of that kind gives him [or her] power to transfer all rights of the entruster to a buyer in ordinary course of business" (*id.* § 2-403 [2]; see *Kaminsky v Karmin*, 187 AD2d 488, 489-490 [1992]). Here, the evidence submitted by the moving defendants established, prima facie, that the plaintiff did not obtain title to the nine vehicles as a good-faith purchaser for value when it purportedly purchased the vehicles from Dream Carz in December 2017 (see UCC 1-201 [20], [30]; Vehicle and Traffic Law § 2113 [a]; *Porter v Wertz*, 53 NY2d 696, 698 [1981]; *Kozar v Christie's, Inc.*, 109 AD3d 967, 968 [2013]; *Kaminsky v Karmin*, 187 AD2d at 489-490) and that Dream Carz was not a "merchant to whom the property was entrusted" (*Porter v Wertz*, 53 NY2d at 698; see Vehicle and Traffic Law § 2113 [a]; *Kozar v Christie's, Inc.*, 109 AD3d at 968). As such, the moving defendants established, prima facie, that they were not unjustly enriched at the plaintiff's expense as a result of the plaintiff's payment to Herold Motor such that equity and good conscience required restitution (see *Keane v Keane*, 193 AD3d 838, 840 [2021]; *Hong Qin Jiang v Li Wan Wu*, 179 AD3d 1035, 1040 [2020]). In opposition, the plaintiff failed to raise a triable issue of fact.

The moving defendants established their prima facie entitlement to judgment as a matter of law dismissing the cause of action alleging breach of contract insofar as asserted against each of them by submitting evidence demonstrating that there was no contractual relationship between them and the plaintiff. “‘Liability for breach of contract does not lie absent proof of a contractual relationship or privity between the parties’” (*KTG Hospitality, LLC v Cobra Kitchen Ventilation, Inc.*, 201 AD3d 710, 711 [2022], quoting *Hamlet at Willow Cr. Dev. Co., LLC v Northeast Land Dev. Corp.*, 64 AD3d 85, 104 [2009]; see *CDJ Bldrs. Corp. v Hudson Group Constr. Corp.*, 67 AD3d 720, 722 [2009]). The moving defendants further established, prima facie, that the contract between them was not intended to benefit the plaintiff (see *Sukhram v Forest City Myrtle Assoc., LLC*, 231 AD3d 890, 891-892 [2024]; *Michael Anthony Contr. Corp. v Queens N.Y. Realty, LLC*, 225 AD3d 848, 852 [2024]; *KTG Hospitality, LLC v Cobra Kitchen Ventilation, Inc.*, 201 AD3d at 712). In opposition, the plaintiff failed to raise a triable issue of fact.

To recover damages for fraud, “‘a plaintiff must prove (1) a misrepresentation or an omission of material fact which was false and known to be false by the defendant, (2) the misrepresentation was made for the purpose of inducing the plaintiff to rely upon it, (3) justifiable reliance of the plaintiff on the misrepresentation or material omission, and (4) injury’” (*Wallkill Med. Dev., LLC v Catskill Orange Orthopaedics, P.C.*, 178 AD3d 987, 990 [2019], quoting *Bernardi v Spyrtos*, 79 AD3d 684, 687 [2010]).

Here, the moving defendants established, prima facie, that they did not knowingly make any misrepresentations to the plaintiff with the intent to induce the plaintiff’s reliance (see *Apollo H.V.A.C. Corp. v Halpern Constr., Inc.*, 55 AD3d 855, 857 [2008]). In opposition, the plaintiff failed to raise a triable issue of fact.

“The elements of a cause of action sounding in prima facie tort include ‘(1) intentional infliction of harm, (2) resulting in special damages, (3) without excuse or justification, (4) by an act or series of acts which are otherwise legal’” (*Hersh v Cohen*, 229 AD3d 524, 526 [2024], quoting *Diorio v Ossining Union Free School Dist.*, 96 AD3d 710, 712 [2012]). “[T]he complaining party must have suffered specific and measurable loss, . . . i.e., the loss of something having economic or pecuniary value” (*Yang v Northwell Health, Inc.*, 195 AD3d 662, 666 [2021] [internal quotation marks omitted]; see *Liberman v Gelstein*, 80 NY2d 429, 434-435 [1992]). “[T]here is no recovery in prima

facie tort unless malevolence is the sole motive for defendant's otherwise lawful act, that is, unless defendant acts from disinterested malevolence" (*Edwards v Walsh*, 169 AD3d 865, 869 [2019] [internal quotation marks omitted]; see *Burns Jackson Miller Summit & Spitzer v Lindner*, 59 NY2d 314, 333 [1983]).

Here, the moving defendants established, prima facie, that the alleged acts the plaintiff accused them of were committed, at least, partly in furtherance of a legitimate motive (see *Hersh v Cohen*, 229 AD3d at 526-527; *Smith v Meridian Tech., Inc.*, 86 AD3d 557, 559 [2011]). Moreover, the moving defendants established, prima facie, that their actions did not rise to the level of actionable economic duress (see *Redcom CM, Inc. v Frederick S. Fish Inv. Co. No. 32-Scarsdale, LLC*, 218 AD3d 615, 616-617 [2023]; *Overbay, LLC v Berkman, Henoch, Peterson, Peddy & Fenchel, P.C.*, 185 AD3d 707, 709 [2020]). In opposition, the plaintiff failed to raise a triable issue of fact.

The moving defendants established their prima facie entitlement to judgment as a matter of law dismissing the demands for punitive damages insofar as asserted against each of them by demonstrating that their conduct was not "so 'gross, wanton, or willful, or of such high moral culpability' as to warrant an award of punitive damages" (*Umlas v Britton*, 222 AD3d 1031, 1032 [2023], quoting *M.V.B. Collision, Inc. v Allstate Ins. Co.*, 187 AD3d 881, 882 [2020]).

The plaintiff's remaining contentions are without merit.

Accordingly, the Supreme Court properly granted Lakeview's motion for summary judgment dismissing the complaint insofar as asserted it and that branch of the Herold defendants' motion which was for summary judgment dismissing the complaint insofar as asserted against them. For the same reasons, the court properly denied the plaintiff's cross-motion for summary judgment on the complaint insofar as asserted against the moving defendants. Chambers, J.P., Dowling, McCormack and Quirk, JJ., concur.

68 Ramona J. Rosario, as Administrator of the Estate of Haniel Reyes-Rosario, Deceased, Appellant, v Town of Mount Kisco et al., Respondents, et al., Defendants. [— NYS3d —]

Municipal Corporations—Tort Liability—Special Relationship—Private Right of Action

In an action, inter alia, to recover damages for wrongful death, the plaintiff appeals from an order of the Supreme Court, Westchester County (Mary H. Smith, J.), dated January 4, 2021. The order granted the motion of the defendants Town of Mount Kisco and Village of Mount Kisco pursuant to CPLR

3211 (a) (7) to dismiss the complaint insofar as asserted against them.

Ordered that the order is affirmed, with costs.

In January 2016, the plaintiff's adult son (hereinafter the decedent) died in a fire in a rented basement apartment that, among other deficiencies, lacked an emergency exit, smoke detectors, or a building permit for the basement's conversion to an apartment. The plaintiff, individually and as the administrator of the decedent's estate, commenced this action against, among others, the Town of Mount Kisco and the Village of Mount Kisco (hereinafter together Mount Kisco), asserting causes of action, inter alia, to recover damages for wrongful death, fraud, and civil conspiracy to commit fraud. The complaint alleged, among other things, that Mount Kisco negligently failed to enforce applicable housing regulations. Mount Kisco moved pursuant to CPLR 3211 (a) (7) to dismiss the complaint insofar as asserted against them. The Supreme Court granted Mount Kisco's motion. The plaintiff appeals.

On a motion to dismiss for failure to state a cause of action pursuant to CPLR 3211 (a) (7), a court must "accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory" (*Leon v Martinez*, 84 NY2d 83, 87-88 [1994]; see *Connaughton v Chipotle Mexican Grill, Inc.*, 29 NY3d 137, 141 [2017]). Nonetheless, allegations "consisting of bare legal conclusions with no factual specificity . . . are insufficient to survive a motion to dismiss" (*Godfrey v Spano*, 13 NY3d 358, 373 [2009]; see *Connaughton v Chipotle Mexican Grill, Inc.*, 29 NY3d at 141).

"[I]t has long been the rule in this State that, in the absence of some special relationship creating a duty to exercise care for the benefit of particular individuals, liability may not be imposed on a municipality for failure to enforce a statute or regulation" (*O'Connor v City of New York*, 58 NY2d 184, 192 [1983]; see *Metz v State of New York*, 20 NY3d 175, 180 [2012]). "The core principle is that to sustain liability against a municipality, the duty breached must be more than that owed the public generally" (*Applewhite v Accuhealth, Inc.*, 21 NY3d 420, 426 [2013] [internal quotation marks omitted]). "A special relationship can be formed in three ways: (1) when the municipality violates a statutory duty enacted for the benefit of a particular class of persons; (2) when it voluntarily assumes a duty that generates justifiable reliance by the person who benefits from the duty; or (3) when the municipality assumes

positive direction and control in the face of a known, blatant and dangerous safety violation” (*Pelaez v Seide*, 2 NY3d 186, 199-200 [2004]; see *Applewhite v Accuhealth, Inc.*, 21 NY3d at 426).

“To form a special relationship through breach of a statutory duty, the governing statute must authorize a private right of action” (*Pelaez v Seide*, 2 NY3d at 200). Here, the plaintiff’s bare legal conclusions fail to sufficiently establish a private right of action under any of the relied upon statutes or regulations. Nor has she provided any authority that would support a finding of a private right of action (see *O’Connor v City of New York*, 58 NY2d at 189-192; *WMC Realty Corp. v City of Yonkers*, 193 AD3d 1018, 1021 [2021]; *Ferreira v Cellco Partnership*, 111 AD3d 777, 779 [2013]). Further, the plaintiff has not alleged sufficient facts that would establish that Mount Kisco voluntarily assumed a duty that generated justifiable reliance by the plaintiff or the decedent or that Mount Kisco assumed positive direction and control in the face of a known blatant and dangerous safety violation (see *Cockburn v City of New York*, 129 AD3d 895, 897 [2015]; *Ferreira v Cellco Partnership*, 111 AD3d at 779-780). Accordingly, the facts alleged by the plaintiff do not constitute the “special relationship” necessary to maintain a negligence cause of action against Mount Kisco.

In addition, neither the allegations in the complaint nor the surrounding circumstances are sufficient to allege a fraud by Mount Kisco (see generally *Eurycleia Partners, LP v Seward & Kissel, LLP*, 12 NY3d 553, 559 [2009]) or that Mount Kisco participated in a conspiracy with respect to a fraud committed by others (see *Mohammad v Rehman*, 236 AD3d 892, 894 [2025]; *B&H Flooring, LLC v Folger*, 228 AD3d 809, 812 [2024]).

In light of our determination, we need not reach the parties’ remaining contentions. Brathwaite Nelson, J.P., Ford, Wan and Love, JJ., concur.

69 Christopher Sager, Respondent, v Frontpage Investments, Doing Business as Yousef Habibian, Defendant, and Drexel University, Appellant. [253 NYS3d 759]—

Employment Relationships—Respondeat Superior—Vicarious Liability—Control over Work

In an action to recover damages for personal injuries, the defendant Drexel University appeals from an order of the Supreme Court, Nassau County (Thomas Rademaker, J.), entered June 20, 2022. The order denied that defendant’s motion for summary judgment dismissing the complaint insofar as asserted against it.

Ordered that the order is reversed, on the law, with costs, and the motion of the defendant Drexel University for summary judgment dismissing the complaint insofar as asserted against it is granted.

The plaintiff allegedly was injured in the course of his employment at Jaidan Industries (hereinafter Jaidan) when a machine that was being transported on a forklift, as well as a crane piece that was lifting the machine, fell from the forklift and landed on his foot. At the time of the accident, the forklift was being operated by two students of the defendant Drexel University (hereinafter Drexel) who were participating in the Drexel Cooperative Education Program (hereinafter the co-op), which permits students to apply for and obtain paid work experience with participating employers for a period of up to six months.

Following the accident, the plaintiff commenced this action to recover damages for personal injuries against Drexel and another defendant. The plaintiff alleged that Drexel was vicariously liable for the negligence of the two students in operating the forklift. After discovery, Drexel moved for summary judgment dismissing the complaint insofar as asserted against it. By order entered June 20, 2022, the Supreme Court denied the motion. Drexel appeals.

“Typically, ‘liability in negligence is . . . premised on a defendant’s own fault, not the wrongdoing of another person’ ” (*Brothers v New York State Elec. & Gas Corp.*, 11 NY3d 251, 257 [2008], quoting *Feliberty v Damon*, 72 NY2d 112, 117 [1988]). “Under the doctrine of vicarious liability, however, liability for another person’s wrongdoing is imputed to the defendant” (*id.*). “This doctrine ‘rests in part on the theory that—because of an opportunity for control of the wrongdoer, or simply as a matter of public policy loss distribution—certain relationships may give rise to a duty of care, the breach of which can indeed be viewed as the defendant’s own fault’ ” (*id.*, quoting *Feliberty v Damon*, 72 NY2d at 118). Here, the plaintiff posited that Drexel was vicariously liable for the students’ negligence because Drexel functioned as the students’ employer or because the students were Drexel’s agents.

“The determination of whether an employer-employee relationship exists turns on whether the alleged employer exercises control over the results produced, or the means used to achieve the results” (*Rivera v Fenix Car Serv. Corp.*, 81 AD3d 622, 623 [2011]; see *Brielmeier v Leal*, 226 AD3d 955, 956-957 [2024]). “[I]ncidental control over the results produced without further indicia of control over the means employed to achieve the

results will not constitute substantial evidence of an employer-employee relationship” (*Matter of Ted Is Back Corp. [Roberts]*, 64 NY2d 725, 726 [1984]; see *D.S. v Positive Behavior Support Consulting & Psychological Resources, P.C.*, 197 AD3d 518, 520 [2021]). “A principal-agent relationship may be established by evidence of the ‘consent of one person to allow another to act on his or her behalf and subject to his or her control, and consent by the other so to act’” (*Fils-Aime v Ryder TRS, Inc.*, 40 AD3d 917, 918 [2007], quoting *Maurillo v Park Slope U-Haul*, 194 AD2d 142, 146 [1993]).

In the present case, Drexel demonstrated, *prima facie*, that it lacked the requisite control over the students’ work and conduct during their employment with Jaidan to give rise to either an employer-employee or principal-agent relationship. Drexel’s evidence demonstrated that it provided an online recruiting platform on which students searched job descriptions submitted by participating employers and applied for jobs with those employers. Drexel also required that students work 32 hours per week to receive academic credit for the co-op, that students follow Drexel’s code of conduct during the co-op, and that students complete a survey at the end of the co-op to report on their experience. However, the co-op employers decided whether to hire a particular student, paid the co-op students’ salaries, and provided IRS documents. Additionally, employers set the students’ work schedule and were responsible for supervising and training the students. While participating employers were encouraged to communicate with Drexel if there were performance issues so that Drexel could provide support, the participating employer had the authority to terminate the students’ employment. During the time that the students worked at their co-op location, they would have little to no contact with Drexel, which, in the case of the students at issue here, was located approximately 130 miles from where the students were living and working for Jaidan.

Under these circumstances, Drexel demonstrated, *prima facie*, that any control it retained over the students’ work and conduct was incidental and insufficient to impose vicarious liability upon it (see *America/Intl. 1994 Venture v Mau*, 146 AD3d 40, 55 [2016]; *Meehan v County of Suffolk*, 144 AD3d 640, 641 [2016]; see also *Malone v County of Suffolk*, 128 AD3d 651, 653 [2015]). In opposition, the plaintiff failed to raise a triable issue of fact.

Accordingly, the Supreme Court should have granted Drexel’s motion for summary judgment dismissing the complaint insofar as asserted against it. Barros, J.P., Iannacci, Voutsinas and Quirk, JJ., concur.

70 Scott Randolph, LLC, Appellant, v Gholis of Brooklyn Corp. et al., Respondents, et al., Defendant. [— NYS3d —]

Specific Performance—Contract for Sale of Real Property—Default on Obligations

Specific Performance—Contract for Sale of Real Property—Time-of-Essence Notice

In an action, inter alia, for specific performance of a contract for the sale of real property, the plaintiff appeals from an order of the Supreme Court, Kings County (Reginald A. Boddie, J.), dated February 4, 2021. The order, insofar as appealed from, granted the separate motions of the defendant Bethpage Federal Credit Union, the defendants Bushwack 10, LLC, Bushwack 5, LLC, and Dawson Stellberger, and the defendant Gholis of Brooklyn Corp., among other things, for summary judgment dismissing the amended complaint insofar as asserted against each of them, denied the plaintiff's motion, inter alia, for summary judgment declaring that a certain deed is void, and denied the plaintiff's cross-motion for summary judgment dismissing the counterclaims of the defendants Bushwack 10, LLC, Bushwack 5, LLC, and Dawson Stellberger.

Ordered that the order is affirmed insofar as appealed from, with one bill of costs payable to the respondents appearing separately and filing separate briefs, and the matter is remitted to the Supreme Court, Kings County, for the entry of a judgment, inter alia, declaring that the plaintiff does not possess any rights to, title to, or interest in the subject property and that the defendant Gholis of Brooklyn Corp. is entitled to retain a down payment made pursuant to the contract for the sale of real property.

In December 2014, the plaintiff commenced this action against the defendant Gholis of Brooklyn Corp. (hereinafter Gholis) for specific performance of a contract of sale for commercial real property located in Brooklyn (hereinafter the premises) for an all cash sales price of \$8,325,000 and to recover damages for breach of contract. The complaint was later amended to add, among others, the defendant Bethpage Federal Credit Union (hereinafter the Credit Union), which held a mortgage on the premises, the defendants Bushwack 10, LLC, and Bushwack 5, LLC (hereinafter together Bushwack), and the defendant Dawson Stellberger. The amended complaint asserted, inter alia, causes of action alleging tortious interference with contract against Bushwack, alleging fraud against Bushwack and Stellberger, and for a judgment declaring that a deed conveying the premises from Gholis to Bushwack is void and setting aside the mortgage held by the Credit Union

against all of the defendants. Issue was joined by service of the respective answers with counterclaims of Gholis, the Credit Union, and Bushwack and Stellberger.

Upon the completion of discovery, the Credit Union, Bushwack and Stellberger, and Gholis separately moved, among other things, for summary judgment dismissing the amended complaint insofar as asserted against each of them. In addition, Gholis moved for summary judgment on its counterclaim for a judgment declaring that the plaintiff defaulted on its obligations under the contract and that Gholis was therefore entitled to retain a down payment made pursuant to the contract. Bushwack and Stellberger also moved for summary judgment on their counterclaims for a judgment “declaring that Plaintiff does not possess any rights to, title to, or interest in the [premises].” The plaintiff opposed the separate motions and moved, *inter alia*, for summary judgment on its causes of action for specific performance of the contract, alleging breach of contract, and for a declaratory judgment. The plaintiff also cross-moved for summary judgment dismissing the counterclaims by Bushwack and Stellberger for a declaratory judgment.

In an order dated February 4, 2021, the Supreme Court, among other things, granted the separate motions of the Credit Union, Bushwack and Stellberger, and Gholis and denied the plaintiff’s motion and cross-motion. The plaintiff appeals.

“A party seeking specific performance of a contract for the sale of real property is required to establish not only that he or she was ready, willing, and able to close on the scheduled closing date, but also that the other party was in default” (*Latora v Ferreira*, 102 AD3d 838, 839 [2013]). “Unsubstantiated assertions that the funds necessary to perform could be secured, or conclusory assertions that the plaintiff was ready, willing, and able to perform, are insufficient to satisfy this burden” (*Aliperti v Laurel Links, Ltd.*, 27 AD3d 675, 676 [2006]).

“[W]hen a party to a real estate contract declares time to be of the essence in setting a closing date, each party must tender performance on that date, and a failure to perform constitutes a default” (*Perelmutter v LRM Bldrs., LLC*, 230 AD3d 1165, 1166 [2024] [internal quotation marks omitted]; *see Grace v Nappa*, 46 NY2d 560, 565 [1979]). “Where a seller seeks to hold a purchaser in breach of contract [and retain the down payment], the seller must establish that he or she was ready, willing, and able to perform on the time-of-the-essence closing date, and that the purchaser failed to demonstrate a lawful excuse for its failure to close” (*Martocci v Schneider*, 119 AD3d

746, 748 [2014] [alterations and internal quotation marks omitted]; see *Donerail Corp. N.V. v 405 Park LLC*, 100 AD3d 131, 138 [2012]). Similarly, as a general rule, to prevail on a cause of action for the return of a down payment on a contract for the sale of real property, the evidence must demonstrate that the seller was not ready, willing, and able to perform on the law day (see *Perelmutter v LRM Bldrs., LLC*, 230 AD3d at 1166-1167).

Contrary to the plaintiff's contention, the Supreme Court properly granted those branches of Gholis's motion which were for summary judgment dismissing the cause of action for specific performance of the contract asserted against it and on its counterclaim for a judgment declaring that the plaintiff defaulted on its obligations under the contract and that Gholis was therefore entitled to retain the down payment made pursuant to the contract. Gholis demonstrated that it was ready, willing, and able to close by submitting a title policy that indicated that Gholis was capable of delivering marketable and insurable title to the premises. In addition, Gholis demonstrated that the plaintiff had defaulted by failing to appear at the scheduled closing. In opposition, the plaintiff failed to raise a triable issue of fact (see *Ashkenazi v Miller*, 190 AD3d 668, 672 [2021]; *Martocci v Schneider*, 119 AD3d at 749).

Likewise, the Supreme Court properly denied that branch of the plaintiff's motion which was for summary judgment on the cause of action for specific performance of the contract. The plaintiff failed to demonstrate, prima facie, that Gholis was in breach of the contract and that a time-of-the-essence notice was a "nullity" so as to relieve the plaintiff of the requirement that it demonstrate, prima facie, that it was ready, willing, and able to close (see *Perelmutter v LRM Bldrs., LLC*, 230 AD3d at 1166-1167; *Latora v Ferreira*, 102 AD3d at 839).

Contrary to the plaintiff's contention, the Supreme Court properly granted those branches of the motion of Bushwack and Stellberger which were for summary judgment dismissing the causes of action alleging tortious interference with contract and fraud insofar as asserted against them. Bushwack and Stellberger submitted evidence demonstrating, inter alia, that Stellberger did not enter into a "backup contract" until after the plaintiff had expressed a wish to terminate its contract with Gholis. In opposition, the plaintiff failed to raise a triable issue of fact (see *Ferdinand v Siegel*, 236 AD3d 861, 862 [2025]; *Ginsburg Dev. Cos., LLC v Carbone*, 134 AD3d 890, 892-893 [2015]).

The plaintiff's remaining contentions are without merit.

Since this is, in part, a declaratory judgment action, we remit the matter to the Supreme Court, Kings County, for the entry of a judgment, among other things, declaring that the plaintiff does not possess any rights to, title to, or interest in the premises and that Gholis is entitled to retain the down payment made pursuant to the contract (*see Lanza v Wagner*, 11 NY2d 317, 334 [1962]). Duffy, J.P., Ford, Golia and Quirk, JJ., concur.

71 John Terehoff, Respondent-Appellant, v Rubin Frenkel, M.D., et al., Appellants-Respondents. [— NYS3d —]

Evidence—Scientific Evidence—Expert Testimony—Causal Inference

In an action to recover damages for medical malpractice, the defendants appeal, and the plaintiff cross-appeals, from a judgment of the Supreme Court, Kings County (Michelle Weston, J.), dated September 14, 2020. The judgment, insofar as appealed from, upon an order of the same court (Marsha L. Steinhardt, J.) dated June 1, 2016, denying that branch of the defendants' motion which was to preclude the plaintiff from offering evidence on a certain theory of causation, and upon a jury verdict in favor of the plaintiff on the issue of liability and awarding the plaintiff damages, inter alia, in the sum of \$2,250,000 for past pain and suffering, is in favor of the plaintiff and against the defendants. The judgment, insofar as cross-appealed from, failed to award the plaintiff damages for future pain and suffering.

Ordered that the judgment is reversed insofar as appealed from, on the law, that branch of the defendants' motion which was to preclude the plaintiff from offering evidence on a certain theory of causation is granted, the order dated June 1, 2016, is modified accordingly, and the matter is remitted to the Supreme Court, Kings County, for a new trial; and it is further,

Ordered that the cross-appeal is dismissed as academic in light of our determination on the appeal; and it is further,

Ordered that one bill of costs is awarded to the defendants.

The plaintiff, an infant by his mother and natural guardian, commenced this action to recover damages for medical malpractice against the defendants, the mother's obstetrician and his medical practice. The plaintiff alleged that the defendants failed to diagnose the mother's preterm labor, causing the plaintiff to be born premature and to have a low birth weight. The plaintiff was born premature at 25 weeks weighing 770 grams and was later diagnosed with autism.

The plaintiff alleged that his premature birth caused autism

spectrum disorder-pervasive developmental delay. Prior to trial, the defendants moved, inter alia, to preclude the plaintiff from offering evidence on causation of autism spectrum disorder-pervasive developmental delay. The defendants argued that the plaintiff's theory of causation has not gained general acceptance in the medical community. After a hearing pursuant to *Frye v United States* (293 F 1013 [DC Cir 1923]), the Supreme Court denied that branch of the defendants' motion.

At trial, the mother testified that she was treated by the defendants. The plaintiff presented the testimony of Marilyn A. Robertson, a physician board certified in obstetrics and gynecology, who testified that the defendants departed from accepted practice when treating the mother because they failed to diagnose her with preterm labor. Robertson opined that because of the defendants' failure to diagnose the mother with preterm labor, they also failed to provide treatment that would have stopped the preterm labor and prolonged the pregnancy by at least two weeks. The plaintiff also presented the testimony of Allan Rubenstein, a physician board certified in neurology, who testified that the failure to extend the pregnancy two weeks was a substantial factor in the plaintiff being diagnosed with autism and related disability.

At the conclusion of the trial, the jury found that the defendants departed from the applicable standard of care by failing to diagnose the mother with preterm labor and that this departure was a substantial factor in causing the plaintiff to be diagnosed with autism. The jury awarded the plaintiff damages, inter alia, in the sum of \$2,250,000 for past pain and suffering. The jury did not award the plaintiff damages for future pain and suffering. Thereafter, the Supreme Court issued a judgment in favor of the plaintiff and against the defendants. The defendants appeal, and the plaintiff cross-appeals.

"In determining the admissibility of expert testimony, New York follows the rule of *Frye v United States* that expert testimony based on scientific principles or procedures is admissible but only after a principle or procedure has gained general acceptance in its specified field" (*Lugo v New York City Health & Hosps. Corp.*, 89 AD3d 42, 55 [2011] [citation and internal quotation marks omitted]; see *People v Wesley*, 83 NY2d 417, 422 [1994]). The burden of proving general acceptance rests upon the party offering the disputed expert testimony (see *Zito v Zabarsky*, 28 AD3d 42, 44 [2006]; *Del Maestro v Grecco*, 16 AD3d 364, 366 [2005]). A *Frye* inquiry "is not concerned with the reliability of a certain expert's conclusions, but instead with whether the experts' deductions are based on principles

that are sufficiently established to have gained general acceptance as reliable” (*Lugo v New York City Health & Hosps. Corp.*, 89 AD3d at 56 [internal quotation marks omitted]).

New York courts expanded *Frye* beyond the results of scientific testing and measurement procedures and have applied it to determine the reliability of psychological and physiological theories or syndromes and also an expert’s theory of causation as to a particular matter (*see id.* at 57). “[W]hen the *Frye* test is applied to a theory of causation, ‘the court’s concern must be limited to making sure that within the scientific field in question, there is a substantive, demonstrable, objective basis for the expert’s conclusion,’ and . . . [t]he focus of the inquiry in such an instance should not be upon how widespread the theory’s acceptance is, but should instead consider whether a reasonable quantum of legitimate support exists in the literature for the expert’s views’” (*id.* at 62, quoting *Marsh v Smyth*, 12 AD3d 307, 312 [2004]). The theory of causation that is being challenged must be “based upon more than theoretical speculation, or a scientific hunch” (*Zito v Zabarsky*, 28 AD3d at 46 [internal quotation marks omitted]). The determination under *Frye* does not decide who is right or wrong but whether there is relevant scientific data and studies to support the causation theory (*see Lugo v New York City Health & Hosps. Corp.*, 89 AD3d at 56).

This Court has previously addressed the distinction between studies that demonstrate an association and those that establish medical or legal causation (*see Ratner v McNeil-PPC, Inc.*, 91 AD3d 63, 76-77 [2011]). Expert testimony is properly precluded when it merely provides a causal inference or association based upon extrapolation from observational studies (*see id.* at 74). “Deduction, extrapolation, drawing inferences from existing data, and analysis are not novel methodologies and are accepted stages of the scientific process” (*id.*). However, “[a] court may conclude that there is simply too great an analytical gap between the data and the opinion proffered” (*id.* at 75, quoting *General Elec. Co. v Joiner*, 522 US 136, 146 [1997]).

The plaintiff sought to use Rubenstein’s testimony to prove that the mother’s preterm labor and the plaintiff’s low birth weight were substantial factors in causing the plaintiff’s diagnosis of autism. Rubenstein testified at the *Frye* hearing that his theory was one of association or causal inference as to low birth weight, prematurity, and autism. However, his testimony did not rise to the level of causation. Rubenstein’s *Frye* hearing testimony reaffirmed that the causes of autism are unknown and that his opinion was supported by several observational

studies. “[O]bservational studies or case reports are not generally accepted in the scientific community on questions of causation’” (*id.* at 76, quoting *Heckstall v Pincus*, 19 AD3d 203, 205 [2005]).

There was no testimony at the *Frye* hearing that any of the studies Rubenstein relied upon concluded that premature birth causes autism. Rather, Rubenstein’s testimony established that the exact mechanism of how autism develops is unknown and that studies found a causal inference or association between prematurity and autism, not a causal relationship. Further, there was no testimony elicited at the *Frye* hearing that demonstrated that the medical community, specifically pediatric neurologists, have accepted that prematurity causes autism or even that a child’s birth at 25 weeks versus 27 weeks increases that child’s risk of later being diagnosed with autism. In any event, the gap between the statistical analysis relied upon by Rubenstein regarding the prevalence of autism in preterm, low-birth-weight infants and his testimony that the pathophysiology and causes of autism are unknown was too great to allow him to opine as to his theory of causation in this action. Based upon the foregoing, the Supreme Court erred in denying that branch of the defendants’ motion which was to preclude Rubenstein’s testimony on this theory of causation.

In light of our determination, the plaintiff’s cross-appeal has been rendered academic, as we need not reach the parties’ contentions regarding the award of damages by the jury.

Accordingly, we remit the matter to the Supreme Court, Kings County, for a new trial.

Connolly, J.P., Brathwaite Nelson, Hom and Goldberg Velazquez, JJ., concur.

72 Wayne Travers et al., Plaintiffs, v Briarcliff Manor Investments, LLC, Defendant, and Andron Construction Corp. et al., Defendants/Third-Party Plaintiffs-Appellants. Gabriel Steel Erectors, Inc., Third-Party Defendant-Respondent. [—NYS3d —]

Indemnity—Contractual Indemnification—Primary Responsibility for Safety
Indemnity—Contractual Indemnification—Partial Indemnification

In an action to recover damages for personal injuries, etc., the defendants third-party plaintiffs appeal from an order of the Supreme Court, Westchester County (Lawrence H. Ecker, J.), dated March 16, 2022. The order, insofar as appealed from, granted those branches of the third-party defendant’s motion which were for summary judgment dismissing the third-party causes of action for contractual indemnification.

Ordered that the order is reversed insofar as appealed from, on the law, with costs, and those branches of the third-party defendant's motion which were for summary judgment dismissing the third-party causes of action for contractual indemnification are denied.

The defendant third-party plaintiff SHI-III Briarcliff REIT, LLC, the owner of certain property located in Briarcliff Manor (hereinafter the owner), hired the defendant third-party plaintiff Andron Construction Corp. (hereinafter the general contractor) to act as the general contractor for a construction project. The general contractor, in turn, contracted with Orange County Ironworks, LLC (hereinafter OCI), to provide and install steel for the project as a subcontractor. OCI thereafter engaged the third-party defendant, Gabriel Steel Erectors, Inc. (hereinafter Gabriel), as a sub-subcontractor to install steel for the project. The contract between OCI and Gabriel required Gabriel, "[t]o the fullest extent permitted by law," to indemnify and hold harmless, among others, the owner and the general contractor, from and against claims, damages, losses, and expenses arising out of or resulting from Gabriel's negligent acts or omissions in the performance of its work under the contract.

In 2018, the plaintiff Wayne Travers (hereinafter the injured plaintiff), an ironworker employed by Gabriel, allegedly was injured when he fell from an extension ladder while working on the project. Thereafter, the injured plaintiff, and his spouse suing derivatively, commenced this action to recover damages for personal injuries alleging, inter alia, violations of Labor Law §§ 200, 240, and 241 (6), against the owner and the general contractor, among others. The owner and the general contractor commenced a third-party action against Gabriel asserting, among other things, causes of action for contractual indemnification. Subsequently, Gabriel moved, inter alia, for summary judgment dismissing the third-party causes of action for contractual indemnification. In an order dated March 16, 2022, the Supreme Court, among other things, granted those branches of Gabriel's motion. The owner and the general contractor appeal.

The right to contractual indemnification depends upon the specific language of the contract (*see George v Marshalls of MA, Inc.*, 61 AD3d 925, 930 [2009]). The promise to indemnify should not be found unless it can be clearly implied from the language and purpose of the entire agreement and the surrounding circumstances (*see Hooper Assoc. v AGS Computers*, 74 NY2d 487, 491-492 [1989]).

Here, the contract provided, inter alia, that Gabriel was obli-

gated to indemnify and hold harmless, among others, the owner and the general contractor, from and against claims, damages, losses, and expenses arising out of or resulting from Gabriel's negligent acts or omissions in the performance of its work under the contract. Although the general contractor played a general supervisory role over the work of its subcontractors, triable issues of fact exist as to whether Gabriel "assumed primary responsibility for the safety of its workers," given the plaintiff's deposition testimony that he received instructions solely from Gabriel and never from anyone else on the project and the deposition testimony of Gabriel's foreman that he completed a weekly job site safety and hazard analysis every week while he was on the project (*Masciotta v Morse Diesel Intl.*, 303 AD2d 309, 313 [2003]).

Furthermore, contrary to Gabriel's contention, General Obligations Law § 5-322.1 does not prohibit the owner and the general contractor from seeking partial indemnification from Gabriel even if the incident was caused, in part, by the negligence of the owner and the general contractor. Under General Obligations Law § 5-322.1 (1), an agreement purporting to indemnify a party for damages arising out of the party's own negligence "is against public policy and is void and unenforceable" (see *Brooks v Judlau Contr., Inc.*, 11 NY3d 204, 207 [2008]; *Feliz v Citnalta Constr. Corp.*, 217 AD3d 750, 752 [2023]). Nonetheless, contractual provisions providing for indemnification "to the fullest extent permitted by law" do not violate General Obligations Law § 5-322.1, as they allow for partial indemnification as to the portion of damages not caused by the indemnitee's own negligence (see *Brooks v Judlau Contr., Inc.*, 11 NY3d at 210-211; *Feliz v Citnalta Constr. Corp.*, 217 AD3d at 752).

Accordingly, the Supreme Court should not have granted those branches of Gabriel's motion which were for summary judgment dismissing the third-party causes of action for contractual indemnification.

Gabriel's remaining contention is without merit. Connolly, J.P., Chambers, Voutsinas and Goldberg Velazquez, JJ., concur.

73 Adel Wesa, Appellant, v Consolidated Bus Transit, Inc., et al., Respondents. [— NYS3d —]

Motor Vehicles—Collision—Rear-End Collision—Alleged Brake Failure

In an action to recover damages for personal injuries, the plaintiff appeals from an order of the Supreme Court, Kings County (Carolyn E. Wade, J.), dated June 26, 2024. The order, insofar as appealed from, denied those branches of the plaintiff's motion which were for summary judgment on the is-

sue of liability and dismissing the defendants' affirmative defenses alleging comparative negligence without prejudice to renew.

Ordered that the order is reversed insofar as appealed from, on the law, with costs, and those branches of the plaintiff's motion which were for summary judgment on the issue of liability and dismissing the defendants' affirmative defenses alleging comparative negligence are granted.

The plaintiff commenced this action against the defendants to recover damages for personal injuries that he alleged he sustained when his vehicle was struck in the rear by the defendants' vehicle. Before any discovery was conducted, the plaintiff moved, inter alia, for summary judgment on the issue of liability and dismissing the defendants' affirmative defenses alleging comparative negligence. In an order dated June 26, 2024, the Supreme Court, among other things, denied those branches of the plaintiff's motion without prejudice to renew. The plaintiff appeals.

"A plaintiff in a negligence action moving for summary judgment on the issue of liability must establish, prima facie, that the defendant breached a duty owed to the plaintiff and that the defendant's negligence was a proximate cause of the alleged injuries. A plaintiff is not . . . required to show freedom from comparative fault in establishing his or her prima facie case" (*Shanyou Liu v Joerg*, 223 AD3d 762, 763 [2024] [citations and internal quotation marks omitted]; see *Rodriguez v City of New York*, 31 NY3d 312, 317-325 [2018]). However, "the issue of a plaintiff's comparative negligence may be decided in the context of a summary judgment motion where, as here, the plaintiff moved for summary judgment dismissing a defendant's affirmative defense alleging comparative negligence" (*Frankel v Jaroslawicz*, 225 AD3d 742, 743 [2024]). Moreover, "[a] driver of a vehicle approaching another vehicle from the rear is required to maintain a reasonably safe distance and rate of speed under the prevailing conditions to avoid colliding with the other vehicle" (*Madrigal v Paragon Motors of Woodside, Inc.*, 236 AD3d 885, 887 [2025] [internal quotation marks omitted]). "Thus, a rear-end collision with a stopped or stopping vehicle establishes a prima facie case of negligence on the part of the operator of the rear vehicle, requiring that operator to come forward with evidence of a nonnegligent explanation for the collision to rebut the inference of negligence" (*Maurice v Donovan*, 235 AD3d 633, 634 [2025] [internal quotation marks omitted]). "A nonnegligent explanation may include a mechanical failure, a sudden, unexplained stop of the

vehicle ahead, an unavoidable skidding on wet pavement, or any other reasonable cause” (*Donnellan v LaMarche*, 221 AD3d 783, 784 [2023] [internal quotation marks omitted]). Where the defendants lay the blame for the accident on brake failure, it is incumbent upon them to show that the brake failure was unanticipated and that reasonable care was exercised to keep the brakes in good working order (see *Ballatore v HUB Truck Rental Corp.*, 83 AD3d 978, 980 [2011]; *Reid v Rayamajhi*, 17 AD3d 557, 558 [2005]).

Here, the plaintiff established his prima facie entitlement to judgment as a matter of law on the issue of liability by submitting his affidavit wherein he averred that his vehicle had been stopped for approximately 10 seconds for a red traffic light when it was struck in the rear by the defendants’ vehicle (see *Maurice v Donovan*, 235 AD3d at 634; *Martin v Copado-Esquivel*, 226 AD3d 668, 670 [2024]). In opposition, the defendants failed to raise a triable issue of fact as to whether the alleged brake failure was unanticipated and whether reasonable care was exercised to keep the brakes in good working order (see *Reid v Rayamajhi*, 17 AD3d 557, 558 [2005]; cf. *Schuster v Amboy Bus Co.*, 267 AD2d 448, 449 [1999]; *Liana v Atacil Contr.*, 212 AD2d 673, 673-674 [1995]).

The plaintiff also established his prima facie entitlement to judgment as a matter of law dismissing the defendants’ affirmative defenses alleging comparative negligence by demonstrating that he was not at fault in the happening of the accident (see *Maurice v Donovan*, 235 AD3d at 634; *Martin v Copado-Esquivel*, 226 AD3d at 670). In opposition, the defendants failed to raise a triable issue of fact.

Contrary to the defendants’ contention, the plaintiff’s motion was not premature (see CPLR 3212 [f]; *Maurice v Donovan*, 235 AD3d at 635).

Accordingly, the Supreme Court should have granted those branches of the plaintiff’s motion which were for summary judgment on the issue of liability and dismissing the defendants’ affirmative defenses alleging comparative negligence. Genovesi, J.P., Christopher, Wan and Ventura, JJ., concur.

74 Willie Wimbish, Respondent, v Joan Crema-Samalya, Appellant, et al., Defendants. [— NYS3d —]

Consumer Protection—Deceptive Acts and Practices—Materially Misleading Conduct
Pleading—Sufficiency of Pleading—Fraud

In an action, inter alia, to recover damages for fraud, the defendant Joan Crema-Samalya appeals from an order of the

Supreme Court, Kings County (Anne J. Swern, J.), dated April 11, 2024. The order denied that defendant's motion pursuant to CPLR 3211 (a) (7) to dismiss the complaint insofar as asserted against her.

Ordered that the order is reversed, on the law, with costs, and the motion of the defendant Joan Crema-Samalya pursuant to CPLR 3211 (a) (7) to dismiss the complaint insofar as asserted against her is granted.

After the plaintiff's property was damaged in a fire, he worked with the defendant Joan Crema-Samalya, who was employed by Mountain Valley Indemnity Company as an insurance adjuster, with respect to the restoration of the property. Crema-Samalya put the plaintiff in contact with the defendant Five Boro Fire Restoration, Inc. (hereinafter FBFR), and the plaintiff entered into a contract with FBFR in January 2018. FBFR performed restoration work on the property until November 2019. According to the plaintiff, in March 2020 a licensed contractor inspected the work performed by FBFR and determined that it was deficient.

The plaintiff commenced this action against Crema-Samalya, among others, alleging causes of action against her to recover damages for violation of General Business Law § 349 and fraud. Prior to serving an answer, Crema-Samalya moved pursuant to CPLR 3211 (a) (7) to dismiss the complaint insofar as asserted against her for failure to state a cause of action. In opposition, the plaintiff submitted his sworn affirmation and text messages between himself and Crema-Samalya. By order dated April 11, 2024, the Supreme Court denied Crema-Samalya's motion, without explanation. Crema-Samalya appeals.

On a motion to dismiss pursuant to CPLR 3211 (a) (7), the court should accept the facts as alleged in the complaint as true, accord the plaintiff the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory (*see Leon v Martinez*, 84 NY2d 83, 87-88 [1994]). Moreover, "the court may consider affidavits submitted by the pleading party to remedy any defects in the pleading, and upon considering such an affidavit, the facts alleged therein must also be assumed to be true" (*Katsorhis v 718 W. Beech St, LLC*, 234 AD3d 744, 747 [2025]).

To state a cause of action under General Business Law § 349 "a plaintiff must allege that a defendant has engaged in (1) consumer-oriented conduct that is (2) materially misleading and that (3) plaintiff suffered injury as a result of the allegedly deceptive act or practice" (*City of New York v Smokes-Spirits.Com, Inc.*, 12 NY3d 616, 621 [2009]; *see Koch v Acker*,

Merrall & Condit Co., 18 NY3d 940, 941 [2012]). For purposes of General Business Law § 349, “deceptive acts and practices, whether representations or omissions, [are] limited to those likely to mislead a reasonable consumer acting reasonably under the circumstances” (*Oswego Laborers’ Local 214 Pension Fund v Marine Midland Bank*, 85 NY2d 20, 26 [1995]). “[T]he statute is limited in its application to those acts or practices which undermine a consumer’s ability to evaluate his or her market options and to make a free and intelligent choice” (*North State Autobahn, Inc. v Progressive Ins. Group Co.*, 102 AD3d 5, 13 [2012]).

Here, the plaintiff failed to identify and allege any conduct by Crema-Samalya that was materially misleading. The plaintiff merely alleged in conclusory fashion that Crema-Samalya provided “misleading information” so as to induce the plaintiff (and other insureds) to hire FBFR (see *Keshin v Montauk Homes, LLC*, 162 AD3d 758, 760 [2018]). Contrary to the plaintiff’s further contention, a reasonable consumer acting reasonably under the circumstances would not have interpreted Crema-Samalya’s text message regarding expenses to be submitted for payment by the insurance company as indicating that Crema-Samalya had verified that FBFR applied for and received the proper permits for the job or that she was acting as a “manager” of FBFR’s performance.

To state a cause of action alleging fraud, “a plaintiff must allege ‘a misrepresentation or a material omission of fact which was false and known to be false by defendant, made for the purpose of inducing the other party to rely upon it, justifiable reliance of the other party on the misrepresentation or material omission, and injury’” (*Mandarin Trading Ltd. v Wildenstein*, 16 NY3d 173, 178 [2011], quoting *Lama Holding Co. v Smith Barney*, 88 NY2d 413, 421 [1996]). CPLR 3016 (b) requires that causes of action based on fraud “shall be stated in detail” (see *Atlasman v Korol*, 238 AD3d 826, 829 [2025]).

Here, the complaint does not provide any detail, but merely states the elements of a cause of action sounding in fraud in conclusory fashion (see *Pare v Aalbue*, 222 AD3d 769, 775 [2023]). In his affirmation, the plaintiff points to the text messages, but does not identify any particular statement therein that would constitute a misrepresentation of fact (see *K.M. v Ursuline Sch. of New Rochelle*, 241 AD3d 673, 676 [2025]; *Ikezi v 82nd St. Academics*, 221 AD3d 986, 988 [2023]).

Accordingly, the Supreme Court should have granted Crema-Samalya’s motion pursuant to CPLR 3211 (a) (7) to dismiss the complaint insofar as asserted against her.

The parties' remaining contentions need not be reached in light of our determination. Iannacci, J.P., Genovesi, Landicino and Love, JJ., concur.

75 Yong Xu et al., Appellants, v 401 Foster Gasoline, Inc., et al., Respondents. [— NYS3d —]—

Contracts—Parol Evidence Rule—Plain Language of Agreement
Contracts—Rescission—Fraud—Reasonable Reliance on Oral Promise
Torts—Conversion—Joint Bank Account—Withdrawal without Authorization

In an action, inter alia, to recover damages for breach of contract, the plaintiffs appeal from a judgment of the Supreme Court, Nassau County (Jerome C. Murphy, J.), entered June 28, 2021. The judgment, upon a decision of the same court dated April 28, 2021, made after a nonjury trial, is in favor of the defendants and against the plaintiffs dismissing the first through fourth and tenth causes of action and in favor of the defendant Xiao Yan Wang and against the plaintiffs dismissing the fifth through ninth causes of action.

Ordered that the judgment is modified, on the law and the facts, (1) by deleting the provision thereof dismissing the first cause of action of the amended complaint, and adding thereto a provision declaring that the plaintiff Yong Xu does not possess an ownership interest in the defendant 401 Foster Gasoline, Inc., and (2) by deleting the provision thereof in favor of the defendant Xiao Yan Wang and against the plaintiff Yong Xu dismissing the fifth cause of action, and substituting therefor a provision in favor of the plaintiff Yong Xu and against the defendant Xiao Yan Wang on that cause of action in the sum of \$60,625.63; as so modified, the judgment is affirmed, without costs or disbursements.

The plaintiff Yong Xu is a principal of the plaintiff 401 Foster Petroleum, LLC (hereinafter Foster Petroleum), which operated a gas station located in Brooklyn. The plaintiffs executed a contract to sell Foster Petroleum's assets (hereinafter the asset purchase agreement) to the defendants 401 Foster Gasoline, Inc. (hereinafter Foster Gasoline), He Wang, and YunWei Yao (hereinafter collectively the purchasers). In October 2016, the sale of Foster Petroleum's assets closed, and Xu was compensated for his ownership interest.

In 2017, the plaintiffs commenced this action against the defendants, inter alia, to recover damages for breach of contract. The plaintiffs alleged that the purchasers failed to fully compensate Xu for his interest in Foster Petroleum's assets. In lieu of making a full payment, the plaintiffs alleged, the purchasers orally represented that they would convey to Xu a

one-third ownership interest in Foster Gasoline. The plaintiffs alleged that the purchasers breached their oral agreement, and instead conveyed a one-third ownership interest in Foster Gasoline to the defendant Xiao Yan Wang (hereinafter Grace). The plaintiffs further alleged that Grace withdrew funds from her and Xu's joint bank account, and converted the funds for her own use. Following a nonjury trial, the Supreme Court found in favor of the defendants and against the plaintiffs dismissing the first through fourth and tenth causes of action and in favor of Grace and against the plaintiffs dismissing the fifth through ninth causes of action. The plaintiffs appeal.

“In reviewing a determination made after a non-jury trial, the power of this Court is as broad as that of the trial court, and this Court may render the judgment it finds warranted by the facts, bearing in mind that in a close case, the trial judge had the advantage of seeing the witnesses and hearing the testimony” (*Morris v Tausik*, 222 AD3d 969, 971 [2023], quoting *Winston v Reichenbaum*, 209 AD3d 801, 804 [2022]).

“A written agreement that is complete, clear and unambiguous on its face must be enforced according to the plain meaning of its terms” (*Ikezi v 82nd St. Academics*, 221 AD3d 986, 987 [2023] [brackets omitted], quoting *Greenfield v Philles Records*, 98 NY2d 562, 569 [2002]). Under the parol evidence rule, “where the parties have reduced their agreement to an integrated writing,” courts may not consider extrinsic evidence of “prior or contemporaneous negotiations between the parties offered to contradict or modify the terms of their writing” (*Marine Midland Bank-S. v Thurlow*, 53 NY2d 381, 387 [1981]; see *Transcan Sys., Inc. v Seldat Distrib., Inc.*, 209 AD3d 911, 913 [2022]). Where, as here, a contract contains a merger clause, the parties have agreed to require the “full application of the parol evidence rule in order to bar the introduction of extrinsic evidence to vary or contradict the terms of the writing” (*Schron v Troutman Sanders LLP*, 20 NY3d 430, 436 [2013] [internal quotation marks omitted]; see *Albert v Afanador*, 237 AD3d 1012, 1014 [2025]).

The Supreme Court properly dismissed the second cause of action, which sought specific performance of the alleged oral promise to convey to Xu a one-third ownership interest in Foster Gasoline. The plain language of the asset purchase agreement did not reserve a one-third ownership interest in the business to Xu, the seller. Contrary to the plaintiffs' contention, evidence of prior or contemporaneous oral representations that Xu would continue to have an ownership interest in the business is not admissible to contradict or vary the parties'

integrated writing (see *Marine Midland Bank-S. v Thurlow*, 53 NY2d at 387; *Albert v Afanador*, 237 AD3d at 1014), and such evidence would effectively negate the asset purchase agreement's merger clause (see *Schron v Troutman Sanders LLP*, 20 NY3d at 437; *Klein v Signature Bank, Inc.*, 204 AD3d 892, 896 [2022]).

The Supreme Court also properly dismissed the third cause of action, which sought to recover damages for breach of the asset purchase agreement based on the purchasers' alleged failure to make full payment for Xu's interest in Foster Petroleum's assets. The evidence at trial demonstrated that Xu received the maximum compensation he was entitled to under the asset purchase agreement and its amendments. Further, the second and third causes of action were properly dismissed insofar as asserted against Grace, since she was not a party to the asset purchase agreement (see *Umoh v Zunz*, 238 AD3d 802, 803-804 [2025]; *Black Car & Livery Ins., Inc. v H&W Brokerage, Inc.*, 28 AD3d 595, 595 [2006]).

In light of the foregoing, the plaintiffs failed to demonstrate entitlement to relief in their favor on the first cause of action, which sought a declaration that Xu possessed an ownership interest in Foster Gasoline. However, since this is, in part, a declaratory judgment action, the judgment should have included a declaration in the defendants' favor on the first cause of action (see *Lanza v Wagner*, 11 NY2d 317, 334 [1962]).

To recover damages for unjust enrichment, a "plaintiff must show that (1) the other party was enriched, (2) at the plaintiff's expense, and (3) that it is against equity and good conscience to permit the other party to retain what is sought to be recovered" (*Main Omni Realty Corp. v Matus*, 124 AD3d 604, 605 [2015]; see *E.J. Brooks Co. v Cambridge Sec. Seals*, 31 NY3d 441, 455 [2018]). "The theory of unjust enrichment lies as a quasi-contract claim and contemplates an obligation imposed by equity to prevent injustice, in the absence of an actual agreement between the parties" (*Gym Door Repairs, Inc. v Astoria Gen. Contr. Corp.*, 144 AD3d 1093, 1096-1097 [2016] [brackets and internal quotation marks omitted]). As a result, "a cause of action predicated on a theory of implied contract or quasi-contract is not viable where there is an express agreement that governs the subject matter underlying the action" (*id.* at 1097 [brackets and internal quotation marks omitted]; see *New Hackensack Realty, LLC v Lawrence Dev. Realty, LLC*, 226 AD3d 799, 803 [2024]).

The Supreme Court properly dismissed the fourth cause of action, which sought to recover damages for unjust enrichment

based upon the purchasers' alleged failure to make full payment for Xu's ownership interest in Foster Petroleum's assets. Because the parties executed a written agreement addressing the sale of Foster Petroleum's assets, the plaintiffs were precluded from recovering under a quasi-contract theory for damages arising out of the same subject matter (see *New Hackensack Realty, LLC v Lawrence Dev. Realty, LLC*, 226 AD3d at 803; *Hoeg Corp. v Peebles Corp.*, 153 AD3d 607, 610 [2017]; *Grossman v New York Life Ins. Co.*, 90 AD3d 990, 991-992 [2011]).

In an action for rescission of a contract on the ground of fraud, the plaintiff must prove (1) a material misrepresentation of an existing fact and (2) justifiable reliance upon the misrepresentation (see *Seneca Wire & Mfg. Co. v Leach & Co.*, 247 NY 1, 7-8 [1928]; *Steen v Bump*, 233 AD2d 583, 584 [1996]; *D'Angelo v Hastings Oldsmobile*, 89 AD2d 785, 785 [1982], *affd* 59 NY2d 773 [1983]). Where "there is a meaningful conflict between an express provision in a written contract and a prior alleged oral representation, the conflict negates a claim of a reasonable reliance upon the oral representation" (*Hong Qin Jiang v Li Wan Wu*, 179 AD3d 1041, 1043 [2020] [internal quotation marks omitted]; see *DDJ Mgt., LLC v Rhone Group L.L.C.*, 15 NY3d 147, 154 [2010]).

The Supreme Court properly dismissed the tenth cause of action, which sought rescission of the asset purchase agreement on the ground of fraud. In support of this cause of action, the plaintiffs alleged that the purchasers fraudulently induced Xu to execute the asset purchase agreement with an oral promise to convey a one-third ownership interest in Foster Gasoline to Xu. However, the asset purchase agreement and its amendments did not reserve a one-third ownership interest in the business to Xu. In light of this meaningful conflict, the plaintiffs were precluded from arguing that Xu reasonably relied on the alleged oral promise (see *Hong Qin Jiang v Li Wan Wu*, 179 AD3d at 1043; *Old Clinton Corp. v 502 Old Country Rd.*, 5 AD3d 363, 364-365 [2004]).

"To establish a cause of action to recover damages for conversion, a plaintiff must show legal ownership or an immediate superior right of possession to a specific identifiable thing and must show that the defendant exercised an unauthorized dominion over the thing in question to the exclusion of the plaintiff's rights" (*RD Legal Funding Partners, LP v Worby Groner Edelman & Napoli Bern, LLP*, 195 AD3d 968, 970 [2021] [internal quotation marks omitted]; see *Cusack v American Defense Sys., Inc.*, 86 AD3d 586, 587 [2011]). "Money, if

specifically identifiable, may be the subject of a conversion action’ ” (*Petrone v Davidoff Hutcher & Citron, LLP*, 150 AD3d 776, 777 [2017], quoting *Simpson & Simpson, PLLC v Lippes Mathias Wexler Friedman LLP*, 130 AD3d 1543, 1544-1545 [2015]).

Contrary to the Supreme Court’s determination, the facts warranted a judgment in Xu’s favor on the fifth cause of action, which sought to recover damages against Grace for converting funds in her and Xu’s joint bank account. “[A] statutory presumption exists in this State that a disposition of personal property (including moneys in bank accounts) to two or more persons creates in them a tenancy in common” (*Matter of Wozniak*, 244 AD2d 148, 150 [1998] [internal quotation marks omitted]; see EPTL 6-2.2 [a]). Where two people hold a joint bank account as a tenancy in common, each person has a one-half interest (see *Sweetman v Suhr*, 126 AD3d 1438, 1439 [2015]; *Sperrazza v Kail*, 267 AD2d 692, 693 [1999]). The evidence at trial demonstrated that from October 2016 to November 2016, the joint bank account held \$208,748.73 and that, within that same period, Grace withdrew or transferred \$165,000 without Xu’s authorization. The plaintiffs therefore proved that Grace invaded Xu’s interest in the joint bank account by taking \$60,625.63 more than her one-half share. Accordingly, the facts warranted a determination in favor of Xu and against Grace on the fifth cause of action in the sum of \$60,625.63 (see *Sperrazza v Kail*, 267 AD2d at 693; *Lenczycki v Shearson Lehman Hutton*, 238 AD2d 248, 248 [1997]; see generally *Hearst v Hearst*, 50 AD3d 959, 962-963 [2008]). However, the court correctly dismissed the fifth cause of action insofar as it was asserted by Foster Petroleum. The plaintiffs failed to prove that Foster Petroleum had a superior right to funds in a joint account under the names of Xu and Grace (see *Looks Great Servs., Inc. v Roosevelt*, 239 AD3d 627, 630 [2025]; *Halvatzis v Perrone*, 199 AD3d 785, 787 [2021]).

The Supreme Court properly dismissed the sixth and seventh causes of action, which respectively, sought to recover damages against Grace for unjust enrichment and money had and received. Those causes of action were duplicative of the fifth cause of action because they relied on identical allegations and sought the same relief (see *Crawford v Integrated Asset Mgt. Servs., LLC*, 236 AD3d 750, 753 [2025]; *Han v Chen*, 213 AD3d 453, 454-455 [2023]).

Further, the Supreme Court correctly dismissed the eighth and ninth causes of action, which, respectively, sought the imposition of a constructive trust on the funds Grace withdrew

and her interest in Foster Gasoline. The plaintiffs failed to establish the existence of an express or implied promise on Grace's part on which Xu relied (*see Jaybar Realty Corp. v Armato*, 175 AD3d 1391, 1393-1394 [2019]; *Mazzei v Kyriacou*, 139 AD3d 823, 824-825 [2016]; *Pergament v Roach*, 41 AD3d 569, 571-572 [2007]).

The parties' remaining contentions are without merit. Dillon, J.P., Wooten, Landicino and Golia, JJ., concur.

76 Yvette S. Zubli, Respondent, v Yosef Sakizadeh, Appellant. [— NYS3d —]—

Marriage—Postnuptial Agreement—Fairness—Circumstances of Execution
Marriage—Postnuptial Agreement—Hearing to Determine Totality of Circumstances

In an action for a divorce, the defendant appeals from (1) an order of the Supreme Court, Nassau County (Stacy D. Bennett, J.), entered May 5, 2023, and (2) a judgment of divorce of the same court entered April 5, 2024. The order, insofar as appealed from, denied, without a hearing, the defendant's motion to set aside the parties' postnuptial agreement. The judgment of divorce, insofar as appealed from, determined that there are no assets subject to equitable distribution due to the parties' postnuptial agreement.

Ordered that the appeal from the order is dismissed; and it is further,

Ordered that the judgment of divorce is reversed insofar as appealed from, on the law, the order entered May 5, 2023, is vacated, and the matter is remitted to the Supreme Court, Nassau County, for a hearing and a new determination of the defendant's motion to set aside the parties' postnuptial agreement thereafter; and it is further,

Ordered that one bill of costs is awarded to the defendant.

The parties were married on October 23, 2012, and entered into a postnuptial agreement in 2015. The agreement, *inter alia*, stated that the parties were entitled to retain their separate property, as well as any appreciation in the value of separate property or income derived therefrom, in the event of a divorce. According to the attached exhibits, the plaintiff possessed significant separate assets acquired before the marriage, including two businesses and real estate, and the defendant possessed none.

The plaintiff commenced this action for a divorce in May 2022. On December 30, 2022, the defendant moved to set aside the postnuptial agreement. The plaintiff opposed the motion. In an order entered May 5, 2023, the Supreme Court, among

other things, denied, without a hearing, the defendant's motion. In a judgment of divorce entered April 5, 2024, the court, inter alia, determined that there are no assets subject to equitable distribution due to the parties' postnuptial agreement. The defendant appeals from the order and the judgment of divorce.

The appeal from the order must be dismissed because the right of direct appeal therefrom terminated with the entry of the judgment of divorce in this action (*see Matter of Aho*, 39 NY2d 241, 248 [1976]). The issues raised on the appeal from the order are brought up for review and have been considered on the appeal from the judgment of divorce (*see* CPLR 5501 [a] [1]; *Matter of Aho*, 39 NY2d at 248).

"Judicial review of separation agreements is to be exercised sparingly, with a goal of encouraging parties to settle their differences on their own" (*Brennan-Duffy v Duffy*, 22 AD3d 699, 699 [2005], quoting *Strangolagalli v Strangolagalli*, 295 AD2d 338, 338 [2002]). However, "courts have thrown their cloak of protection over postnuptial agreements, and made it their business, when confronted, to see to it that they are arrived at fairly and equitably, in a manner so as to be free from the taint of fraud and duress, and to set aside or refuse to enforce those born of and subsisting in inequity" (*Petracca v Petracca*, 101 AD3d 695, 697-698 [2012], quoting *Christian v Christian*, 42 NY2d 63, 72 [1977]). "Thus, [i]n view of the fiduciary relationship existing between spouses, [postnuptial] agreements are more closely scrutinized by the courts than ordinary contracts" (*Kabir v Kabir*, 85 AD3d 1127, 1127 [2011], quoting *Cardinal v Cardinal*, 275 AD2d 756, 757 [2000]).

"An agreement between spouses which is fair on its face will be enforced according to its terms unless there is proof of unconscionability, or fraud, duress, overreaching, or other inequitable conduct" (*McKenna v McKenna*, 121 AD3d 864, 865 [2014]; *see Rauso v Rauso*, 73 AD3d 888, 889 [2010]). "To warrant equity's intervention, no actual fraud need be shown, for relief will be granted if the settlement is manifestly unfair to a spouse because of the other's overreaching" (*O'Malley v O'Malley*, 41 AD3d 449, 451 [2007] [internal quotation marks omitted]). "A motion to set aside an agreement between spouses may be denied without a hearing if the agreement is fair on its face" (*id.*).

Here, it cannot be said that the postnuptial agreement is fair on its face. It appears from the record that the defendant has received no benefit from the agreement (*see Barclay v Barclay*, 151 AD3d 676, 678 [2017]; *O'Malley v O'Malley*, 41 AD3d at

452). Moreover, the defendant has set forth facts that warrant an examination into the circumstances under which the agreement was executed (*see Barclay v Barclay*, 151 AD3d at 678; *O'Malley v O'Malley*, 41 AD3d at 452). Namely, the defendant has alleged that he speaks limited English, that his attorney did not review the agreement with him and was later disbarred for fraud, that the defendant believed he was signing a business agreement, and that he would not have signed the agreement if he knew what the document actually was. In opposition, the plaintiff did not eliminate these triable issues of fact.

A reviewing court examining a challenge to a postnuptial agreement will view the agreement in its entirety and under the totality of the circumstances (*see Reiss v Reiss*, 21 AD3d 1073, 1074 [2005]). Without a hearing to determine the totality of the circumstances, including the extent of the parties' assets, and the circumstances surrounding the execution of the agreement, it cannot be determined on this record whether or not equity should intervene to invalidate the parties' agreement (*see O'Malley v O'Malley*, 41 AD3d at 452).

Accordingly, the matter must be remitted to the Supreme Court, Nassau County, for a hearing and a new determination of the defendant's motion to set aside the postnuptial agreement thereafter. Barros, J.P., Warhit, Landicino and Love, JJ., concur.

THIRD DEPARTMENT, APRIL, 2026

(April 2, 2026)

1 The People of the State of New York, Respondent, v Johnny Oquendo, Appellant. [— NYS3d —]

Crimes—Verdict—Sufficiency and Weight of Evidence—Murder, Concealment of Human Corpse, and Criminal Obstruction of Breathing or Blood Circulation

Crimes—Fair Trial—Compelling Circumstantial Evidence Linking Defendant Stepfather to Victim's Death

Crimes—Proof of Other Crimes—Probative Value Outweighed Prejudice in Admitting DNA Evidence Present on Murder Victim's Vulvar Swabs

Clark, J. Appeals (1) from a judgment of the Supreme Court (Andrew Ceresia, J.), rendered March 12, 2018, in Rensselaer County, upon a verdict convicting defendant of the crimes of murder in the second degree, concealment of a human corpse and criminal obstruction of breathing or blood circulation, and (2) by permission, from an order of the County Court of Rensselaer County (Jennifer Sober, J.), entered December 27, 2023,

which denied defendant's motion pursuant to CPL 440.10 to vacate the judgment of conviction, without a hearing.

In December 2015, a suitcase containing the body of a deceased woman (hereinafter the victim) was found in the Hudson River near the City of Albany. After police confirmed that the victim was the subject of a missing persons case out of the City of Troy, Rensselaer County, defendant was arrested and charged by indictment with murder in the second degree, strangulation in the first degree and concealment of a human corpse. The strangulation charge was reduced to criminal obstruction of breathing or blood circulation during pretrial proceedings. A jury trial thereafter ensued and defendant was convicted of all counts. Supreme Court (Ceresia, J.) sentenced defendant, as a second felony offender, to a prison term of 25 years to life on the murder conviction, to run consecutively with a prison term of 2 to 4 years on the conviction of concealment of a human corpse and concurrently with a one-year jail term on the conviction of criminal obstruction of breathing or blood circulation. County Court (Sober, J.) thereafter summarily denied defendant's pro se CPL 440.10 motion to set aside the verdict. Defendant appeals from the judgment of conviction and, by permission, the denial of his CPL article 440 motion.

Defendant contends that the verdict is not supported by legally sufficient evidence and is contrary to the weight of the evidence, arguing that the proof at trial did not establish his identity as the perpetrator of the crimes charged. We disagree. "[I]n conducting a legal sufficiency analysis, this Court views the evidence in the light most favorable to the People and evaluates whether there is any valid line of reasoning and permissible inferences which could lead a rational person to the conclusion reached by the jury on the basis of the evidence at trial and as a matter of law satisfy the proof and burden requirements for every element of the crimes charged" (*People v James*, 245 AD3d 1102, 1104 [3d Dept 2026] [internal quotation marks and citations omitted]; see *People v Bleakley*, 69 NY2d 490, 495 [1987]). By contrast, when conducting a weight of the evidence analysis, "this Court must first determine whether, based on all the credible evidence, a different finding would not have been unreasonable and then weigh the relative probative force of conflicting testimony and the relative strength of conflicting inferences that may be drawn from the testimony to determine if the verdict is supported by the weight of the evidence" (*People v Mack*, 244 AD3d 1289, 1290 [3d Dept 2025] [internal quotation marks and citations omitted]; see *People v Bleakley*, 69 NY2d at 495). "To be satisfied that the

jury was justified in finding guilt beyond a reasonable doubt in a circumstantial evidence case,” such as the one here, we must find that “the inference of guilt is the only one that can fairly and reasonably be drawn from the facts, and that the evidence excludes beyond a reasonable doubt every reasonable hypothesis of innocence” (*People v Baque*, 43 NY3d 26, 30 [2024] [internal quotation marks and citation omitted]; accord *People v Bohn*, 242 AD3d 1357, 1366 [3d Dept 2025]).

As charged to the jury, “[a] person is guilty of murder in the second degree when . . . [w]ith intent to cause the death of another person, he [or she] causes the death of such person” (Penal Law § 125.25 [1]). “A person is guilty of criminal obstruction of breathing or blood circulation when, with intent to impede the normal breathing or circulation of the blood of another person, he or she . . . applies pressure on the throat or neck of such person” (Penal Law § 121.11 [a]). Finally, “[a] person is guilty of concealment of a human corpse when, having a reasonable expectation that a human corpse or a part thereof will be produced for or used as physical evidence in . . . an official proceeding; . . . an autopsy as part of a criminal investigation; or . . . an examination by law enforcement personnel as part of a criminal investigation; such person, alone or in concert with another, conceals, alters or destroys such corpse or part thereof with the intent to prevent its production, use or discovery” (Penal Law § 195.02).

The trial evidence established that the victim was last seen alive in the City of Troy on the evening of November 22, 2015. A suitcase containing her remains was subsequently found on the bed of the Hudson River near the City of Albany a little over a month later. As for the circumstances of the victim’s disappearance, the People elicited testimony from the victim’s former coworker, who explained that they worked together at a restaurant in the Lansingburgh neighborhood of Troy in November 2015 and that he often drove her back to her residence after their shifts ended. On the evening of November 22, 2015, however, the victim asked the coworker to drop her off several blocks down from where she lived near downtown Troy, testifying that he did so around 9:00 p.m. and that he never saw her again after that date. Although the coworker was aware that the victim was in a physically tumultuous relationship with another woman at the time of her disappearance, he did not observe any bruises on her body when he dropped her off that evening.

In an attempt to link defendant, the victim’s stepfather, to her disappearance, the People presented evidence that defend-

ant lived in a building on Third Street near downtown Troy on the evening of November 22, 2015, and that the last outbound call placed from the victim's phone number was to defendant. The call was made at 9:10 p.m. on the evening of the victim's disappearance and lasted for a total of eight seconds. All calls received by the victim's phone thereafter went to voicemail. The People also called three occupants of the first-floor apartment of the building in which defendant resided in November 2015 to testify about an incident that occurred at the residence on the evening of the victim's disappearance. In that regard, one of the first-floor occupants (hereinafter witness 1) testified that, while she was attempting to fall asleep around 10:00 p.m. on November 22, 2015, she heard a man and a woman arguing in an upstairs apartment. She explained that the second-floor apartment was vacant, and defendant lived in the third-floor apartment. Witness 1 thereafter "heard a loud scream and a bump" that sounded like "a weight being dropped on the ground." She did not subsequently hear any additional arguing in the upstairs apartment after that sound. Around 11:00 p.m., while witness 1 was watching television in the living room with her roommates, she heard "bumps coming down the stairs like someone [was] carrying something heavy" and then "something large fell and hit [the] door." Two other occupants of the first-floor apartment (hereinafter witnesses 2 and 3) also described hearing a crashing sound in the stairwell of the building around 11:00 p.m. on November 22, 2015, and that something "large" fell and hit their front doors, causing the doors to bow inward.¹ After hearing the sound of footsteps rushing down the stairs, witnesses 2 and 3 opened their apartment door and encountered defendant in the hallway with a "very large" roller suitcase; he was attempting to fix a broken stair banister. Witness 2 described the suitcase as "[p]urplish blue" in color and witness 3 described it as dark purple. Witness 2 testified that, when he asked defendant if he needed any help, defendant "wouldn't face [him]," was "being dismissive" and was "shooing [him] away." Defendant then left the building with the suitcase and witness 3 described that defendant "struggled" to get it outside.

The People also presented evidence of surveillance video footage depicting an individual walking with a dark roller suitcase throughout downtown Troy between 11:15 p.m. and 11:30 p.m. on November 22, 2015, shortly after defendant had been seen leaving his building on Third Street with a suitcase.

1. Like witness 1, witness 3 also recalled having previously heard a man and a woman arguing upstairs around 9:30 p.m. or 10:00 p.m. that evening.

The individual depicted in the footage was wearing a dark jacket with a hoodie pulled over his or her head. Notably, around 11:25 p.m., a surveillance camera captured footage of a person wearing what appears to be the same clothing pulling a suitcase along River Street toward the intersection with Third Street and then crossing River Street in the direction of the Hudson River. Approximately 20 minutes later, a camera at the intersection of Third Street and Congress Street in downtown Troy captured footage of an individual in similar clothing walking south on Third Street—in the direction of defendant's apartment—with no suitcase in tow.

During the investigation into the victim's disappearance, police located a strip of grass "just along the edge of the seawall" in Riverfront Park in downtown Troy where "some vegetation . . . had been matted down" and "impressions [were] in the dirt." A few days later, while performing a grid search of the Hudson River, police located a suitcase handle on the riverbed in an area north of Albany.² After a suitcase was spotted in the river near the Dutch Apple Cruise landing in downtown Albany, investigators focused their search efforts further south from Troy. On December 30, 2015, while performing a grid search of the riverbed in the vicinity of Albany, police divers located and pulled from the river a black suitcase that was missing its handle. The victim's deceased body was found naked and folded into the suitcase. At trial, defendant's ex-girlfriend identified the suitcase containing the victim's remains as belonging to defendant, explaining that she lived with defendant in the third-floor apartment in Troy from July 2015 until November 20, 2015, and had seen the suitcase on several occasions during that period. The ex-girlfriend, who moved out of the subject apartment only two days prior to the evening in question, also confirmed that the second-floor apartment in defendant's building was vacant in late November 2015, that defendant owned a coat like the one depicted in the surveillance footage from the evening of November 22, 2015, and that he often wore a do-rag or a hoodie when outside in the fall months.

As for the physical evidence in this case, Michal Sikirica, the Rensselaer County Medical Examiner, testified that he performed an autopsy of the victim and that she presented with several external and internal injuries, including bruising and swelling around the right side of her face, a right eye that was bruised and swollen shut, brown bruises around her chin, small bruises along the right upper chest area, and small hemorrhages along the soft tissue of the right chest wall, the

2. The City of Troy is north of the City of Albany.

left portion of the hyoid bone, and beneath the scalp. Sikirica explained that the bruising along the side of the hyoid bone was indicative of “blunt force or compressive injury [having been] applied” to that area and that the bruising on the side of the victim’s face was consistent with blunt force trauma. He further testified that there was a plastic shopping bag from Hannaford grocery store “fastened around [the victim’s] neck,” with the “lower edge . . . rolled tightly into almost a rope-like configuration” and “knotted with that rolled edge.” When Sikirica removed the bag from the victim’s neck, he observed furrowed impressions in the skin demonstrating that the bag was tied “very tight[ly].” Sikirica opined, within a reasonable degree of medical certainty, that the cause of the victim’s death was “[b]lunt force trauma to the head with asphyxia due to suffocation due to restriction of ventilation.” Sikirica further testified that he performed a sexual assault kit on the victim and that there were no signs that the victim had been sexually assaulted. Nevertheless, the People used the findings from the sexual assault kit in an attempt to establish that defendant had access to the victim around the time of her death, proffering evidence that “sperm” was present on the vaginal, cervical and vulvar swabs obtained from the victim and that defendant and “his biological paternal relatives c[ould] be included as possible contributors” to the YSTR DNA profile³ of the sperm on such swabs. An STR DNA analysis of the sperm on the vulvar swabs—which can generate more precise results than YSTR DNA testing—demonstrated a match to defendant, with the forensic analyst placing “the probability of selecting an unrelated individual” as being “less than one in 320 billion.” A mixture profile of STR DNA was also found on the nonsperm fraction of the vulvar swab and defendant was identified as the major contributor. The sperm fraction of the vaginal swabs contained a mixture profile of STR DNA, which “was consistent with DNA from [the victim] admixed with DNA from at least one additional donor, at least one of which [wa]s male,” but there was insufficient information to make a further comparison.

In defense of the charges, defense counsel elicited testimony and presented evidence in support of a theory that someone else was responsible for the victim’s death. To that end, when

3. YSTR DNA testing is a method that analyzes the Y chromosome. A match utilizing such method establishes only that a particular male cannot be “exclud[ed] . . . from the pool of contributors with the DNA characteristics identified through the YSTR DNA test” (*People v Wright*, 25 NY3d 769, 776 [2015]).

cross-examining the People's witnesses, defense counsel elicited testimony demonstrating that no forensic evidence had been found to link defendant to the suitcase, its handle or the plastic bag tied around the victim's neck. Nor were any blood remnants located in defendant's apartment during the execution of two search warrants at the premises following the victim's disappearance.⁴ Defense counsel also vigorously challenged the credibility of defendant's ex-girlfriend, who had identified the suitcase in which the victim was found as defendant's, and emphasized to the jury that the two occupants of the first-floor apartment who saw defendant with a suitcase in the common area of the first floor around 11:00 p.m. on the evening of the victim's disappearance described the suitcase as purple instead of black like the one containing the victim's body.

Defense counsel also called several witnesses to the stand at trial, including a police detective involved in the investigation into the victim's disappearance. The police detective revealed that, during the investigation, the police department received a tip that someone had seen the victim standing on the corner of Fourth Street and Tyler Street in the City of Troy at 11:30 p.m. on November 22, 2015—i.e., approximately 30 minutes after witnesses saw defendant leave his apartment building in Troy with a suitcase. Defense counsel also elicited testimony from a witness whose brother had previously dated the victim, who claimed that he saw the victim alive and talking to a man on the corner of Third Street and Liberty Street in Troy around 11:30 p.m. on November 22, 2015. However, on cross-examination, this witness conceded that he could have “[p]ossibly” made this observation prior to 11:00 p.m., that it was dark outside, that his brother had dated the victim several years prior, and that he observed the interaction from across the street. Another witness recalled seeing the victim on the morning of November 21, 2015, testifying that she was standing with a man on the corner of Fourth Street and Washington Street in the City of Troy, that she was crying, and that he heard her state to the man that she was standing next to: “[p]lease don't bring me back there [be]cause he's gonna kill me.” This witness further testified that a woman he was with that morning placed her hand on the victim's arm, told her not to worry, and that “God w[ould] be with [her],” and that the man who was with the victim responded by stating: “[a] lot sooner than you think.” Defense counsel also elicited testimony that, shortly after the victim's disappearance, contents from

4. Police did find plastic Hannaford shopping bags in defendant's apartment during the execution of the search warrants.

her purse were found on the sidewalk on Fourth Street and Washington Street, approximately a block away from her apartment.

When viewing the foregoing evidence in the light most favorable to the People, there is a “valid line of reasoning and permissible inferences” from which the jury could conclude beyond a reasonable doubt that defendant committed the crimes charged (*People v Stanley*, 246 AD3d 1218, 1219 [3d Dept 2026]; see *People v Dorvil*, 234 AD3d 1106, 1110 [3d Dept 2025], *lv denied* 44 NY3d 982 [2025]; *People v Grady*, 233 AD3d 1369, 1371-1372 [3d Dept 2024], *lv denied* 43 NY3d 963 [2025]). Accordingly, the verdict is supported by legally sufficient evidence. Turning to the weight of the evidence, we recognize that the case against defendant was entirely circumstantial and that defendant proffered evidence in support of a theory that someone else killed the victim. Had the jury credited defendant’s theory, a different verdict would not have been unreasonable. However, as noted by the Court of Appeals, “[c]ircumstantial evidence . . . may be stronger than direct evidence” in certain instances (*People v Geraci*, 85 NY2d 359, 369 [1995]; see *People v Cleague*, 22 NY2d 363, 367 [1968]), and, in this case, the People presented compelling circumstantial evidence linking defendant to the victim’s death.

To that end, in addition to eliciting testimony that the victim had been dropped off near downtown Troy in the general vicinity of defendant’s apartment around 9:00 p.m. on the evening of her disappearance, the proof demonstrated that the last outbound call placed from her phone was at 9:10 p.m. that evening to defendant. After the victim had been dropped off by her coworker in the vicinity of defendant’s apartment and placed a call to defendant, an occupant of the first-floor apartment of the building in which defendant resided recalled hearing a man and a woman arguing in defendant’s apartment between 10:00 p.m. and 11:00 p.m., followed by a loud scream and a crashing sound. Thereafter, around 11:00 p.m., three occupants of the first-floor apartment independently testified that they heard a loud crashing sound coming down the stairs and that an object hit the front doors to their apartment, causing them to bow inward. When two of the first-floor occupants went to investigate the source of the noise, they observed defendant standing in the hallway next to a large rolling suitcase, attempting to fix a broken stair banister. Defendant was then observed struggling to take the suitcase outside, permitting a reasonable inference that the suitcase contained something heavy. Shortly after defendant was seen leaving his apartment

building with a suitcase, surveillance footage captured an individual wearing a dark coat with a hoodie over his or her head walking in downtown Troy in the direction of the Hudson River with a rolling suitcase in tow. An individual wearing the same clothing was later captured walking back in the direction of defendant's apartment on Third Street without a suitcase around 11:45 p.m. that night. Although the suitcase containing the victim's remains was eventually located on the riverbed near Albany, the ex-girlfriend identified it as belonging to defendant and the matted-down area of grass and impressions in the dirt along the edge of the seawall in Riverfront Park in Troy permitted a reasonable inference that the suitcase had been deposited into the Hudson River from Troy.

When viewing the evidence in “a neutral light and weighing the ‘relative probative force of conflicting testimony and the relative strength of conflicting inferences that may be drawn [therefrom]’” (*People v Bohn*, 242 AD3d at 1366, quoting *People v Sanchez*, 32 NY3d 1021, 1023 [2018]), we are satisfied that defendant's identity as the perpetrator of the victim's homicide is “the only [inference] that can fairly and reasonably be drawn from the facts” and that the evidence “excludes beyond a reasonable doubt every reasonable hypothesis of innocence” (*People v Baque*, 43 NY3d at 30 [internal quotation marks and citation omitted]; see *People v Bohn*, 242 AD3d at 1366). Additionally, the fact that the victim was found with a Hannaford shopping bag wrapped around her neck and that she died as the result of “asphyxia due to suffocation due to restriction of ventilation” amply supports the jury's finding that the killing was intentional (see *People v Cartagena*, 149 AD3d 1518, 1518-1519 [4th Dept 2017], *lv denied* 29 NY3d 1124 [2017]; *People v Ryder*, 146 AD3d 1022, 1024 [3d Dept 2017], *lv denied* 29 NY3d 1086 [2017]). Accordingly, the verdict on the murder charge is not against the weight of the evidence. The convictions on the concealment of a human corpse and criminal obstruction of breathing or blood circulation charges are also supported by the weight of the evidence (see Penal Law §§ 195.02, 121.11; *People v Harris*, 203 AD3d 1320, 1327-1328 [3d Dept 2022], *lv denied* 38 NY3d 1033 [2022]; *People v McClendon*, 199 AD3d 1233, 1236 [3d Dept 2021]).

Next, we are unpersuaded by defendant's contention that he was deprived of a fair trial when the People twice elicited testimony from witness 3 that, during a second interaction with defendant approximately a week after the victim's disappearance, defendant asked whether police had been by the residence looking for him and stated that he “kinda messed up

and needed to get a lawyer.” Defendant argues that the testimony about him stating that he needed a lawyer after the victim’s disappearance was improper and unduly prejudicial. Under the circumstances of this case, we disagree. Although defendant correctly notes that “[a] defendant’s invocation of his or her right . . . to counsel during a custodial interrogation may not be used against him or her as part of the People’s case-in-chief” (*People v Serrano*, 200 AD3d 1340, 1346 [3d Dept 2021], *affd* 38 NY3d 1180 [2022]; *see People v Al-Kanani*, 26 NY2d 473, 478 [1970]), such testimony did not concern statements regarding the invocation of the right to counsel while in custody (*compare People v Al-Kanani*, 26 NY2d at 478; *People v Harris*, 177 AD3d 1199, 1204-1205 [3d Dept 2019], *lv denied* 35 NY3d 970 [2020]; *People v Johnson*, 70 AD3d 1188, 1190-1191 [3d Dept 2010]; *People v Murphy*, 51 AD3d 1057, 1058 [3d Dept 2008], *lv denied* 11 NY3d 792 [2008]; *People v Knowles*, 42 AD3d 662, 665 [3d Dept 2007]). Moreover, any prejudice to defendant from the testimony was appropriately mitigated by Supreme Court, which, in an exercise of caution, immediately sustained defense counsel’s objections in response to such testimony, struck the entirety of the witness’ testimony about his second interaction with defendant from the record and directed the jury to disregard it. Although defendant faults Supreme Court for failing to give a curative instruction directing the jury not to draw an adverse inference against him from his statement about needing an attorney, he did not ask for such a curative instruction, rendering his challenge to the failure to give one unpreserved (*see People v Bonaparte*, 196 AD3d 866, 869 [3d Dept 2021], *lv denied* 37 NY3d 1025 [2021]; *People v Hilts*, 187 AD3d 1408, 1416 n 9 [3d Dept 2020], *lv denied* 36 NY3d 973 [2020]). Under the circumstances of this case, we are satisfied that Supreme Court adequately mitigated any prejudice to defendant resulting from the testimony that he told witness 3 that he needed a lawyer after the victim’s disappearance and that he was not deprived of a fair trial by the elicitation of such testimony (*compare People v Lentini*, 163 AD3d 1052, 1055 [3d Dept 2018];⁵ *People v Johnson*, 70 AD3d at 1190-1191; *People v Knowles*, 42 AD3d at 665).

Defendant additionally argues that the DNA evidence establishing that his sperm was present on the vulvar swabs obtained during the victim’s sexual assault examination constituted improper *Molineux* evidence and should not have been

5. Defendant’s contention that *People v Lentini* (163 AD3d 1052 [2018]) is controlling on this issue and requires reversal is based upon an overly broad reading of that decision.

admitted into evidence at trial. We disagree. Under the *Molineux* rule, “evidence of a defendant’s prior bad acts or uncharged crimes is generally inadmissible where its purpose is only to show a defendant’s bad character or propensity towards crime” (*People v Bohn*, 242 AD3d at 1367 [internal quotation marks and citations omitted]; see *People v Weinstein*, 42 NY3d 439, 444 [2024]). Contrary to defendant’s contention, the DNA evidence pertaining to the vulvar swabs did not constitute *Molineux* evidence, as the People did not use the evidence to imply that defendant had committed a prior bad act or an uncharged sex crime (see *People v Brewer*, 28 NY3d 271, 276 [2016]; *People v Everett*, 231 AD3d 1296, 1299 n 3 [3d Dept 2024], *lv denied* 42 NY3d 1052 [2024]). Indeed, defense counsel revealed during his opening statement that defendant and the victim had a consensual sexual relationship and the People did not refute that proposition or imply otherwise, instead using the evidence to establish defendant’s access to the victim before her death.

We are similarly unpersuaded by defendant’s argument that such evidence was irrelevant to show access in the absence of direct testimony demonstrating that the sperm was deposited in proximity to the date of the victim’s disappearance. “Under general evidentiary principles, all relevant evidence is admissible unless its admission violates some exclusionary rule” (*People v Bohn*, 242 AD3d at 1368-1369 [internal quotation marks and citations omitted]). “Evidence is relevant if it has *any* tendency in reason to prove the existence of any material fact” (*People v Harris*, 26 NY3d 1, 5 [2015] [internal quotation marks and citation omitted and emphasis added]). “[E]ven where relevant evidence is admissible, it may still be excluded in the exercise of the trial court’s discretion if its probative value is substantially outweighed by the potential for prejudice” (*id.* [internal quotation marks and citation omitted]). Given that the victim was found in the suitcase naked, we agree with Supreme Court that the jury could reasonably infer that defendant’s sperm had been deposited in proximity to the date of the victim’s disappearance and, thus, that it was relevant to show access (see generally *People v Romualdo*, 37 NY3d 1091, 1093 [2021]; compare *People v Animshaun*, 186 AD3d 497, 497 [2d Dept 2020], *lv denied* 35 NY3d 1111 [2020]; *People v Mount*, 285 AD2d 899, 900 [3d Dept 2001], *lv denied* 97 NY2d 642 [2001]). Moreover, the court appropriately weighed the probative value of such evidence against the risk of prejudice in admitting such evidence.

We are also unpersuaded by defendant’s argument that the

manner in which the prosecutor characterized the DNA evidence deprived him of a fair trial. In that regard, defendant highlights that, during his opening statement and again on summation, the prosecutor inaccurately stated that defendant's sperm was found "inside" of the victim, emphasizing that the DNA evidence supported finding only that his sperm was found "on" the victim's vulva and not "in" her vagina. Although the prosecutor's language characterizing the DNA evidence was imprecise—as the YSTR DNA profile obtained from the vaginal and cervical swabs established only that defendant or his biological paternal relatives "c[ould] be included as possible contributors" to the sperm on those swabs—defendant was not deprived of a fair trial as a result. Indeed, this was not a sex crime prosecution, the charges against defendant did not require the People to establish penetration, and the distinction about defendant's sperm being "in" or "on" the victim's vagina was not crucial to establishing access. Contrary to defendant's suggestion, the Court of Appeals' decision in *People v Wright* (25 NY3d 769 [2015]) does not support reversal on this basis. Unlike in *People v Wright*, here there was STR DNA evidence in the sperm on the victim's vulvar swabs that matched defendant's DNA profile and a DNA analyst testified that the statistical probability of selecting an unrelated individual was "less than one in 320 billion" (see *People v Ramsaran*, 29 NY3d 1070, 1071 [2017]). In other words, there was DNA evidence in this case that directly linked defendant to the victim, rendering the imprecise language used by the prosecutor substantially less prejudicial than the statements made by the prosecutor in *People v Wright* (25 NY3d at 780-785). There was also more compelling proof connecting defendant to the victim's murder, independent of the DNA evidence, than there was in *People v Wright*. On this record, we conclude that the prosecutor's language describing the DNA evidence did not deprive defendant of a fair trial (see *People v Longo*, 212 AD3d 471, 472 [1st Dept 2023], *lv denied* 40 NY3d 935 [2023]; *People v Gertz*, 204 AD3d 1166, 1171 [3d Dept 2022], *lv denied* 38 NY3d 1070 [2022]; compare *People v Wright*, 25 NY3d at 780-785).

Turning to the appeal from the denial of defendant's CPL 440.10 motion, he argues that County Court erred in denying the motion without a hearing on his claim of ineffective assistance of counsel (see CPL 440.10 [1] [h]).⁶ However, inasmuch as defendant's nonrecord-based claim of ineffective assistance

6. On appeal, defendant challenges the denial of his CPL 440.10 motion only as it pertains to his ineffective assistance of counsel claim raised therein, rendering the other claims he asserted in the motion abandoned (see *People v*

(n. cont'd)

of counsel is predicated solely upon conclusory and unsubstantiated allegations, he did not demonstrate his entitlement to a hearing and County Court did not abuse its discretion in summarily denying the motion (*see* CPL 440.30 [4] [d]; *People v Wright*, 27 NY3d 516, 520 [2016]; *People v Carota*, 235 AD3d 1069, 1072 [3d Dept 2025], *lv denied* 43 NY3d 962 [2025]; *People v Hooker*, 230 AD3d 1465, 1468 [3d Dept 2024]). Defendant's remaining contentions, to the extent not expressly addressed, have been considered and found lacking in merit.

Garry, P.J., Pritzker, McShan and Corcoran, JJ., concur. Ordered that the judgment and the order are affirmed.

2 The People of the State of New York, Respondent, v Leroy Bowden, Also Known as Bar and Barshawn, Appellant. [253 NYS3d 811]—

Crimes—Accomplices—Providing Handgun That Codefendant Used to Shoot Victim—Weight of Evidence

Crimes—Verdict—Weight of Evidence—Assault, Gang Assault, Burglary, and Possession of Weapon

Fisher, J. Appeals (1) from a judgment of the Supreme Court (Kathleen Hogan, J.), rendered August 25, 2020, in Schenectady County, upon a verdict convicting defendant of the crimes of assault in the first degree, gang assault in the second degree, burglary in the second degree (four counts) and criminal possession of a weapon in the second degree (two counts), and (2) by permission, from an order of the County Court of Schenectady County (Matthew Sypniewski, J.), entered April 15, 2024, which denied defendant's motion pursuant to CPL 440.10 to vacate the judgment of conviction, without a hearing.

In the early morning hours of December 26, 2018, the victim was shot during a physical altercation inside the entrance hallway of an apartment located in the City of Schenectady. The ensuing police investigation revealed that the victim had a heated exchange with a man who left the premises and returned with a group of men, leading to a physical fight and the shooting. The victim sustained nonfatal wounds and identified one of the men in the group, which led to the discovery of the remaining individuals—including defendant, who had been seen earlier that evening at a nearby residence with a semiautomatic handgun. Although the police did not recover a firearm in connection with this shooting, they found a single shell casing which was determined to have been ejected from a semiautomatic weapon.

Hoffler, 74 AD3d 1632, 1633 n 2 [3d Dept 2010], *lv denied* 17 NY3d 859 [2011]).

Thereafter, defendant and two codefendants were charged by indictment with attempted murder in the second degree (count 1), assault in the first degree (count 2) (*see* Penal Law § 120.10 [1]), gang assault in the second degree (count 3) (*see* Penal Law § 120.06), four counts of burglary in the second degree (counts 4-7) (*see* Penal Law § 140.25 [1] [a]-[d]) and two counts of criminal possession of a weapon in the second degree (counts 8-9) (*see* Penal Law § 265.03 [1] [b]; [3]).¹ The People alleged that defendant was an accomplice to counts 1-7 because he provided the handgun that his codefendant used to shoot the victim, and was the principal actor to counts 8-9 for being the person who initially possessed the handgun. Following a jury trial, defendant was acquitted on count 1 and convicted of the remaining charges. Supreme Court (Hogan, J.) sentenced him, as a second felony offender, to 20 years in prison, to be followed by five years of postrelease supervision, for his conviction of assault in the first degree, and to lesser concurrent terms of incarceration on the remaining counts. Defendant then filed a CPL article 440 motion to vacate his conviction, which County Court (Sypniewski, J.) denied, without a hearing. Defendant appeals from the judgment of conviction and, by permission, the order denying his CPL article 440 motion.

Defendant contends that the verdict is not supported by legally sufficient evidence and that it is contrary to the weight of the evidence because the People failed to proffer any competent evidence that he provided the handgun used by his codefendant in the shooting (counts 2-7) or that the handgun he was seen with earlier that evening was operable (counts 8-9). “In conducting a legal sufficiency analysis, we view the facts in the light most favorable to the People and examine whether there is a valid line of reasoning and permissible inferences from which a rational jury could have found the elements of the crime proved beyond a reasonable doubt” (*People v Smith*, 237 AD3d 1367, 1369 [3d Dept 2025] [internal quotation marks and citations omitted], *lv denied* 43 NY3d 1059 [2025]). Whereas in reviewing the weight of the evidence, “we view the evidence in a neutral light and determine first whether a different verdict would have been unreasonable and, if not, weigh the relative probative force of conflicting testimony and the relative strength of conflicting inferences that may be drawn from the testimony to determine if the verdict is supported by the weight of the evidence” (*People v Warr*, 237 AD3d 1262, 1263 [3d Dept 2025] [internal quotation marks and cita-

1. Although jointly charged, defendant successfully moved for a separate trial.

tions omitted], *lv denied* 43 NY3d 1059 [2025]). “Since there is no legal distinction between criminal liability as a principal or as an accessory to a crime, when one person engages in conduct which constitutes an offense, another person is criminally liable for such conduct when, acting with the mental culpability required for the commission thereof, he or she solicits, requests, commands, importunes, or intentionally aids such person to engage in such conduct” (*People v Rivera*, 212 AD3d 942, 945 [3d Dept 2023] [internal quotation marks and citations omitted], *lv denied* 39 NY3d 1113 [2023]).

As charged to the jury, counts 2 through 7 required the People to prove that defendant either committed the offense or intentionally aided another person to commit such offense (*see* Penal Law § 20.00), with an element of each count including a deadly weapon or dangerous instrument (counts 2, 4 and 6), serious physical injury to another (count 3), physical injury to any person who is not a participant in the crime (count 5), or the display of what appeared to be a firearm (count 7). Relating to counts 8 and 9, the People were required to prove that defendant possessed any loaded firearm outside of his home or place of business (count 8), or with intent to use such firearm unlawfully against another (count 9). Pertinently, to establish criminal possession of a weapon under Penal Law § 265.03, “the People must prove that the weapon is operable” (*People v Longshore*, 86 NY2d 851, 852 [1995]; *see People v Taylor*, 207 AD3d 806, 808 [3d Dept 2022], *lv denied* 39 NY3d 942 [2022]).

The evidence at trial established that the victim was watching his and his former girlfriend’s son at her apartment while she went out with friends. The former girlfriend testified that she went to a local bar with one of the codefendants, where his mother and brother were with defendant and the other codefendant. The group left the bar and returned to the mother’s residence, where two witnesses testified that they observed defendant with a semiautomatic handgun. One of the codefendants left the residence to drop off the former girlfriend at her apartment, where he ended up getting into a verbal argument with the victim. Both men were making threats to the other before the former girlfriend split them up and took the victim inside. According to the victim, the codefendant threatened to come back to shoot him. The former girlfriend testified that she called the other codefendant to apologize and “defuse anything from going further,” but that she ended the phone call after the victim began yelling threats into the phone and began physically “tussling” with her over the phone. The codefendant testified that he was still at his mother’s residence when the former

girlfriend called him “in disarray,” and that he decided to walk to her apartment because it sounded like she was “having a problem.” He further testified that her apartment was only about a minute away and that he left without speaking to anyone because he was still on the phone.

The video surveillance footage depicts the codefendants and the brother walking down the sidewalk and stopping in front of the apartment—gesturing to the apartment while one of the codefendants appears to be on his phone. Defendant arrived less than a minute later and walked up a neighbor’s driveway before reaching the group, moving out of frame. The codefendants then approached the apartment by walking through a gate and disappeared off screen. A short time later, defendant and one of the codefendants separately reappeared and converged on the sidewalk with the brother. Defendant and the codefendant brushed into each other as defendant appeared to pull his hand out of his sweatshirt/jacket pocket and extend his arm toward the codefendant—who immediately walked back toward the apartment and off screen again. Concurrent with events from the footage, the victim testified that he opened the apartment door, taunted the group to come fight him and was charged by one of the codefendants followed by two other men. He testified that his struggle with one of the codefendants spilled into the hallway as the former girlfriend tried to break up the fight, which is when he pulled out his utility knife and began swinging it defensively—stabbing the codefendant but accidentally striking the former girlfriend. The victim was then shot by the codefendant who dropped off the former girlfriend and brushed up against defendant, and the group ran out of the hallway. Law enforcement officers testified as to their response and investigation, including that the recovered shell casing was determined to have come from a semiautomatic weapon and that defendant did not possess the requisite permit for a handgun.

Based on the foregoing, when viewing this evidence in a light most favorable to the People, we conclude that a valid line of reasoning existed through which the jury could have found that defendant’s conduct met the elements of each crime for which he was convicted (*see People v Gaylord*, 224 AD3d 1169, 1172 [3d Dept 2024], *lv denied* 42 NY3d 926 [2024]). Defendant was the only individual seen before the shooting with a gun—a weapon consistent with the shell casing found at the scene. The video evidence also confirmed his presence with the codefendants outside the apartment before the shooting, coming together closely with the codefendant who ultimately shot the

victim. Drawing all inferences in favor of the People and their theory that this brief huddle was when defendant provided his gun to the shooter, the verdict is supported by legally sufficient evidence (see *People v Durham*, 226 AD3d 1099, 1101 [3d Dept 2024], *lv denied* 42 NY3d 926 [2024]; *People v Rivera*, 212 AD3d at 946-947).

But when viewing the evidence in a neutral light, we cannot say that the weight of the evidence supports the verdict (see *People v Spencer*, 152 AD3d 863, 866 [3d Dept 2017], *lv denied* 30 NY3d 983 [2017]). The crux of the People's accomplice theory supporting counts 2 through 7 against defendant was that the video surveillance footage depicted the gun being handed off before the shooting. However, the video footage is dark and pixelated, and the brother's body obscures part of the interaction, making it impossible to discern whether defendant and the codefendant exchanged a handgun—let alone anything—without resorting to speculation, which cannot be the basis for defendant's guilt beyond a reasonable doubt (see *People v Goodman*, 231 AD3d 1366, 1369 [3d Dept 2024]). Nor is there anything in the record to suggest that this codefendant was aware that defendant had a gun, as none of the witnesses testified that he was present when defendant had displayed the gun at the mother's residence. To this point, the codefendant's lack of knowledge combined with the testimony that he threatened to return and shoot the victim creates the reasonable inference that he already had access to a gun of his own. Accordingly, given the lack of record support to establish beyond a reasonable doubt that defendant solicited, requested, commanded, importuned or intentionally aided another individual to possess and use a firearm in commission of the offenses charged under counts 2 through 7, we reverse these convictions as against the weight of the evidence (see *id.*; *People v Spencer*, 152 AD3d at 866).²

Relating to the weapon charges under counts 8 and 9, multiple witnesses testified that defendant was seen with a handgun only while at the mother's residence. However, since the evidence fails to demonstrate that the shooting was committed with the same gun, it so follows that the record also

2. The People's alternative argument that defendant was a principal actor for the burglary charges (counts 4 through 7) also fails, as the video footage—while showing defendant moving off camera and toward the apartment—does not establish that he ever went inside the apartment building. The former girlfriend also testified that defendant did not enter the hallway, and although the victim testified that he saw a person in the hallway which he claimed was defendant, he ultimately described the clothing and overall physical attributes consistent with the brother.

fails to establish beyond a reasonable doubt that defendant intended to use the gun he was seen with “unlawfully against another” as charged by the indictment (Penal Law § 265.03 [1] [b]). Further, although defendant did not possess the requisite gun permit and was outside of his home or place of business, the People cannot establish operability of the handgun that defendant was seen with at the mother’s residence before the shooting either (*see* Penal Law § 265.03 [3]; *People v Longshore*, 86 NY2d at 852). Accordingly, defendant’s convictions of counts 8 and 9 are also against the weight of the evidence and therefore must be reversed as well (*see People v Pizarro*, 151 AD3d 1678, 1682 [4th Dept 2017], *lv denied* 29 NY3d 1132 [2017]; *People v Amato*, 99 AD2d 495, 496 [2d Dept 1984]).

In light of the People’s failure to establish any of the counts beyond a reasonable doubt, the judgment of conviction must be reversed and the indictment against defendant dismissed (*see People v Goodman*, 231 AD3d at 1369). Based on the foregoing, we need not consider defendant’s remaining contentions.

Aarons, J.P., Pritzker, Reynolds Fitzgerald and Mackey, JJ., concur. Ordered that the judgment is reversed, on the facts, indictment dismissed, and matter remitted to the County Court of Schenectady County for further proceedings pursuant to CPL 470.45. Ordered that the appeal from the order is dismissed, as moot.

3 Jennifer O., Respondent, v Kevin O., Appellant. [— NYS3d —]—

Parent, Child and Family—Visitation—Removal of Prohibition against Overnight Visits in Home with Unrelated Male

Ceresia, J. Appeal from an order of the Supreme Court (Julian Schreibman, J.), entered April 8, 2024, in Ulster County, which, among other things, partially denied defendant’s cross-motion to modify a prior order of visitation.

Plaintiff (hereinafter the mother) and defendant (hereinafter the father) are the parents of two children (born in 2010 and 2014). In 2019, a judgment of divorce was entered that incorporated but did not merge the terms of the parties’ stipulation of settlement. That stipulation provided that the mother would have primary physical custody of the children, with parenting time for the father on certain midweek overnights. In February 2023, the mother moved, among other things, to modify the father’s parenting time by eliminating his overnight visits, contending that the father’s living situation—which involved frequent moves and, at times, unrelated adult roommates—was too chaotic and unstable. The father opposed and

cross-moved for additional parenting time on the weekends. In April 2024, following a three-day fact-finding hearing and a *Lincoln* hearing, Supreme Court denied the mother's motion and partially granted the father's cross-motion to the extent of setting a new schedule whereby he would have overnight parenting time every other weekend upon the conditions that he maintain a private bedroom for the children and that he not permit any unrelated men to live in his home. This new schedule resulted in an overall reduction in the father's parenting time, and the father appeals.

The mother and the attorney for the children argue that this appeal is moot, citing a subsequent custody and parenting time order entered by Supreme Court upon the parties' consent in July 2025. The father concedes, and we agree, that the July 2025 order renders moot his arguments pertaining to parenting time. However, the father maintains that one issue raised on appeal is not moot—that is, his claim that the court abused its discretion in its April 2024 order by conditioning the father's overnight visits on the directive that he not reside with any unrelated men. The father argues that this requirement operates independently of the custody and parenting time provisions and has not been superseded by the July 2025 order.

Although the July 2025 order did not expressly indicate that it superseded the April 2024 order, the wording of the later order clearly eliminated the restriction about which the father now complains. In the April 2024 order, in the context of addressing suitable accommodations for the children on overnight visits, the father was prohibited from having an unrelated male roommate. In that same context, the July 2025 order authorized the father to have overnight visits at the home of “an adult friend of the [f]ather,” thereby effectively removing any prohibition against overnight visits in a home with an unrelated male. Accordingly, the appeal has been rendered fully moot (*see Matter of Andrew YY. v Gabriela XX.*, 228 AD3d 1091, 1092-1093 [3d Dept 2024]; *Matter of Renee S. v Heather U.*, 196 AD3d 1014, 1016 [3d Dept 2021]). Finally, the exception to the mootness doctrine does not apply.

Reynolds Fitzgerald, J.P., Fisher, Powers and Mackey, JJ., concur. Ordered that the appeal is dismissed, as moot, without costs.

4 In the Matter of Sand Land Corporation et al., Appellants, v New York State Department of Environmental Conservation et al., Respondents. [— NYS3d —]

tion of Mining Permit—Prior Nonconforming Use

Garry, P.J. Appeal from a judgment of the Supreme Court (James Ferreira, J.), entered April 11, 2024, in Albany County, which, among other things, in a combined proceeding pursuant to CPLR article 78 and action for declaratory judgment, declared the operative nature of a previously issued Mined Land Reclamation permit.

Petitioner Sand Land Corporation owns a sand and gravel mine on a 50-acre parcel in the Town of Southampton, Suffolk County. The mine has operated continuously since the 1960s, preceding the 1972 rezoning that prohibited mining in the district in which the parcel is located and the 1975 enactment of the Mined Land Reclamation Law (*see* ECL 23-2701 *et seq.*). In 1981, Sand Land's predecessor in interest obtained a Mined Land Reclamation permit from respondent Department of Environmental Conservation (hereinafter DEC) to mine 20 acres of the site. That permit was renewed several times thereafter. In 1998, the permit was transferred to Sand Land; at that time, the permit authorized mining on 31.5 acres of the parcel to a depth of 160 feet above mean sea level (hereinafter amsl). The permit was again renewed in 2003, 2008 and 2013.

In 2014, Sand Land submitted an application to DEC to modify its permit to increase the depth of mining to 120 feet amsl and to expand the mining footprint to include additional acreage, including an approximately 3-acre area known as the "stump dump," which Sand Land used to receive, store and process vegetative organic waste materials (i.e., create mulch). DEC denied that application. Pending administrative review, DEC issued Sand Land notice of its intent to modify Sand Land's permit to require that mining activities at the site cease and reclamation activities begin. With the permit set to expire, Sand Land also submitted a renewal application. The foregoing issues were ultimately resolved by a 2016 order on consent, in which Sand Land agreed to cease the receipt, storage and processing of vegetative organic waste materials and to perform certain groundwater monitoring, and DEC agreed to renew Sand Land's permit to include the stump dump area within the life of mine and to process a modification permit application for increased depth of 120 feet amsl. In March 2019, DEC issued a renewed permit to Sand Land reflecting the correction to the permitted acreage of 34.5 acres, and Sand Land submitted a new modification application.

Meanwhile, the Town and several concerned landowners and organizations commenced a CPLR article 78 proceeding against Sand Land and DEC to, among other things, annul the March

2019 renewal permit, contending that Sand Land improperly sought to expand the mine's footprint in a renewal application in order to avoid the restrictions of ECL 23-2703 (3), which prevents DEC from considering applications for permits to mine in covered counties when "local zoning laws or ordinances prohibit mining uses within the area proposed to be mined." In June 2019, DEC issued Sand Land a permit modification authorizing mining within the 34.5-acre footprint to a depth of 120 feet amsl, effective June 5, 2019. A supplemental petition to annul the June 2019 permit modification was filed.

During the pendency of that litigation, DEC issued a second permit modification, effective May 1, 2020, removing the prior permit provision that allowed vegetative waste to be brought to the site for reclamation purposes, directing that all future reclamation would be done using loam and sand already on site, and limiting importation of materials to the site to include crushed stone, crushed concrete aggregate and finished compost to create salable aggregate products. Relevant here, the second permit modification expressly provided that "[a]ll mining activities at the site" would "continue in accordance with the permit modification issued on 6/5/2019." The May 2020 permit modification was not made part of or otherwise raised in the pending litigation.

In May 2021, this Court annulled the 2019 permits, agreeing that ECL 23-2703 (3) encompassed renewal and modification applications and that DEC was precluded from issuing the permits in view of the Town's general mining prohibition (*Matter of Town of Southampton v New York State Dept. of Env'tl. Conservation*, 194 AD3d 1310, 1312-1313 [3d Dept 2021], *mod* 39 NY3d 201 [2023]). The Court of Appeals upheld that annulment in February 2023, albeit with different reasoning (*Matter of Town of Southampton v New York State Dept. of Env'tl. Conservation*, 39 NY3d 201 [2023]). The Court of Appeals concluded that DEC may process renewal and modification applications when such applications seek to mine land that falls within the scope of an undisputed prior nonconforming use—and, thus, the use is not actually prohibited (*id.* at 208-213)—but, because the scope of Sand Land's prior nonconforming use had never been established, remand to DEC for further proceedings to that end was necessary (*id.* at 213-214).

Following the Court of Appeals' decision, DEC took the position that, because the May 2020 modification permit expressly continued mining in accordance with the June 2019 modification, it exclusively derived its authority from a nonexistent source, and was thus extinguished by operation of law, leaving

the 2013 renewal permit as the operative permit. DEC later issued Sand Land notices of violation for excavation and importation activities that would have been authorized under the 2020 modification permit but were not authorized under the 2013 permit.

Petitioners in turn commenced the present combined CPLR article 78 proceeding and declaratory judgment action, seeking annulment of those violations and a declaration that the 2020 permit was controlling during the relevant period unless and until revoked through proper administrative process. Many of the petitioners from the prior hybrid proceeding were then granted permission to intervene. DEC answered, setting forth affirmative defenses, including judicial estoppel, and counter-claimed for, among other relief, a declaration that the 2013 renewal permit governs mining at the site. Supreme Court agreed with respondents that the 2020 permit modification was a nullity and declared the 2013 permit, as modified by the 2016 order on consent incorporating the stump dump within the life of mine, to be operative, otherwise rejecting the claim of judicial estoppel. The court came to differing conclusions regarding the notices of violation. Petitioners appeal, challenging only the court's declaration.*

Supreme Court correctly held that Sand Land's 2013 permit, as modified by the 2016 order on consent, governed mining at the site during the pertinent time period. The 2020 permit modification expressly provided that all mining activities at the site would continue in accordance with the permit modification issued in June 2019 and did not independently authorize expanded mining rights apart from the annulled permits. As the Court of Appeals made clear, DEC's authority to process and grant the 2019 permits in this county, covered by ECL 23-2703 (3), was contingent upon a determination that the proposed mining fell within the scope of a lawful prior nonconforming use and thus was not in fact prohibited by local zoning (*Matter of Town of Southampton v New York State Dept. of Env'tl. Conservation*, 39 NY3d at 214). Because no such determination had been made, the statutory condition precedent to DEC's authority was unsatisfied, and the permits were is-

* At oral argument, DEC highlighted that the 2020 permit expired in March 2024 and contended that, in light of petitioners' abandonment of any challenge to the upheld violations, and in the absence of any cross-appeal, the need for a declaration concerning the operative permit is moot. However, the record does not demonstrate, and DEC has not shown, that the status of the 2020 permit could have no continuing legal consequences, including with respect to future permitting applications. We accordingly decline to dismiss this appeal as moot.

sued in excess of the agency's power. The permits were therefore properly treated as legal nullities (*see Faison v Lewis*, 25 NY3d 220, 224 [2015]; *Matter of Cobleskill Stone Prods., Inc. v Town of Schoharie*, 169 AD3d 1182, 1185 [3d Dept 2019]; *see also Matter of Socha v Town of Starkey*, 239 AD3d 1298, 1300-1301 [4th Dept 2025]; *Matter of Reiss v Keator*, 150 AD2d 939, 941-942 [3d Dept 1989]). Even assuming the 2019 permits were merely voidable rather than void ab initio, once judicially annulled, the permits ceased to exist and therefore could no longer serve as the foundation for mining activities under the 2020 modification, which, by its own terms, derived entirely from them (*see Matter of Village of Hudson Falls v New York State Dept. of Envtl. Conservation*, 158 AD2d 24, 28 [3d Dept 1990], *affd* 77 NY2d 983 [1991]). Thus, contrary to petitioners' contention, the 2020 permit did not require formal suspension or revocation under the Uniform Procedures Act; those procedures govern agency-initiated modification, suspension or revocation of an existing permit, not the automatic legal consequence of a judicial annulment (*see* ECL 70-0115 [1]; 6 NYCRR 621.13 [c]).

In light of our conclusion, we need not reach DEC's alternative ground for affirmance concerning judicial estoppel (*see generally* 12 *New St., LLC v National Wine & Spirits, Inc.*, 196 AD3d 883, 884-885 [3d Dept 2021]). We nevertheless must at least briefly recognize that petitioners' present position concerning the operative permit during the relevant period is plainly in tension with the position they successfully advanced in at least one related proceeding. In June 2021, two of the intervenor-respondents commenced a citizen suit pursuant to ECL 71-1311 (2), seeking to enjoin Sand Land from operating the mine on the theory that this Court's annulment of the 2019 permits left it without any authority to do so. In opposition, Sand Land argued that this Court's order rendered DEC's 2019 permitting action without legal effect but that the 2013 permit remained in effect by operation of State Administrative Procedure Act § 401 (2). Supreme Court expressly adopted that position in dismissing the relevant claims. Petitioners now advance a materially different view as to which permit governed during that same period. That shift exceeds mere refinement of the prior argument and implicates the concerns animating this equitable doctrine (*compare Huizhi Liu v Guoqing Guan*, 225 AD3d 749, 751-752 [2d Dept 2024]; *White Rock Ins. Co. PCC Ltd. v Lloyd's Syndicate 4242*, 202 AD3d 563, 566 [1st Dept 2022]).

Aarons, Ceresia, Fisher and Mackey, JJ., concur. Ordered that the judgment is affirmed, without costs.

5 In the Matter of Melissa MM., Appellant, v Barrett LL., Respondent. (And Three Other Related Proceedings.) [— NYS3d —]—

Parent, Child and Family—Custody—Modification—Sound and Substantial Basis for Award of Primary Residential Custody to Father

Garry, P.J. Appeal from an order of the Family Court of Delaware County (Gary Rosa, J.), entered June 14, 2024, which, among other things, partially dismissed petitioner's application, in a proceeding pursuant to Family Ct Act article 6, to modify a prior order of custody.

Petitioner (hereinafter the mother) and respondent (hereinafter the father) are the parents of the subject child (born in 2011). The parties have litigated the issue of custody for virtually the child's entire life, resulting in various custodial arrangements. In 2022, there was a change from joint legal custody and primary physical placement with the mother to the father having sole custody of the child subject to the mother's parenting time. About a year later, the father and the child were residing with the paternal grandmother when, according to the father, the grandmother verbally accosted the child and pulled his hair. The father promptly filed for and received a temporary order of protection against the grandmother in favor of the child. The mother then filed the first of the subject modification petitions, citing the incident with the grandmother and seeking sole custody. In response to her petition, Family Court granted the mother temporary physical custody of the child and ordered a Family Ct Act § 1034 investigation, which found the allegations against the grandmother to be substantiated.¹ By the time the mother's petition was arraigned, the father had ceased living with the grandmother and had obtained new housing. Several days after arraignment, the mother filed a second modification petition, alleging that she was having difficulty facilitating proper health care for the child due to conflicts with the father, including his refusal to administer prescribed supplements. The same day, the father petitioned to terminate the temporary order based upon his change of residence. He subsequently filed a second petition to the same end, alleging that the child had expressed thoughts of suicide and increased anger since back in the mother's care.² Following fact-finding and *Lincoln* hearings, Family Court awarded the mother primary decision-making

1. Child Protective Services had also immediately issued a safety plan prohibiting the child from being left alone with the grandmother.

2. The parties subsequently consented to a temporary order providing the father certain parenting time during the pendency of the proceedings.

authority with respect to the child's health care and education but otherwise reinstated the prior custodial arrangement. The mother appeals, arguing that awarding her primary residential custody is in the child's best interests.

Initially, even if the resolved domestic incident could no longer constitute the requisite change in circumstances (*see Matter of Moore v Sloan*, 88 AD3d 1193, 1194 [3d Dept 2011]), the father's alleged refusal to facilitate treatment as recommended by the child's medical providers warranted inquiry into the child's continued best interests (*see Matter of Cooper v Williams*, 161 AD3d 1235, 1237 [3d Dept 2018]). "Any court in considering questions of child custody must make every effort to determine 'what is for the best interest of the child, and what will best promote [the child's] welfare and happiness'" (*Eschbach v Eschbach*, 56 NY2d 167, 171 [1982], quoting Domestic Relations Law § 70). "[T]here are no absolutes in making these determinations" (*Eschbach v Eschbach*, 56 NY2d at 171), but some relevant factors include the quality of the respective home environments, maintaining stability in the child's life, the child's wishes, and the parents' respective abilities to provide for and guide the child's development and overall well-being (*see Matter of Sherab X. V Michelle Y.*, 244 AD3d 1532, 1533 [3d Dept 2025]; *Matter of David JJ. v Tara KK.*, 240 AD3d 984, 986 [3d Dept 2025]).

Family Court found that each parent maintained stable employment and appropriate housing and wanted what they believe is best for the child. Of central importance was the child's health, both physically and mentally. At the time of the hearing, both parents were committed to monitoring the child's several conditions, facilitating ongoing treatment and securing additional evaluations. Although testimony established that the father declined to administer a supplement regime recommended by healthcare professionals—based upon his belief that the child's physical and mental health concerns could be addressed through alternative means—the record reflects that he did not disregard the child's needs (*compare Matter of Andrea C. v David B.*, 146 AD3d 1104, 1106-1107 [3d Dept 2017]). Most concerning to Family Court, and properly so, was a postpetition social media post by the child expressing suicidal ideation. Although the parents' strained communication makes it difficult to reconstruct precisely how that matter unfolded, the record establishes that their responses—each imperfect—ensured that the child was properly evaluated for acute crisis. According to the father, the child was experiencing heightened anger issues while living with the mother, which

was generally corroborated by testimony from one of the child's teachers and his school counselor. The evidence demonstrated that either primary residential placement would afford the child comparable supports for his behavioral challenges and learning disability, and each parent resides within a school district that is a component of the same regional cooperative such that the child's academic program would remain unchanged. Although placement with the father would require a change in pediatric providers from the current school-based practitioner, the record does not suggest that continuity of that particular provider is crucial. Finally, as asserted by the attorney for the child and acknowledged by the mother, the child has expressed a desire to reside with the father, a preference entitled to some weight given his age and emotional circumstances (*see Matter of Chad KK. v Jennifer LL.*, 219 AD3d 1581, 1584-1585 [3d Dept 2023]).³ In view of the foregoing, we find that Family Court's award of primary residential custody to the father is supported by a sound and substantial basis in the record (*see Matter of Coleman v Millington*, 140 AD3d 1245, 1247 [3d Dept 2016]).⁴

Aarons, Ceresia, Fisher and Mackey, JJ., concur. Ordered that the order is affirmed, without costs.

6 U.S. Bank National Association, as Trustee, Appellant, v Ralph Thibault, Respondent. [— NYS3d —]

Mortgages—Foreclosure—Default in Filing Answer—Lack of Reasonable Excuse

Pritzker, J. Appeal from an order of the Supreme Court (Mary Farley, J.), entered April 15, 2024, in St. Lawrence County, which, among other things, denied plaintiff's motion for default judgment.

In 2001, defendant Ralph Thibault (hereinafter defendant)

3. The attorney for the child similarly supports Family Court's award of physical custody (*see Matter of Justin K. v Jutonynea L.*, 221 AD3d 1335, 1337 [3d Dept 2023]).

4. As the father properly concedes, his complaints directed at Family Court's decision to award the mother primary medical decision-making authority are not properly before us given that he is not an appealing party (*see Hecht v City of New York*, 60 NY2d 57, 60 [1983]; *Matter of Janeen MM. v Jean-Philippe NN.*, 183 AD3d 1029, 1030 n [3d Dept 2020], *lv dismissed* 35 NY3d 1079 [2020]; *Matter of Carrie ZZ. v Aaron YY.*, 178 AD3d 1291, 1293 [3d Dept 2019]). Nonetheless, we find it important to note that, unlike in *Matter of Barrett LL. v Melissa MM.* (224 AD3d 942, 944 [3d Dept 2024], *lv denied* 42 NY3d 905 [2024]), Family Court made no finding that the mother minimized the child's behavioral concerns or that she bore responsibility for the parties' inability to effectively cooperate.

and Stephanie Thibault (hereinafter the wife)¹ executed a note in favor of Beneficial Homeowner Service Corporation secured by a mortgage encumbering two separate properties located in St. Lawrence County. In November 2021, defendant and the wife failed to make their monthly payment and, therefore, defaulted on the note. After two earlier assignments, the mortgage was assigned to plaintiff in August 2022 and, in December 2022, this mortgage foreclosure action was commenced. Defendant thereafter participated in settlement conferences from May 2023 until September 2023, when the action was released from the settlement conference part. In June 2023, while still in the settlement conference part, counsel for defendant filed a notice of appearance. In November 2023, plaintiff moved for default judgment and an order of reference, and, in December 2023, defendant cross-moved for permission to file a late answer and for dismissal of the complaint. Over plaintiff's opposition, Supreme Court denied plaintiff's motion and granted the portion of defendant's cross-motion allowing a late answer. Plaintiff appeals.

"In order to establish entitlement to a default judgment, a plaintiff is required to submit proof of (1) valid service of the summons and the complaint, (2) the facts constituting the claim and (3) the default" (*Miller Greenberg Mgt. Group, LLC v Couture*, 193 AD3d 1273, 1274 [3d Dept 2021] [citation omitted], citing CPLR 3215 [f]). In support of its motion, plaintiff submitted, among other things, an attorney affirmation with attached exhibits. As relevant here, included in the attached exhibits is the summons and verified complaint as well as affidavits of service demonstrating personal service in January 2023. Additionally, in her affirmation, plaintiff's attorney averred that, as of November 20, 2023, the date of filing of the motion for a default judgment and order of reference, defendant had defaulted in filing an answer. Accordingly, "plaintiff[] established [its] entitlement to a default judgment against . . . defendant[] on the issue of liability" (*Rosenzweig v Gubner*, 194 AD3d 1086, 1089 [2d Dept 2021], *lv dismissed* 38 NY3d 1126 [2022]; *see Bank of Am., N.A. v Keefer*, 245 AD3d 774, 778 [2d Dept 2026]; *Deutsche Bank Natl. Trust Co. v Amoah*, 244 AD3d 812, 814 [2d Dept 2025]). "Moreover, [contrary to Supreme Court's determination,] plaintiff was not required to

1. The wife passed away in November 2021 prior to the commencement of this action, and, as a result, defendant will be referred to singularly. This is despite the fact that the wife is named as a party in this action, the cross-motion was purportedly filed by both her and defendant, and she is listed on the brief before this Court.

demonstrate its compliance with RPAPL 1304 in order to obtain a default judgment, since the failure to comply with RPAPL 1304 is not a jurisdictional defect, and that defense was never raised by [defendant], who failed to answer the complaint” (*Deutsche Bank Natl. Trust Co. v Silverman*, 178 AD3d 898, 901 [2d Dept 2019] [internal quotation marks, brackets, ellipsis and citations omitted]; accord *HSBC Bank USA, N.A. v Thorne*, 189 AD3d 1193, 1195 [2d Dept 2020]).

Defendant opposed plaintiff’s motion for a default judgment by filing a cross-motion for leave to file a late answer. In this regard, “[t]o defeat a facially adequate CPLR 3215 motion, a defendant must show either that there was no default, or that it has a reasonable excuse for its delay and a potentially meritorious defense” (*HSBC Bank USA, N.A. v Thorne*, 189 AD3d at 1195 [internal quotation marks and citation omitted]; see *Deutsche Bank Natl. Trust Co. v Silverman*, 178 AD3d at 901; see also *Wang v IV-CVCF NEB REO, LLC*, 227 AD3d 937, 939 [2d Dept 2024]; *US Bank N.A. v Salvatierra*, 205 AD3d 757, 758 [2d Dept 2022]). In support of his cross-motion, defendant proffered an attorney affirmation, memorandum of law and a proposed verified answer. In these submissions, “defendant failed to allege that he did not default or that he had a reasonable excuse for his default” (*Deutsche Bank Natl. Trust Co. v Silverman*, 178 AD3d at 901). In fact, defendant did not proffer any excuse, reasonable or otherwise, for the delay (see generally *Bachvarov v Khaimov*, 224 AD3d 724, 726 [2d Dept 2024]; compare *Arnav Indus. Inc. Profit Sharing Plan & Trust v 3449-3461 Hamilton Ft, LLC*, 237 AD3d 786, 789 [2d Dept 2025]).² Given this failure of proof, it is “unnecessary to address whether defendant[] ha[s] established a meritorious defense” (*Bank of N.Y. v Wells*, 244 AD3d 1438, 1439-1440 [3d Dept 2025]; see *Deutsche Bank Natl. Trust Co. v Silverman*, 178 AD3d at 901). Accordingly, Supreme Court erred in denying plaintiff’s motion for a default judgment and order of refer-

2. As defendant clearly stated in his memorandum of law in further support of his cross-motion, he was seeking leave to file a late answer pursuant to CPLR 2004, *not* seeking to vacate a default judgment, as defendant had not yet been found to be in default. Bearing this in mind, the denial of defendant’s cross-motion based upon a failure of proof should not be read as a determination of the merits of any subsequent motion to vacate the default, should defendant choose to so move. Succinctly stated, the denial of defendant’s motion to file a late answer does not preclude defendant from subsequently seeking vacatur of the default judgment pursuant to CPLR 5015 (a) (1) (see generally *Carrington Mtge. Servs., LLC v Fiore*, 206 AD3d 1306 [3d Dept 2022]; *Bank of Am., N.A. v Hirsch*, 186 AD3d 1469 [2d Dept 2020]).

ence and granting defendant's cross-motion seeking leave to file a late answer.

Clark, J.P., McShan, Powers and Corcoran, JJ., concur. Ordered that the order is modified, on the law, without costs, by reversing so much thereof as denied plaintiff's motion for a default judgment and order of reference and granted the portion of defendants' cross-motion seeking leave to file a late answer; motion granted and cross-motion denied; and, as so modified, affirmed.

7 In the Matter of Linda V., Appellant-Respondent, v Christopher W., Respondent-Appellant. (And Three Related Proceedings.) [— NYS3d —]

Parent, Child and Family—Custody—Modification—Continued Primary Custody to Father while Increasing Parenting Time for Mother

Ceresia, J. Cross-appeals from an order of the Family Court of Schenectady County (Stephen Rodriguez, Ref.), entered July 15, 2024, which, among other things, granted petitioner's application, in a proceeding pursuant to Family Ct Act article 6, to modify a prior order of custody.

Petitioner (hereinafter the mother) and respondent (hereinafter the father) are the parents of the subject child (born in 2015). In 2019, a consent order was entered in Family Court wherein the parties agreed to share joint legal custody of the child, with the father retaining primary physical custody and the mother receiving parenting time on the first three weekends of every month and every Wednesday evening, as well as additional time during the summer and on holidays. In 2022, the mother filed a modification petition seeking primary physical custody, and three enforcement petitions alleging that the father was refusing to allow her to exercise her weekend parenting time. Following a three-day hearing and *Lincoln* hearing, the court granted the mother's modification petition to the extent of providing her with increased parenting time, although it found that primary physical custody should remain with the father. As such, the court lengthened the mother's weekend parenting time from Friday through Sunday to Thursday through Sunday and increased her parenting time during the summer. These cross-appeals ensued.¹

Initially, contrary to the father's argument, the mother met her threshold burden of showing a change in circumstances sufficient to warrant an inquiry into what custodial arrange-

1. During the hearing, Family Court also dismissed the mother's enforcement petitions based upon insufficient evidence, a finding that the mother does not challenge on appeal.

ment will serve the child's best interests (see *Matter of Jennifer HH. v Alavanh II.*, 243 AD3d 1170, 1171 [3d Dept 2025]; *Ricky SS. v Christine SS.*, 241 AD3d 1009, 1011 [3d Dept 2025]; *Matter of Christopher T. v Jessica U.*, 90 AD3d 1092, 1093-1094 [3d Dept 2011]). That is, the evidence demonstrated that, since the entry of the initial consent order, Child Protective Services had imposed a sexual assault treatment program (hereinafter SATP) on the child's behalf and required that the child participate in counseling following allegations of "sexual play" between the child and a paternal half brother as well as a maternal half brother.² Further, while the father had constructed a separate bedroom for the child within his home, as mandated by the SATP, the child had reported to the mother that his paternal half brother continued to come into that bedroom without an adult present. Although the father points out that the mother's modification petition did not contain these allegations, Family Court, noting that the petition had been filed pro se, providently exercised its discretion in granting a motion by the attorney for the child to conform the pleading to the proof elicited at trial (see CPLR 3025 [c]; *Matter of Oksoon K. v Young K.*, 115 AD3d 486, 487 [1st Dept 2014], *lv denied* 24 NY3d 902 [2014]).

Turning to the best interests analysis, "[d]etermining the child's best interests requires consideration of, among other factors, the quality of the home environments of each parent, the need for stability in the child's life, the degree to which each parent has complied with the existing custodial arrangement and whether he or she will promote a positive relationship between the child and the other parent, as well as each parent's past performance and ability to provide for the child's physical, emotional and intellectual well-being" (*Matter of Ronald R. v Natasha FF.*, 217 AD3d 1163, 1164 [3d Dept 2023] [internal quotation marks and citations omitted]; see *Matter of Mary N. v Scott M.*, 218 AD3d 890, 892 [3d Dept 2023]). "A custodial determination depends to a great extent upon an assessment of the testimony, character and sincerity of the parties [and,] [f]or this reason, it is well established that, given its superior position to observe the witnesses, deference is ordinarily accorded to Family Court's findings in this respect" (*Matter of Joanna PP. v Ohad PP.*, 230 AD3d 1445, 1447 [3d Dept 2024] [citations omitted]; see *Matter of Robert C. v Katlyn D.*, 230 AD3d 1392, 1394 [3d Dept 2024]).

The hearing evidence supported Family Court's finding that

2. The child has four older half brothers, two on the father's side and two on the mother's side.

primary physical custody should remain with the father. The court credited the father's testimony that he had always been more involved than the mother with the child's doctors' appointments and schooling, including attending regular meetings concerning the child's individualized education plan, and that the child had shown continuous scholastic improvement in the father's school district, where he had been attending school all his life. The father additionally testified that he abides by the requirements of the SATP and regularly brings the child to counseling sessions. To the extent that several sessions had been missed, the father provided reasons for those occurrences that the court deemed credible. The court also noted that the father had decreased his work hours so that he could spend more time with the child and his half brothers and provide more of the adult supervision required under the SATP.

At the same time, there was also an adequate foundation for Family Court's decision to increase the mother's parenting time. The mother had recently finished cancer treatments and taken steps such as shifting her work schedule and obtaining a car in order to be more available to the child. The mother was respectful of the father's decisions concerning the child's education and medical care, while also increasing her involvement in those areas of the child's life, and she strictly adhered to the requirements of the SATP. Even with the father's decreased work hours, the mother had more time to spend with the child than the father.

Accordingly, Family Court's determination to continue primary physical custody with the father while increasing parenting time for the mother—an outcome that is supported by both the trial and appellate attorneys for the child—has a sound and substantial basis in the record, and we decline to disturb it (see *Matter of Michelle EE. v John EE.*, 235 AD3d 1121, 1124 [3d Dept 2025]; *Matter of Daniel C. v Joanne C.*, 182 AD3d 711, 715-716 [3d Dept 2020]). The parties' remaining contentions have been considered and found to be without merit.

Garry, P.J., Aarons, Fisher and Mackey, JJ., concur. Ordered that the order is affirmed, without costs.

8 In the Matter of Khloe KK., Alleged to be a Permanently Neglected Child. Ulster County Department of Social Services, Respondent; Tiffany JJ., Appellant. (And Three Other Related Proceedings.) [— NYS3d —]

Parent, Child and Family—Termination of Parental Rights—Permanent Neglect—Suspended Judgment Not in Children's Best Interests

Pritzker, J. Appeals from four orders of the Family Court of

Ulster County (Sarah Rakov, J.), entered August 2, 2024, which granted petitioner's applications, in four proceedings pursuant to Social Services Law § 384-b, to adjudicate the subject children to be permanently neglected, and terminated respondent's parental rights.

Respondent is the mother of, as relevant here, the four subject children (born in 2010, 2012, 2015 and 2018). In June 2019, the children were removed from the mother's care and placed in petitioner's care and custody. In November 2019, the mother consented to a finding of neglect and an order of fact-finding and disposition was entered, requiring her to complete mental health counseling and parenting classes, among other things. In November 2021, petitioner filed permanent neglect petitions against the mother. Following a fact-finding hearing, Family Court adjudicated the children to be permanently neglected. After a dispositional hearing in March 2024, Family Court terminated the mother's parental rights to the four subject children. The mother appeals from the order of disposition.

The mother contends that Family Court erred by not granting her a final opportunity in the form of a suspended judgment, rather than terminating her parental rights.¹ "Following an adjudication of permanent neglect, the sole concern at a dispositional hearing is the best interests of the child[ren] and there is no presumption that any particular disposition, including the return of [the children] to a parent, promotes such interests. A suspended judgment is appropriate where a parent has demonstrated that, given a finite period of time, he or she is capable of becoming a fit parent with whom the child[ren] can be safely reunited, and that a delay in permanency would not be contrary to the best interests of the child[ren]" (*Matter of Edrick PP. [Alexis QQ.]*, 221 AD3d 1307, 1308-1309 [3d Dept 2023] [internal quotation marks and citations omitted]; see *Matter of Gabriel J. [Christina I.]*, 232 AD3d 1093, 1097 [3d Dept 2024], *lv denied* 43 NY3d 901 [2025]). This Court "accord[s] great weight to the factual findings and credibility determinations of Family Court, and its findings will not be disturbed unless they lack a sound and substantial basis in the record" (*Matter of Ryan J. [Taylor J.]*, 222 AD3d 1207, 1209 [3d Dept 2023], *lv denied* 41 NY3d 909 [2024]; accord *Matter of*

1. The mother does not raise any arguments relative to the underlying permanent neglect finding and, thus, has abandoned any such claims (see generally *Matter of Patricia Y. v Justin X.*, 219 AD3d 1586, 1587 n 1 [3d Dept 2023]; *Matter of Michael U. v Barbara U.*, 189 AD3d 1909, 1909 n 1 [3d Dept 2020]).

Daimeon MM. [Laurie MM.], 230 AD3d 1416, 1419-1420 [3d Dept 2024], *lv denied* 42 NY3d 910 [2025]).

Testimony at the dispositional hearing demonstrates that a delay in permanency (i.e., a suspended judgment) is not in the children's best interests. The two youngest children have spent the majority of their lives in foster care and are strongly bonded with their foster parents (*see Matter of Gabriel J. [Christina I.]*, 232 AD3d at 1097; *Matter of Jason H. [Lisa K.]*, 118 AD3d 1066, 1068 [3d Dept 2014]). Despite biweekly parenting time, these children do not recognize the mother as their mother. Moreover, the mother's parenting time has yet to progress to completely unsupervised, due to her noncompliance with the November 2019 dispositional order. Additionally, the older children have also spent a significant amount of time in foster care and, as of the dispositional hearing, had parenting time suspended with the mother at their own requests, and with the support of their therapists. Both older children have significant behavioral and/or mental health challenges and are receiving the specialized care they need in their respective placements (*see Matter of Ahnna N. [Rosa N.]*, 240 AD3d 964, 967 [3d Dept 2025]; *Matter of Gabriel J. [Christina I.]*, 232 AD3d at 1097). Further, while testimony at the dispositional hearing demonstrated that the mother had made some positive strides, she still was not in an acceptable mental health treatment program and was in violation of several other conditions of the 2019 dispositional order. While the attorney for the oldest child's opinion that Family Court should have granted a suspended judgment for that child is entitled to considerable weight, the mother has not demonstrated that, if given a finite period of time, she can address the issues that led to the removal of that child or plan for the child's future (*see Matter of Hazel OO. [Roseanne OO.]*, 133 AD3d 1126, 1128 [3d Dept 2015]).² Thus, "[g]iving the appropriate deference to Family Court's factual findings and credibility determinations, we agree that the mother failed to make any meaningful progress in overcoming the barriers preventing reunification and that a suspended judgment is not in the child[ren's] best interests" (*Matter of Gabriel J. [Christina I.]*, 232 AD3d at 1097-1098). Accordingly, Family Court's determination that termination of the mother's parental rights was in the best interests of the children is supported by a sound and substantial basis in the record (*see id.*;

2. The attorney for the three other children asserts that there was a sound and substantial basis for Family Court's termination of parental rights and that a suspended judgment would not be in the best interests of these three children.

Matter of Samuel DD. [Margaret DD.], 123 AD3d 1159, 1163 [3d Dept 2014], *lv denied* 24 NY3d 918 [2015]).

Garry, P.J., Clark, McShan and Corcoran, JJ., concur. Ordered that the orders are affirmed, without costs.

9 In the *Matter of Joshua X.*, Appellant, v *Alexandria Y.*, Respondent. [— NYS3d —]—

Parent, Child and Family—Custody—Modification Based on Change in Circumstances—Father’s Petition Dismissed without Full Fact-Finding Hearing

Reynolds Fitzgerald, J. Appeal from an order of the Family Court of Chemung County (Ottavio Campanella, J.), entered December 7, 2023, which, in a proceeding pursuant to Family Ct Act article 6, granted respondent’s motion to dismiss the petition at the close of petitioner’s proof.

Petitioner (hereinafter the father) and respondent (hereinafter the mother) are the divorced parents of two children (born in 2009 and 2010). In 2019, the parties entered into a settlement agreement, which was incorporated but not merged into a judgment of divorce. The agreement provided that the parties would have joint legal custody of the children with primary physical custody to be with the mother. A definitive parenting schedule could not be established for the father due to his active military status and attendant possible deployment. As such, the parties agreed to arrange for the father’s general parenting time on an ad hoc basis in accordance with his availability. However, the agreement did provide for specific holiday and summer parenting schedules. At the time of the agreement, the father resided in Maryland and the mother resided in New York.

Now, while still in the military, the father has a desk duty position which provides for a regular schedule and does not require deployment. Additionally, the mother has remarried and there are now six children residing in her home. In January 2023, the father commenced this modification proceeding alleging a change in circumstances and seeking primary physical custody of solely the younger child. After the mother sought dismissal of the father’s initial petition, the father filed an amended petition in June 2023. The matter proceeded with in camera interviews of both children *followed* by a fact-finding hearing.¹ At the close of the father’s proof, the mother moved to dismiss the father’s petition. In a bench decision, Family Court

1. Family Court, in its determination of the motion to dismiss, referenced having conducted *Lincoln* hearings of both children. What actually took place were in camera interviews of the children, not *Lincoln* hearings. The purpose of a *Lincoln* hearing is to corroborate information acquired through

found that the father failed to establish a change in circumstances and dismissed the petition and the amended petition. The court subsequently issued a written order, and the father appeals.

The father contends that Family Court erred in finding that he had failed to demonstrate a change in circumstances since entry of the prior custody order. We agree. “A parent seeking to modify an existing custody and parenting time order first must demonstrate that a change in circumstances has occurred since the entry thereof to warrant the court undertaking a best interests analysis” (*Matter of Jacob L. v Heather L.*, 228 AD3d 1191, 1192-1193 [3d Dept 2024] [internal quotation marks, brackets and citations omitted]; see *Matter of Mary N. v Scott M.*, 218 AD3d 890, 891 [3d Dept 2023]).² “[A] custody arrangement consented to by the parties is afforded less weight than one ordered by a court after a full hearing” (*Heather B. v Daniel B.*, 125 AD3d 1157, 1159 [3d Dept 2015] [internal quotation marks and citations omitted]; see *Matter of Virginia OO. v Alan PP.*, 214 AD3d 1045, 1046 [3d Dept 2023]).

“When, as here, Family Court is tasked with deciding a motion to dismiss at the close of the petitioner’s proof, the court must accept the petitioner’s evidence as true and afford the petitioner every favorable inference that could reasonably be drawn from that evidence, including resolving all credibility questions in the petitioner’s favor” (*Matter of Shayne FF. v Julie GG.*, 221 AD3d 1202, 1203-1204 [3d Dept 2023] [internal quotation marks and citations omitted]; accord *Matter of Darcy XX. v Jeffrey YY.*, 237 AD3d 1274, 1275 [3d Dept 2025]). We find that the record in this matter is replete with sufficient proof to survive a motion to dismiss.

The father testified that he has changed his position in the military and is no longer subject to deployments³ or TDYs.⁴ His employment now consists of a desk job with weekday hours be-

testimonial and documentary evidence during a fact-finding hearing and to ascertain a child’s preferences and concerns. Therefore, a *Lincoln* hearing is to take place after or during the fact-finding hearing, not prior to the fact-finding hearing (see *Matter of Rush v Roscoe*, 99 AD3d 1053, 1055 [3d Dept 2012]; *Matter of Spencer v Spencer*, 85 AD3d 1244, 1245-1246 [3d Dept 2011]).

2. Family Court in its determination of whether the father demonstrated a change in circumstances erred by focusing on the best interests analysis factors with its reference to parental fitness.

3. Deployments are temporary military orders involving combat operations outside the United States.

4. TDYs are temporary duty assignments which are short-term military orders requiring personnel to leave their home station and the length of the orders vary from a few days up to six months.

tween 9:00 a.m. and 4:00 p.m., and he is available in the evenings and weekends to care for the younger child “[100%]” of the time. Additionally, the father testified that the mother has remarried, her husband has two children who reside at the mother’s house and the mother has given birth to two additional children who are under the age of two. Thus, the mother now has six children residing in her home. He averred that the younger child has had difficulties adjusting to the composition and family dynamics of the mother’s new household, including that the stepfather is “loud,” that the younger child has sibling rivalries especially with the stepfather’s son and frequently complains to the father about how he is treated by his brother and stepsiblings. This situation is so stressful that it has caused the younger child to regularly seek out the school counselor and therapist and has prompted him to request to live with the father. Lastly, the father testified that his relationship with the mother has further deteriorated as she speaks ill of him to the children, does not encourage a relationship between him and the older child, and is inflexible in affording him additional parenting time other than the holiday and summer schedules set forth in the 2019 agreement.

Providing the father the benefit of every reasonable inference and resolving all credibility questions in his favor, as we must do when considering a motion to dismiss, the father’s proof sufficiently established that since the 2019 judgment of divorce he has moved to a job that no longer requires deployment and provides him with a standard schedule which provides significant expansion of his availability to care for the younger child. We find that this proof, standing alone, demonstrated a change in circumstances sufficient to overcome a motion to dismiss (see *Matter of Hughes v Davis*, 68 AD3d 1674, 1675 [4th Dept 2009]; *Matter of Diffin v Towne*, 47 AD3d 988, 990-991 [3d Dept 2008], *lv denied* 10 NY3d 710 [2008]). Moreover, it is undisputed that the mother has remarried and, as a result, there are now six children in the household as well as her current spouse. Additionally, if credited, which it must be at this procedural juncture, the father’s testimony has demonstrated that this current family makeup has caused stress and anxiety for the younger child. Finally, the father has alleged a further breakdown in the parties’ relationship resulting in difficulties scheduling additional parenting time and in the mother’s failure to foster a relationship between the father and the children. This proof further demonstrates a change in circumstances sufficient to overcome the mother’s motion to dismiss (see *Matter of Jacob L. v Heather L.*, 228 AD3d at 1194; *Matter of Shayne FF. v Julie GG.*, 221 AD3d at 1206). As the

father's petition was dismissed without a full fact-finding hearing, the record does not allow us to undertake the required analysis into whether modification of the current custody arrangement would be in the best interests of the younger child. As such, we reverse the order on appeal and must remit to Family Court for a new fact-finding hearing before a different judge (see *Matter of Shayne FF. v Julie GG.*, 221 AD3d at 1207; *Matter of Nicole B. v Franklin A.*, 210 AD3d 1351, 1354-1355 [3d Dept 2022], *lv dismissed* 39 NY3d 1092 [2023]).

Clark, J.P., Ceresia, Powers and Corcoran, JJ., concur. Ordered that the order is reversed, on the law, without costs; motion denied; and matter remitted to the Family Court of Chemung County for further proceedings not inconsistent with this Court's decision before a different judge, said proceedings to be commenced within 45 days of this Court's decision.

10 In the Matter of Aphrodite A., Alleged to be a Neglected Child. Broome County Department of Social Services, Respondent; Heather A., Appellant. [— NYS3d —]

Parent, Child and Family—Abused or Neglected Child—Child at Imminent Risk of Harm as Result of Mother's Untreated Mental Health and Substance Abuse Issues

Clark, J.P. Appeal from an order of the Family Court of Broome County (Brett Noonan, J.), entered September 25, 2024, which granted petitioner's application, in a proceeding pursuant to Family Ct Act article 10, to adjudicate the subject child to be neglected.

Respondent (hereinafter the mother) is the mother of the subject child (born in 2021), who has been in and out of foster care for the majority of her life. On August 26, 2023—just three days after the child had been returned to the mother's care following the resolution of a neglect proceeding concerning indicated reports for, among other things, untreated mental health and substance abuse issues—petitioner received a report alleging that the mother was having auditory hallucinations and paranoid delusions while the child was in her sole care. The mother consented to placing the child in a kinship foster home during the ensuing investigation, which resulted in an indicated report for inadequate guardianship. In September 2023, petitioner filed a neglect petition against the mother alleging that the child had been harmed or was at imminent risk thereof as a result of the mother's untreated mental health and substance abuse issues. The mother consented to the child's continued placement in kinship foster care during the pendency of the proceeding and, following a multiday fact-finding hear-

ing, Family Court adjudged the child to have been neglected by the mother. The mother appeals.¹

We affirm. Contrary to the mother's contention, Family Court's neglect finding has a sound and substantial basis in the record. "A party seeking to establish neglect must show, by a preponderance of the evidence, first, that a child's physical, mental or emotional condition has been impaired or is in imminent danger of becoming impaired and second, that the actual or threatened harm to the child is a consequence of the failure of the parent or caretaker to exercise a minimum degree of care in providing the child with proper supervision or guardianship" (*Matter of Kingston V. [Javon V.]*, 234 AD3d 1056, 1057 [3d Dept 2025] [internal quotation marks and citations omitted], *lv dismissed* 43 NY3d 951 [2025]; *see* Family Ct Act §§ 1012 [f] [i] [B]; 1046 [b] [i]; *Nicholson v Scoppetta*, 3 NY3d 357, 368 [2004]). "Notably, a finding of neglect requires only an imminent threat of injury or impairment, not actual injury or impairment, and such threat may be established through a single incident or circumstance" (*Matter of Kingston V. [Javon V.]*, 234 AD3d at 1057 [internal quotation marks, brackets and citations omitted]; *see Matter of Aerobella T. [Bartolomeo V.]*, 170 AD3d 1453, 1453-1454 [3d Dept 2019]). "In determining whether [a parent] failed to exercise a minimum degree of care, the critical inquiry is whether a reasonable and prudent parent would have so acted, or failed to act, under the circumstances" (*Matter of Bonnie FF. [Marie VV.]*, 220 AD3d 1078, 1079-1080 [3d Dept 2023] [internal quotation marks, ellipsis and citations omitted]; *see Matter of Jasic UU. [Natasha UU.]*, 246 AD3d 1271, 1271-1272 [3d Dept 2026]; *Matter of Cheyenne Q. [Charles Q.]*, 196 AD3d 747, 748 [3d Dept 2021], *lv denied* 37 NY3d 915 [2021]). "Family Court's factual findings and credibility determinations are accorded great weight in such a proceeding and will not be disturbed on appeal unless they lack a sound and substantial basis in the record" (*Matter of Addilyn I. [Richard I.]*, 245 AD3d 1038, 1039 [3d Dept 2026] [internal quotation marks and citations omitted]; *see Matter of Raquel ZZ. [Angel ZZ.]*, 216 AD3d 1242, 1244 [3d Dept 2023]; *Matter of Asiah S. [Nancy S.]*, 212 AD3d 1062, 1063 [3d Dept 2023], *lv denied* 39 NY3d 913 [2023]).

The testimony at the fact-finding hearing established that, prior to the commencement of the underlying neglect proceeding, the mother had been the subject of several prior indicated reports of inadequate guardianship pertaining to her care of

1. The attorney for the child argues that Family Court's neglect finding has a sound and substantial basis in the record and should be affirmed.

the subject child and her two older children. The prior reports concerned allegations of untreated substance abuse and mental health issues, among other concerns, and resulted in the subject child being placed in kinship foster care. As for the circumstances of the underlying neglect proceeding, petitioner elicited testimony from the mother's cousin, who served as the child's kinship foster placement, about the circumstances precipitating the August 26, 2023 child protective report.² She explained that, on the morning of August 26, she woke up to a Facebook message and missed calls from the mother around 12:00 a.m. When she subsequently returned the mother's calls, the mother was "really frantic saying that people were outside . . . threatening her." The mother's statements prompted the cousin to call the police, who performed a welfare check at the mother's residence and found no evidence to support the mother's claim that people were outside of her home. The cousin received several additional paranoid calls from the mother throughout the day, causing her to call the police another three times to perform welfare checks. On each occasion, the police found no evidence to support the mother's claims.

When the cousin went to the mother's house to check on her later that morning, the mother had a friend over and was smoking marijuana while holding the child. The cousin confirmed that the mother was impaired at the time, that there was no sober caretaker for the child, and that she had previously seen the mother under the influence of drugs while taking care of her other children. The mother also showed the cousin used syringes outside of her bedroom window and "kept saying that she was scared of the [child] because [she] was looking at her funny," causing the cousin to become concerned. The cousin offered to have the mother and child stay at her home, but the mother declined. During one of the welfare checks performed on August 26, 2023, a determination was made to remove the child and the mother consented to placing the child in the temporary care of the cousin during the ensuing investigation. The cousin testified that, upon picking the child up on that date, the mother was "very irate [sic]," refused to take a drug test, threatened to "kill herself" and told the child "they're taking you from me again."

Petitioner also proffered evidence that, when a caseworker

2. Petitioner had previously received duplicate reports on August 21, 2023, alleging that, during the mother's visitation with her two older children who are not the subject of this proceeding, methamphetamine use was occurring at her home, there was a lack of food at the home and several people were coming in and out of her home.

spoke by phone with the mother on August 28, 2023, the mother continued to relay her belief that people had been trying to break into her home two days prior and that there had been “voices . . . following her around the house.” The caseworker confirmed that the mother had agreed to allow the child to stay with her cousin during the pendency of the investigation and signed a safety plan for the child. When the caseworker asked the mother about potential drug use during their phone conversation on August 28, the mother admitted to cocaine use two years prior and revealed that she had relapsed in June 2023. Although the mother maintained that she had last used drugs in June 2023 and initially agreed to take a drug test, she subsequently declined to submit to a urine screen when the caseworker attempted to facilitate one. The caseworker also asked the mother about mental health concerns during the phone call on August 28 and she acknowledged that she had several mental health diagnoses. Although the mother claimed that she was on a waitlist for mental health treatment with three service providers, the caseworker learned that the mother was on a waitlist with only one provider and that the provider did not have the necessary staff to treat her conditions.

During a subsequent conversation with the mother on September 6, 2023—a few days prior to the filing of the instant neglect petition—the caseworker spoke with the mother about a text message conversation she had had with a different caseworker in which the mother indicated that she had been going through withdrawal from drugs on the evening of August 26, 2023. The caseworker testified that, when she asked the mother about such text message, the mother denied having sent it and claimed someone had taken her phone. The caseworker testified that, at the end of the investigation into the August 26 report, the case was indicated for inadequate guardianship based upon the mother’s untreated mental health issues and the failure to obtain a drug evaluation, confirming that the mother was refusing to submit to drug testing on the basis that “she didn’t have to.”

Police officers who performed the welfare checks at the mother’s residence on August 26, 2023, also testified at the fact-finding hearing. The officers described the child as appearing in good health on that date and relayed that they did not have concerns about the mother being a danger to herself or others. One of the officers, however, became concerned about the child’s welfare insofar as the mother “continuously [kept] pick[ing] the child up” and moving her from room to room to

try to get away from voices that “weren’t actually present,” waking the child up in the process. The officer also testified that he called Child Protective Services after dispatch advised that the mother was making statements about the child wanting to harm her.

Although the mother presented evidence in defense of the neglect petition, including calling the cousin to provide testimony on her behalf, we are satisfied that petitioner proved the neglect allegations by a preponderance of the evidence. We first turn to Family Court’s finding that the mother failed to “exercise a minimum degree of care . . . in providing the child with proper supervision or guardianship” (Family Ct Act § 1012 [f] [i] [B]). While we commend the mother for promptly consenting to the child’s placement in foster care during the pendency of the investigation into the child protective services report received on August 26, 2023, we note that she had declined the cousin’s earlier offer to stay with the child at the cousin’s home despite experiencing hallucinations and believing that people were attempting to break into her residence when they were not. Instead, the mother decided to smoke marihuana while holding the child on that date, leaving the child without a sober caregiver, notwithstanding that she had been returned to the mother’s care only three days prior in connection with previous indicated reports for untreated mental health and substance abuse issues. The mother then refused to submit to a drug screen and was not taking appropriate steps to address her mental health concerns, demonstrating a lack of insight into her struggles. Given this evidence, there is a sound and substantial basis in the record to support Family Court’s finding that the mother failed to act as a reasonably prudent parent would have under similar circumstances (*see Matter of Nina VV. [Wendy VV.]*, 216 AD3d 1215, 1217 [3d Dept 2023]; *Matter of Alexis TT. [Andrea VV.]*, 204 AD3d 1311, 1314 [3d Dept 2022]). As for the actual or imminent impairment element of neglect, the foregoing evidence also provides a sound and substantial basis for Family Court’s finding that the child was placed in actual or imminent danger as a result of the mother’s conduct (*see Matter of Wynter V. [Felitta V.]*, 230 AD3d 505, 505 [2d Dept 2024]; *Matter of C.B. [Tiffany S.]*, 225 AD3d 415, 417 [1st Dept 2024]; *Matter of Maggie YY. [Lisa ZZ.]*, 172 AD3d 1562, 1563 [3d Dept 2019]; *compare Matter of Chloe P.-M. [Martinique P.]*, 220 AD3d 783, 785 [2d Dept 2023]). Accordingly, there is no basis to disturb Family Court’s order.

Aarons, Pritzker, McShan and Corcoran, JJ., concur. Ordered that the order is affirmed, without costs.

11 Jennifer Shaughnessey et al., Appellants, v Tim Relyea et al., Respondents. [— NYS3d —]—

Pleading—Amendment—Assertion of Time Frame That Defendants Allegedly Trespassed and Removed Various Chattels from Plaintiffs’ Rental Residence

McShan, J. Appeal from an order of the Supreme Court (Patrick O’Sullivan, J.), entered October 17, 2024, in Madison County, which, among other things, granted defendants’ motion to dismiss the complaint.

Plaintiffs reside at a property located in the City of Oneida, Madison County that they have rented from defendants since sometime prior to 2018. In April 2018, plaintiffs were arrested and incarcerated for drug-related activities. In May 2020, following their release from incarceration, plaintiffs commenced this action against defendants alleging that defendants entered the property and unlawfully removed and sold plaintiffs’ personal possessions. Defendants answered in September 2020, denying plaintiffs’ allegations and raising several affirmative defenses, including that plaintiffs had failed to set forth the underlying facts and occurrences necessary to prepare a defense and sustain an action as required by CPLR 3013. The action sat dormant for four years before, in April 2024, plaintiffs filed a note of issue and certificate of readiness for trial. Defendants then moved to dismiss the complaint, claiming that plaintiffs’ complaint failed to contain sufficient particularity to give defendants notice of the transactions underlying the alleged action. Plaintiffs opposed the motion and cross-moved to amend the complaint. Supreme Court granted defendants’ motion to dismiss the complaint and denied plaintiffs’ cross-motion, finding that plaintiffs’ original complaint failed to provide sufficient detail that would inform defendants of the notice of the transactions and material elements of the action and that plaintiffs proposed amended complaint was similarly insufficient. Plaintiffs appeal.

Plaintiffs first contend that Supreme Court improperly dismissed the initial complaint for failure to comply with the pleading requirements of CPLR 3013. We disagree. “Pursuant to CPLR 3013, a pleading must be sufficiently particular to give the court and parties notice of the transactions, occurrences, or series of transactions or occurrences, intended to be proved and the material elements of each cause of action” (*Archer-Vail v LHV Precast Inc.*, 168 AD3d 1257, 1258 [3d Dept 2019] [internal quotation marks and citations omitted]; see *12 Baker Hill Rd., Inc. v Miranti*, 130 AD3d 1425, 1426 [3d Dept 2015]). The original complaint included allegations that, with the benefit of a very generous reading, were adequate to allege

a trespass into plaintiffs' residence (*compare City of Albany v Normanskill Cr., LLC*, 165 AD3d 1437, 1439 [3d Dept 2018]), trespass to chattels (*see Jackie's Enters., Inc. v Belleville*, 165 AD3d 1567, 1572 [3d Dept 2018]) and conversion (*see Ciprich v Atwood*, 163 AD3d 1332, 1334 [3d Dept 2018]). However, notably absent from the complaint is any indication whatsoever of the time frame in which such acts allegedly occurred.¹ Without that information on the face of the complaint or any other accompanying filing (*see e.g. Lederman v McLean Trucking Co.*, 41 AD2d 5, 11 [2d Dept 1973]), Supreme Court properly determined that the complaint failed to comply with the requirements of CPLR 3013 (*see Mid-Hudson Val. Fed. Credit Union v Quartararo & Lois, PLLC*, 155 AD3d 1218, 1220 [3d Dept 2017], *affd* 31 NY3d 1090 [2018]).

However, we disagree with Supreme Court's denial of plaintiffs' motion to amend the complaint. The court found that the proposed amended complaint posited dates of the transactions or occurrences that made no sense, and a cursory examination of the proposed amendment suggests as much. Although the amended complaint, like its predecessor, is inartful and sparse in detail, the deficiency noted by Supreme Court appears to be a typographical mistake, albeit one of several. Specifically, in asserting the time frame that defendants allegedly trespassed and removed various chattels from plaintiffs' residence, the amended complaint inaccurately states the year 2024 rather than 2018. There is, however, a clear reference in that paragraph to the period of time that plaintiffs were incarcerated, which coincides with the dates in the complaint when corrected for the proper years (*see generally Victoria T. Enters., Inc. v Charmer Indus., Inc.*, 63 AD3d 1698, 1698 [4th Dept 2009]; *compare New Dimension Solutions, Inc. v Spearhead Sys. Consultants [US], Ltd.*, 28 AD3d 260, 260 [1st Dept 2006]). Ultimately, "the primary function of a pleading is to apprise an adverse party of the pleader's claim" (*12 Baker Hill Rd., Inc. v Miranti*, 130 AD3d at 1426 [internal quotation marks and citation omitted]; *see Cole v Mandell Food Stores*, 93 NY2d 34, 40 [1999]). Viewed liberally, the amended complaint meets that minimal threshold (*see Foley v D'Agostino*, 21 AD2d 60, 63 [1st Dept 1964]).

As to the burden plaintiffs bear on their motion to amend, it is well established that "the movant need not establish the

1. Seemingly, plaintiffs had originally intended to include such information by beginning their factual recitation with "[o]n or about," before inexplicably proceeding without including any time frame. We note that this omission somehow remains in the amended complaint.

merits of the proposed amendment and, in the absence of prejudice or surprise resulting directly from the delay in seeking leave, such applications are to be freely granted unless the proposed amendment is palpably insufficient or patently devoid of merit” (*Passeri v Brody*, 199 AD3d 1260, 1261 [3d Dept 2021] [internal quotation marks and citations omitted]; see CPLR 3025 [b]; *Bynum v Camp Bisco, LLC*, 155 AD3d 1503, 1504 [3d Dept 2017]). Although a determination on a motion for leave to amend is generally subject to an abuse of discretion standard (see *Petry v Gillon*, 199 AD3d 1277, 1280 [3d Dept 2021]; *Matter of Perkins v Town of Dryden Planning Bd.*, 172 AD3d 1695, 1697 [3d Dept 2019]), Supreme Court did not engage in any analysis with respect to the merits of plaintiffs’ cross-motion seeking leave to amend. Our review of the record persuades us that the motion should have been granted. Liberally construing defendants’ arguments in opposition as an assertion of prejudice owing to the four-year delay in filing, we find the assertion lacking. “Prejudice in this context exists where a party has incurred some change in position or hindrance in the preparation of its case which could have been avoided had the original pleading contained the proposed amendment” (*Lakeview Outlets Inc. v Town of Malta*, 166 AD3d 1445, 1446 [3d Dept 2018] [internal quotation marks and citations omitted]). Here, the substance of defendants’ answer to the original complaint acknowledges that they became aware of plaintiffs’ incarceration by reading about it in the newspaper. In connection with that information, defendants were suspicious that the property was being used in furtherance of plaintiffs’ criminal activity which, in their view, warranted an emergency inspection. Defendants further acknowledged that they, upon entering the property, “secur[ed] each plaintiffs’ remaining personal effects.” These facts suggest that defendants have not been hindered in formulating a defense to the allegations in plaintiffs’ complaint. To the extent defendants assail the sufficiency of the handwritten list of items that were purportedly removed from the property and have been provided by plaintiffs alongside the proposed amended complaint, we note that plaintiffs have no burden to submit any proof at this stage of litigation (see *Mohammed v New York State Professional Fire Fighters Assn., Inc.*, 209 AD3d 1151, 1152 [3d Dept 2022]), and the probative value of that list, or lack thereof, does not render the amendment “palpably insufficient or patently devoid of merit” (*Passeri v Brody*, 199 AD3d at 1261 [internal quotation marks and citations omitted]; see *NYAHS Servs., Inc., Self-Ins. Trust v People Care Inc.*, 156 AD3d 99, 103 [3d Dept 2017]). Accord-

ingly, at this juncture, plaintiffs have accomplished the bare minimum to allow the action to proceed.²

In light of our determination, we find no basis to grant defendants' request for costs and fees, irrespective of plaintiffs' approach to briefing on this appeal. The parties' remaining contentions, to the extent not expressly addressed, have been considered and found unavailing.

Clark, J.P., Aarons, Pritzker and Corcoran, JJ., concur. Ordered that the order is modified, on the law, without costs, by reversing so much thereof as denied plaintiffs' cross-motion to amend the complaint; cross-motion granted, and plaintiffs are directed to serve the amended complaint within 20 days of the date of this Court's decision; and, as so modified, affirmed.

12 In the Matter of Kareem E., Alleged to be a Juvenile Delinquent. Schenectady County Attorney, Respondent; Kareem E., Appellant. [— NYS3d —]

Infants—Juvenile Delinquents—Sufficiency of Petition—Second-Degree Riot Charge

Infants—Juvenile Delinquents—Attempted Assault and Resisting Arrest—Weight of Evidence at Fact-Finding Hearing

Fisher, J. Appeal from an order of the Family Court of Schenectady County (Kevin Burke, J.), entered October 23, 2024, which granted petitioner's application, in a proceeding pursuant to Family Ct Act article 3, to adjudicate respondent a juvenile delinquent.

In February 2024, petitioner commenced this juvenile delinquency proceeding against respondent (born in 2009) based upon allegations that he engaged in a physical altercation with another individual in a parking lot with several other individuals present, failed to respond to police commands to cease fighting and then had to be physically restrained by two officers in

2. Although plaintiffs filed a note of issue and certified that they are ready for trial, there has been no discovery conducted in this case. Generally, these facts would warrant a cautious approach in permitting plaintiffs to amend their complaint (*see Ferretti v Village of Scotia*, 200 AD3d 1243, 1247 [3d Dept 2021]). However, we note that plaintiffs' amendment does not add new facts or causes of action and instead seeks to correct deficiencies pointed out in defendants' motion to dismiss, which allows for a more permissive review with respect to whether or not to allow an amendment. Further, although Supreme Court did not address defendants' motion to strike the note of issue, our determination permitting plaintiffs to file the amended complaint, along with the fact that no discovery has been performed in this case, may warrant such relief (*see generally Hutchins v Wand*, 82 AD2d 928, 928 [3d Dept 1981]; *compare Lisa I. v Manikas*, 188 AD3d 1369, 1371 [3d Dept 2020]; *Rosen v Mosby*, 180 AD3d 1253, 1256 [3d Dept 2020]; *Kropp v Town of Shandaken*, 91 AD3d 1087, 1092 [3d Dept 2012]).

order to effectuate his arrest. Following a fact-finding hearing, Family Court found that respondent had committed acts that, if committed by an adult, would constitute the crimes of riot in the second degree, attempted assault in the third degree and resisting arrest.¹ Following a dispositional hearing, Family Court adjudicated respondent a juvenile delinquent and placed him on probation for one year. Respondent appeals.

Respondent initially contends that the petition is jurisdictionally defective with respect to second-degree riot, which requires proof that a person, “simultaneously with four or more other persons, . . . engages in tumultuous and violent conduct and thereby intentionally or recklessly causes or creates a grave risk of causing public alarm” (Penal Law § 240.05). We agree. A juvenile delinquency petition is facially sufficient “when nonhearsay allegations of the factual part of the petition or of any supporting depositions establish, if true, every element of each crime charged and the respondent’s commission thereof” (*Matter of Antwaine T.*, 23 NY3d 512, 515-516 [2014] [internal quotation marks and citation omitted]). The absence of factual allegations supporting each element of the crimes charged constitutes “a jurisdictional defect that is nonwaivable and is reviewable for the first time upon appeal” (*Matter of Tashawn MM.*, 218 AD3d 906, 907 [3d Dept 2023] [internal quotation marks, ellipsis and citation omitted]).

The petition alleges that respondent “did engage in a physical altercation with another unknown juvenile . . . with more than four people present, recklessly causing public alarm.” The supporting deposition of the police lieutenant who responded to the incident stated only that he observed “several” individuals fighting in the street and the parking lot, that respondent was “significantly larger” and repeatedly punching another individual in the head who “did not appear to be able to defend himself,” and that respondent was “accompanied by” eight other individuals. Taken together, these allegations do not establish that respondent and four other individuals simultaneously engaged in tumultuous and violent conduct, i.e., conduct that was “much more than mere loud noise or ordinary disturbance” and instead rises to the level of “frightening mob behavior involving ominous threats of injury, stone throwing or other such terrorizing acts” with at least four other individuals (*People v Morales*, 158 Misc 2d 443, 445 [Crim Ct, NY County 1993] [internal quotation marks and citation omitted]; see Penal Law § 240.05; *Matter of Christopher M.*, 94 AD3d 1119,

1. Family Court dismissed the charge of obstructing governmental administration.

1120 [2d Dept 2012]; *compare People v Michie*, 52 Misc 3d 270, 276 [Crim Ct, Bronx County 2016]). As such, the relevant portion of the petition must be dismissed (*see* Family Ct Act § 315.1 [1], [2]; *Matter of Savannah F.*, 232 AD3d 1100, 1103 [3d Dept 2024]).

Next, respondent's challenge to the legal sufficiency of the evidence in connection with attempted assault is unpreserved because the specific grounds being advanced on appeal were not raised in his trial motion to dismiss before Family Court (*see Matter of Angel ZZ.*, 220 AD3d 1097, 1097 [3d Dept 2023]).² Nevertheless, "[w]hen presented with a weight of the evidence argument in a case, such as this one, where a different determination would not have been unreasonable, we view the evidence in a neutral light while according deference to the credibility determinations of Family Court" (*Matter of Lucas Y.*, 223 AD3d 1057, 1058 [3d Dept 2024] [internal quotation marks and citations omitted], *lv denied* 41 NY3d 909 [2024]). As pertinent here, "attempted assault in the third degree requires proof that [the] defendant engaged in conduct which tends to effect the commission of assault with the intent to cause physical injury to another" (*People v Repanti*, 24 NY3d 706, 710 [2015] [internal quotation marks, brackets and citation omitted]). "Physical injury" is an "impairment of physical condition or substantial pain" (Penal Law § 10.00 [9] [internal quotation marks omitted]). In addition, "[a] person is guilty of resisting arrest when he [or she] intentionally prevents or attempts to prevent a police officer or peace officer from effecting an authorized arrest of himself [or herself] or another person" (Penal Law § 205.30; *see People v Hadlock*, 218 AD3d 925, 927 [3d Dept 2023], *lv denied* 40 NY3d 997 [2023]).

Here, the responding police officers testified that they arrived at the scene and observed a large group of people fighting in the street and the parking lot. According to the police lieutenant, he observed several people throwing punches at

2. We reject respondent's contention that petitioner failed to disprove the justification of self-defense, as he never raised such issue before Family Court (*see Matter of Rasean B.*, 7 AD3d 520, 521 [2d Dept 2004]). Thus, petitioner had no reason to present evidence concerning respondent's belief as to the necessity of the use of physical force, his ability to retreat or whether the fight depicted in the body camera footage was mutual combat to which the defense of justification does not apply (*see* Penal Law § 35.15 [1] [c]; *People v Hall*, 195 AD3d 1574, 1575 [4th Dept 2021], *lv denied* 37 NY3d 1096 [2021]). To the extent that petitioner's counsel may be viewed as conceding on appeal that Family Court was "fully aware" that justification could have been a defense to the attempted assault charge, we are free to reject concessions belied by the record—like here (*see e.g. People v Cooper BB.*, 229 AD3d 944, 944 [3d Dept 2024], *lv denied* 42 NY3d 1019 [2024]).

each other and attempted to break up a fight involving respondent—who appeared to be “much larger” and “was attacking and punching” another person. The lieutenant further testified that he advised respondent that he was under arrest and to put his hands behind his back, but that he refused to do so. The body camera video from the patrol officer assisting the lieutenant depicts respondent and the other person exchanging punches, including respondent landing several punches to the face, head or neck area of the other individual. The footage further shows the lieutenant holding respondent’s arms behind his back when respondent suddenly pulls his arms away and flails backwards, before both officers then push respondent to the ground to effectuate the arrest.

Although a different verdict as to attempted assault in the third degree would not have been unreasonable given that the police were unable to identify the individual who had been punched by respondent and determine whether he had sustained a physical injury, we are satisfied that the verdict is supported by the weight of the evidence (*see People v Hall*, 243 AD3d 1070, 1072 [3d Dept 2025]; *People v Bonilla*, 229 AD3d 850, 853 [3d Dept 2024], *lv denied* 42 NY3d 1018 [2024]). The evidence presented during the hearing, viewed in a neutral light, established that defendant was larger and landed several punches to the other individual’s face, head or neck—therefore coming “dangerously close” to causing “substantial pain” to another (*People v Lendof-Gonzalez*, 36 NY3d 87, 89 [2020] [internal quotation marks and citation omitted]; Penal Law § 10.00 [9]; *see* § 110.00; *Matter of Dwayne H.*, 278 AD2d 706, 707 [3d Dept 2000]). In doing so, respondent’s actions provided probable cause for an arrest for misdemeanor assault or attempted assault (*see* Family Ct Act § 305.2 [2]; Penal Law § 120.00 [1]; *Matter of Kalexis R.*, 85 AD3d 927, 928 [2d Dept 2011]). Based on the testimony of the police officers and the body camera footage depicting the struggle between them and respondent in effectuating the arrest, and deferring to Family Court’s assessment of the witnesses’ credibility, we conclude that Family Court’s determination with respect to resisting arrest is also not against the weight of the evidence (*see People v Cox*, 129 AD3d 1210, 1211-1212 [3d Dept 2015], *lv denied* 26 NY3d 966 [2015]; *see also People v Jones*, 214 AD3d 1340, 1341-1342 [4th Dept 2023], *lv denied* 39 NY3d 1155 [2023]). We have examined respondent’s remaining contentions and have found them to be without merit or academic.

Clark, J.P., and Pritzker, J., concur.

Aarons, J. (dissenting in part). Although we agree with the

majority's conclusion that the riot charge is defective, we would go further and dismiss the entire petition. As such, we respectfully dissent from the majority's affirmance of the order adjudicating respondent a juvenile delinquent based upon the crimes of attempted assault in the third degree and resisting arrest.

As to attempted third-degree assault, the police officers who testified indicated that they did not witness who started the altercation, and the alleged victim fled as police were arresting respondent. The alleged victim did not testify or provide any evidence. The first image in the video from the body camera worn by the patrol officer shows that the alleged victim swung his arms at respondent while police officers looked on and shouted for the pair to break up the fight; respondent then punched the alleged victim repeatedly. This evidence was enough to put a justification defense into issue, requiring petitioner to disprove that defense (*see* Penal Law § 25.00 [1]).* Testimony that the alleged victim did not appear to be able to defend himself did not prove respondent was the initial aggressor so as to disprove justification (*see* Penal Law § 35.15 [1]; *Matter of Ganjel P.*, 131 AD3d 877, 877 [1st Dept 2015]). Therefore, in our view, Family Court's finding as to attempted third-degree assault is against the weight of the evidence; accordingly, we would dismiss that part of the petition (*see Matter of Mondy E.*, 121 AD3d 785, 788 [2d Dept 2014]).

Next, although we agree that Family Court's finding with respect to resisting arrest is not against the weight of the evidence (*see Matter of Kara M.*, 242 AD2d 630, 631 [2d Dept 1997]), the evidence indicates that respondent's level of physical resistance did not involve more than pulling away from the police lieutenant who was holding respondent's arms behind his back. At that point, the lieutenant and the patrol officer tackled respondent to the ground. Testimony established that police focused on respondent because his appearance made them believe he was a 20-year-old adult; they did not discover

* Although there is no record of respondent's trial counsel requesting that Family Court consider a justification defense at the fact-finding hearing, petitioner states on appeal that the court "was fully aware that self-defense could be a defense to the charge" and addresses the merits of the defense without arguing that the defense is unpreserved. Petitioner did not appear at oral argument, and respondent has different counsel on appeal. Under the circumstances, we consider petitioner's representation a concession that the issue is preserved. Alternatively, in our estimation, the same factors that support dismissal of the resisting arrest count in furtherance of justice support dismissal of so much of the petition as alleged attempted assault (*see* Family Ct Act § 315.2 [1], [2]).

they had arrested a 14-year-old child until after they brought him to the station. Though the patrol officer testified that the alleged victim appeared unable to defend himself, the officer's body camera video shows the alleged victim swinging his fist at respondent's head, and respondent trying to dodge that swing. Further, there was no evidence that respondent's conduct inhibited the operation of the ambulance company where the incident occurred; thus, as we see it, the location of the incident did not elevate the gravity of respondent's conduct. Finally, the attempted assault count was not a serious crime, and there was no evidence that respondent's conduct resulted in any injury to the alleged victim or the arresting officers (*see* Family Ct Act § 315.2 [1]; *Matter of A. WW.*, 237 AD3d 1420, 1423 [3d Dept 2025]). Given all of these considerations, we would exercise the Court's discretion to dismiss the resisting arrest count in furtherance of justice (*see* Family Ct Act § 315.2 [1], [2]; *Matter of Steven C.*, 93 AD3d 91, 95 [2d Dept 2012]).

Reynolds Fitzgerald, J., concurs. Ordered that the order is modified, on the law, without costs, by reversing so much thereof as adjudged that respondent committed an act which if committed by an adult would constitute the crime of riot in the second degree; count 1 of the petition is dismissed; and, as so modified, affirmed.

13 James Alexander, Appellant, v Dylan Rippe et al., Defendants, and Chili Soccer Association, Inc., et al., Respondents. [— NYS3d —]

Negligence—Negligent Supervision—Injury to Participant in Youth Soccer Tournament—Foreseeability of Rough Play
Negligence—Negligent Supervision—Injury to Participant in Youth Soccer Tournament—Lack of Supervision Not Proximate Cause of Injury Where Underlying Incident Occurred within Such Short Time Span That Even Most Intense Supervision Could Not Have Prevented it

Powers, J. Appeal from that part of an order of the Supreme Court (Richard Kupferman, J.), entered November 18, 2024, in Saratoga County, which granted a motion by defendant Chili Soccer Association, Inc. for summary judgment dismissing the complaint and cross-claims against it.

In 2016, plaintiff was participating in a youth soccer tournament in the Town of Fort Ann, Washington County, when he sustained a broken clavicle, which he claims was the result of being thrown to the ground by defendant Dylan Rippe. At that time both plaintiff and Rippe were minors playing for opposing teams, with Rippe playing for defendant Chili Soccer Association, Inc. In 2019, plaintiff commenced this action in Saratoga County against Rippe, Rippe's parents, Chili Soccer and de-

fendant New York State West Youth Soccer Association, Inc.¹ Plaintiff alleged, among other things, that Chili Soccer was negligent in its supervision of Rippe, which ultimately resulted in plaintiff's injuries. As is relevant here, following joinder of issue, Chili Soccer moved for summary judgment dismissing the claims against it on the basis that it did not host the tournament or select the referees as plaintiff alleged and, even so, any alleged negligence on its part was not the proximate cause of plaintiff's injuries. Supreme Court, finding Chili Soccer to have met its burden on summary judgment and that plaintiff failed to raise a triable issue of fact in opposition, granted the motion and dismissed the claims against Chili Soccer. Plaintiff appeals.²

It is well settled that “[o]n a motion for summary judgment, the movant must establish its prima facie entitlement to judgment as a matter of law by presenting competent evidence that demonstrates the absence of any material issue of fact. If the movant makes such a showing, thereby satisfying this burden, the burden then shifts to the nonmovant to demonstrate that a triable issue of fact exists” (*Vickers v Parcels*, 198 AD3d 1160, 1161 [3d Dept 2021] [internal quotation marks and citations omitted]). “In considering applications of this nature, courts must focus on issue finding rather than issue determination, and deny the drastic remedy of summary judgment if there is any doubt as to whether a material factual issue exists or if such an issue is even arguable” (*Smero v City of Saratoga Springs*, 160 AD3d 1169, 1170 [3d Dept 2018] [internal quotation marks and citations omitted]).

Coaches and associated teams or clubs, like schools and

1. Plaintiff also commenced a related action in Washington County against the owner of the facility where the tournament was held, Golden Fields, LLC (see NY St Cts Elec Filing [NYSCEF] Doc No. 1, summons and complaint, in *Alexander v Golden Fields, LLC*, Sup Ct, Washington County, index No. EC2022-33930). After entry of the order on appeal, plaintiff stipulated to consolidation of these two actions, which are now being heard in Supreme Court in Washington County (see NY St Cts Elec Filing [NYSCEF] Doc No. 81, consolidation order, in *Alexander v Rippe*, Sup Ct, Washington County, index No. EC2025-38662).

2. The motion for summary judgment was joined by New York State West, which, similar to Chili Soccer, plaintiff asserted had hosted or provided the referees for the tournament. Plaintiff subsequently consented to discontinuance of the claims against New York State West during oral argument. As such, the claims against this defendant were dismissed and plaintiff does not raise any issue related thereto on appeal. Accordingly, rather than filing a joint brief with Chili Soccer, New York State West could have chosen not to participate on this appeal and, therefore, its assertion that it is improperly named as a party herein is misplaced.

youth camps, “‘are under a duty to adequately supervise the [youths] in their charge and they will be held liable for foreseeable injuries proximately related to the absence of adequate supervision’” (*Shoemaker v Whitney Point Cent. School Dist.*, 299 AD2d 719, 720 [3d Dept 2002], *lv dismissed* 99 NY2d 610 [2003], quoting *Mirand v City of New York*, 84 NY2d 44, 49 [1994]; see *Beninati v City of Troy*, 163 AD3d 1241, 1242 [3d Dept 2018]; see also *DiGiacomo v Town of Babylon*, 124 AD3d 828, 829 [2d Dept 2015]). “They are not, however, insurers of safety and will not be held liable for every thoughtless or careless act by which one [youth] may injure another” (*Foster v New Berlin Cent. School Dist.*, 246 AD2d 880, 881 [3d Dept 1998] [internal quotation marks and citation omitted]). Thus, “[w]here liability is imposed on a [defendant] for negligent supervision due to injuries related to an individual’s intentional acts, the plaintiff generally must demonstrate the [defendant]’s prior knowledge or notice of the individual’s propensity or likelihood to engage in such conduct, so that the individual’s acts could be anticipated or were foreseeable” (*Dia CC. v Ithaca City School Dist.*, 304 AD2d 955, 956 [3d Dept 2003], *lv denied* 100 NY2d 506 [2003]; see *Osmanzai v Sports & Arts in Schools Found., Inc.*, 116 AD3d 937, 938 [2d Dept 2014]; *LaPage v Evans*, 37 AD3d 1019, 1020 [3d Dept 2007]). “The test for causation is whether, under all the circumstances, the chain of events that followed the negligent act or omission was a normal or foreseeable consequence of the situation created by the [defendant’s] negligence” (*T.E. v South Glens Falls Cent. Sch. Dist.*, 232 AD3d 1185, 1186-1187 [3d Dept 2024] [internal quotation marks, brackets and citations omitted]). Still, “[w]here . . . the underlying accident occurs in so short a span of time that even the most intense supervision could not have prevented it, lack of supervision is not the proximate cause of the injury and summary judgment in favor of the . . . defendant is warranted” (*Elbadwi v Saugerties Cent. Sch. Dist.*, 141 AD3d 805, 807 [3d Dept 2016] [internal quotation marks, brackets and citations omitted]).

In support of its motion for summary judgment, Chili Soccer offered, among other things, the deposition testimony of plaintiff, Rippe, Rippe’s parents, as well as that of his coach Jeffery Vieira and a video of the incident. Despite plaintiff’s description of an earlier incident in a prior game between his team and Chili Soccer during the same tournament, Vieira affirmed that he was not aware of any such incident, did not recall receiving any warnings about any players and no players from his team received a yellow or a red card during that game. Rippe also testified that he had never received a yellow or a

red card or even a warning for rough play in all his time playing soccer and Vieira confirmed that Rippe was not known to be an aggressive player. Thus, taken collectively, the testimony established that Vieira was not on notice of any inclination toward aggressive play by Rippe or any animosity amongst players. Chili Soccer could not therefore have reasonably foreseen or anticipated Rippe's alleged tortious conduct (see *Thomas v United States Soccer Fedn.*, 236 AD2d 600, 602 [2d Dept 1997]; compare *T.E. v South Glens Falls Cent. Sch. Dist.*, 232 AD3d at 1187; *Wood v Watervliet City School Dist.*, 30 AD3d 663, 664 [3d Dept 2006]). Moreover, this proof—most notably, the video of the incident—likewise established that plaintiff's injuries were the result of a sudden act that came without warning. As a result, Vieira did not have the opportunity to intercede and, thus, defendant established that any purported inadequate supervision by Chili Soccer was not a proximate cause of plaintiff's injuries (see *Elbadwi v Saugerties Cent. Sch. Dist.*, 141 AD3d at 807-808; *LaPage v Evans*, 37 AD3d at 1021; *Shoemaker v Whitney Point Cent. School Dist.*, 299 AD2d at 720; *Foster v New Berlin Cent. School Dist.*, 246 AD2d at 881; *Thomas v United States Soccer Fedn.*, 236 AD2d at 602). Consequently, Chili Soccer met its moving burden demonstrating its entitlement to summary judgment, thereby shifting the burden to plaintiff to set forth a triable issue of fact in opposition.

Plaintiff provided affidavits from his coach as well as the teammate who had been involved in the earlier incident with Rippe. These affidavits opine that Chili Soccer was playing aggressively during the tournament and express that the referees for the tournament did not issue warnings or penalties for rough play and what the affiants believed to have been fouls. It was stated that Vieira failed to properly supervise his team and that, if he had reprimanded Rippe for the earlier incident, Rippe would not have been aggressive during the later game. Viewing the proof in the light most favorable to plaintiff, as we must at this juncture, plaintiff failed to raise a triable issue of fact as to whether Vieira had been aware of the prior incident, had notice of an inclination on the part of Rippe to play in an aggressive or violent manner or the existence of any previous acrimony between the teams or players (compare *T.E. v South Glens Falls Cent. Sch. Dist.*, 232 AD3d at 1187; *Thomas v United States Soccer Fedn.*, 236 AD2d at 602). The aforementioned proof also failed to raise an issue of fact as to whether the incident was not so sudden and of such a short duration that there was not time for Vieira to intercede (see *Harris v Five Point Mission—Camp Olmstedt*, 73 AD3d 1127, 1128-1129

[2d Dept 2010]; *compare Williams v Student Bus Co., Inc.*, 170 AD3d 1085, 1087 [2d Dept 2019]; *Shoemaker v Whitney Point Cent. School Dist.*, 299 AD2d at 720). Rather, this proof amounted to “mere conclusions, expressions of hope or unsubstantiated allegations or assertions” and was, therefore, insufficient to satisfy plaintiff’s burden in opposition (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). Supreme Court therefore properly granted Chili Soccer’s motion for summary judgment dismissing the claims against it and, despite plaintiff’s assertion to the contrary, the court did not partake in impermissible issue determination when deciding this motion.

Clark, J.P., Ceresia and Corcoran, JJ., concur. Ordered that the order is affirmed, with costs.

14 In the Matter of Emily SS., Respondent, v Charles SS., Appellant. (And Other Related Proceedings.) [— NYS3d —]—

Parent, Child and Family—Custody—Dismissal of Modification Petition—Vacatur of Acknowledgment of Paternity Following Genetic Testing Result Appeal—Academic and Moot Questions—Expiration of Order of Protection

Mackey, J. Appeal from an order of the Family Court of Broome County (Brett Noonan, J.), entered November 19, 2024, which, in two proceedings pursuant to Family Ct Act articles 6 and 8, denied respondent’s motion to vacate two prior orders issued on default.

Petitioner (hereinafter the mother) is the mother of the subject child (born in 2023). Shortly after the child was born, the mother filed a family offense petition against respondent—her husband—based upon allegations of abuse stemming from the paternity of the child. Relatedly, the mother also filed a custody petition pursuant to Family Ct Act article 6. Respondent was initially assigned counsel, however, during an initial appearance he adamantly insisted that he did not want an attorney, and he was thereafter permitted to proceed pro se. Respondent failed to appear at the subsequent fact-finding hearing on the petitions, and Family Court conducted the hearing in his absence, ultimately issuing two orders upon respondent’s default—the first being an order of protection in favor of the mother and the child, with the second default order awarding sole custody of the child to the mother. Respondent thereafter filed several motions, unsuccessfully attempting to vacate the default orders. In August 2024, respondent moved to vacate the default orders for a sixth time, which motion Family Court denied. Respondent, now represented by counsel, appeals.

In February and August 2024, respondent filed multiple

custody modification petitions as to the subject child. The mother in turn filed a petition seeking to vacate respondent's acknowledgment of paternity, and genetic marker testing was ordered. During the pendency of this appeal, Family Court dismissed respondent's custody modification petitions and issued an order vacating respondent's acknowledgment of paternity after the ordered genetic testing established that a different individual, and not respondent, is the biological father of the child. Upon this basis, the court further vacated the underlying order of custody entered upon respondent's default. Accordingly, Family Court's denial of respondent's motion to vacate the same has been rendered moot (*see generally Saratoga County Chamber of Commerce v Pataki*, 100 NY2d 801, 810-811 [2003], *cert denied* 540 US 1017 [2003]; *see also Matter of Alyssa C. v Samuel L.W.*, 216 AD3d 1091, 1092 [2d Dept 2023]; *Matter of Matt J.F. v Billie L.F.*, 126 AD3d 1488, 1488 [4th Dept 2015]).

Respondent's remaining challenge to the denial of his motion to vacate the order of protection has likewise been rendered moot, as the order expired by its own terms in October 2025 (*see Matter of Sandra G. v Victor P.*, 71 AD3d 588, 588 [1st Dept 2010], *lv dismissed* 15 NY3d 862 [2010]). Moreover, as the order was not issued with adverse findings, respondent is not otherwise prejudiced by potential "enduring consequences" (*Matter of Jonnilyn C. v Amy D.*, 244 AD3d 1462, 1463 [3d Dept 2025] [internal quotation marks and citations omitted]; *see Matter of Schreiber v Schreiber*, 2 AD3d 1094, 1095 [3d Dept 2003]; *compare Matter of Smith v Morrison*, 196 AD3d 772, 773 n [3d Dept 2021]).

Aarons, J.P., Pritzker, Reynolds Fitzgerald and Fisher, JJ., concur. Ordered that the appeal is dismissed, as moot, without costs.

15 In the Matter of Emilie Munson et al., Respondents, v New York State Division of Criminal Justice Services, Appellant. [— NYS3d —]

Records—Freedom of Information Law—Public Safety Exemption—Disclosure of State Registry of Certified Police Officers Properly Denied as Material That Could Endanger Life or Safety of Undercover Officers

Corcoran, J. Appeal from a judgment of the Supreme Court (Meagan Galligan, J.), entered November 4, 2024, in Albany County, which partially granted petitioners' application, in a combined proceeding pursuant to CPLR article 78 and action for declaratory judgment, to annul a determination of respondent denying petitioners' Freedom of Information Law request.

Respondent maintains a central registry of all police officers and peace officers certified to serve in the state pursuant to Executive Law § 845. For each officer, the registry contains “his or her name, date of birth, social security number, rank or title, employer, and date of successful completion of training” (Executive Law § 845 [1]). Local and state agencies must provide this information to respondent annually and whenever new officers are appointed (*see* Executive Law § 845 [2] [a]). In August 2022, petitioner Emilie Munson, an Albany Times Union reporter, submitted a request pursuant to the Freedom of Information Law (*see* Public Officers Law art 6 [hereinafter FOIL]) seeking records for all certified and decertified officers, together with officers’ names, city and/or zip code of residence, current and previous employers with current and/or last ranks and positions for each, training history and other information.

Respondent effectively granted Munson’s request for information related to decertified officers by referring her to its website, where it publishes the statewide list of decertified officers, i.e., those deemed ineligible for continued police employment. However, respondent asserted that the list of all certified officers was exempt from disclosure pursuant to Public Officers Law § 87 (2) (f) because releasing it “could endanger the life or safety of any person.” In denying petitioners’ administrative appeal, respondent explained that the registry necessarily includes officers serving in undercover capacities, and that respondent lacks the ability to identify or segregate those officers from the registry.

Petitioners commenced this combined CPLR article 78 proceeding and declaratory judgment action challenging respondent’s denial of the registry of certified officers. Supreme Court partially granted the petition and directed disclosure of the requested records, subject to redaction of the officers’ city or zip code of residence and other identifying information. Respondent appealed, and this Court modified the judgment and remitted the matter to Supreme Court to permit further submissions and in camera review “for determination as to whether further redaction of all identifying information is necessary” (228 AD3d 1119, 1122 [3d Dept 2024]). Upon remittal, Supreme Court adhered to its prior determination granting the petition after finding that respondent did not show a possibility of endangerment to officers listed on the registry. The court directed respondent to disclose the entire registry after redacting information related to undercover training, together with the city or zip code of residence. Respondent again appeals, and we reverse.

“FOIL imposes a broad duty of disclosure on government agencies and all agency records are presumptively available for public inspection and copying unless one of the statutory exemptions applies, in which case the agency may withhold or redact the requested records” (*Matter of Whitfield v FOIL Appeals Officer, Dept. of Corr. & Community Supervision*, 221 AD3d 1341, 1343 [3d Dept 2023] [internal quotation marks and citations omitted]). “Public Officers Law § 87 (2) (f) exempts from disclosure materials that, if disclosed, *could* endanger the life or safety of any person, and respondent, the agency in question, need only demonstrate a *possibility* of endangerment in order to invoke this exemption” (*Matter of Prisoners’ Legal Servs. of N.Y. v New York State Dept. of Corr. & Community Supervision*, 209 AD3d 1208, 1211-1212 [3d Dept 2022] [internal quotation marks and citations omitted], *aff’d* 42 NY3d 936 [2024]). Although “[e]xemptions are to be narrowly construed to provide maximum access, and the agency seeking to prevent disclosure carries the burden of demonstrating that the requested material falls squarely within a FOIL exemption” (*Matter of Capital Newspapers Div. of Hearst Corp. v Burns*, 67 NY2d 562, 566 [1986]), they “must be given their natural and obvious meaning where such interpretation is consistent with the legislative intent and with the general purpose and manifest policy underlying FOIL” (*Matter of Hutchinson v Annucci*, 189 AD3d 1850, 1853 [3d Dept 2020] [internal quotation marks and citation omitted]).

“[W]ithholding or denying a request is proper ‘where the requested records, when combined with other readily available information, *could* identify or lead to the identification of information protected under a FOIL exemption’” (*Matter of Spence v New York State Dept. of Civ. Serv.*, 223 AD3d 1019, 1020 [3d Dept 2024], quoting *Matter of Suhr v New York State Dept. of Civ. Serv.*, 193 AD3d 129, 136 [3d Dept 2021], *lv denied* 37 NY3d 907 [2021]). The exemption allows an agency to withhold information that would identify undercover officers (*see Matter of Grajales v Lungen*, 15 AD3d 789, 790 [3d Dept 2005], *lv denied* 5 NY3d 704 [2005]). Moreover, a law enforcement agency may properly invoke the “life or safety” exemption under Public Officers Law § 87 (2) (f) to withhold information which could be used in combination with other readily available information to estimate the number of undercover officers in a department or the relative staffing levels of police departments or precincts (*see Matter of Digital Forensics Unit v Records Access Officer*, 214 AD3d 532, 533-534 [1st Dept 2023]; *Matter of Empire Ctr. for Pub. Policy v New York City Off. of Payroll Admin.*, 2019 NY Slip Op 30643[U], *5 [Sup Ct, NY

County 2019], *mod* 187 AD3d 435, 435-436 [1st Dept 2020], *lv denied* 36 NY3d 906 [2021]; *see also Matter of Ruberti, Girvin & Ferlazzo v New York State Div. of State Police*, 218 AD2d 494, 499 [3d Dept 1996]). As explained below, the state registry could be compared to a local law enforcement agency's public payroll database to discern the names and total number of officers working in an undercover or sensitive role because respondent and some police agencies use different procedures to shield this information. Thus, Supreme Court erred in directing respondent to disclose the registry with certain fields redacted because redaction will not adequately minimize the risks of disclosure.

Although respondent may adopt regulations to ensure the integrity of the registry as a public record (*see* Executive Law § 845; 9 NYCRR part 6056; 9 NYCRR 6056.3 [a]), the regulations do not address how to handle FOIL requests that implicate sensitive information like undercover assignments or training. As explained by the affidavit of the agency's representative, each law enforcement agency is required to submit to the state registry certain prescribed information for each certified officer it employs, including officers working undercover or in sensitive capacities, though the officer's undercover status is not revealed in this submission. Respondent therefore cannot discern from the registry if a particular officer works undercover. When respondent receives a FOIL request for an officer's registry information, it communicates with the officer's employer to identify any justification for redacting or withholding information, including that the officer works undercover or in a sensitive position. Respondent then discloses the officer's registry profile after redacting statutorily protected information, such as social security numbers and birthdates, as illustrated by the exemplar registry profile annexed to the petition by Munson. This practice is unaffected by this appeal, such that the public and police agencies may verify whether a particular officer maintains current, proper certification by requesting registry information for a particular officer or by reviewing respondent's list of decertified officers.

The in camera submissions reveal that, unlike the state registry, at least one police agency omits from its own public payroll database certain information about certified officers working undercover or in sensitive assignments to protect their safety and preserve confidentiality; again, the police agency submits information about those same officers to the state registry. This distinction in how respondent and a local law enforcement agency account for undercover officers would be

evident to one who compares the department's public payroll database to the list attributed by the state registry to that agency. Simply put, comparing the state registry to a local department's publicly disclosed payroll database could reveal names of undercover officers that appear on the state registry but not on their employer's redacted payroll database. Thus, respondent demonstrated that disclosure of the registry could endanger police officers who could be presumptively revealed by name as working undercover, thereby satisfying its burden to trigger the exemption under Public Officers Law § 87 (2) (f).

We next consider the distinct risk to public safety implicated by potential disclosure of the registry with redaction of social security numbers, zip codes, city/town, and undercover training as ordered by Supreme Court.* Disclosure of the current employer of all certified officers, even with other fields redacted, could still reveal the *number* of undercover officers in a particular department, thereby creating a possibility of endangerment justifying denial of the public information request (*see Matter of Digital Forensics Unit v Records Access Officer*, 214 AD3d at 533-534; *Matter of Empire Ctr. for Pub. Policy v New York City Off. of Payroll Admin.*, 187 AD3d 435, 435-436 [1st Dept 2020], *lv denied* 36 NY3d 906 [2021]). Such information could be used in conjunction with future requests for equivalent information to estimate increases or decreases in the number of undercover officers, thereby undermining their deterrent effect or hampering law enforcement operations (*see Matter of Empire Ctr. for Pub. Policy v New York City Off. of Payroll Admin.*, 187 AD3d at 435-436).

Respondent has demonstrated that these risks are not merely theoretical. For example, the record-keeping and disclosure practices of the New York Police Department (hereinafter NYPD), and the roadmap to deduce the number of officers assigned to undercover operations, were discussed at oral argument and are detailed in *Matter of Empire Ctr.*, a case cited by both parties here (*see Matter of Empire Ctr. for Pub. Policy v New York City Off. of Payroll Admin.*, 187 AD3d at 435-436). In that case, the petitioner strategically sought the total amount spent annually by the NYPD on undercover officers by requesting salary information that was *not* included in the department's searchable public payroll database. The respondent payroll agency submitted an affidavit from a knowledgeable police department official describing generally how

* Redacting only the undercover training entries would highlight the very fact sought to be concealed, namely, that the officer received undercover training.

and where undercover officers are deployed and how and when they appear in department databases (*see id.*). The Appellate Division, First Department held that the public safety exemption was triggered by the official's description of how anonymous, aggregate salary data could be compared to the public payroll database to deduce increases or decreases in undercover policing, thus creating a possibility of endangerment to public safety (*see id.*). Here, comparing a department's public payroll database to the state registry, even with all names redacted, would permit an even more direct calculation of changes in undercover staffing than the one found sufficient to trigger the public safety exemption in *Matter of Empire Ctr.*

To the extent petitioners may argue that respondent did not directly articulate this basis for withholding the state registry during administrative review, this Court may still address and rely upon it because "the confidentiality rights of third parties not before the court are implicated by the disclosure determination" (*Matter of Hutchinson v Annucci*, 189 AD3d at 1855 [internal quotation marks and citation omitted]; *accord Matter of Whitfield v FOIL Appeals Officer, Dept. of Corr. & Community Supervision*, 221 AD3d at 1344). Regardless, on remittal to consider supplemental materials in camera, some law enforcement agencies addressed disclosure of aggregate information, buttressing the concern described above.

As respondent met its burden of proving that disclosure of the state registry could create a possibility of endangerment under Public Officers Law § 87 (2) (f), Supreme Court erred in granting the petition and ordering disclosure with redactions. Consistent with that finding, there is no basis for awarding counsel fees and costs to petitioners, since they have not "substantially prevailed" (Public Officers Law § 89 [4] [c]; *see Matter of Prisoners' Legal Servs. of N.Y. v New York State Dept. of Corr. & Community Supervision*, 209 AD3d at 1214; *Matter of Empire Ctr. for Pub. Policy v New York City Off. of Payroll Admin.*, 187 AD3d at 436).

Garry, P.J., and Pritzker, J., concur.

Powers, J. (dissenting). This Court set forth in no uncertain terms that remittal was not meant to provide respondent "another full bite of the apple" but was intended to afford it the opportunity to demonstrate, out of the public eye, "how the information might be utilized to endanger active undercover officers" and "whether further redaction of all identifying information [was] necessary" (228 AD3d 1119, 1121-1122 [3d Dept 2024]). As this Court should be constrained to consider only the submissions provided in camera upon remittal, which failed

to establish how the information may be utilized to endanger undercover officers, we must dissent because denial of disclosure is not supported.

“In a CPLR article 78 proceeding to compel production of records pursuant to FOIL, the government has the burden of establishing the applicability of its asserted exemption” and “[w]e must narrowly construe such FOIL exemptions to ensure maximum public access to government records” (*Matter of Russell v Town of Mt. Pleasant, N.Y.*, — NY3d —, —, 2026 NY Slip Op 00966, *3 [2026]). “Public Officers Law § 87 (2) (f) exempts from disclosure materials that, if disclosed, could endanger the life or safety of any person, and respondent, the agency in question, need only demonstrate a possibility of endangerment in order to invoke this exemption” (*Matter of Munson v New York State Div. of Criminal Justice Servs.*, 228 AD3d 1119, 1121 [3d Dept 2024] [internal quotation marks and citations omitted]). “A denial of access shall not be based solely on the category or type of such record and shall be valid only when there is a particularized and specific justification for such denial” (Public Officers Law § 87 [2]). As such, conclusory or speculative assertions without factual support are “insufficient to meet [an agency’s] burden of demonstrating that [an] exemption applie[s]” (*Matter of Wagner v New York City Dept. of Health & Mental Hygiene*, 246 AD3d 751, 753 [2d Dept 2026] [internal quotation marks and citation omitted]; see *Matter of Prisoners’ Legal Servs. of N.Y. v New York State Dept. of Corr. & Community Supervision*, 211 AD3d 1382, 1384 [3d Dept 2022]; *Matter of Vertucci v New York State Dept. of Transp.*, 195 AD3d 1209, 1211 [3d Dept 2021], *lv denied* 37 NY3d 917 [2022]).

To, among other things, “ensure that persons whose names are contained [there]in . . . are lawfully appointed” (9 NYCRR 6056.1 [c]), respondent is required to “collect information to maintain, on a current basis, a registry of all police officers and peace officers in the state. Such registry shall contain, with respect to each officer, his or her name, date of birth, social security number, rank or title, employer, and date of successful completion of training required by [CPL 2.30] and [General Municipal Law § 209-q]” (Executive Law § 845 [1]). At no point during this proceeding has respondent provided even a fully redacted version of the registry it maintains. For that reason, we cannot be certain what data points are contained on the

registry, and, therefore, we are guided only by these statutory requirements.¹

Although an in-depth review of the procedural history of this matter is not necessary, it is relevant that Supreme Court initially granted petitioners' request for disclosure finding that respondent did not make a particularized and specific showing that release of the information sought could identify those who currently serve or have served in an undercover capacity. Supreme Court did find, however, that redaction of the city or zip code of residences was supported.² Respondent appealed to this Court and, in the context of that appeal, we found that "respondent's conclusory and speculative affidavit, averring as it does that the safety exemption justifies denial of access to the requested records, [was] insufficient to deny access to the records sought" (228 AD3d at 1121). Therefore, considering what we perceived to be respondent's "reasonable hesitation to articulate in open court how the information might be utilized to endanger active undercover officers," we remitted the matter to allow the parties to provide in camera submissions and for Supreme Court to determine "whether further redaction of all identifying information [was] necessary" (*id.* at 1121, 1122). Upon its consideration of these submissions, Supreme Court again found that respondent did not sufficiently establish how disclosure of the registry could potentially identify officers who currently serve or have served in an undercover capacity, provided that relevant training as to undercover work was redacted. Therefore, Supreme Court again granted disclosure of the registry with this limited carveout for the redaction of relevant training. Therefore, up until this point, the only information to be redacted was the certified officer's zip code or city of residence and any training relevant to undercover work.

Without providing a high level of detail as to the submissions provided in camera, an affidavit was supplied by an em-

1. While the list of decertified officers is publicly available online, most of the information contained therein relates to decertification and is therefore of no assistance in determining what information is contained on respondent's registry of certified officers. Additionally, as the majority notes, petitioners have provided what appears to be a "Training History Report" for an individual officer which was purportedly disclosed as part of a prior FOIL request. This document may provide some guidance as to what information respondent maintains, yet it does not provide much light as to what respondent may deem responsive to this request.

2. Respondent is not statutorily required to include an officer's residential city, town or zip code in the registry it maintains and the "Training History Report" provided by petitioner does not contain such information, further evidencing that it is unclear from our record what data points respondent maintains.

ployee of respondent familiar with the registry. Therein it was affirmed that respondent does not have the ability to identify officers listed on the registry who currently serve in an undercover or sensitive capacity, or may do so in the future, and that it does not receive this information from law enforcement agencies. This affiant asserted broadly that identification of undercover officers may endanger their safety and that of their families and then detailed the attachments provided in support of the affidavit. These attachments describe how *any*—not just those who may serve in an undercover capacity—officer's name and place of employment may be utilized to discover personal information by harnessing the Internet and, along the same lines, that the Internet can be utilized to find photographs of that individual and those close to them. It was then set forth that, because those recruited to serve in undercover capacities are often experienced officers, it is likely that their name and/or image appears online in connection with their role in law enforcement. The attachments assert that if identities are known, officers may face threats, intimidation and potential harm, again a claim not limited to those who serve in an undercover capacity. Based upon these attachments, the affidavit ultimately opined that release of the registry and training history could endanger undercover officers, as it provides information to those who may seek to uncover the identities of these officers. Therefore, according to respondent, petitioners' request should be denied in its entirety.

The assertions contained in this affidavit mirror, albeit in slightly more detail, those made to Supreme Court in the first instance and the risks described therein are undoubtably true for all officers, not just those who serve in an undercover capacity. Nevertheless, these submissions failed to demonstrate what respondent was required to establish upon remittal: how one may utilize the registry to narrow down who on that list serves in an undercover capacity. Instead, the submissions contain only generalized assertions that when an officer's name is known, the Internet may be utilized to discover personal information and, because of the role undercover officers play, the safety risk is greater to these officers. To the extent the majority asserts that the submissions set forth that at least one agency does not disclose payroll information related to undercover officers, this is not borne directly by the record. Instead, the in camera submissions set forth that certain internal databases do not reflect these officers' information. Moreover, it is not clear how a law enforcement agency's decision to publicize itself and the accomplishments of its officers should be used as a basis to deny access to information which

would otherwise be public. Accordingly, these assertions remain speculative and conclusory and, therefore, inadequate to deny access to the requested records (*see Matter of Munson v New York State Div. of Criminal Justice Servs.*, 228 AD3d at 1121; *cf. Matter of Mack v Howard*, 91 AD3d 1315, 1316 [4th Dept 2012]; *Matter of Carnevale v City of Albany*, 68 AD3d 1290, 1292 [3d Dept 2009]; *see generally Matter of Standardbred Owners Assn., Inc. v New York State Gaming Commission*, 237 AD3d 1354, 1356-1357 [3d Dept 2025]).

Based upon the foregoing, we would order disclosure of responsive records with the redaction of social security numbers and any training history related to undercover work. The majority claims that redaction of such training history would highlight the fact that the officer in question may serve in an undercover capacity. Such assertion is based upon the unsupported assumption that respondent has no way to redact documents without making it evident that information has been subject to redaction. This argument is not only speculative but also has not been advanced by respondent during this proceeding or—even more to the point, considering these redactions were ordered by Supreme Court—in its brief on appeal (*see generally Matter of Reclaim the Records v New York State Dept. of Health*, 45 NY3d 1 [2025]).³

In addition to the foregoing, we also find the majority's invocation of the public safety exemption to be improper as this was never raised by respondent as grounds for denial of petitioner's FOIL request. "Judicial review of an administrative determination is limited to the grounds invoked by the agency and the court is powerless to affirm the administrative action *by substituting what it considers to be a more adequate or proper basis*" (*Matter of Reclaim the Records v New York State Dept. of Health*, 45 NY3d at 14 [internal quotation marks, brackets and citations omitted and emphasis added]). While "this principle of administrative law d[oes] not preclude Supreme Court from addressing the applicability of [a] newly

3. Although date of birth may constitute private information (*see Matter of Data Tree, LLC v Romaine*, 9 NY3d 454, 463 [2007]) and has been subject to redaction when respondent has provided responsive records to other FOIL requests, as evidenced by the submissions provided in support of the petition, this has not been raised as a basis for redaction by respondent in the context of the underlying FOIL request or through the course of this proceeding (*compare Matter of Newsday LLC v New York State Educ. Dept.*, 244 AD3d 1359, 1361 n 2 [3d Dept 2025]; *see generally Matter of Reclaim the Records v New York State Dept. of Health*, 45 NY3d at 15-16. Nevertheless, petitioners' request indicates that birth year or current age are acceptable alternatives to the disclosure of the officer's full date of birth.

raised exemption,” that court—and this Court as well—may not replace the grounds raised by respondent with another that has not been (*Matter of Rose v Albany County Dist. Attorney’s Off.*, 111 AD3d 1123, 1125 [3d Dept 2013] [emphasis added]). The cases relied upon by the majority to conclude otherwise are readily distinguishable as the exemption under review was raised at some juncture (see *Matter of Whitfield v FOIL Appeals Officer, Dept. of Corr. & Community Supervision*, 221 AD3d 1341, 1344 n 2 [3d Dept 2023]; *Matter of Hutchinson v Annucci*, 189 AD3d 1850, 1854-1855 [3d Dept 2020]; see also *Matter of Newsday LLC v New York State Educ. Dept.*, 244 AD3d 1359, 1361 n 2 [3d Dept 2025]; *Matter of Cross-Sound Ferry Servs. v Department of Transp.*, 219 AD2d 346, 350 [3d Dept 1995]; but see *Matter of Johnson v New York City Police Dept.*, 257 AD2d 343, 349 [1st Dept 1999], *lv dismissed* 94 NY2d 791 [1999]).

Respondent claimed that the records in question were exempt from disclosure pursuant to Public Officers Law § 87 (2) (f), the same statute from which the public safety exemption is grounded, yet it specifically asserted that the alleged danger was to undercover officers themselves, not the public at large. Accordingly, we disagree with this Court’s decision to broaden the basis for exemption invoked by respondent to include a supposed threat to the public as doing so “contravenes Court of Appeals precedent as well as the spirit and purpose of FOIL” (*Matter of Aron Law, PLLC v Town of Hempstead*, 242 AD3d 880, 882 [2d Dept 2025] [internal quotation marks and citations omitted], *lv dismissed* 44 NY3d 1072 [2026]) and goes “beyond [this Court’s] mandate to judge the propriety of the agency’s action solely by the grounds invoked by the agency” (*Matter of Union Carbide Corp. v New York State Dept. of Envtl. Conservation*, 189 AD3d 1805, 1809 [3d Dept 2020] [internal quotation marks, brackets and citations omitted]; see *Matter of Reclaim the Records v New York State Dept. of Health*, 45 NY3d at 14; *Matter of Aron Law PLLC v Sullivan County*, 214 AD3d 1186, 1187 [3d Dept 2023]; *Matter of New York Civ. Liberties Union v City of Syracuse*, 210 AD3d 1401, 1405-1406 [4th Dept 2022]).

In any event, we would also find that the submissions upon remittal do not support invocation of the public safety exemption (compare *Matter of Digital Forensics Unit v Records Access Officer*, 214 AD3d 532, 533 [1st Dept 2023]; *Matter of Empire Ctr. for Pub. Policy v New York City Off. of Payroll Admin.*, 187 AD3d 435, 435 [1st Dept 2020], *lv denied* 36 NY3d 906 [2021]).

Accordingly, as we would affirm Supreme Court's order directing disclosure of the requested records, we respectfully dissent.

Aarons, J., concurs. Ordered that the judgment is reversed, on the law, without costs, and petition dismissed.

16 In the Matter of L. XX., Alleged to be an Abused and/or Neglected Child. Albany County Department for Children, Youth and Families, Respondent; V. WW., Appellant. [— NYS3d —]—

Parent, Child and Family—Abused or Neglected Child—Mother Facilitated or Failed to Prevent Sexual Abuse of Child by Unrelated Adult Household Member Which Resulted in Child's Pregnancy

Parent, Child and Family—Abused or Neglected Child—Corroboration of Child's Out-of-Court Statement

Corcoran, J. Appeal from an order of the Family Court of Albany County (Jill Kehn, J.), entered November 26, 2024, which granted petitioner's application, in a proceeding pursuant to Family Ct Act article 10, to adjudicate the subject child to be abused and/or neglected.

Respondent (hereinafter the mother) is the mother of the subject child (born in 2007). Following receipt of a Statewide Central Register hotline report in September 2023 and an ensuing investigation, petitioner commenced this Family Ct Act article 10 proceeding alleging, among other things, that the mother facilitated or failed to prevent sexual abuse of the child by an unrelated adult household member and that she failed to adequately plan for the child's care after learning she was pregnant. After the child ran away from home to another state, she was placed in petitioner's custody with the mother's consent. Following a fact-finding hearing, Family Court determined that the mother abused and neglected the child. The mother appeals, and we affirm.

A person legally responsible for a child's care commits abuse when he or she "allows" a sex offense to be committed against such child (Family Ct Act § 1012 [e] [iii]; see *Matter of Addilyn I. [Richard I.]*, 245 AD3d 1038, 1039 [3d Dept 2026]; *Matter of Kaleb LL. [Bradley MM.]*, 218 AD3d 846, 848 [3d Dept 2023]).¹ "Neglect is established when a preponderance of the evidence shows that the child[]'s physical, mental or emotional condi-

1. As relevant here, a person 21 years old or older who engages in sexual intercourse with another person less than 17 years old commits rape in the third degree (see Penal Law § 130.25 [4]). The victim's lack of consent is an element of every offense defined in Penal Law article 130, and a person less than 17 years old is incapable of granting consent (see Penal Law § 130.05 [1], [2] [b]; [3] [a]).

tion has been impaired or is in imminent danger of becoming impaired and that the actual or threatened harm to the child[] results from the parent's failure to exercise a minimum degree of care in providing the child[] with proper supervision or guardianship" (*Matter of Sariyah T. [Deidre R.]*, 238 AD3d 1253, 1254 [3d Dept 2025] [internal quotation marks and citations omitted]. "[E]ven a single incident of excessive corporal punishment can support a finding of neglect and actual physical injury is not required" (*Matter of Jahkell SS. [Victoria SS.]*, 237 AD3d 1416, 1419 [3d Dept 2025] [internal quotation marks, ellipsis and citations omitted]; see *Matter of Liam DD. [Jamie CC.]*, 244 AD3d 1625, 1627 [3d Dept 2025]). "[A]ny determination that the child is an abused or neglected child must be based on a preponderance of evidence" (Family Ct Act § 1046 [b] [i]). "Family Court's factual findings and credibility determinations are accorded great weight in such a proceeding and will not be disturbed on appeal unless they lack a sound and substantial basis in the record" (*Matter of Addilyn I. [Richard I.]*, 245 AD3d at 1039 [internal quotation marks and citations omitted]).

The hearing evidence established that the child came to the United States with the mother in 2023. Upon their arrival, the family resided with the child's aunt, along with an unrelated 28-year-old male (hereinafter the adult male).² In September 2023, petitioner's caseworker received a hotline report alleging that the adult male was sexually abusing the child. The mother informed the caseworker that he no longer resided in the home and she executed a written safety plan agreeing to prohibit his contact with the child. Despite these assurances, the child's high school social worker contacted the caseworker in October 2023 to report that the mother had attempted to sign her parental rights over to the adult male.

The caseworker, along with a forensic interviewer for the Albany Police Department, interviewed the child at school where she disclosed several instances of sexual abuse by two different men. The child said her mother encouraged her to "hug and kiss" another young adult male (a different individual than the 28-year-old male) who frequently visited her aunt's apartment. This man made repeated sexual advances toward the child and, ultimately, had sexual contact with her. The family then moved to a different apartment along with the adult male. The child reported that her mother encouraged her

2. The hearing did not establish the nature of the relationship, if any, between the 28-year-old male and the child's aunt, nor did it otherwise demonstrate his relationship with the child's family.

“to go sleep with” him and that she was aware they had a sexual relationship. The child told the caseworker that she and the adult male had intercourse three times, that she was pregnant, and that he was the father.

After disclosing her pregnancy to the mother, the child reported that the mother hit her in the face with a pan; she showed pictures of her injuries to the caseworker and the forensic interviewer. The mother told the adult male to move out of their apartment (an event that coincided with the caseworker’s first contact with the household). The child claimed that the mother then entered into a “lease agreement,” whereby the adult male would assume parental supervision of the child, and she showed the forensic interviewer and the caseworker a photograph of the purported “lease.” Around the same time that the child was interviewed, the mother admitted to the caseworker that the adult male was again living with her family. Moreover, the mother conceded that she had “consider[ed]” relinquishing her parental rights to him because she could not afford to care for an additional child, i.e., her anticipated grandchild.

Later in October 2023, the caseworker received a second hotline report alleging that the child ran away to another state. The caseworker inquired whether the mother had a plan to retrieve the child, but her only response was that the other state was “far [away].” During the car ride back to Albany with a different caseworker, the child disclosed that she was three months pregnant with the adult male’s child and that the mother told her she was no longer responsible for her because of the pregnancy.

Family Court determined that the mother abused the child by permitting, and at times encouraging, sexual contact with adult males, which resulted in the child’s pregnancy. Family Court further determined that the mother neglected the child by failing to protect her from sexual abuse, refusing to care for the child when she learned of the pregnancy, neglecting to plan for the child after she was found in another state and using excessive corporal punishment.

Initially, the mother’s contention that Family Court failed to provide adequate notice before conforming the petition to the proof about the alleged sexual abuse is belied by the record (*compare Matter of Astilla BB. [Francis BB.]*, 233 AD3d 1309, 1312 [3d Dept 2024], *lv dismissed* 43 NY3d 948 [2025]; *Matter of Alexander Z. [Melissa Z.]*, 129 AD3d 1160, 1162 [3d Dept 2015], *lv denied* 25 NY3d 914 [2015]; *see* Family Ct Act § 1051 [b]). Although the child alleged that she was subjected to a

specific instance of sexual contact not included in the petition, Family Court did not rely upon that evidence as an independent basis for the abuse or neglect adjudications. Rather, Family Court's finding that the mother "encouraged [the child] to talk to adult men" was fairly implied by the petition's allegation that she "encouraged inappropriate intimate contact between" the child and the abuser. Nor is there merit to the mother's claim that Family Court relied upon an unpleaded theory of neglect, as the petition expressly alleged neglect based on the mother's failure to provide appropriate guardianship and supervision after learning of the child's pregnancy. Accordingly, the proof adduced at the fact-finding hearing supported theories of abuse and neglect that were fairly encompassed by the petition.

We next consider the mother's challenge to the caseworker's hearsay testimony repeating the school social worker's account of the mother's attempt to relinquish her parental rights to the adult male. Even assuming this testimony was improperly admitted, the same essential facts were established through the mother's own admission against interest to the caseworker that she considered assigning her parental rights (*see Matter of M.G. [Marquise G.]*, 234 AD3d 575, 576 [1st Dept 2025]; *Matter of Amara C. [Wanda C.]*, 206 AD3d 424, 424-425 [1st Dept 2022]; *People v Finch*, 160 AD3d 1212, 1214 [3d Dept 2018]), rendering any error harmless (*see Matter of Zaiden P. [Ashley Q.]*, 211 AD3d 1348, 1355 n 5 [3d Dept 2022], *lvs denied* 39 NY3d 911 [2023], 39 NY3d 911 [2023]; *Matter of Carmela H. [Danielle F.]*, 185 AD3d 1460, 1461 [4th Dept 2020], *lv denied* 35 NY3d 915 [2020]; *Matter of Nicholas R. [Jason S.]*, 82 AD3d 1526, 1527 n [3d Dept 2011], *lvs denied* 17 NY3d 706 [2011], 17 NY3d 706 [2011]).

Finally, we reject the mother's contention that the abuse and neglect findings lack a sound and substantial basis in the record. She first argues that the testimony of caseworkers and the forensic interviewer, relaying the child's hearsay statements, was not sufficiently corroborated. In any hearing under Family Ct Act article 10, the out-of-court statements of a child relating to allegations of abuse are admissible but are insufficient to support a finding of neglect or abuse unless corroborated (*see* Family Ct Act § 1046 [a] [vi]; *Matter of Emily RR. [Daniel QQ.]*, 244 AD3d 1630, 1633 [3d Dept 2025]). "The relatively low degree of required corroboration may be provided by any other evidence tending to support the reliability of the child's statements" (*Matter of K.H. [J.H.]*, 241 AD3d 1640, 1642-1643 [3d Dept 2025] [internal quotation marks and citations omitted];

see *Matter of Kalam EE. v Amber EE.*, 244 AD3d 1523, 1525 [3d Dept 2025]), and may include “medical indications of abuse, expert validation testimony, cross-corroboration by another child’s similar statements, marked changes in a child’s behavior, and sexual behavior or knowledge beyond a child’s years” (*Matter of A.T. [T.T.]*, 240 AD3d 950, 952 [3d Dept 2025] [internal quotation marks and citations omitted], *lv denied* 44 NY3d 909 [2026]). “The sufficiency and reliability of the corroboration . . . are matters entrusted to the sound discretion of Family Court and will not be disturbed unless clearly unsupported by the record” (*Matter of K.H. [J.H.]*, 241 AD3d at 1643 [internal quotation marks and citations omitted]).

It is undisputed that the 15-year-old child became pregnant after sexual intercourse with the 28-year-old male living at the family’s apartment with the mother’s knowledge; this evidence demonstrates sexual behavior beyond a child’s years and tends to support the reliability of the child’s allegation that the mother encouraged her to sleep with her abuser (see *Matter of Nicole V.*, 71 NY2d 112, 119 [1987]; *Matter of Taurice M. [Gregory A.]*, 147 AD3d 844, 844 [2d Dept 2017]). “Moreover, although the mere repetition of an accusation does not, by itself, provide sufficient corroboration, some degree of corroboration can be found where, as here, the out-of-court repetitions are consistent” (*Matter of A.T. [T.T.]*, 240 AD3d at 952 [internal quotation marks, brackets and citations omitted]; see *Matter of K.H. [J.H.]*, 241 AD3d at 1643; *Matter of Kaleb LL. [Bradley MM.]*, 218 AD3d at 849). Under these circumstances, we conclude that the child’s allegations of abuse and neglect were sufficiently corroborated.

The mother further asserts that her directive that the child “sleep with” an adult could be construed in a nonsexual manner, that the absence of documentary proof undermines the child’s allegation that she was struck with a pan and that the record fails to establish the mother’s ability to retrieve the child from the other state. These contentions challenge the weight and interpretation of the evidence, matters entrusted to Family Court’s discretion, to which we accord great deference on appeal (see *Matter of Addilyn I. [Richard I.]*, 245 AD3d at 1039; *Matter of Brian Q. v Allysa R.*, 244 AD3d 1328, 1329 [3d Dept 2025]). Upon our independent review of the record, and deferring to Family Court’s credibility determinations including that the mother’s failure to testify supported the strongest possible inference against her (see *Matter of Sariyah T. [Deidre R.]*, 238 AD3d at 1256), a sound and substantial basis exists to support Family Court’s findings that the mother abused and neglected the child.

Garry, P.J., Clark, Pritzker and McShan, JJ., concur. Ordered that the order is affirmed, without costs.

17 In the Matter of Kashmir JJ., Alleged to be a Neglected Child. Broome County Department of Social Services, Respondent; Shawn JJ., Appellant, et al., Respondent. [— NYS3d —]

Parent, Child and Family—Abused or Neglected Child—Mother’s Substance Abuse during Pregnancy Which Resulted in Child Exhibiting Withdrawal Symptoms Following Birth—Denial of Parental Consent for Newborn Child to Undergo Drug Screen

Powers, J. Appeal from two orders of the Family Court of Broome County (Mark Young, J.), entered November 1, 2024, and January 10, 2025, which granted petitioner’s application, in a proceeding pursuant to Family Ct Act article 10, to adjudicate the subject child to be neglected.

Respondents Shawn JJ. (hereinafter the father) and Aleischa II. (hereinafter the mother) are the parents of the subject child (born in 2022). Shortly after the child’s birth, petitioner received a report alleging that the mother had a known substance abuse history and the child had exhibited symptoms of withdrawal following his birth. The mother consented to placement of the child with the maternal grandparents upon discharge from the hospital, and a neglect petition was subsequently filed.¹ In March 2023, after proceedings had already commenced on the initial petition, a second report was received alleging that the father had been subject to a traffic stop, which ultimately resulted in the discovery of an envelope consistent with heroin packaging and fentanyl in his vehicle. Petitioner filed an amended neglect petition alleging, among other things, that the father knew or should have known that the mother was abusing illegal substances during her pregnancy and failed to take sufficient measures to prevent her from doing so, which resulted in the child suffering symptoms of withdrawal that had no other medical explanation. Family Court found the child to have been neglected and, after a dispositional hearing, continued placement with the maternal grandparents. The court additionally directed, as is relevant here, that the father engage in certain parenting classes, be subject to random drug screens and participate in those ser-

1. At some point thereafter—seemingly with petitioner’s acquiescence, but not approval—the child returned to the care of the parents. Nevertheless, Family Court later temporarily placed the child with the maternal grandparents once again.

vices deemed appropriate by petitioner. The father appeals the orders of fact-finding and disposition.²

“A party seeking to establish neglect must show, by a preponderance of the evidence, first, that a child’s physical, mental or emotional condition has been impaired or is in imminent danger of becoming impaired and second, that the actual or threatened harm to the child is a consequence of the failure of the parent or caretaker to exercise a minimum degree of care in providing the child with proper supervision or guardianship” (*Matter of Raquel ZZ. [Angel ZZ.]*, 216 AD3d 1242, 1243-1244 [3d Dept 2023] [internal quotation marks and citations omitted]; see *Matter of N’Thai N. [Mali N.]*, 242 AD3d 1313, 1317-1318 [3d Dept 2025]; *Matter of Rosalie HH. [Samantha HH.]*, 221 AD3d 1299, 1300 [3d Dept 2023]). “In determining whether respondent failed to exercise a minimum degree of care, the critical inquiry is whether a reasonable and prudent parent would have so acted, or failed to act, under the circumstances” (*Matter of Joseph GG. [Chrystal FF.]*, 227 AD3d 1238, 1239 [3d Dept 2024] [internal quotation marks, brackets and citations omitted]). “Family Court’s factual findings and credibility determinations are accorded great weight in such a proceeding and will not be disturbed on appeal unless they lack a sound and substantial basis in the record” (*Matter of Jahkell SS. [Victoria SS.]*, 237 AD3d 1416, 1417 [3d Dept 2025] [internal quotation marks and citations omitted]).

At the fact-finding hearing, petitioner presented the testimony of multiple caseworkers, the physician assistant who treated the child and the police officer who conducted a traffic stop of the father’s vehicle. During this testimony, it was elicited that the child was hospitalized for over a week after his birth, during which time he was treated in the Neonatal Intensive Care Unit (hereinafter NICU).³ At this time, possible drug use was suspected and, as a result, both the mother and the father were questioned. The father denied any current drug use but conceded that he was aware the mother had used drugs. The mother admitted that she utilized drugs at the beginning of her pregnancy, stopped for a time and then relapsed two to three weeks prior to the birth of the child. Both the mother and the father were requested to undergo drug

2. The mother has not appeared on appeal.

3. Family Court properly admitted the child’s medical records over the father’s hearsay objection, as the statements contained within those records were relevant to the child’s treatment and diagnosis (see *Matter of L.K. [C.K.]*, 246 AD3d 660, 660 [1st Dept 2026]; *Matter of Zackery S. [Stephanie S.]*, 170 AD3d 1594, 1594-1595 [4th Dept 2019]; see also *People v Maisonette*, 192 AD3d 1325, 1329 [3d Dept 2021], *lv denied* 37 NY3d 966 [2021]).

screens, but both denied such requests and denied a similar request for the child to undergo a drug screen while in the NICU. In consideration of the mother's known drug history, the father was asked for a contingency plan if the mother relapsed but was unable to provide any plan other than stating simply that he and the mother would "figure it out." The physician assistant that treated the child testified that the child was admitted to the NICU because he was exhibiting symptoms that were consistent with either sepsis or withdrawal. However, because the parents refused to consent to a drug screen for the child, his treatment was paused because treating physicians could not be sure of what was in his system. Ultimately, after ruling out other diagnoses, the child was treated with morphine. The physician assistant specifically testified that the mother's admitted heroin use two to three weeks prior to the child's birth was consistent with the symptoms of withdrawal the child was exhibiting. Notably, the child was administered nourishment through a feeding tube while in the NICU because of an increased breathing rate, which was confirmed by the physician assistant to be a symptom of withdrawal. It was further elicited through a caseworker's testimony that, during a subsequent home visit in January 2023, the caseworker observed red marks on the child's face and the child's head appeared flat. The caseworker recommended the parents follow-up with a pediatrician but, when later asked if they had done so, the mother admitted they had not. When this caseworker later attempted to assist scheduling appointments for the child, the parents were uncooperative and did not take the child. During the same January home visit, the caseworker also observed multiple lighters, ashes and a white substance in the parent's bathroom, which she believed to be drug paraphernalia. Similar items were again observed during a later home visit in March 2023 precipitated by the father's arrest. The police officer testified that, during a March 2023 traffic stop of the father's vehicle, a wax envelope consistent with heroin packaging was found and the father's wallet contained a substance that tested positive for fentanyl. As a result, the father was charged with criminal possession of a controlled substance in the seventh degree.

Deferring to Family Court's credibility determinations, we find there to be a sound and substantial basis in the record to support the court's finding that the father had neglected the child (*see* Family Ct Act § 1012 [f] [i]; *Matter of Jarrett SS. [Jade TT.—Scott SS.]*, 183 AD3d 1031, 1035 [3d Dept 2020]; *see generally* *Matter of Kingston V. [Javon V.]*, 234 AD3d 1056, 1057 [3d Dept 2025], *lv dismissed* 43 NY3d 951 [2025]). Al-

though the father denied using drugs himself, he admitted that he was aware the mother had done so and left the child in her care regardless (*see Matter of Misha W. [Melissa R.]*, 242 AD3d 759, 761 [2d Dept 2025]; *Matter of Camden J. [William J.]*, 167 AD3d 1346, 1350 [3d Dept 2018]). Despite the child exhibiting symptoms of withdrawal, the father denied consent for the child to undergo a drug screen, which caused his treatment to be stalled while medical professionals ruled out other potential causes of his symptoms. Similarly, in spite of observations of drug paraphernalia during two home visits and that he was criminally charged with a drug offense in the course of this proceeding, the father steadfastly refused to undergo drug screenings requested by petitioner. Relevant to both aforementioned facts, the father's arguments to this Court regarding what he claims to be gaps in petitioner's proof are the result of his denial of consent for the child to undergo a drug screen and his own refusal to complete those requested by petitioner. Consequently, the record does not definitively demonstrate that the child was experiencing withdrawal upon his birth or that the father was using illicit substances. Nevertheless, the father's lack of action when aware of the mother's drug use was not the behavior of a reasonably prudent parent and placed the child in imminent danger as demonstrated by, most notably, the child's hospitalization in the NICU (*compare Matter of Leo RR. [Joshua RR.]*, 213 AD3d 1190, 1192-1193 [3d Dept 2023]).

As to the father's challenge to the dispositional order, "[a] dispositional order in a neglect proceeding must reflect a resolution consistent with the best interests of the child after consideration of all relevant facts and circumstances, and must be supported by a sound and substantial basis in the record" (*Matter of Jaylin XX. [Jamie YY.]*, 216 AD3d 1224, 1228 [3d Dept 2023] [internal quotation marks, brackets and citations omitted]). The testimony elicited during the dispositional hearing demonstrated that the father had not been compliant with recommended services, including drug testing. Additionally, it was testified that parenting classes were recommended, though the father had older children, so that he could remain up to date regarding child development and safety. We find there to be a sound and substantial basis in the record to support Family Court's determination that the best interests of the child would be served by continued placement with the maternal grandparents, rather than returning the child to the father's care (*see Matter of Asiah S. [Nancy S.]*, 212 AD3d 1062, 1064 [3d Dept 2023], *lv denied* 39 NY3d 913 [2023]). Similarly, the requirement that the father undergo random drug testing and

participate in parenting classes is supported by the record (*see Matter of Moses M. [Melissa M.]*, 237 AD3d 825, 826 [2d Dept 2025], *lv denied* 44 NY3d 901 [2025]; *Matter of Kaitlyn SS. [Antonio UU.]*, 184 AD3d 961, 966-967 [3d Dept 2020]). Finally, the court's directive that he participate in those services deemed appropriate by petitioner did not operate to impermissibly delegate the court's authority as petitioner maintains the duty to develop a service plan that is "tailored to fit the [father's] individual situation" (*Matter of Jack V. [Jack U.]*, 243 AD3d 1174, 1176 [3d Dept 2025] [internal quotation marks and citations omitted]) and this clause did not condition the father's visitation upon his participation in those services (*see generally Matter of Sandra DD. [Kenneth DD.]*, 185 AD3d 1259, 1261 [3d Dept 2020]; *Matter of Logan C. [John C.]*, 169 AD3d 1240, 1246 n 7 [3d Dept 2019]).

The father's remaining arguments have been reviewed and found to be either unpreserved or lacking in merit.

Clark, J.P., Reynolds Fitzgerald, Ceresia and Corcoran, JJ., concur. Ordered that the orders are affirmed, without costs.

18 In the Matter of Ana J., Respondent, v Nasar J., Appellant. (And Two Other Related Proceedings.) [— NYS3d —]

Parent, Child and Family—Order of Protection—Father Physically Abusive Toward Mother and Emotionally Manipulative Toward Child
Parent, Child and Family—Custody—Modification Based on Change in Circumstances—Sole Custody to Mother with Limited Parenting Time to Father in Best Interests of Child

Mackey, J. Appeal from an order of the Family Court of Tompkins County (Joseph Cassidy, J.), entered August 27, 2024, which, among other things, granted petitioner's application, in a proceeding pursuant to Family Ct Act article 6, to modify a prior order of custody.

Petitioner (hereinafter the mother) and respondent (hereinafter the father), who were married but later separated, are the parents of the subject child (born in 2017). Pursuant to an August 2020 order entered upon consent, the parents shared joint legal custody of the child with equal parenting time. In September 2023, the mother filed a custody modification petition seeking sole custody of the child, alleging that the father had been physically abusive toward her and emotionally manipulative toward the child. The mother also filed a family offense petition alleging that, among other things, the father had committed harassment in the first or second degree. The father denied the mother's allegations, and cross-petitioned for sole custody of the child. A temporary order was subsequently issued, granting the mother sole custody of the child and

limited visitation to the father. Following fact-finding and *Lincoln* hearings, Family Court granted the mother's family offense petition, finding that the father had committed harassment in the second degree, and an order of protection against the father was issued. The court further awarded the mother sole legal and primary physical custody of the child, with limited parenting time to the father.¹ The father appeals.

Initially, we find that Family Court did not err in issuing an order of protection against the father. A party seeking an order of protection "bears the burden of showing by a preponderance of the evidence that the [other parent] committed one or more family offenses" (*Matter of Paul Y. v Patricia Z.*, 190 AD3d 1038, 1042 [3d Dept 2021]; see *Matter of Derek KK. v Jennifer KK.*, 196 AD3d 765, 769 [3d Dept 2021]). Pertinent here, a person commits harassment in the second degree "when, with intent to harass, annoy or alarm another person . . . [h]e or she strikes, shoves, kicks or otherwise subjects such other person to physical contact, or attempts or threatens to do the same" or "[h]e or she engages in a course of conduct or repeatedly commits acts which alarm or seriously annoy such other person and which serve no legitimate purpose" (Penal Law § 240.26 [1], [3]; Family Ct Act § 812). "In reviewing Family Court's determination, we pay deference to the court's factual findings and credibility determinations, and will not disturb those assessments if they are supported by a sound and substantial basis" (*Matter of Samah DD. v Mark VV.*, 235 AD3d 1116, 1117-1118 [3d Dept 2025] [citations omitted], *lv denied* 44 NY3d 901 [2025]; see *Matter of Holly P. v George Q.*, 240 AD3d 1029, 1030 [3d Dept 2025]).

At trial, the mother testified that, during their marriage, the father engaged in physical abuse against her, monitored her in the home through video surveillance without her consent, and restricted her financial freedom and her access to drive a vehicle. According to the mother, the parties briefly attempted to reconcile after their separation but that, in the fall of 2020, the father struck her in front of the child. The mother submitted photographic evidence in support of her allegations. The father wholly denied the mother's claims and, although he acknowledged having installed surveillance cameras in the home, he asserted that the same had been placed with the mother's agreement. As to the mother's claims that he had repeatedly texted her threatening or insulting messages, which she sup-

1. Following an initial determination, Family Court issued a supplemental decision clarifying, at the behest of the mother's counsel, a requirement that the father engage in certain programing.

ported with documentary evidence, the father either denied the allegations or asserted that he could not recall the incidents referenced. Accepting Family Court's credibility determinations, which found the mother's account of the father's conduct to be credible and discredited the father's denials, we conclude that a preponderance of the evidence supported the determination that the father committed the family offense of harassment in the second degree (see *Matter of Derek KK. v Jennifer KK.*, 196 AD3d at 769-770; *Matter of Paul Y. v Patricia Z.*, 190 AD3d at 1042).

Turning to the issue of custody, "[a] party seeking to modify a prior order of custody must show that there has been a change in circumstances since the prior order and, then, if such a change occurred, that the best interests of the child would be served by a modification of that order" (*Matter of Ashley UU. v Ned VV.*, 235 AD3d 1200, 1201 [3d Dept 2025] [internal quotation marks and citations omitted]; see *Matter of Christine EE. v David FF.*, 235 AD3d 1156, 1157 [3d Dept 2025]). In rendering a best interests determination, "courts must consider a variety of factors, including the quality of the parents' respective home environments, the need for stability in the child's life, each parent's willingness to promote a positive relationship between the child and the other parent and each parent's past performance, relative fitness and ability to provide for the child's intellectual and emotional development and overall well-being" (*Matter of Michael M. v Makiko M.*, 238 AD3d 1304, 1306 [3d Dept 2025] [internal quotations marks and citations omitted]; see *Ricky SS. v Christine SS.*, 241 AD3d 1009, 1011 [3d Dept 2025]). "Inasmuch as Family Court is in a superior position to evaluate witness credibility, this Court will defer to its factual findings and only assess whether its determination is supported by a sound and substantial basis in the record" (*Matter of Michael M. v Makiko M.*, 238 AD3d at 1305 [internal quotation marks and citations omitted]; see *Matter of Kyle I. v Kandice K.*, 232 AD3d 1074, 1076 [3d Dept 2024]).

We find ample record evidence that "the parties' relationship has deteriorated to a point where there is no meaningful communication or cooperation for the sake of the child" so as to establish the requisite change in circumstances warranting Family Court's examination of the child's best interests (*Matter of Michael M. v Makiko M.*, 238 AD3d at 1305 [internal quotation marks and citations omitted]; see *Matter of Debra YY. v Michael XX.*, 234 AD3d 1021, 1022 [3d Dept 2025]; *Matter of Richard CC. v Lacey DD.*, 230 AD3d 1389, 1390 [3d Dept 2024]). To this end, the record reflects that although the par-

ties had equal parenting time under the prior order, the mother assumed responsibility for the child's medical care and educational matters. Moreover, at the time of the hearing, the mother had gainful employment, whereas the father had recently resigned from high-income employment and his new work as a consultant had yet to generate income. Further, Family Court credited the mother's testimony as to the father's controlling behavior, verbal abuse and several instances of domestic violence, which she largely supported with photographic and documentary evidence. In contrast, the father's allegations that the mother had failed to properly care for the child and was physically abusive toward the child were discredited by the court. Notably, when questioned as to why the father failed to report his concerns in this regard to authorities, he explained that the child's alleged injuries were "not that serious." Indeed, the mother denied the father's allegations and testified that the child was very active and would sometimes sustain minor cuts and bruises while playing. In addressing the father's submission of video evidence of the child, apparently blaming the mother for his minor injuries, the court found that there was "no other rational explanation" for the child's statements except that he "felt pressure to disparage [the] mother in order to please [the] father."

Overall, the record supports Family Court's conclusion that the father "attempted to create discord" between the child and the mother, as he struggled to parent the child without engaging in coercive behavior or disparaging the mother. The father's commission of acts of domestic violence against the mother, which were properly considered in determining the child's best interests inasmuch as such were proven by a preponderance of the evidence, further casts doubt upon his ability to facilitate a relationship between the mother and the child (*see* Domestic Relations Law § 240 [1] [a]; *Matter of Justin K. v Jutonynea L.*, 221 AD3d 1335, 1337 [3d Dept 2023]; *Matter of Stephanie R. v Walter Q.*, 203 AD3d 1440, 1443 [3d Dept 2022]). In view of the foregoing, and deferring to the court's credibility assessments, a sound and substantial basis in the record supports Family Court's award of sole custody to the mother with limited parenting time to the father (*see Matter of Michelle L. v Steven M.*, 227 AD3d 1159, 1163 [3d Dept 2024]; *Matter of Justin K. v Jutonynea L.*, 221 AD3d at 1337; *Matter of Joshua XX. v Stefania YY.*, 218 AD3d 893, 899 [3d Dept 2023]).² Although not determinative, we note that the attorney for the child is sup-

2. We note that Family Court's order expressly provides that the father's completion of certain domestic violence training would constitute a change in

(n. cont'd)

portive of the custody modification (*see Matter of Denise VV. v Ian VV.*, 205 AD3d 1090, 1093 n 4 [3d Dept 2022]).

Garry, P.J., Aarons, Ceresia and Fisher, JJ., concur. Ordered that the order is affirmed, without costs.

19 In the Matter of Anna D., Appellant, v David E., Respondent. [— NYS3d —]—

Parent, Child and Family—Family Offense Proceeding—Stalking—Sufficiency of Factual Allegations in Petition
Parent, Child and Family—Family Offense Proceeding—Second-Degree Harassment

Aarons, J.P. Appeal from an order of the Family Court of Chemung County (Mary Tarantelli, J.), entered March 7, 2025, which, in a proceeding pursuant to Family Ct Act article 8, dismissed the petition.

Petitioner (hereinafter the mother) and respondent (hereinafter the father) are the divorced parents of six children, three of whom (born in 2007, 2013 and 2016) are minors and reside with the mother; the oldest child resides with the father. The mother commenced this proceeding in March 2025 alleging that the father committed the family offenses of stalking or harassment in the first or second degrees. The day after the mother filed the petition and before the father joined issue, Family Court, on its own initiative, dismissed the petition. The mother appeals.

“[A] family offense petition may be dismissed without a hearing where the petition fails to set forth factual allegations which, if proven, would establish that the respondent has committed a qualifying family offense” (*Matter of Lashlee v Lashlee*, 145 AD3d 723, 724 [2d Dept 2016] [internal quotation marks and citation omitted]; *see Matter of Charles E. v Frank E.*, 72 AD3d 1439, 1440 [3d Dept 2010]). When determining whether a family offense petition sufficiently states a cause of action, the court must afford the petition a liberal construction, accept the allegations as true and grant the petitioner the benefit of every favorable inference (*see Matter of Christina Z. v Bishme AA.*, 132 AD3d 1102, 1102-1103 [3d Dept 2015]; *Matter of Craig O. v Barbara P.*, 118 AD3d 1068, 1070 [3d Dept 2014]). This standard applies equally where the court dismisses the petition sua sponte (*see Matter of Burdick v Boehm*, 148 AD3d 1439, 1440 n 4 [3d Dept 2017]).

Applying that standard here, the petition alleges that, after the mother’s stay-away order against the father expired in

circumstances for purposes of a potential future custody modification petition.

2021, the father came to her home unannounced on several occasions despite her requests that he refrain from doing so. The father also repeatedly asked to come to her home for custody exchanges notwithstanding the mother's clear and unwavering instructions to abide by prearranged locations. Further, the father is alleged to have attempted on multiple occasions to communicate "I love you" to the mother through a code they established before their marriage, ignored the mother's demand to stop and disingenuously claimed the message was for the children. In addition, the mother alleged that the father inappropriately attempted to relitigate the end of their marriage over text message and email despite the mother's requests to refrain from doing so. Indeed, the documents appended to the petition appear to show that the father engaged in a campaign to speak to the mother against her wishes, in one instance withholding information about a purported emergency concerning the oldest child to induce the mother to contact him.

Notwithstanding the liberal pleading standard, the above-recited allegations do not make out a cause of action for stalking in the fourth degree, which "is the engagement in a course of conduct that causes material harm to the mental or emotional health of a specific person, where such conduct consists of following, telephoning or initiating communication or contact with such person, a member of such person's immediate family or a third party with whom such person is acquainted and the actor was previously clearly informed to cease that conduct" (*Matter of Samah DD. v Mark VV.*, 235 AD3d 1116, 1118 [3d Dept 2025] [internal quotation marks, brackets, ellipsis and citation omitted], *lv denied* 44 NY3d 901 [2025]; see *Matter of Tammy TT. v Charles TT.*, 204 AD3d 1336, 1337 [3d Dept 2022]). Specifically, Family Court appropriately concluded that the petition fails to allege facts from which to infer that the father's conduct materially harmed the mother's mental or emotional health (*compare Matter of C.H. v M.J.G.*, 233 AD3d 540, 541-542 [1st Dept 2024]).

We reach a different conclusion with respect to harassment in the second degree,* which, pursuant to Penal Law § 240.26 (3), "requires proof that an individual with intent to harass, annoy or alarm another person engages in a course of conduct or repeatedly commits acts which alarm or seriously annoy such other person and which serve no legitimate purpose" (*Mat-*

* The mother does not raise any arguments directed at dismissal of the part of the petition alleging harassment in the first degree (see Penal Law § 240.25), and thus that issue is deemed abandoned (see *Matter of Christina Z. v Bishme AA.*, 132 AD3d at 1103 n).

ter of Amber EE. v Kalam EE., 241 AD3d 1623, 1628 [3d Dept 2025] [internal quotation marks, ellipsis and citations omitted]; see *Matter of Debra SS. v Brian TT.*, 163 AD3d 1199, 1204 [3d Dept 2018]). “Badgering someone through repeated telephone calls and text messages despite numerous requests to stop may amount to second degree harassment” (*Matter of James XX. v Tracey YY.*, 146 AD3d 1036, 1039 [3d Dept 2017] [internal quotation marks, brackets and citations omitted]). In our view, the father’s alleged pattern of unwanted contact with the mother and disregard for the mother’s express requests to cease that conduct would, if true, permit a factfinder to infer the requisite intent to harass, annoy or alarm and to conclude that the father’s alleged conduct served no legitimate purpose (see *Matter of Samah DD. v Mark VV.*, 235 AD3d at 1119-1120; *Matter of Erica II. v Jorge JJ.*, 165 AD3d 1390, 1392 [3d Dept 2018]; *Matter of Angelique QQ. v Thomas RR.*, 151 AD3d 1322, 1324 [3d Dept 2017]; *Matter of Lynn TT. v Joseph O.*, 129 AD3d 1129, 1131 [3d Dept 2015]). Thus, the allegations contained in the petition are sufficient to state a cause of action for a family offense based on second-degree harassment (see *Matter of Walter Q. v Stephanie R.*, 201 AD3d 1142, 1144 [3d Dept 2022]; *Matter of Craig O. v Barbara P.*, 118 AD3d at 1070; compare *Matter of Charles E. v Frank E.*, 72 AD3d at 1440).

Pritzker, Reynolds Fitzgerald, Fisher and Mackey, JJ., concur. Ordered that the order is reversed, on the law, without costs, and matter remitted to the Family Court of Chemung County for further proceedings not inconsistent with this Court’s decision.

20 In the Matter of Robert UU., Respondent, v Phoebe VV., Appellant. [— NYS3d —]

Appeal—Timeliness—Family Court Custody Order

Aarons, J.P. Appeal from an order of the Family Court of Washington County (Adam Michelini, J.), entered March 21, 2025, which, among other things, partially granted petitioner’s application, in a proceeding pursuant to Family Ct Act article 6, for custody of the parties’ child.

Petitioner (hereinafter the father) and respondent (hereinafter the mother) are the parents of the subject child (born in 2023). After the mother ended her relationship with the father, the mother discovered that she was pregnant with the child, but she did not inform the father of her pregnancy or the subsequent birth of the child. The father learned of the child’s existence months later through a third party, and thereafter commenced the first of these proceedings for custody of the

child. Law enforcement then conducted a welfare check on the child at the father's request, and the father later went to the mother's residence, but the mother refused to allow the father to see the child. The next day, the mother relocated out of state to Montana with the child and the child's half sibling. The mother, represented by the Washington County Public Defender's office, thereafter cross-petitioned for joint legal and primary physical custody of the child. Following a fact-finding hearing, Family Court issued an order granting joint legal custody to the parties, primary physical custody to the father and five consecutive weeks of parenting time to the mother. The mother appeals.

The father initially contends that this appeal must be dismissed because the mother's notice of appeal was not timely filed.¹ "An appeal is taken from a Family Court order by filing an original notice of appeal with the clerk of the family court in which the order was made and from which the appeal is taken, then serving that notice upon any adverse party as provided for in CPLR 5515 (1) and upon the child's attorney, if any, within the time allowed by Family Ct Act § 1113" (*Matter of Robert M. v Barbara L.*, 227 AD3d 141, 143-144 [3d Dept 2024] [internal quotation marks, brackets, ellipsis and citations omitted]). Family Ct Act former § 1113 provides that an appeal "must be taken no later than [30] days after the service by a party or the child's attorney upon the appellant of any order from which the appeal is taken, [30] days from receipt of the order by the appellant in court or [35] days from the mailing of the order to the appellant by the clerk of the court, whichever is earliest" (see *Matter of Miller v Mace*, 74 AD3d 1442, 1443 [3d Dept 2010], *lv denied* 15 NY3d 705 [2010]). "The filing of a notice of appeal is nonwaivable and jurisdictional" (*Matter of Liam DD. [Jamie CC.]*, 244 AD3d 1625, 1626 [3d Dept 2025] [citations omitted]).

The family court clerk mailed the appealed-from order to the parties, including the mother, on March 21, 2025, and thus the time to take an appeal expired 35 days later on April 25, 2025. The mother's notice of appeal was not filed until May 7, 2025, after the statutory deadline had passed. According to the Public Defender, the assistant public defender assigned to the mother's case resigned from the office effective March 31, 2025. A shortage of attorneys and staff in the Public Defender's office

1. During the pendency of this appeal, the father moved to dismiss the appeal as untimely, and the mother cross-moved to deem the notice of appeal timely. Both motions were denied without prejudice to the issues involved being raised upon argument of the appeal.

meant that the mother's case was unassigned for a short period, and there was a breakdown in communication between the Public Defender's office and the mother. Once communication was reestablished, the mother expressed her wish to file an appeal to the Public Defender, who did so and thereafter moved to file a late notice of appeal. Extensions of time, however, are permitted only if, before the time to take an appeal has elapsed, the appellant's attorney is "removed or suspended, or becomes physically or mentally incapacitated or otherwise disabled," conditions that are not applicable here (CPLR 5514 [b]; see Family Ct Act § 1118; cf. *Pallone v New York Tel. Co.*, 34 AD2d 1091, 1091 [4th Dept 1970]).

The mother further contends that we should deem her appeal timely because she was deprived of the effective assistance of counsel when the assistant public defender failed to follow her instructions to file a notice of appeal if Family Court did not grant her legal and primary physical custody of the child (see generally Family Ct Act §§ 261, 262; *Matter of De Vivo v Burrell*, 101 AD2d 607, 607 [3d Dept 1984]). This argument relies on facts not appearing on the face of the appellate record and, as such, must be raised in a motion "for post-judgment relief under CPLR 5015" (*Matter of Skylar P.J. [Kerry M.T.]*, 204 AD3d 1001, 1002 [2d Dept 2022]; see *Matter of Liam DD. [Jamie CC.]*, 244 AD3d at 1626; *Matter of Ricardo T., Jr. [Ricardo T., Sr.]*, 172 AD3d 732, 733 [2d Dept 2019]).² "Accordingly, the mother's appeal is untimely and, as the applicable statutory time bar is absolute and not subject to extension, this Court lacks jurisdiction to entertain it" (*Matter of Carrie X. [Amber Y.]*, 230 AD3d 1397, 1398 [3d Dept 2024] [internal quotation marks and citations omitted], *lv denied* 42 NY3d 910 [2025]). The mother's remaining contentions are academic.

Reynolds Fitzgerald, Fisher and Mackey, JJ., concur. Ordered that the appeal is dismissed, without costs.

21 In the Matter of Neal Paul Brodsky, an Attorney. (Attorney Registration No. 5261409.) [251 NYS3d 812]—

Attorney and Client—Resignation—Nondisciplinary Reasons

Per Curiam. Neal Paul Brodsky was admitted to practice by this Court in 2014 and lists a business address in Virginia Beach, Virginia with the Office of Court Administration. Brodsky now seeks leave to resign from the New York bar for

2. Vacatur could permit Family Court to "issue a replacement order . . . so that the [mother's] time to appeal will run anew" (*Matter of Ricardo T., Jr. [Ricardo T., Sr.]*, 172 AD3d at 733).

nondisciplinary reasons (*see* Rules for Atty Disciplinary Matters [22 NYCRR] § 1240.22 [a]). The Attorney Grievance Committee for the Third Judicial Department (hereinafter AGC) advises that it does not oppose Brodsky's application.

Upon reading Brodsky's affidavit sworn to February 2, 2026, and filed February 9, 2026, and upon reading the March 25, 2026 correspondence in response by the Deputy Chief Attorney for AGC, and having determined that Brodsky is eligible to resign for nondisciplinary reasons, we grant his application and accept his resignation.

Garry, P.J., Clark, Fisher, Mackey and Ryba, JJ., concur. Ordered that Neal Paul Brodsky's application for permission to resign is granted and his nondisciplinary resignation is accepted; and it is further ordered that Neal Paul Brodsky's name is hereby stricken from the roll of attorneys and counselors-at-law of the State of New York, effective immediately, and until further order of this Court (*see generally* Rules for Atty Disciplinary Matters [22 NYCRR] § 1240.22 [b]); and it is further ordered that Neal Paul Brodsky is commanded to desist and refrain from the practice of law in any form in the State of New York, either as principal or as agent, clerk or employee of another; and Brodsky is hereby forbidden to appear as an attorney or counselor-at-law before any court, judge, justice, board, commission or other public authority, or to give to another an opinion as to the law or its application, or any advice in relation thereto, or to hold himself out in any way as an attorney and counselor-at-law in this state; and it is further ordered that Neal Paul Brodsky shall, within 30 days of the date of this decision, surrender to the Office of Court Administration any Attorney Secure Pass issued to him.

22 In the Matter of Ryan Kenneth Crayne, an Attorney. (Attorney Registration No. 4710554.) [253 NYS3d 817]—

Attorney and Client—Resignation—Nondisciplinary Reasons—Preexisting Registration Delinquency Cured

Per Curiam. Ryan Kenneth Crayne was admitted to practice by this Court in 2009 and lists a business address in Minneapolis, Minnesota with the Office of Court Administration. Crayne has applied to this Court, by affidavit sworn to January 9, 2026, for leave to resign from the New York bar for nondisciplinary reasons (*see* Rules for Atty Disciplinary Matters [22 NYCRR] § 1240.22 [a]). The Attorney Grievance Committee for the Third Judicial Department (hereinafter AGC) opposes the application, contending that Crayne is ineligible for nondisciplinary resignation because he has failed to fulfill his attorney

registration requirements for the most recent biennial period beginning in 2025 (*see* Judiciary Law § 468-a; *Matter of Lee*, 148 AD3d 1350, 1350 [3d Dept 2017]; *Matter of Bomba*, 146 AD3d 1226, 1226-1227 [3d Dept 2017]; Rules of Chief Admr of Cts [22 NYCRR] § 118.1).

In reply to AGC's opposition, however, Crayne has submitted a letter dated March 4, 2026, in which he states that he is now current in his New York attorney registration requirements. Furthermore, Office of Court Administration records likewise establish that Crayne has duly registered and cured any preexisting registration delinquency. Accordingly, with AGC voicing no other substantive objection to his application, and having determined that Crayne is now eligible to resign for nondisciplinary reasons (*compare Matter of Tierney*, 148 AD3d 1457, 1458 [3d Dept 2017]; *Matter of Bomba*, 146 AD3d at 1227), we grant the application and accept his resignation.

Garry, P.J., Clark, Pritzker, McShan and Corcoran, JJ., concur. Ordered that Ryan Kenneth Crayne's application for permission to resign is granted and his nondisciplinary resignation is accepted; and it is further ordered that Ryan Kenneth Crayne's name is hereby stricken from the roll of attorneys and counselors-at-law of the State of New York, effective immediately, and until further order of this Court (*see generally* Rules for Atty Disciplinary Matters [22 NYCRR] § 1240.22 [b]); and it is further ordered that Ryan Kenneth Crayne is commanded to desist and refrain from the practice of law in any form in the State of New York, either as principal or as agent, clerk or employee of another; and Crayne is hereby forbidden to appear as an attorney or counselor-at-law before any court, judge, justice, board, commission or other public authority, or to give to another an opinion as to the law or its application, or any advice in relation thereto, or to hold himself out in any way as an attorney and counselor-at-law in this state; and it is further ordered that Ryan Kenneth Crayne shall, within 30 days of the date of this decision, surrender to the Office of Court Administration any Attorney Secure Pass issued to him.

23 In the Matter of Christy Katelyn Kailis, an Attorney. (Attorney Registration No. 4806022.) [251 NYS3d 815]—

Attorney and Client—Resignation—Nondisciplinary Reasons

Per Curiam. Christy Katelyn Kailis was admitted to practice by this Court in 2010 and lists a business address in Western Australia, Australia with the Office of Court Administration. Kailis now seeks leave to resign from the New York bar for nondisciplinary reasons (*see* Rules for Atty Disciplinary Mat-

ters [22 NYCRR] § 1240.22 [a]). The Attorney Grievance Committee for the Third Judicial Department (hereinafter AGC) advises that it does not oppose Kailis' application.

Upon reading Kailis' affidavit sworn to February 3, 2026, and filed February 13, 2026, and upon reading the March 24, 2026 correspondence in response by the Deputy Chief Attorney for AGC, and having determined that Kailis is eligible to resign for nondisciplinary reasons, we grant her application and accept her resignation.

Aarons, J.P., Reynolds Fitzgerald, Powers, Corcoran and Ryba, JJ., concur. Ordered that Christy Katelyn Kailis' application for permission to resign is granted and her nondisciplinary resignation is accepted; and it is further ordered that Christy Katelyn Kailis' name is hereby stricken from the roll of attorneys and counselors-at-law of the State of New York, effective immediately, and until further order of this Court (*see generally* Rules for Atty Disciplinary Matters [22 NYCRR] § 1240.22 [b]); and it is further ordered that Christy Katelyn Kailis is commanded to desist and refrain from the practice of law in any form in the State of New York, either as principal or as agent, clerk or employee of another; and Kailis is hereby forbidden to appear as an attorney or counselor-at-law before any court, judge, justice, board, commission or other public authority, or to give to another an opinion as to the law or its application, or any advice in relation thereto, or to hold herself out in any way as an attorney and counselor-at-law in this state; and it is further ordered that Christy Katelyn Kailis shall, within 30 days of the date of this decision, surrender to the Office of Court Administration any Attorney Secure Pass issued to her.

24 In the Matter of Griffin Elizabeth Kas, an Attorney. (Attorney Registration No. 5903380.) [251 NYS3d 817]—

Attorney and Client—Resignation—Nondisciplinary Reasons

Per Curiam. Griffin Elizabeth Kas was admitted to practice by this Court in 2021 and lists a business address in Chicago, Illinois with the Office of Court Administration. Kas now seeks leave to resign from the New York bar for nondisciplinary reasons (*see* Rules for Atty Disciplinary Matters [22 NYCRR] § 1240.22 [a]). The Attorney Grievance Committee for the Third Judicial Department (hereinafter AGC) advises that it does not oppose Kas' application.

Upon reading Kas' affidavit sworn to February 18, 2026, and filed February 23, 2026, and upon reading the March 25, 2026 correspondence in response by the Deputy Chief Attorney for

AGC, and having determined that Kas is eligible to resign for nondisciplinary reasons, we grant her application and accept her resignation.

Aarons, J.P., Reynolds Fitzgerald, Powers, Corcoran and Ryba, JJ., concur. Ordered that Griffin Elizabeth Kas' application for permission to resign is granted and her nondisciplinary resignation is accepted; and it is further ordered that Griffin Elizabeth Kas' name is hereby stricken from the roll of attorneys and counselors-at-law of the State of New York, effective immediately, and until further order of this Court (*see generally* Rules for Atty Disciplinary Matters [22 NYCRR] § 1240.22 [b]); and it is further ordered that Griffin Elizabeth Kas is commanded to desist and refrain from the practice of law in any form in the State of New York, either as principal or as agent, clerk or employee of another; and Kas is hereby forbidden to appear as an attorney or counselor-at-law before any court, judge, justice, board, commission or other public authority, or to give to another an opinion as to the law or its application, or any advice in relation thereto, or to hold herself out in any way as an attorney and counselor-at-law in this state; and it is further ordered that Griffin Elizabeth Kas shall, within 30 days of the date of this decision, surrender to the Office of Court Administration any Attorney Secure Pass issued to her.

25 In the Matter of Bruce H. Andrews, an Attorney. (Attorney Registration No. 2866010.) [251 NYS3d 816]—

Attorney and Client—Resignation—Nondisciplinary Reasons

Per Curiam. Bruce H. Andrews was admitted to practice by this Court in 1998 and lists a business address in Washington, DC with the Office of Court Administration. Andrews now seeks leave to resign from the New York bar for nondisciplinary reasons (*see* Rules for Atty Disciplinary Matters [22 NYCRR] § 1240.22 [a]). The Attorney Grievance Committee for the Third Judicial Department (hereinafter AGC) advises that it does not oppose Andrews' application.

Upon reading Andrews' affidavit sworn to February 17, 2026, and filed February 23, 2026, and upon reading the March 25, 2026 correspondence in response by the Deputy Chief Attorney for AGC, and having determined that Andrews is eligible to resign for nondisciplinary reasons, we grant his application and accept his resignation.

Garry, P.J., Reynolds Fitzgerald, Ceresia, Powers and Mackey, JJ., concur. Ordered that Bruce H. Andrews' application for permission to resign is granted and his nondisciplinary res-

ignation is accepted; and it is further ordered that Bruce H. Andrews' name is hereby stricken from the roll of attorneys and counselors-at-law of the State of New York, effective immediately, and until further order of this Court (*see generally* Rules for Atty Disciplinary Matters [22 NYCRR] § 1240.22 [b]); and it is further ordered that Bruce H. Andrews is commanded to desist and refrain from the practice of law in any form in the State of New York, either as principal or as agent, clerk or employee of another; and Andrews is hereby forbidden to appear as an attorney or counselor-at-law before any court, judge, justice, board, commission or other public authority, or to give to another an opinion as to the law or its application, or any advice in relation thereto, or to hold himself out in any way as an attorney and counselor-at-law in this state; and it is further ordered that Bruce H. Andrews shall, within 30 days of the date of this decision, surrender to the Office of Court Administration any Attorney Secure Pass issued to him.

26 In the Matter of Michael Jeffrey Goldstein, an Attorney. (Attorney Registration No. 2071926.) [251 NYS3d 813]—

Attorney and Client—Resignation—Nondisciplinary Reasons

Per Curiam. Michael Jeffrey Goldstein was admitted to practice by this Court in 1986 and lists a business address in Scottsdale, Arizona with the Office of Court Administration. Goldstein now seeks leave to resign from the New York bar for nondisciplinary reasons (*see* Rules for Atty Disciplinary Matters [22 NYCRR] § 1240.22 [a]). The Attorney Grievance Committee for the Third Judicial Department (hereinafter AGC) advises that it does not oppose Goldstein's application.

Upon reading Goldstein's affidavit sworn to January 31, 2026, and filed February 2, 2026, and upon reading the March 24, 2026 correspondence in response by the Deputy Chief Attorney for AGC, and having determined that Goldstein is eligible to resign for nondisciplinary reasons, we grant his application and accept his resignation.

Garry, P.J., Reynolds Fitzgerald, Ceresia, Powers and Mackey, JJ., concur. Ordered that Michael Jeffrey Goldstein's application for permission to resign is granted and his nondisciplinary resignation is accepted; and it is further ordered that Michael Jeffrey Goldstein's name is hereby stricken from the roll of attorneys and counselors-at-law of the State of New York, effective immediately, and until further order of this Court (*see generally* Rules for Atty Disciplinary Matters [22 NYCRR] § 1240.22 [b]); and it is further ordered that Michael Jeffrey Goldstein is commanded to desist and refrain from the

practice of law in any form in the State of New York, either as principal or as agent, clerk or employee of another; and Goldstein is hereby forbidden to appear as an attorney or counselor-at-law before any court, judge, justice, board, commission or other public authority, or to give to another an opinion as to the law or its application, or any advice in relation thereto, or to hold himself out in any way as an attorney and counselor-at-law in this state; and it is further ordered that Michael Jeffrey Goldstein shall, within 30 days of the date of this decision, surrender to the Office of Court Administration any Attorney Secure Pass issued to him.

27 In the Matter of Peter James Harrington, an Attorney. (Attorney Registration No. 6088744.) [251 NYS3d 810]—

Attorney and Client—Resignation—Nondisciplinary Reasons

Per Curiam. Peter James Harrington was admitted to practice by this Court in 2024 and lists a business address in Albany County with the Office of Court Administration. Harrington now seeks leave to resign from the New York bar for nondisciplinary reasons (*see* Rules for Atty Disciplinary Matters [22 NYCRR] § 1240.22 [a]). The Attorney Grievance Committee for the Third Judicial Department (hereinafter AGC) advises that it does not oppose Harrington's application.

Upon reading Harrington's affidavit sworn to January 31, 2026, and filed February 4, 2026, and upon reading the March 24, 2026 correspondence in response by the Deputy Chief Attorney for AGC, and having determined that Harrington is eligible to resign for nondisciplinary reasons, we grant his application and accept his resignation.

Garry, P.J., Reynolds Fitzgerald, Ceresia, Powers and Mackey, JJ., concur. Ordered that Peter James Harrington's application for permission to resign is granted and his nondisciplinary resignation is accepted; and it is further ordered that Peter James Harrington's name is hereby stricken from the roll of attorneys and counselors-at-law of the State of New York, effective immediately, and until further order of this Court (*see generally* Rules for Atty Disciplinary Matters [22 NYCRR] § 1240.22 [b]); and it is further ordered that Peter James Harrington is commanded to desist and refrain from the practice of law in any form in the State of New York, either as principal or as agent, clerk or employee of another; and Harrington 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 rela-

tion thereto, or to hold himself out in any way as an attorney and counselor-at-law in this state; and it is further ordered that Peter James Harrington shall, within 30 days of the date of this decision, surrender to the Office of Court Administration any Attorney Secure Pass issued to him.

28 In the Matter of G.J. Kaufmann-Kohler, an Attorney. (Attorney Registration No. 1865385.) [251 NYS3d 814]—

Attorney and Client—Resignation—Nondisciplinary Reasons

Per Curiam. G.J. Kaufmann-Kohler was admitted to practice by this Court in 1982 and lists a business address in Geneva, Switzerland with the Office of Court Administration. Kaufmann-Kohler now seeks leave to resign from the New York bar for nondisciplinary reasons (*see* Rules for Atty Disciplinary Matters [22 NYCRR] § 1240.22 [a]). The Attorney Grievance Committee for the Third Judicial Department (hereinafter AGC) advises that it does not oppose Kaufmann-Kohler's application.

Upon reading Kaufmann-Kohler's affidavit sworn to February 9, 2026, and filed February 23, 2026, and upon reading the March 25, 2026 correspondence in response by the Deputy Chief Attorney for AGC, and having determined that Kaufmann-Kohler is eligible to resign for nondisciplinary reasons, we grant her application and accept her resignation.

Garry, P.J., Reynolds Fitzgerald, Ceresia, Powers and Mackey, J.J., concur. Ordered that G.J. Kaufmann-Kohler's application for permission to resign is granted and her nondisciplinary resignation is accepted; and it is further ordered that G.J. Kaufmann-Kohler's name is hereby stricken from the roll of attorneys and counselors-at-law of the State of New York, effective immediately, and until further order of this Court (*see generally* Rules for Atty Disciplinary Matters [22 NYCRR] § 1240.22 [b]); and it is further ordered that G.J. Kaufmann-Kohler is commanded to desist and refrain from the practice of law in any form in the State of New York, either as principal or as agent, clerk or employee of another; and Kaufmann-Kohler is hereby forbidden to appear as an attorney or counselor-at-law before any court, judge, justice, board, commission or other public authority, or to give to another an opinion as to the law or its application, or any advice in relation thereto, or to hold herself out in any way as an attorney and counselor-at-law in this state; and it is further ordered that G.J. Kaufmann-Kohler shall, within 30 days of the date of this decision, surrender to the Office of Court Administration any Attorney Secure Pass issued to her.

29 In the Matter of Risa B. Winograd, an Attorney. (Attorney Registration No. 5630629.) [251 NYS3d 811]—

Attorney and Client—Resignation—Nondisciplinary Reasons

Per Curiam. Risa B. Winograd was admitted to practice by this Court in 2018 and lists a business address in Saratoga County with the Office of Court Administration. Winograd now seeks leave to resign from the New York bar for nondisciplinary reasons (*see* Rules for Atty Disciplinary Matters [22 NYCRR] § 1240.22 [a]). The Attorney Grievance Committee for the Third Judicial Department (hereinafter AGC) advises that it does not oppose Winograd's application.

Upon reading Winograd's affidavit sworn to February 6, 2026, and filed February 13, 2026, and upon reading the March 24, 2026 correspondence in response by the Deputy Chief Attorney for AGC, and having determined that Winograd is eligible to resign for nondisciplinary reasons, we grant her application and accept her resignation.

Garry, P.J., Reynolds Fitzgerald, Ceresia, Powers and Mackey, JJ., concur. Ordered that Risa B. Winograd's application for permission to resign is granted and her nondisciplinary resignation is accepted; and it is further ordered that Risa B. Winograd's name is hereby stricken from the roll of attorneys and counselors-at-law of the State of New York, effective immediately, and until further order of this Court (*see generally* Rules for Atty Disciplinary Matters [22 NYCRR] § 1240.22 [b]); and it is further ordered that Risa B. Winograd is commanded to desist and refrain from the practice of law in any form in the State of New York, either as principal or as agent, clerk or employee of another; and Winograd is hereby forbidden to appear as an attorney or counselor-at-law before any court, judge, justice, board, commission or other public authority, or to give to another an opinion as to the law or its application, or any advice in relation thereto, or to hold herself out in any way as an attorney and counselor-at-law in this state; and it is further ordered that Risa B. Winograd shall, within 30 days of the date of this decision, surrender to the Office of Court Administration any Attorney Secure Pass issued to her.

(April 9, 2026)

1 The People of the State of New York, Respondent, v Dennis Brown, Appellant. [— NYS3d —]—

Crimes—Unlawful Search and Seizure—Traffic Stop—Reasonable Suspicion

That Defendant Committed Crime**Crimes—Unlawful Search and Seizure—Warrantless Search of Vehicle—Plain View Doctrine—Handgun Visible under Front Passenger Seat**

Mackey, J. Appeal from a judgment of the County Court of Rensselaer County (Jennifer Sober, J.), rendered August 19, 2021, convicting defendant upon his plea of guilty of the crimes of criminal possession of a weapon in the second degree and criminal possession of a firearm.

In July 2020, defendant was charged by indictment with criminal possession of a weapon in the second degree and criminal possession of a firearm. The charges stemmed from a traffic stop related to multiple separate interactions, all of which occurred on one day in April 2020, between defendant and his ex-girlfriend (hereinafter the victim). At first, the victim made an in-person report to the Troy Police Department that defendant had kicked in the door to her residence. An hour and a half after the complaint was finalized and the victim had left the station, she called the police department to report that defendant had just pointed a gun at her, so patrol officers were dispatched to her residence. Shortly thereafter, an individual matching the description of the suspect, in the vehicle in which he had allegedly fled and in the approximate reported location, was observed by patrol officers, who then initiated a traffic stop. Defendant and the driver cooperated and exited the vehicle, at which time a handgun was recovered from under the passenger side seat where defendant had been sitting. Defendant was thereafter arrested.

Following indictment, defendant moved to suppress all evidence obtained as a result of the traffic stop on the basis that the stop and subsequent search of the vehicle were unlawful. A hearing was held and County Court denied the motion. Defendant ultimately pleaded guilty to both counts of the indictment and, pursuant to the terms of the plea agreement, was sentenced to a prison term of 6½ years, to be followed by five years of postrelease supervision, for the conviction of criminal possession of a weapon in the second degree and a concurrent prison term of 1½ to 3 years for the conviction of criminal possession of a firearm.* Defendant appeals.

Defendant contends that the traffic stop was constitutionally invalid and, thus, that County Court erred in denying his motion to suppress. “Automobile stops are lawful only when based on probable cause that a driver has committed a traffic violation; when based on a reasonable suspicion that the driver or occupants of the vehicle have committed, are committing, or

* Defendant did not waive his right to appeal.

are about to commit a crime; or, when conducted pursuant to nonarbitrary, nondiscriminatory, uniform highway traffic procedures” (*People v Hunter*, 219 AD3d 975, 978 [3d Dept 2023] [internal quotation marks and citations omitted]; see *People v Smith*, 237 AD3d 1367, 1374 [3d Dept 2025], *lv denied* 43 NY3d 1059 [2025]). Pertinent here, “[r]easonable suspicion is that quantum of knowledge sufficient to induce an ordinarily prudent and cautious person under the circumstances to believe criminal activity is at hand” (*People v Graham*, 233 AD3d 1361, 1366 [3d Dept 2024] [internal quotation marks and citations omitted], *lv denied* 43 NY3d 944 [2025]; see *People v Vieweg*, 155 AD3d 1305, 1306 [3d Dept 2017], *lv denied* 30 NY3d 1121 [2018]). “A suppression court’s factual determinations are entitled to great weight, and generally will not be disturbed absent a basis in the record for finding that the court’s resolution of credibility issues was clearly erroneous” (*People v Calafell*, 211 AD3d 1114, 1119 [3d Dept 2022] [internal quotation marks and citations omitted], *lv denied* 39 NY3d 1077 [2023]).

At the suppression hearing, a responding officer testified that he received information that the suspect, a black male wearing all black clothing, reportedly threatened the victim with a firearm at her residence and then left the scene in a gold-colored vehicle, heading north on Seventh Avenue near Douw Street in the City of Troy, Rensselaer County. The officer was approximately six blocks away from the victim’s residence when, moments later, he saw defendant, who matched the suspect’s description. He was in a vehicle that matched that described by the victim, heading in the direction and on the route that she had just reported. On this basis, the officer initiated the traffic stop. Inasmuch as a police officer is “entitled to act on the strength of a radio bulletin from a fellow officer or department and to assume its reliability” (*People v Hunter*, 219 AD3d at 978 [internal quotation marks, ellipsis and citation omitted]), and as County Court implicitly found the foregoing testimony to be credible, we are satisfied that there was a reasonable suspicion that defendant had committed a crime so as to justify the stop (see *People v Smith*, 237 AD3d at 1375; *People v Hunter*, 219 AD3d at 978-979; *People v Calafell*, 211 AD3d at 1119; *People v Vieweg*, 155 AD3d at 1307-1308).

To the extent that defendant challenges the warrantless search of the vehicle, under the plain view doctrine, “the police [are] entitled to seize incriminating evidence in plain view if they had the right to be where they were when they saw it” (*People v Brooks*, 152 AD3d 1084, 1087 [3d Dept 2017] [internal

quotation marks and citations omitted]; see *People v Suprunchik*, 239 AD3d 1055, 1056-1057 [3d Dept 2025]). County Court credited the responding officer's testimony that, after the driver and defendant exited the vehicle as instructed, the passenger side door was left open and the "black grips to a handgun" were visible under the front passenger seat. Given the lawful traffic stop, and as the handgun was readily visible and its incriminating nature apparent, defendant's motion seeking to suppress the handgun and related testimony was properly denied (see *People v Spradlin*, 188 AD3d 1454, 1457-1458 [3d Dept 2020], *lv denied* 37 NY3d 960 [2021]; *People v Brooks*, 152 AD3d at 1087).

Finally, defendant's ineffective assistance of counsel claim, to extent that it impacts upon the voluntariness of his plea, is unpreserved in the absence of an appropriate postallocation motion (see *People v Lunt*, 232 AD3d 1054, 1055 [3d Dept 2024], *lv denied* 43 NY3d 1010 [2025]; *People v Ulmer*, 226 AD3d 1259, 1260 [3d Dept 2024], *lv denied* 42 NY3d 930 [2024]). "[D]efendant made no statements during the plea allocation that triggered the narrow exception to the preservation rule" (*People v Gorman*, 165 AD3d 1349, 1349 [3d Dept 2018], *lv denied* 32 NY3d 1125 [2018]; see generally *People v Rios*, — NY3d —, —, 2026 NY Slip Op 00963, *3 [2026]). To the extent that defendant's ineffective assistance claims concern matters outside the record—including his assertion that counsel failed to pursue a CPL 30.30 speedy trial claim where the People allegedly failed to disclose certain photographic evidence—they are more properly the subject of a CPL 440.10 motion (see *People v Lewis*, 234 AD3d 1209, 1210 [3d Dept 2025], *lv denied* 43 NY3d 1009 [2025]; *People v Ulmer*, 226 AD3d at 1260).

Reynolds Fitzgerald, J.P., Ceresia, Fisher and Powers, JJ., concur. Ordered that the judgment is affirmed.

2 The People of the State of New York, Respondent, v Sergio Vasquez Ramirez, Appellant. [252 NYS3d 345]—

Crimes—Appeal—Valid Waiver of Right to Appeal

Appeal from a judgment of the County Court of Washington County (Kelly McKeighan, J.), rendered August 18, 2022, convicting defendant upon his plea of guilty of the crime of assault in the first degree.

In satisfaction of a four-count indictment—with the highest count therein being murder in the second degree—defendant pleaded guilty to assault in the first degree and agreed to waive his right to appeal. In accordance with the terms of the plea agreement, County Court sentenced defendant to a prison term

of six years, to be followed by five years of postrelease supervision. Defendant appeals.

We are unpersuaded by defendant's contention that he did not validly waive his right to appeal. The record reflects that County Court advised defendant that the waiver of appeal was separate and distinct from other rights automatically forfeited by his guilty plea and that by waiving his right to appeal he was giving up certain rights, but not all rights, that would be reviewed by an appellate court, which defendant assured the court he understood (*see People v Carota*, 235 AD3d 1069, 1070 [3d Dept 2025], *lv denied* 43 NY3d 962 [2025]; *People v Robinson*, 213 AD3d 1002, 1002-1003 [3d Dept 2023]). Defendant then executed a comprehensive written waiver, which explicitly set forth various rights that survived review, and assured the court that he had reviewed it with counsel, understood its contents and had no questions about the appeal waiver (*see People v Leroux*, 234 AD3d 1214, 1214 [3d Dept 2025]; *People v Williams*, 208 AD3d 1499, 1500 [3d Dept 2022]). We are satisfied that the totality of the circumstances reflects that defendant knowingly, voluntarily and intelligently waived his right to appeal (*see People v Thomas*, 34 NY3d 545, 559 [2019]; *People v Leroux*, 234 AD3d at 1214; *People v Gatchell*, 208 AD3d 1549, 1550 [3d Dept 2022]; *People v Robinson*, 213 AD3d at 1003). Given the valid appeal waiver, defendant's challenge to severity of the agreed-upon sentence is precluded (*see People v Prime*, 233 AD3d 1182, 1182 [3d Dept 2024]; *People v Mittler*, 225 AD3d 1003, 1004 [3d Dept 2024]; *see also People v Andrews*, 244 AD3d 1324, 1324 [3d Dept 2025]).

Aarons, J.P., Reynolds Fitzgerald, Fisher, Powers and Mackey, JJ., concur. Ordered that the judgment is affirmed.

3 The People of the State of New York, Respondent, v Gregory Duplessis, Appellant. [253 NYS3d 822]—

Crimes—Jurors—Selection of Jury—*Batson* Inquiry—Whether Race-Neutral Reason Proffered by Prosecution was Pretextual

Fisher, J. Appeal from a judgment of the County Court of Schenectady County (Traci DiMezza, J.), rendered May 23, 2023, upon a verdict convicting defendant of the crimes of criminal sale of a controlled substance in the third degree (two counts) and criminal possession of a controlled substance in the third degree (two counts).

In March 2020, defendant was charged by indictment with two counts of criminal sale of a controlled substance in the third degree and two counts of criminal possession of a controlled substance in the third degree. During jury selection, de-

defendant raised a *Batson* challenge to the People's use of peremptory strikes on two prospective jurors based on race. County Court disagreed with the prosecutor's explanation for striking one of the jurors, but then denied defendant's challenge—warning the People to “be mindful” of *Batson*. A jury ultimately convicted defendant as charged, and he was sentenced to concurrent prison terms of three years on each conviction, to be followed by three years of postrelease supervision. Defendant appeals.

We agree with defendant that County Court improperly compressed the *Batson* inquiry and deviated from the accepted protocol by failing to reach the final step. The now-familiar three-step test from “*Batson* provides the framework under which courts analyze challenges to peremptory strikes of potential jurors based on alleged discrimination” (*People v Bridgeforth*, 28 NY3d 567, 571 [2016]). “The job of enforcing *Batson* rests first and foremost with trial judges who are supposed to operate at the front lines of American justice” (*People v Estwick*, 42 NY3d 92, 94 [2024] [internal quotation marks, brackets and citation omitted]). “At step one, the moving party must make a prima facie showing that the opposing party has exercised a peremptory strike to remove a potential juror on the basis of race. At step two, the burden shifts to the nonmoving party to come forward with a nondiscriminatory reason for each of the challenged strikes. Finally, at step three, once race-neutral reasons for the strike are provided, the inference of discrimination is overcome and the ultimate burden shifts back to the moving party to persuade the court that the reasons are merely a pretext for intentional discrimination” (*People v Wright*, 42 NY3d 708, 714-715 [2024] [internal quotation marks, brackets and citations omitted]). Although there is no ritualistic language which a court must use in ruling on a *Batson* challenge, “[t]he third step of the *Batson* inquiry requires the trial court to make an ultimate determination on the issue of discriminatory intent based on all of the facts and circumstances presented” (*People v Smocum*, 99 NY2d 418, 422 [2003]). As a trial court is best situated to evaluate the credibility of the jurors and the prosecutor who exercised the peremptory strikes, “[o]nly where a trial court's decision as to pretext finds no support in the record may that decision be overturned on the cold record of appeal” (*People v Wright*, 42 NY3d at 715; see *People v Hecker*, 15 NY3d 625, 656-657 [2010], *cert denied* 563 US 947 [2011]).

During jury selection, the prosecutor exercised a peremptory challenge to prospective juror No. 95 and then prospective juror

No. 53—the only two individuals in the venire who appeared to be Black, like defendant. Defense counsel raised an objection to “the second [B]lack juror” being peremptorily struck during voir dire, requesting an explanation from the prosecutor. While County Court was attempting to identify the jurors, the prosecutor voluntarily stated that juror No. 95 “struggled to communicate” and defense counsel expressed disagreement. Without commenting on the sufficiency of step one, County Court asked the prosecutor to explain what juror No. 95 had trouble communicating and the prosecutor stated that “[h]e had broken English.” County Court then inquired as to juror No. 53 and the prosecutor stated it was because she was wearing a mask, but qualified his objection as not “very strong” toward her serving. County Court then acknowledged the hesitation with having a juror who may have issues communicating, but stated “I didn’t notice that juror No. 95 had some difficulty communicating.” In response to two further questions from County Court, the prosecutor stated that he did not ask juror No. 95 any questions and that the basis for his peremptory strike was on the juror’s reading of the questions and answers provided by the court. Without commenting on the sufficiency of step two, County Court overruled defendant’s objection, stating “I believe you’re looking at a *Batson*’s challenge . . . [a]nd I’m not necessarily finding grounds for that. But be mindful, obviously this is your warning.” County Court immediately turned to juror No. 53, and the prosecutor stated he did not recall the racial composition of the remaining prospective jurors but decided to withdraw his peremptory challenge to juror No. 53—who ultimately served on the jury.

It is uncontested that defendant triggered a *Batson* challenge when he objected to the People’s peremptory challenge of the only two jurors who were perceived by defendant to be of the same racial group—satisfying step one (see *People v Cruz*, 228 AD3d 1019, 1022 [3d Dept 2024]). Although the prosecutor offered a race-neutral reason for each juror at step two, County Court merged the step two and three requirements by immediately denying the objection without first allowing defense counsel to make an argument that the reasons were pretextual, thereby “squeeze[ing] the process into a functional bypass of the key, final protocol [the Court of Appeals has] put in place” (*People v Payne*, 88 NY2d 172, 186 [1996]). Such “practice falls short of a meaningful inquiry into the question of discrimination” (*People v Smocum*, 99 NY2d at 423 [internal quotation marks and citation omitted]), particularly because the court’s consideration of pretext cannot be discerned from the record (compare *People v Morgan*, 230 AD3d 864, 872 [3d Dept 2024],

affd 45 NY3d 940 [2025]; *People v Murray*, 155 AD3d 1106, 1110 [3d Dept 2017], *lv denied* 31 NY3d 1015 [2018]).

While we are mindful of defense counsel’s failure to preserve this issue, given the magnitude of the error, we take corrective action in the interest of justice because the process here was woefully inadequate to satisfy the safeguards enshrined by *Batson* to every defendant (*see* CPL 470.15 [6] [a]; *People v Luke*, 236 AD3d 55, 60 [1st Dept 2025]). Therefore, since the issue of pretext is a question of fact for the trial court to assess the prosecutor’s credibility against the challenged juror’s demeanor and language capabilities, which is an inquiry appellate courts are unable to address at step three, “we withhold decision and remit this case to [County] Court to enable the trial judge who presided over this matter to determine whether the race-neutral reason proffered by the People was pretextual” (*People v Cruz*, 228 AD3d at 1024-1025 [internal quotation marks, brackets and citation omitted]; *see People v Luke*, 236 AD3d at 65-66; *see generally People v Aguirre*, 275 AD2d 418, 418 [2d Dept 2000], *lv denied* 95 NY2d 960 [2000]; *People v Colon*, 228 AD2d 609, 609-610 [2d Dept 1996], *lv denied* 88 NY2d 982 [1996]).

Reynolds Fitzgerald, J.P., Ceresia, Powers and Mackey, JJ., concur. Ordered that the decision is withheld and matter remitted to the County Court of Schenectady County for further proceedings not inconsistent with this Court’s decision.

4 The People of the State of New York, Respondent, v Zack Zeoli, Appellant. [— NYS3d —]

Crimes—Verdict—Sufficiency and Weight of Evidence—Attempted Murder and Criminal Possession of Weapon

Crimes—Evidence—Video Surveillance Footage—Authentication

Crimes—Right to Counsel—Effective Representation—Clear Defense Strategy of Casting Doubt on Defendant’s Identification as Shooter

McShan, J. Appeal from a judgment of the County Court of Rensselaer County (Debra Young, J.), rendered October 19, 2023, upon a verdict convicting defendant of the crimes of attempted murder in the second degree and criminal possession of a weapon in the second degree.

In December 2022, defendant was charged by indictment with the crimes of attempted murder in the second degree and criminal possession of a weapon in the second degree stemming from an August 2022 shooting in the City of Troy, Rensselaer County. Following a jury trial, defendant was convicted as charged and was sentenced to a prison term of 25 years, to be followed by five years of postrelease supervision, for the at-

tempted murder conviction and a concurrent prison term of 15 years, to be followed by five years of postrelease supervision, for the criminal possession of a weapon conviction.¹ Defendant appeals.

Defendant assails the legal sufficiency of his conviction on two separate grounds. First, defendant contends that the evidence adduced at trial is legally insufficient to prove his identity as the perpetrator. “Defendant preserved [that specific] claim of legal insufficiency when County Court reserved upon [his] motion to dismiss presented at the close of the People’s case and ultimately denied the motion at the close of defendant’s case” (*People v Munise*, 222 AD3d 1183, 1184 [3d Dept 2023]; see *People v Payne*, 3 NY3d 266, 273 [2004]). “When assessing the legal sufficiency of a jury verdict, we view the facts in the light most favorable to the People and examine whether there is a valid line of reasoning and permissible inferences from which a rational jury could have found the elements of the crime proved beyond a reasonable doubt” (*People v Dillon*, 231 AD3d 1352, 1353 [3d Dept 2024] [internal quotation marks and citations omitted]; accord *People v White*, 231 AD3d 1429, 1429 [3d Dept 2024], *lv denied* 42 NY3d 1082 [2025]). However, defendant’s second contention that the People failed to establish his intent to kill beyond a reasonable doubt is unpreserved, as he did not raise that specific ground for dismissal as part of his motion (see *People v Parker*, 240 AD3d 66, 71 [3d Dept 2025], *lv denied* 43 NY3d 1047 [2025]; *People v Gentry*, 218 AD3d 919, 921 [3d Dept 2023], *lv denied* 40 NY3d 1012 [2023]). “Nevertheless, a weight of the evidence challenge, which bears no preservation requirement, also requires consideration of the adequacy of the evidence as to each element of the crimes to ensure that they were proven beyond a reasonable doubt” (*People v Noble*, 244 AD3d 1499, 1500 [3d Dept 2025] [internal quotation marks and citations omitted]; see *People v Osman*, 228 AD3d 1007, 1008 [3d Dept 2024]).

Relevant here, “[a] conviction for attempted murder in the second degree requires proof that, with intent to cause the death of another, the defendant engaged in conduct that tended to effect the commission of that crime” (*People v Greenfield*, 167 AD3d 1060, 1061 [3d Dept 2018], *lv denied* 32 NY3d 1204 [2019]; see Penal Law §§ 110.00, 125.25 [1]). Criminal possession of a weapon in the second degree occurs when an individual “possesses any loaded firearm” outside of their “home or

1. Although the sentences were directed to run concurrently to each other, they were directed to run consecutively to another sentence rendered the same day on a separate indictment.

place of business” (Penal Law § 265.03 [3]). “As an implicit but necessary element of each and every crime, the People must prove beyond a reasonable doubt the identity of the defendant as the person who committed the crime” (*People v Alexander*, 231 AD3d 1310, 1311 [3d Dept 2024] [internal quotation marks, brackets and citations omitted]; *accord People v Grady*, 233 AD3d 1369, 1370-1371 [3d Dept 2024], *lv denied* 43 NY3d 963 [2025]).

At trial, the victim testified to his familiarity with defendant, having known him since childhood, noting that the mother of the victim’s child was in a relationship with defendant at the time of the shooting. On the day of the incident, the victim was driving home from work when he saw defendant at the corner of an intersection he was approaching. The victim shouted at defendant from his vehicle and the two exchanged words, which prompted the victim to stop his vehicle shortly beyond the intersection. Defendant then approached the vehicle and, according to the victim, displayed a firearm that he pulled from his pocket. The victim then drove off and briefly stopped, before reversing closer to defendant as the two continued their exchange. As confirmed on video surveillance footage that was recovered by law enforcement from a nearby residence, defendant then ran toward the victim’s vehicle, prompting the victim to drive away quickly. However, after defendant turned his back and began walking back toward the direction he came from, the victim’s vehicle rapidly reversed and nearly struck defendant. Defendant then stepped to the front of the vehicle and discharged his weapon through the victim’s windshield, striking the victim in the chest, neck and hand. The victim then drove himself to the hospital and, while there, he informed responding law enforcement that it was defendant who shot him.

A retired police sergeant, who was active at the time of the shooting, testified that he was familiar with defendant from the sergeant’s service with the Troy Police Department. According to the sergeant, he reviewed the video surveillance footage while on scene and was able to ascertain that the shooter in the video was defendant. However, the sergeant acknowledged that, while on scene, he had also mistakenly identified a different individual, who had ridden a bicycle through the perimeter of the secured scene, as defendant. During defendant’s case-in-chief, another responding police officer testified that, while at the scene, he watched video surveillance footage and mistakenly described the shooter to the sergeant as a Hispanic male wearing all black clothes with white letter-

ing. That officer also testified that he spoke with witnesses on scene who indicated that the shooter was “possibly Hispanic.”

“Based upon our review, we find that, when construing the evidence in the light most favorable to the People as we must, a rational person could conclude that the shooter’s identity was sufficiently proven to be defendant” (*People v Grady*, 233 AD3d at 1371-1372 [internal quotation marks and citation omitted]; see *People v Alexander*, 231 AD3d at 1312; *People v Peasley*, 208 AD3d 1466, 1467 [3d Dept 2022], *lv denied* 39 NY3d 1074 [2023]). The victim clearly testified about his familiarity with defendant and, shortly after the shooting occurred, identified the defendant as the person who shot him. Additionally, the jury could infer, given the victim’s wounds, that if defendant was the shooter, he knowingly possessed a loaded and operable firearm in violation of the law (see *People v Grady*, 233 AD3d at 1372; *People v Lewis*, 224 AD3d 1143, 1148-1149 [3d Dept 2024], *lv denied* 42 NY3d 939 [2024]; *People v Nellis*, 217 AD3d 1056, 1058 [3d Dept 2023]; *People v Calafell*, 211 AD3d 1114, 1117 [3d Dept 2022], *lv denied* 39 NY3d 1077 [2023]).

As to the weight of the evidence, a different verdict would not have been unreasonable had the jury rejected the victim’s identification and ascribed greater weight to the prior misidentification by the sergeant and the erroneous description provided by defendant’s witness when he responded on scene. Nevertheless, deferring to its credibility determinations, we find that the jury’s conclusion that defendant was indeed the shooter and, by inference, possessed a loaded firearm, is not contrary to the weight of the evidence, as the jury could rely upon its own identification from the video evidence, the victim’s identification and the victim’s immediate report to law enforcement that defendant had shot him (see *People v Grady*, 233 AD3d at 1372; *People v Calafell*, 211 AD3d at 1117-1118; *People v Williams*, 182 AD3d 776, 778 [3d Dept 2020], *lv denied* 35 NY3d 1071 [2020]; *People v Malloy*, 166 AD3d 1302, 1307 [3d Dept 2018], *affd* 33 NY3d 1078 [2019]; see also *People v Parker*, 240 AD3d at 71). Further, the manner in which defendant discharged his firearm directly from the front of the victim’s vehicle through the windshield provides sufficient grounds to support the requisite criminal intent (see *People v Terry*, 196 AD3d 840, 842 [3d Dept 2021], *lv denied* 37 NY3d 1030 [2021]; *People v Warner*, 194 AD3d 1098, 1104 [3d Dept 2021], *lv denied* 37 NY3d 1030 [2021]; *People v Ward*, 141 AD3d 853, 855 [3d Dept 2016], *lv denied* 33 NY3d 1074 [2019]).

Defendant next contends that the aforementioned surveillance footage and the stills generated from it were admitted

without proper authentication. “In the authentication context, what matters most is whether the events depicted are as real as the proponent claims them to be” (*Matter of M.S. [M.H.]*, — NY3d —, —, 2026 NY Slip Op 00825, *5 [2026]). “[A]uthenticity is established by proof that the offered evidence is genuine and that there has been no tampering with it, and the foundation necessary to establish these elements may differ according to the nature of the evidence sought to be admitted” (*People v Jenne*, 224 AD3d 953, 956 [3d Dept 2024] [internal quotation marks and citations omitted], *lv denied* 42 NY3d 927 [2024]). “With respect to video evidence, . . . a video may be authenticated through (1) testimony of a witness to the recorded events or of an operator or installer or maintainer of the equipment that the videotape accurately represents the subject matter depicted or (2) testimony (expert or lay) establishing that the video truly and accurately represents what was before the camera” (*Matter of M.S. [M.H.]*, — NY3d at —, 2026 NY Slip Op 00825, *3 [internal quotation marks and citations omitted]; *see People v Sumpter*, 191 AD3d 1160, 1165 [3d Dept 2021], *lv denied* 37 NY3d 968 [2021]). “The decision to admit videotape evidence rests within the sound discretion of the trial court and will not be disturbed absent a lack of foundation for its introduction or a demonstrated abuse of the court’s discretion” (*People v Sanders*, 185 AD3d 1280, 1283 [3d Dept 2020] [internal quotation marks and citations omitted], *lv denied* 35 NY3d 1115 [2020]; *accord People v Lorenz*, 211 AD3d 1109, 1111 [3d Dept 2022], *lv denied* 39 NY3d 1112 [2023]).

Defendant argues that County Court should not have admitted the video footage of the incident based upon the testimony of the detective who collected said footage. On that, defendant contends that the testimony from the detective, who recounted the manner in which he obtained the footage from a homeowner who maintained a surveillance system that captured the incident, was insufficient to independently establish the foundational requirements for admission (*see Matter of M.S. [M.H.]*, — NY3d at —, 2026 NY Slip Op 00825, *3-4 [2026]; *People v Patterson*, 93 NY2d 80, 84 [1999]; *People v Ely*, 68 NY2d 520, 527-528 [1986]). However, in this case, any foundational concerns in the detective’s testimony immediately preceding the video being entered are not dispositive, as the record reflects that, on cross-examination, the victim was shown the surveillance footage previously entered into evidence and confirmed that it depicted the confrontation he had with defendant and the subsequent shooting (*see People v Colon*, 243 AD3d 1340, 1342 [4th Dept 2025], *lv denied* 45 NY3d 936 [Feb. 27, 2026]; *see also People v Abrams*, 231 AD3d 963, 964 [2d

Dept 2024]; *Keene v Rosas*, 215 AD3d 938, 939 [2d Dept 2023]; *People v France*, 120 AD3d 1357, 1357 [2d Dept 2014]). We are mindful that, generally, the appropriate time to establish the proper foundation for evidence is prior to its admission. Nevertheless, assuming without deciding that the detective's testimony fell short of establishing the requisite foundation on its own, "any deficiency in that foundation was later remedied by the testimony of [the victim] who confirmed the accuracy of the events depicted in the video" (*People v Jackson*, 225 AD3d 1136, 1137 [4th Dept 2024], *lv denied* 42 NY3d 927 [2024]; see *People v Cardoza*, 218 AD3d 1291, 1293 [4th Dept 2023], *lv denied* 40 NY3d 996 [2023]; see also *People v Junior*, 119 AD3d 1228, 1231 [3d Dept 2014], *lv denied* 24 NY3d 1044 [2014]; *People v Boyd*, 97 AD3d 898, 899 [3d Dept 2012], *lv denied* 20 NY3d 1009 [2013]). We therefore do not find that the admission of the surveillance footage and the corresponding stills into evidence constituted reversible error.

Turning to defendant's assertion that he was denied meaningful representation at trial, he first points to counsel's failure to challenge the sergeant's identification testimony.² We find his contention unpersuasive. Notably, the video footage precipitating the sergeant's identification was not exceedingly clear and, more importantly, County Court provided an instruction shortly after the sergeant's identification that the jury could independently determine whether defendant was depicted in the video and otherwise reject the sergeant's testimony (see *People v Cannon*, 239 AD3d 986, 988 [2d Dept 2025], *lv denied* 44 NY3d 1027 [2025]; *People v Lee*, 200 AD3d 432, 433-434 [1st Dept 2021], *lv denied* 37 NY3d 1162 [2022]; see generally *People v Williams*, 234 AD3d 1180, 1184 [3d Dept 2025], *lv denied* 43 NY3d 966 [2025]). Moreover, although defense counsel could have objected when the sergeant provided his testimony identifying defendant as the shooter, he ultimately utilized such testimony by contrasting the sergeant's identification against the misidentification of both the sergeant and law enforcement generally, emphasizing that the investigation and focus on him as the shooter was the product of "tunnel vision." Considering defense counsel's strategy in its entirety, "we find no merit to defendant's argument that counsel's failure to object . . . constituted the type of singular error that requires reversal" (*People v Bessette*, 246 AD3d 1310, 1315 [3d Dept

2. Acknowledging that this argument is unpreserved, we decline defendant's request to invoke our interest of justice jurisdiction and directly reach the issue beyond the context of his ineffective assistance of counsel argument.

2026]; *see People v Dunham*, 231 AD3d 1437, 1439 [3d Dept 2024], *lv denied* 43 NY3d 963 [2025]).

Defendant also contends that counsel was ineffective for failing to pursue a justification defense. However, defendant acknowledges that doing so would have conflicted with the clear strategy employed by defense counsel of casting doubt on defendant's identity as the shooter. The challenge of presenting such competing defenses is evident when one looks to the facts of this case and considers the necessary showing to justify the use of deadly force; particularly, the subjective belief that such force was necessary under the circumstances presented (*see People v Caselnova*, 243 AD3d 1123, 1127 [3d Dept 2025]; *People v Mercer*, 221 AD3d 1259, 1261 [3d Dept 2023], *lv denied* 41 NY3d 1003 [2024]). Further, the video footage reflects that defendant willingly moved to the front of the vehicle in order to fire his weapon through the windshield, despite a clear opportunity to retreat in between the two cars adjacent to him, which is the exact path he ultimately took when he fled the scene (*see People v DeCamp*, 211 AD3d 1121, 1122 [3d Dept 2022], *lv denied* 39 NY3d 1077 [2023]; *People v Cutting*, 206 AD3d 1281, 1281 [3d Dept 2022]). Accordingly, defendant's argument fails to demonstrate a complete lack of strategy in forgoing a justification defense (*see People v Wilcox*, 231 AD3d 1350, 1351 [3d Dept 2024]; *People v Burton*, 215 AD3d 1054, 1062-1063 [3d Dept 2023], *lv denied* 40 NY3d 927 [2023]; *People v Sposito*, 193 AD3d 1236, 1241 [3d Dept 2021], *affd* 37 NY3d 1149 [2022]). Beyond the foregoing, the record provides no other indication that defendant received less than meaningful representation.

Finally, we decline defendant's request to modify his sentence in the interest of justice (*see* CPL 470.15 [6] [b]; *see also People v Brisman*, 43 NY3d 322, 325 [2025]). At the time of the shooting, defendant, who has an extensive criminal history, was awaiting sentencing on a June 2022 conviction for criminal possession of a forgery device and two counts of forgery in the first degree and had to be extradited from Ohio after failing to appear for his sentencing. Although the 25-year sentence is the maximum permissible term for his conviction for attempted murder, considering the foregoing alongside the information garnered from defendant's presentence interview, we are not persuaded that a reduction is warranted given the totality of circumstances (*see People v George*, 242 AD3d 1447, 1453 [3d Dept 2025]; *People v Kilgore*, 218 AD3d 1054, 1058 [3d Dept 2023], *lv denied* 40 NY3d 1081 [2023]).

Garry, P.J., Clark, Pritzker and Corcoran, JJ., concur. Ordered that the judgment is affirmed.

5 The People of the State of New York, Respondent, v Gustavo Santana, Appellant. [— NYS3d —]

**Constitutional Law—Validity of Statute—Unlicensed Possession of Loaded Firearm Outside of Home or Place of Business—Standing
Licenses—Firearms—Good Moral Character Requirement Not Susceptible to Unchanneled Discretion on Part of Licensing Officials**

Ceresia, J. Appeal from a judgment of the County Court of Rensselaer County (Debra Young, J.), rendered June 18, 2024, upon a verdict convicting defendant of the crime of criminal possession of a weapon in the second degree.

Following a shooting on September 18, 2023 in the City of Troy, Rensselaer County, that caused the death of one person and injured another, defendant was indicted on charges of murder in the second degree (count 1), criminal possession of a weapon in the second degree (count 2) and assault in the first degree (count 3). Prior to trial, defendant sought dismissal of count 2 on the ground that the corresponding statute, Penal Law § 265.03 (3), is unconstitutional. County Court denied the motion, and a six-day jury trial ensued. At the close of proof, defendant requested, and received, a jury instruction on the defense of justification in connection with counts 1 and 3. The jury returned a verdict finding defendant not guilty of counts 1 and 3 but guilty of count 2. Defendant then renewed his motion to dismiss count 2, and the court again denied the motion. Thereafter, the court sentenced defendant to a prison term of 12 years, to be followed by five years of postrelease supervision. Defendant appeals.

We first address defendant’s facial challenge to the constitutionality of Penal Law § 265.03 (3). This statute criminalizes the unlicensed possession of a loaded firearm outside of the home or place of business. Inasmuch as it is a defense to this charge that a defendant has a license to carry the firearm (*see* Penal Law § 265.20 [a] [3]), defendant contends that his conviction should be overturned because New York’s firearm licensing scheme, contained in Penal Law § 400.00, has a flaw of constitutional dimension. Contrary to the People’s assertion, a defendant has standing to bring such a challenge even if he or she never applied for a firearm license, as was the case here (*see People v Johnson*, — NY3d —, —, 2025 NY Slip Op 06528, *2 [Nov. 24, 2025]).

A party bringing a facial constitutional challenge “bears the substantial burden of demonstrating that in any degree and in every conceivable application, the law suffers wholesale constitutional impairment” (*People v Emmanuel D.*, 238 AD3d 1068, 1070 [2d Dept 2025] [internal quotation marks and cita-

tion omitted], *lv denied* 44 NY3d 1011 [2025]; see *People v Johnson*, — NY3d at —, 2025 NY Slip Op 06528, *3). “Legislative enactments carry an exceedingly strong presumption of constitutionality, and while this presumption is rebuttable, one undertaking that task carries a heavy burden of demonstrating unconstitutionality beyond a reasonable doubt” (*Matter of Kelsey v Hochul*, 221 AD3d 1236, 1237 [3d Dept 2023] [internal quotation marks and citations omitted], *appeal dismissed* 42 NY3d 960 [2024]; see *Stefanik v Hochul*, 43 NY3d 49, 57 [2024]).

Defendant takes issue with the “good moral character” requirement contained in the firearm licensing scheme. As set forth therein, “[n]o license shall be issued or renewed except for an applicant . . . of good moral character, which, for the purposes of this article, shall mean having the essential character, temperament and judgement necessary to be entrusted with a weapon and to use it only in a manner that does not endanger oneself or others” (Penal Law § 400.00 [1] [b]). Defendant claims that this requirement places too much discretion in the hands of the licensing officer, and that it has no analogue in our nation’s history of firearms regulation. In so arguing, defendant relies upon the Supreme Court of the United States’ decision in *New York State Rifle & Pistol Assn., Inc. v Bruen* (597 US 1 [2022]), in which it was held that New York’s requirement that a license applicant show “proper cause” to carry a concealed firearm violated the Second Amendment for these same reasons.

We reject defendant’s arguments. With regard to the issue of discretion for licensing officials, when the Legislature amended New York’s firearm licensing scheme in the wake of *Bruen* via the Concealed Carry Improvement Act (L 2022, ch 371), it essentially converted the scheme from a “may-issue” regime to a “shall-issue” regime by changing the framework from one where a licensing officer may, in his or her discretion, issue a license after determining that the applicant has a special need for self-defense to one where a license shall be issued so long as the applicant satisfies certain threshold eligibility requirements, including possessing good moral character. With that in mind, we note that *Bruen* itself cited with approval other states’ shall-issue regimes that contain a similar threshold requirement to the one at issue here, such as in Delaware, which has a good moral character requirement (see Del Code Ann title 11, § 1441 [a]), as well as Connecticut and Rhode Island, which allow a licensing official to deny a license to candidates who are not “suitable” (Conn Gen Stat § 29-28 [b], [c]; RI Gen Laws §

11-47-11 [a])—defined in Connecticut as “‘individuals whose conduct has shown them to be lacking the essential character o[r] temperament necessary to be entrusted with a weapon’” (*New York State Rifle & Pistol Assn., Inc. v Bruen*, 597 US at 14 n 1, quoting *Dwyer v Farrell*, 193 Conn 7, 12, 475 A2d 257, 260 [1984]; see also *Antonyuk v James*, 120 F4th 941, 995 [2d Cir 2024] [(o)f the forty-three licensing regimes that *Bruen* described as consistent with its analysis, more than a dozen confer some measure of discretion on licensing officers, with many using terms that are nearly identical to New York’s character provision”], *cert denied* 604 US —, 145 S Ct 1900 [2025]). Thus, *Bruen* does not support the proposition, nor do we find, that the good moral character requirement is susceptible to the type of “unchanneled discretion” on the part of licensing officials that violates the Second Amendment (*New York State Rifle & Pistol Assn., Inc. v Bruen*, 597 US at 79 [Kavanaugh, J., concurring]).

As for the question of whether the good moral character requirement is sufficiently grounded in history, subsequent to *Bruen*, the Supreme Court of the United States acknowledged that this country indeed has a historical tradition of disarming individuals who would cause harm to others, which is the precise aim of this requirement. That is, in *United States v Rahimi* (602 US 680 [2024]), the Court observed that “[s]ince the founding, our Nation’s firearm laws have included provisions preventing individuals who threaten physical harm to others from misusing firearms” (*id.* at 690). “Such dangerousness is the core of New York’s character requirement” (*Antonyuk v James*, 120 F4th at 985). Therefore, a good moral character provision “clearly fall[s] within the historical tradition of preventing dangerous individuals from carrying guns” (*id.*). For the above reasons, defendant’s facial challenge fails (see *id.*; see generally *People v Watts*, 234 AD3d 620, 621 [1st Dept 2025], *lv denied* 43 NY3d 1059 [2025]).

Next, defendant contends that Penal Law § 265.03 (3) is unconstitutional as applied to him because he was carrying a firearm in public for the purpose of self-defense, which is protected by the Second Amendment (see *District of Columbia v Heller*, 554 US 570, 584 [2008]). However, this statute “does not effectuate a complete ban on the possession of handguns” outside the home but, rather, “‘prohibit[s] only *unlicensed* possession of handguns. A person who has a valid, applicable license for his or her handgun commits no crime’” (*People v Tucker*, 181 AD3d 103, 110 [4th Dept 2020], *cert denied* 592 US —, 141 S Ct 566 [2020], quoting *People v Hughes*, 22 NY3d 44,

50 [2013]; see *New York State Rifle & Pistol Assn., Inc. v Bruen* at 79 [Kavanaugh, J., concurring] [“the Court’s decision does not prohibit States from imposing licensing requirements for carrying a handgun for self-defense”]). Given that defendant’s possession in this case was unlicensed and, as noted above, he has not pointed to any constitutionally deficient element of New York’s licensing scheme, we reject his as-applied challenge.

Defendant also asserts that the sentencing scheme for varying degrees of weapon possession violates the Second Amendment by imposing harsher punishment on unlicensed possession outside of the home as opposed to inside it (*compare* Penal Law §§ 265.01 [1]; 265.01-b, *with* § 265.03 [3]; see §§ 70.00 [2] [e]; [3] [b]; 70.02 [1] [b]; [3] [b]; 70.15 [1]). We disagree. It is within the Legislature’s purview as well as the boundaries of the Second Amendment to devise a licensing scheme for firearm possession (see *New York State Rifle & Pistol Assn., Inc. v Bruen* at 79 [Kavanaugh, J., concurring]). Thus, by the same token, the Legislature may criminalize unlicensed possession, and it is hardly controversial for the Legislature to “distinguish among the ills of society which require a criminal sanction, and prescribe, as it reasonably views them, punishments appropriate to each” (*People v Broadie*, 37 NY2d 100, 110 [1975], *cert denied* 423 US 950 [1975]). We therefore conclude that it was neither unreasonable nor unconstitutional for the Legislature to have determined that unlicensed possession of a weapon outside the home poses a greater risk of danger than it does inside the home, and set the respective penalties accordingly. In a similar vein, we reject defendant’s Eighth Amendment claim. In our view, the allowable sentencing range of up to 15 years in prison does “not rise to the gross disproportionality violative of constitutional limitations,” given the threat to public safety inherent in the possession of a loaded, unlicensed firearm outside the home (*id.* at 110-111; see *People v Harris*, 98 NY2d 452, 476 [2002]; *People v Guity*, 223 AD3d 598, 599 [1st Dept 2024], *lv denied* 41 NY3d 1002 [2024]).

Finally, with respect to defendant’s challenge to the severity of his sentence, we deem it appropriate in this case to exercise our discretion and modify the sentence in the interest of justice. Recognizing that the jury acquitted defendant of the murder and assault charges, and noting defendant’s lack of criminal history, acceptance of responsibility and showing of remorse, we reduce defendant’s sentence to eight years in prison, to be followed by five years of postrelease supervision.

Aarons, J.P., Pritzker, Powers and Mackey, JJ., concur.

Ordered that the judgment is modified, as a matter of discretion in the interest of justice, by reducing the sentence to a prison term of eight years, to be followed by five years of post-release supervision; and, as so modified, affirmed.

6 The People of the State of New York, Respondent, v Troy D. Cassell Jr., Appellant. [— NYS3d —]

Motor Vehicles—Aggravated Unlicensed Operation of Motor Vehicle—Sufficiency and Weight of Evidence—Knowledge or Reason to Know That License Suspended

Motor Vehicles—Operating Vehicle while Under Influence of Alcohol or Drugs—Testimony of Paramedic, Responding Trooper and Drug Recognition Expert, Together with Body-Worn Camera Footage Depicted Defendant's Impaired Demeanor

Crimes—Jurors—Selection of Jury—Requirement That Prospective Jurors be Called by Name during Jury Selection

Corcoran, J. Appeal from a judgment of the County Court of Saratoga County (James Murphy III, J.), rendered November 3, 2022, upon a verdict convicting defendant of the crimes of aggravated driving while intoxicated with a child, driving while ability impaired by drugs, aggravated unlicensed operation of a motor vehicle in the third degree and endangering the welfare of a child.

On September 12, 2021, defendant was driving with his six-year-old child as a passenger when his vehicle left the roadway and overturned into a ditch. Defendant was charged by indictment with aggravated driving while intoxicated with a child (*see* Vehicle and Traffic Law § 1192 [2-a] [b]), driving while ability impaired by drugs (*see* Vehicle and Traffic Law § 1192 [4]), aggravated unlicensed operation of a motor vehicle in the third degree (*see* Vehicle and Traffic Law § 511 [1] [a]) and endangering the welfare of a child (Penal Law § 260.10 [1]). Following a jury trial, defendant was convicted as charged. County Court (Murphy III, J.) sentenced him to an indeterminate prison term of 1¹/₃ to 4 years upon his conviction of aggravated driving while intoxicated with a child, one year in jail upon his convictions of driving while ability impaired by drugs and endangering the welfare of a child and 30 days in jail upon his conviction of aggravated unlicensed operation of a motor vehicle in the third degree; all sentences ran concurrently. County Court also imposed a period of conditional discharge, revoked defendant's license for one year and directed that he install and maintain an ignition interlock device on his vehicle. Defendant appeals.

Defendant first contends that the evidence is legally insufficient to support his conviction for aggravated unlicensed operation of a motor vehicle in the third degree and that the

verdict as to all counts is against the weight of the evidence. We disagree. When reviewing a legal sufficiency claim, this Court must “view the evidence in the light most favorable to the People and evaluate whether there is any valid line of reasoning and permissible inferences which could lead a rational person to the conclusion reached by the jury on the basis of the evidence at trial and as a matter of law satisfy the proof and burden requirements for every element of the crimes charged” (*People v Fragassi*, 178 AD3d 1153, 1154 [3d Dept 2019] [internal quotation marks, brackets and citations omitted], *lv denied* 34 NY3d 1128 [2020]). “In contrast, a weight of the evidence analysis requires us to first determine, based on all of the credible evidence, whether a different result would have been unreasonable and, if not, weigh the relative probative force of conflicting testimony and the relative strength of conflicting inferences that may be drawn from the testimony to determine if the verdict is supported by the weight of the evidence” (*id.* [internal quotation marks and citations omitted]; see *People v Ambrosio*, 235 AD3d 1181, 1182-1183 [3d Dept 2025], *affd* — NY3d —, 2026 NY Slip Op 00824 [2026]).

As relevant here, a person is guilty of driving while ability impaired by drugs when he or she operates a motor vehicle while the person’s ability to operate such motor vehicle is impaired by the use of a drug (see Vehicle and Traffic Law § 1192 [4]). A person is guilty of aggravated driving while intoxicated with a child when he or she violates Vehicle and Traffic Law § 1192 (4) while a child who is 15 years of age or less is a passenger in such motor vehicle (see Vehicle and Traffic Law § 1192 [2-a] [b]). A person is guilty of aggravated unlicensed operation of a motor vehicle in the third degree when he or she operates a motor vehicle upon a public highway while knowing or having reason to know that his or her license or privilege of operating a motor vehicle in this state is suspended, revoked or otherwise withdrawn (see Vehicle and Traffic Law § 511 [1] [a]). Finally, a person is guilty of endangering the welfare of a child when he or she knowingly acts in a manner likely to be injurious to the physical, mental or moral welfare of a child less than 17 years old (see Penal Law § 260.10 [1]).

The testimony at trial established that a paramedic returning to his station came upon defendant’s vehicle in a ditch on September 12, 2021. The paramedic testified that defendant and his daughter were still inside the vehicle and that defendant appeared confused. While speaking with defendant later in the ambulance, the paramedic observed that defendant repeat-

edly nodded off, appeared drowsy and had difficulty staying alert. According to the paramedic, defendant periodically leaned from side to side, unable to stay fully awake during the encounter. Defendant gave the paramedic inconsistent or mistaken information, including the wrong date of birth for his daughter.

A state trooper responded to the scene and conducted the primary investigation, most of which was memorialized on body-worn camera footage. According to the trooper, defendant spoke slowly and appeared disoriented. Defendant again gave inconsistent or mistaken information, including the wrong date of birth for his daughter, and he struggled to answer basic questions like the date and time. The trooper asked defendant about the status of his driver's license. According to the trooper's testimony and body-worn camera footage admitted into evidence, defendant initially responded that he had "taken care of" his traffic tickets and believed that his license was no longer suspended. Later in the encounter, however, defendant stated that he attempted to address an outstanding infraction the day before the accident but was unable to do so because the relevant town court office was closed. Defendant's driving abstract, which was received in evidence, revealed that his license had been subject to multiple suspensions. Some suspensions had been cleared shortly before the accident, but the abstract reflected one extant suspension when defendant operated the vehicle.

During the roadside investigation, defendant stated that he was prescribed Suboxone but vacillated about when he last ingested the medication. Initially he claimed that he had taken it the previous morning but later stated that he had taken the last dose earlier that day. Based upon defendant's lethargic demeanor, slow speech and his admission that he had taken prescription medication that day, the trooper administered standardized field sobriety tests. Defendant had difficulty following instructions and required repeated clarification. For instance, during the horizontal gaze nystagmus test, defendant failed to keep his head still and appeared unfocused. During the walk-and-turn and one-leg stand tests, defendant exhibited poor balance and coordination. Defendant stared blankly at times, his eyes appeared droopy and he continued to nod off intermittently.

After defendant was placed under arrest and transported to the State Police barracks, he promptly and unequivocally invoked his right to counsel. The trooper testified that he advised defendant about his chemical test rights and obligations

and that defendant debated whether he would submit to testing, ultimately refusing to provide a blood sample. Evidence of defendant's refusal was admitted at trial.

A State Police sergeant trained and certified as a drug recognition expert (hereinafter DRE) conducted and recorded a drug recognition evaluation at the barracks. The DRE detailed at trial his twelve-step evaluation process and his observations of defendant. During the evaluation, defendant's pupils were constricted, his eyelids drooped, his coordination was poor and he swayed while standing. Defendant stated that he was prescribed buprenorphine, which he sometimes called Suboxone and other times called Subutex. The DRE concluded that defendant was impaired by a narcotic analgesic and unable to safely operate a motor vehicle.

Defendant testified and offered an alternative explanation for his condition and appearance. Specifically, he claimed that he was tired, stressed and confused following the accident; he had worked a long day, eaten very little and missed his evening dose of medication. Defendant believed his license was valid because he had recently paid the outstanding tickets that prompted his earlier suspension and had not received notice of an additional suspension.

Turning first to his legal sufficiency challenge, defendant argues that the People failed to establish that he knew or had reason to know that his license was suspended. The driving abstract admitted into evidence reflected that defendant's license had been subject to multiple suspensions, several of which had been recently cleared, but one suspension remained in effect on the date of the accident. Defendant first claimed that he had "taken care of" his tickets and thought his license was valid. However, he later conceded that he unsuccessfully attempted to resolve an outstanding infraction in the Town of Greenwich, Washington County on the day before the accident because the town court office was closed. From this evidence, the jury could reasonably infer that defendant knew or *had reason to know* that his privilege to operate a motor vehicle was suspended at the time he drove. Accordingly, defendant's conviction for aggravated unlicensed operation of a motor vehicle in the third degree is supported by legally sufficient evidence.

Next, we address defendant's contention that each guilty verdict is against the weight of the evidence. As for the conviction for aggravated unlicensed operation of a motor vehicle in the third degree, a different verdict would not have been unreasonable had the jury credited defendant's belief that his

license was valid. Nevertheless, viewing the evidence in a neutral light and according deference to the jury's credibility determinations, the same proof that established the existence of an active suspension, together with defendant's acknowledgment of recent efforts to address an unresolved suspension, supports the jury's finding that defendant knew or had reason to know that his license was suspended.

Likewise, different verdicts on the counts which turned on whether defendant was impaired by a drug while operating the vehicle would not have been unreasonable if the jury credited defendant's explanation that his presentation and conduct were attributable to fatigue, stress and the shock of the accident. However, the testimony of the paramedic, the responding trooper and the DRE, together with the body-worn camera footage depicting defendant's demeanor and evaluation, provided a basis for the jury to conclude that defendant was impaired within the meaning of Vehicle and Traffic Law § 1192 (4). As for the conviction for endangering the welfare of a child, the jury's verdict was supported by evidence that defendant's six-year-old daughter was riding in the vehicle with him and the DRE's conclusion that defendant was unable to safely operate a motor vehicle (*see People v Fragassi*, 178 AD3d at 1154-1155). Viewing the evidence in a neutral light and according appropriate deference to the jury's credibility determinations, we find that the verdict as to all counts is supported by the weight of the evidence (*see People v Shirley*, 209 AD3d 1272, 1274 [4th Dept 2022], *lv denied* 39 NY3d 964 [2022]; *People v Fragassi*, 178 AD3d at 1155-1156).

We next address defendant's argument that County Court erred in allowing his postinvocation statements to be introduced at trial. County Court properly admitted defendant's responses to routine booking questions, as well as spontaneous statements made before and after the drug recognition evaluation, which were not the product of interrogation or inducement (*see People v Higgins*, 124 AD3d 929, 932 [3d Dept 2015]). "An individual suspected of driving while intoxicated is allowed a limited right to counsel for the purpose of deciding whether to submit to a chemical test" (*id.* at 933 [citations omitted]). Because defendant made a broad and general request for counsel, rather than a specific request for advice on whether to submit to chemical testing, County Court properly declined to suppress the fact that he refused to submit to chemical testing (*see id.* at 933-934).

Turning to defendant's claim that County Court erred by empaneling an anonymous jury, we agree with defendant that

County Court's unexplained decision to withhold the names of the jurors entitles him to a new trial. Here, prospective and sworn jurors were identified by their assigned juror number and not by their names.* The People concede, and we agree, that County Court violated CPL 270.15, which requires that prospective jurors be called by name during jury selection (see *People v Flores*, 32 NY3d 1087, 1088 [2018]; *People v Tenace*, 229 AD3d 908, 911 [3d Dept 2024]; *People v Heidrich*, 226 AD3d 1096, 1098 [3d Dept 2024], *lv denied* 42 NY3d 927 [2024]; see also CPL 270.15 [1]). Because the statutory violation is not a mode of proceedings error, it is subject to the preservation requirement (see *People v Goberdhan*, 241 AD3d 992, 1000 [3d Dept 2025], *lv denied* 44 NY3d 1011 [2025]). Notwithstanding defendant's failure to preserve this claim, we may exercise our discretion and reverse in the interest of justice (see CPL 470.15 [6] [a]). When deciding whether to exercise that discretion, we consider the totality of the circumstances, including the nature of the statutory violation, the explanation offered by the trial court and the potential for prejudice to the defendant (see *People v Tenace*, 229 AD3d at 912; *People v Flores*, 153 AD3d 182, 191-193 [2d Dept 2017], *affd* 32 NY3d 1087 [2018]).

Here, prospective jurors were identified only by numbers and the record is devoid of proof that their names were ever provided to defendant, which materially heightens the risk of prejudice (see *People v Flores*, 153 AD3d at 191-192; compare *People v Goberdhan*, 241 AD3d at 1000). Additionally, County Court withheld prospective jurors' names without making any findings on the record or articulating a case-specific justification for departing from the procedure mandated by CPL 270.15, explaining only that prospective juror identities were withheld "because of confidentiality." The record does not reflect any concern regarding juror safety, intimidation or interference, nor any circumstances that would otherwise warrant the use of an anonymous jury (see *People v Flores*, 32 NY3d at 1088; *People v Heidrich*, 226 AD3d at 1099). Additionally, we are not persuaded by any of the reasons suggested by the People at oral argument. We thus exercise our interest of justice jurisdiction, reverse and remit for a new trial.

Although this disposition renders academic many of defendant's remaining contentions, including his claim that County

* Courts have used the term "anonymous jury" to describe several circumstances involving the nondisclosure of juror information. Here, County Court unilaterally empaneled an "innominate" or "numbers" jury, in which jurors are referred to by number rather than by name (see *People v Flores*, 153 AD3d 182, 189-190 [2d Dept 2017], *affd* 32 NY3d 1087 [2018]).

Court denied him the right to meaningfully participate in the *Sandoval* hearing, we address certain remaining issues in anticipation of a new trial.

Defendant contends that County Court erred in denying his motion to suppress the body-worn camera footage depicting the drug recognition evaluation, the results of the drug recognition evaluation and related opinion testimony, all purportedly obtained after he invoked his right to counsel. In his omnibus motion, defendant sought a hearing to suppress the body-worn camera footage of the drug recognition evaluation based on a violation of his right to counsel. The People consented to a *Huntley* hearing but County Court denied defendant's request for a *Mapp/Dunaway* hearing, concluding that he had not set forth a factual basis for such hearing (see CPL 710.60 [3]; *People v Ibarguen*, 37 NY3d 1107, 1109 [2021], *cert denied* 596 US —, 142 S Ct 2650 [2022]). At the conclusion of the *Huntley* hearing, defendant orally renewed his application to suppress video footage of the drug recognition evaluation and related opinions, citing the facts adduced at the hearing that ultimately justified suppression of his statements. However, County Court (Lorman, J.) never determined this oral motion. Where a defendant has made a pretrial motion to suppress evidence, "the trial may not be commenced until determination of the motion" (CPL 710.40 [3]) and, "[r]egardless of whether a hearing was conducted, the court, upon determining the motion, must set forth on the record its findings of fact, its conclusions of law and the reasons for its determination" (CPL 710.60 [6]). Accordingly, on remittal, County Court must address the admissibility of evidence related to the DRE (see *People v Green*, 141 AD3d 746, 747 [3d Dept 2016]).

With respect to arguments about the proper jury instruction for a violation of Vehicle and Traffic Law § 1192 (4), the Court of Appeals recently clarified that the impairment standard requires proof that a defendant's physical or mental abilities were actually impaired to any extent, not proof that the defendant was intoxicated or incapable of driving (see *People v Dondorfer*, — NY3d —, —, 2026 NY Slip Op 00823, *1 [2026]). County Court's (Murphy III, J.) charge therefore accurately stated the proper instruction. Finally, as the People concede, the sentencing condition requiring defendant to install an ignition interlock device was illegal, as an alcohol-related offense was not an essential element of any conviction here (see *People v Miller*, 191 AD3d 802, 803 [2d Dept 2021]; *People v Levy*, 91 AD3d 793, 794 [2d Dept 2012], *lv denied* 18 NY3d 995 [2012]; see also Vehicle and Traffic Law § 1193 [1] [a]; Penal Law § 60.01 [2] [a] [i]).

Clark, J.P., Reynolds Fitzgerald, Ceresia and Powers, JJ., concur. Ordered that the judgment is reversed, as a matter of discretion in the interest of justice, and matter remitted to the County Court of Saratoga County for a new trial.

7 The People of the State of New York, Respondent, v Francisco Rivera-Ramos, Appellant. [— NYS3d —]—

Crimes—Fair Trial—On-Duty Police Officer Victim Allowed to Testify Wearing Police Uniform with Service Weapon on Him

Crimes—Jurors—Meaningful Response to Jury Notes—Clarification on Intent Element of Burglary in First Degree

Clark, J.P. Appeal from a judgment of the County Court of Schenectady County (Matthew Sypniewski, J.), rendered March 21, 2023, upon a verdict convicting defendant of the crimes of burglary in the first degree, assault in the second degree (two counts), criminal possession of a weapon in the third degree, endangering the welfare of a child and obstructing governmental administration in the second degree.

In January 2022, defendant was charged in an 11-count indictment with various crimes stemming from allegations that he entered his estranged wife’s apartment and attacked her romantic partner (hereinafter the victim) with a knife. Defendant’s two-year-old child, whom he shared with the wife, was in the apartment during the incident and an order of protection was in effect that directed defendant to refrain from harassing or assaulting the wife. The indictment also alleged that defendant stole several personal items from the victim while fleeing the scene and assaulted police officers upon being booked into custody. Following a jury trial, defendant was acquitted of certain charges, including a charge of criminal contempt in the first degree based upon the alleged violation of the order of protection in favor of the wife. However, he was convicted of burglary in the first degree, two counts of assault in the second degree, criminal possession of a weapon in the third degree, endangering the welfare of a child and obstructing governmental administration in the second degree. Defendant was sentenced to concurrent prison terms on the convictions, amounting to an aggregate prison term of 10 years, to be followed by five years of postrelease supervision. Defendant appeals.

Initially, we are unpersuaded by defendant’s contention that he was deprived of a fair trial by County Court’s decision to allow the victim—a police officer—to testify while wearing his police uniform with his service weapon on him. The victim was on duty both days that he testified and, when charging the jury, County Court instructed the jury that it was to “evaluate

the testimony of police officers” like it would “any other witness” and that it was “not to find their testimony to be more or less likely to be true simply because [they are] a police officer.” In these circumstances, permitting the victim to testify in his uniform was not unduly prejudicial so as to deprive defendant of a fair trial (*see People v Destin*, 150 AD3d 76, 84 [1st Dept 2017], *lv denied* 29 NY3d 1077 [2017]; *People v Pratchett*, 90 AD3d 1678, 1679 [4th Dept 2011], *lv denied* 18 NY3d 997 [2012]; *People v Aupperlee*, 168 AD2d 561, 562 [2d Dept 1990], *lv denied* 77 NY2d 958 [1991]; *People v Simms*, 124 AD2d 349, 349 [3d Dept 1986], *lv denied* 69 NY2d 886 [1987]).

Defendant also challenges the manner in which County Court responded to two jury notes submitted during deliberations asking for clarification on the intent element of burglary in the first degree. “Where a jury requests clarification or further instruction, ‘the court must direct that the jury be returned to the courtroom and, after notice to both the People and counsel for the defendant, and in the presence of the defendant, must give such requested information or instruction as the court deems proper’ ” (*People v Briskin*, 125 AD3d 1113, 1121 [3d Dept 2015] [brackets omitted], *lv denied* 25 NY3d 1069 [2015], quoting CPL 310.30; *see People v Ashe*, 208 AD3d 1500, 1506-1507 [3d Dept 2022], *lv denied* 39 NY3d 961 [2022]). “[T]he trial court is vested with discretion in determining the substance of its response, guided by the requirement that such response be meaningful” (*People v Rawlinson*, 170 AD3d 1425, 1429 [3d Dept 2019], *lv denied* 33 NY3d 1107 [2019]; *see People v O’Rama*, 78 NY2d 270, 276 [1991]). “In analyzing whether that discretion was abused, ‘[t]he factors to be evaluated are the form of the jury’s question, which may have to be clarified before it can be answered, the particular issue of which inquiry is made, the supplemental instruction actually given and the presence or absence of prejudice to the defendant’ ” (*People v Lee*, 183 AD3d 1183, 1188 [3d Dept 2020], *lv denied* 35 NY3d 1114 [2020], quoting *People v Malloy*, 55 NY2d 296, 302 [1982], *cert denied* 459 US 847 [1982]; *see People v Cason*, 203 AD3d 1309, 1315 [3d Dept 2022], *lv denied* 38 NY3d 1132 [2022]).

Prior to the start of deliberations, County Court instructed the jury on the elements of burglary in the first degree in accordance with the general language set forth in the Pattern Criminal Jury Instructions, explaining that a burglary conviction in this case required the jury to conclude that defendant knowingly entered or remained unlawfully in a dwelling with the intent to commit a crime therein and that when, “in effecting entry or while in the dwelling or in immediate flight there-

from, he . . . [c]ause[d] physical injury to [a] person who [was] not a participant in the crime” (Penal Law § 140.30 [2]). As it pertained to the intent element of the crime, the court specifically stated that defendant’s unlawful entry into the apartment must have been “with the intent to commit a crime *inside* the dwelling” (emphasis added) (*see* CJI2d[NY] Penal Law § 140.30 [2]). After approximately an hour of deliberation, the jury submitted a note to the court requesting clarification as to whether the “intent to commit a crime[] could . . . be violating the . . . [o]rder of [p]rotection [in favor of defendant’s wife] by intending to harass or annoy [her].” County Court read the note in front of defendant, his counsel and the prosecutor. Rather than specifically answering the jury’s question, the court relayed its plan to reread the legal instructions for burglary in the first degree and to explain that the jury could consider the intent to commit any crime inside of the apartment to satisfy the intent element of the burglary charge, including criminal contempt in the first degree. Defendant did not object to this proposal. County Court then instructed the jury as contemplated and advised that it would read back the definition of criminal contempt in the first degree if requested.

Following a weekend recess, County Court advised the parties that it had received another note from the jury requesting a read-back of the definitions of burglary in the first degree and criminal contempt in the first degree. The prosecutor, relying on two Court of Appeals decisions, advocated for a supplemental response explicitly informing the jury that it could consider whether it was defendant’s intent to enter the apartment to annoy or harass the wife as the predicate crime satisfying the “intent to commit a crime” element of burglary in the first degree. Over defendant’s objection, County Court instructed the jury as proposed by the prosecutor, explaining that burglary in the first degree required proof that defendant entered the apartment “with the intent to commit a crime inside,” which could include the intent to annoy or harass the wife.

Defendant argues that County Court’s response to the jury’s notes did not adequately convey the “intent to commit a crime element” of burglary in the first degree because it failed to explain that a conviction could not be predicated on an intent to violate the order of protection issued in favor of the wife simply by entering the apartment. This argument is unpreserved, as defendant did not request such an instruction upon being informed of the manner in which County Court planned to supplement its response to the jury’s second note (*see People*

v Lewis, 5 NY3d 546, 551 [2005]). To the extent that it may be preserved, defendant's argument is unavailing. Although defendant is correct that an "[u]nlawful entry cannot itself be used as the sole predicate crime in the 'intent to commit a crime therein' element of burglary" and intent to violate an order of protection "in a manner that [goes] beyond trespass" is necessary (*id.* at 551, 552; *see People v Cajigas*, 19 NY3d 697, 701 [2012]), the court's response properly and meaningfully conveyed that premise by explaining that the "intent to commit a crime" element of burglary in the first degree required proof that defendant intended to commit a crime "inside" of the apartment, thereby adequately conveying that the intent and entry elements were separate and distinct (*see People v Lewis*, 5 NY3d at 551; *People v Cason*, 203 AD3d at 1315).

We are also unpersuaded by defendant's contention that the sentence imposed is unduly harsh or severe (*see* CPL 470.15 [6] [b]). Upon reviewing the presentence report and considering all relevant circumstances, we decline to reduce defendant's sentence in the interest of justice. Defendant's remaining contentions, to the extent not expressly addressed, have been considered and found to be without merit.

Reynolds Fitzgerald, Ceresia, Powers and Corcoran, JJ., concur. Ordered that the judgment is affirmed.

8 Simone Harari, Appellant, v Steven Rosakranse, Respondent. [— NYS3d —]

Husband and Wife and Other Domestic Relationships—Equitable Distribution—Due to Husband's Disability and Unanticipated Loss of Employment, Resulting in Significantly Diminished Income, Obligation to Pay Certain Medical Expenses and Wife's Life Insurance Premiums Ceased

Husband and Wife and Other Domestic Relationships—Counsel Fees—Husband Less Monied Spouse—Submission of Personal Income Tax Returns and Family Business Corporate Income Tax Returns

Parent, Child and Family—Support—Husband's Unanticipated Loss of Employment Due to Disability, Resulting in Significantly Diminished Income, Warranted Downward Modification of Child Support

Reynolds Fitzgerald, J. Appeals (1) from an order of the Supreme Court (Richard Mott, J.), entered March 24, 2023, in Ulster County, which, among other things, granted defendant's cross-motion to modify a child support obligation, and (2) from an order of said court, entered March 24, 2023, in Ulster County, which granted defendant's motion for an award of counsel fees.

Plaintiff (hereinafter the wife) and defendant (hereinafter the husband) are the divorced parents of three children (born in 2001, 2003 and 2005). In 2014, the parties entered into a divorce stipulation (hereinafter divorce stipulation) which was

incorporated but not merged into a judgment of divorce. The divorce stipulation sets forth the husband's child support obligations. In January 2020, the husband filed a petition for reorganization pursuant to chapter 13 of the Bankruptcy Code, prompting the wife to commence an adversary proceeding seeking to exempt from discharge the husband's obligations under the divorce stipulation. Thereafter in November 2020, the parties executed a global stipulation of settlement (hereinafter the bankruptcy stipulation) and attendant release of claims, resolving and waiving all claims between the parties which arose prior to the filing of the husband's bankruptcy petition.

In September 2021, the wife moved in Supreme Court to hold the husband in contempt for failing to make certain payments required by the divorce stipulation, including his failure to pay the children's medical and educational expenses and her life insurance premiums. The husband opposed the wife's motion and cross-moved to downwardly modify his child support obligations based on a substantial change in circumstances from having a stroke/seizure, resulting in him being disabled and unable to work. Supreme Court held a multiday hearing on the motions wherein it limited the wife's contempt claims to those occurring subsequent to the husband's filing of his bankruptcy petition. Following the hearing, Supreme Court denied the wife's contempt motion finding that the husband's disability and resultant reduced income established a defense to his failure to pay, modified the husband's child support obligations, found that the husband was not obligated to pay certain medical expenses nor the wife's life insurance premiums, granted the husband a credit for his overpayments of support and for the children's medical and education expenses and granted the husband counsel fees. The wife appeals.

The wife initially contends that Supreme Court erred in limiting the evidence at the hearing to claims occurring subsequent to the filing of the husband's bankruptcy petition. We disagree. A parent can expressly waive his or her right to unpaid child support; however, such a waiver must evince a voluntary and intentional abandonment of said right (*see Decker v Decker*, 148 AD3d 1272, 1273 [3d Dept 2017]; *Matter of Hastie v Tokle*, 122 AD3d 1129, 1129-1130 [3d Dept 2014]). "Because a release is a contract, its construction is governed by principles of contract law" (*Matter of Walter*, 180 AD3d 1201, 1203 [3d Dept 2020] [internal quotation marks and citations omitted]). "In that regard, there is a heavy presumption that a deliberately prepared and executed written instrument manifests the true intention of the parties . . . [A] valid release

generally constitutes a complete bar to an action on a claim which is the subject of the release” (*Marcella v Glowacki*, 233 AD3d 1137, 1140 [3d Dept 2024] [internal quotation marks, brackets and citations omitted]; see *Matter of Walter*, 180 AD3d at 1203).

In November 2020, the parties executed the bankruptcy stipulation encompassing the parties’ disputes and resolution of those disputes in Bankruptcy Court, including the wife’s claim for prepetition child support. Paragraph six of said stipulation sets forth that “[a]ny obligations of the [p]arties[] to each other in connection with any matter addressed herein, accruing prior to the execution of the [s]tipulation and not specifically addressed in this [s]tipulation shall be waived and released by the [p]arties.” Paragraph seven states that “any and all *ongoing* [o]bligations under the [divorce] [s]tipulation shall be enforceable by the [p]arties in the [m]atrimonial [a]ction and the automatic stay (to the extent applicable) is hereby vacated to permit the [p]arties to enforce such [o]bligations. . . . To be clear, there shall be no waiver of future enforcement proceedings under the [divorce] [s]tipulation except as otherwise resolved herein” (emphasis added).¹ The language of the bankruptcy stipulation is clear and unambiguous. Pursuant to it, the parties waive any prepetition claims arising from the divorce stipulation; at the same time, it lifts the bankruptcy automatic stay with respect to future claims. Therefore, Supreme Court properly determined that the enforcement proceeding should be limited to claims arising subsequent to the filing of the husband’s bankruptcy petition (see *Matter of Woolfolk v New York City Bd. of Educ.*, 161 AD3d 643, 644 [1st Dept 2018]; *Hannigan v Hannigan*, 104 AD3d 732, 734-735 [2d Dept 2013], *lv denied* 21 NY3d 858 [2013]; *Parmigiani v Parmigiani*, 250 AD2d 744, 745 [2d Dept 1998]).

Next, the wife argues that Supreme Court erred in granting the husband’s cross-motion to downwardly modify his child support obligation both because he failed to file a sworn statement of net worth and that any reduction in his income was voluntary. Although the husband was required to file a statement of net worth with his cross-motion (see 22 NYCRR 202.16 [k] [2]) and Supreme Court should have directed the husband to do so, the court did not summarily grant the husband’s cross-motion; instead it held a multiday hearing which allowed the

1. The bankruptcy stipulation further limited the adversary proceeding claims and counterclaims to be litigated in Bankruptcy Court to three issues—the amount of special maintenance due to the wife, the amount owed to the wife for legal fees and any issues pertaining to life insurance policies.

court to consider the parties' relative financial circumstances prior to rendering a determination (*see Castro v Kaminski*, 197 AD3d 609, 611 [2d Dept 2021]; *Harold v Harold*, 133 AD3d 1376, 1378 [4th Dept 2015]).

"Generally, a party seeking modification of a child support provision derived from an agreement or stipulation incorporated but not merged into a judgment of divorce has the burden of proving, insofar as is relevant here, that an unanticipated and unreasonable change [in] circumstances has occurred" (*Matter of Frederick-Kane v Potter*, 155 AD3d 1327, 1329 [3d Dept 2017] [internal quotation marks and citations omitted]; *see Matter of Sidoti v Sidoti*, 41 AD3d 944, 944-945 [3d Dept 2007]). At the hearing, the wife stipulated that the husband has a permanent total disability for which he now receives Social Security disability benefits. Additionally, the husband's sister testified that in February 2021, the husband had a stroke/seizure resulting in the husband having difficulties with his gait, speech, short term memory, dexterity and that he is unable to drive or return to work. Also, the sister stated that she acts on behalf of the husband via a power of attorney, including paying his bills and she must take him grocery shopping.² Although the wife contends that the husband has the ability to continue to provide child support through other sources of income, as he continues to have a 49% ownership interest in his family's business, she failed to present any evidence in support of this allegation. To the contrary, the only evidence produced at trial with respect to any income the husband received from the family business came from the testimony of his sister, who owns 51% of the business. She testified that since his receipt of company-provided executive's disability insurance payments from February through August 2021, the husband has not received any draws, distributions, salary or other income from it. Accordingly, Supreme Court properly determined that the husband's loss of employment due to his disability was unanticipated, resulting in significantly diminished income, and warranted a downward modification of child support (*see Smith v Smith*, 91 AD3d 1083, 1084 [3d Dept 2012]; *Matter of Silver v Reiss*, 74 AD3d 1441, 1442 [3d Dept 2010]; *Matter of Perry v Pica*, 22 AD3d 903, 904 [3d Dept 2005]).

The wife next takes issue with several determinations within Supreme Court's support order. Perhaps most significantly, the

2. While the husband was called as a witness, he had apparent and significant difficulties speaking and answering questions and his testimony was limited.

wife asserts that Supreme Court erred in affording the husband a credit in the amount of \$24,396.36 in his monthly child support obligation plus any amounts he paid in excess of the court-ordered reduced monthly amount as of the date of the filing of his cross-motion; and an additional credit in the amount of \$1,839.86 for his overpayments to educational and medical expenses in light of his reduced proportionate share of same. The order is silent as to where these credits are to be applied, and, in light of this, we remit the matter to Supreme Court for clarification of same. However, in so doing we caution that the Child Support Standards Act has no provision for recouping said payments, which is in keeping with New York's strong public policy against recouping overpayments from future support (see *Matter of Weaver v Weaver*, 198 AD3d 1168, 1170 [3d Dept 2021], *lv denied* 41 NY3d 1010 [2024]; *Johnson v Johnson*, 172 AD3d 1654, 1657 [3d Dept 2019]).

The wife further claims that Supreme Court erred in its findings that the husband is entitled to a credit for college costs related to room and board, that he was not obligated to pay premiums for her life insurance policy and denying her request for reimbursement for certain medical expenses for the children's DNA testing. Initially, we find no error in its mandates that the husband's payment of his pro rata share of educational expenses which constitute payment for room and board shall reduce, proportionately, his monthly child support payments. "A court is entitled, depending on the particular facts and circumstances of a case, to make an adjustment in child support where the noncustodial parent contributes to college expenses and said expenses include room and board" (*Matter of Houck v Houck*, 246 AD2d 905, 906 [3d Dept 1998] [citations omitted]). "[T]he availability and amount of such a credit depend upon the facts and circumstances in the particular case, taking into account the needs of the custodial parent to maintain a household and provide certain necessities" (*Matter of Apjohn v Lubinski*, 114 AD3d 1061, 1064 [3d Dept 2014] [internal quotation marks, brackets and citation omitted], *lv denied* 23 NY3d 902 [2014]; see *Matter of Covington v Boyle*, 127 AD3d 1393, 1395 [3d Dept 2015]). Based on the parties' significant disparity in income, the husband's inability to earn income other than Social Security disability due to his illness and the fact that the wife will not have any children residing in her household while the youngest child is attending college, the court did not abuse its discretion in determining that the husband is entitled to an adjustment to his child support payments (see *Matter of Apjohn v Lubinski*, 114 AD3d at 1064; *Matter of Kirschner v Kirschner*, 119 AD2d 962, 963 [3d Dept 1986]).

Next, Supreme Court's finding that the husband had no obligation to pay the wife's life insurance premiums was not in error. Contrary to the wife's contention, this determination was not a sua sponte one by the court that was beyond the scope of the husband's cross-motion. Rather, it was based on that aspect of the *wife's* contempt motion seeking to hold the husband in contempt for failure to pay it. With respect to said motion, the court had to first determine if the husband had a legal obligation—pursuant to the divorce stipulation—to pay said premiums. Here, the divorce stipulation is void of any language requiring the husband to pay the wife's life insurance premium. Paragraph 9.3 of the divorce stipulation sets forth that “[t]he [h]usband shall maintain term or whole life insurance in the amount of at least \$500,000 on his life, naming the children or a testamentary trustee for the benefit of the children as beneficiary, until the emancipation of the children.” The divorce stipulation then delineates three life policies that the husband shall maintain. The stipulation does not list the wife's life insurance policy. More importantly, the principle underlying maintaining life insurance on a payor spouse's life is that “[t]he death of a payor spouse . . . may cause financial injury to a former spouse or children who, but for the payor spouse's death, would have continued to receive maintenance, a distributive award, or child support. Accordingly, the Legislature has provided that a court may require a payor spouse to maintain life insurance to prevent that financial injury” (*Mayer v Mayer*, 142 AD3d 691, 696 [2d Dept 2016], *lv dismissed* 28 NY3d 1100 [2016], *lv denied* 29 NY3d 918 [2017]; see *Holterman v Holterman*, 307 AD2d 442, 443 [3d Dept 2003], *affd* 3 NY3d 1 [2004]). As the divorce stipulation did not obligate the husband to maintain life insurance on the wife's life and further because she is the recipient of and not the payor spouse, Supreme Court did not abuse its discretion in finding that the husband did not have an obligation to pay the wife's life insurance premium (see *Bell-Vesely v Vesely*, 180 AD3d 1272, 1275 [3d Dept 2020]).

The wife's contention that Supreme Court rewrote the divorce stipulation when it found that the bills for the children's DNA testing were not qualifying medical expenses for which defendant is responsible has merit. “A [divorce stipulation] is a legally binding and enforceable contract, subject to ordinary principles of contract construction and interpretation. Where a [divorce stipulation] is clear and unambiguous on its face, the parties' intent must be discerned from the four corners of the document, without resort to extrinsic evidence” (*Matter of Dillon v Dillon*, 155 AD3d 1271, 1272 [3d Dept 2017] [citations omitted]; see *Martin v Martin*, 204 AD3d 1318, 1319 [3d

Dept 2022]). The divorce stipulation, paragraph 8.5, states that “the parties agree that any medical, dental or orthodontic expenses not reimbursed by insurance shall be paid by the [h]usband.” The agreement is clear and unambiguous; there are no conditions precedent to the husband paying for unreimbursed medical expenses. “Medical services are services in connection with the diagnosis, prevention, and/or treatment of a disease of the body or mind” (*Matter of Connolly v Connolly*, 37 AD3d 717, 718 [2d Dept 2007] [citations omitted]). At the hearing, the wife testified that the bills pertaining to the children’s DNA testing were for “diagnostic testing, a consultation for the results of the diagnostic testing and then treatments to address those results of the diagnostic testing”; specifically the services involved chromosomal and genetic testing of the children. The wife further testified that she advised the husband of the DNA testing prior to obtaining said services. As the bills were for medical services, the husband was obligated to reimburse the wife.

The wife’s allegations that Supreme Court was biased against her are unpreserved, as she failed to object on that ground or seek recusal (*see Theodore P. v Debra P.*, 209 AD3d 1146, 1147 [3d Dept 2022]; *Matter of Amanda YY. v Faisal ZZ.*, 198 AD3d 1125, 1129 [3d Dept 2021], *lv denied* 38 NY3d 908 [2022]).

Lastly, the wife argues that Supreme Court erred in granting the husband counsel fees. We disagree. Domestic Relations Law § 238 authorizes a court to make a discretionary award of counsel fees upon an enforcement or modification motion (*see Weaver v Weaver*, 198 AD3d at 1146; *Seale v Seale*, 154 AD3d 1190, 1196 [3d Dept 2017]). The wife’s continued argument that the husband’s failure to file a statement of net worth also precludes a counsel fee award is similarly meritless (*see Jeffrey P. v Alyssa P.*, 202 AD3d 1409, 1413 [3d Dept 2022]). Moreover, this was not an interim award of counsel fees, it was a final award rendered after a six-day hearing and the submission of testimonial and documentary evidence, including the husband’s income tax returns and his family’s business’ corporate income tax returns. Thus, Supreme Court had ample opportunity to consider the parties’ respective finances in determining that the husband was the less monied spouse. In light of the husband’s success in modifying his child support obligations, we cannot say that the award to the husband was an abuse of discretion (*see Jeffrey P. v Alyssa P.*, 202 AD3d at 1413; *Weaver v Weaver*, 198 AD3d at 1146). To the extent not expressly addressed herein, the wife’s remaining contentions have been reviewed and found to lack merit.

Aarons, J.P., Pritzker, Fisher and Mackey, JJ., concur. Ordered that the order granting defendant's cross-motion to modify his child support obligation is modified, on the law and the facts, without costs, by directing defendant to pay medical bills related to the children's DNA testing and diagnosis; matter remitted to the Supreme Court to determine how any overpayments are to be recouped; and, as so modified, affirmed. Ordered that the order awarding defendant counsel fees is affirmed, without costs.

9 In the Matter of Esther J., Respondent, v Christopher K., Appellant. (Proceeding No. 1.) In the Matter of Christopher K., Appellant, v Esther J., Respondent. (Proceeding No. 2.) [—NYS3d —]—

Parent, Child and Family—Custody—Parental Breakdowns in Communication Change in Circumstances—Continued Joint Physical Custody on Weekly Parenting Schedule and Joint Legal Custody But Father Awarded Sole Decision-Making Authority over Extracurricular Activities and Mother Awarded Sole Decision-Making Authority over Medical Care Appointments

Fisher, J. Appeal from an order of the Family Court of Chenango County (Frank Revoir Jr., J.), entered April 25, 2024, which, among other things, partially dismissed petitioner's application, in proceeding No. 2 pursuant to Family Ct Act article 6, to modify a prior order of custody and visitation.

Esther J. (hereinafter the mother) and Christopher K. (hereinafter the father) are the parents of the subject child (born in 2015). Pursuant to a pair of custody orders entered on consent, the parties shared joint legal and physical custody of the child with a biweekly rotating schedule and certain holiday time.¹ In June 2023, the mother filed a modification petition seeking primary physical custody of the child with certain parenting time for the father, as well as final decision-making authority over medical decisions and extracurricular activities. The father answered the mother's petition and cross-petitioned for modification of the prior custody orders, also requesting primary physical custody of the child with certain parenting time for the mother. While the petitions were pending, Family Court issued a temporary order modifying the parenting schedule from a biweekly basis to weekly exchanges. Following a fact-finding hearing and a *Lincoln* hearing, Family Court issued an order continuing joint physical custody on the weekly parenting schedule and holiday schedule. Such order also continued the joint legal custody arrangement, but, among other things, awarded the father sole decision-making authority to enroll

1. The first custody order was stipulated to by the parties in August 2020 and the second was in December 2022.

the child in certain school and extracurricular activities or events, and awarded the mother sole decision-making authority to schedule the child's routine medical care appointments. The father appeals.

Initially, neither parent disputes Family Court's finding of a change in circumstances,² and our review of the record confirms a breakdown in communication impacting the child's medical needs and social relationships (see *Matter of Sheena PP. v Edward QQ.*, 238 AD3d 1417, 1418 [3d Dept 2025]; *Matter of Patricia Y. v Justin X.*, 219 AD3d 1586, 1587 [3d Dept 2023]). Accordingly, our review focuses on whether Family Court's determination served the best interests of the child. "In determining the best interests of the child, courts must consider, among other factors, the quality of the parents' respective home environments, each parent's past performance and ability to provide for the child's physical, mental, emotional and intellectual needs and the willingness of each parent to foster a positive relationship between the child and the other parent" (*Matter of Michael YY. v Teresa ZZ.*, 242 AD3d 1343, 1344-1345 [3d Dept 2025] [internal quotation marks and citations omitted]). It is well understood that the best interests of a child generally lie with a healthy and meaningful relationship with both parents, and "[t]he fact that there are some disagreements will not necessarily render joint custody improper where the parents' relationship is not so acrimonious as to render . . . joint custody . . . unworkable" (*Matter of Joseph L. v Heather K.*, 214 AD3d 1041, 1043 [3d Dept 2023] [internal quotation marks, brackets and citations omitted]; see *Matter of Michelle EE. v John EE.*, 235 AD3d 1121, 1124 [3d Dept 2025]; *Matter of Steven OO. v Amber PP.*, 227 AD3d 1154, 1156 [3d Dept 2024]). "Given the superior position of Family Court to observe and evaluate the witnesses' testimony, its factual findings and credibility assessments are to be accorded great deference, and we will not disturb its custodial determination if supported by a sound and substantial basis in the record" (*Matter of Brooke PP. v Joshua QQ.*, 240 AD3d 1047, 1049 [3d Dept 2025] [internal quotation marks and citations omitted]; see *Matter of Henry CC. v Antoinette DD.*, 222 AD3d 1231, 1233 [3d Dept 2023]).

At the fact-finding hearing, the mother testified that the father was reluctant to medicate the child despite a prescription for medication to treat the child's newly diagnosed attention-deficit/hyperactivity disorder (hereinafter ADHD).

2. Although the order is somewhat contradictory, Family Court ultimately determined that there was a change in circumstances.

She enrolled the child in extracurricular activities to provide structure and routine in the child's schedule as part of a strategy that she felt was best for treating the child's ADHD. The mother maintained that she notified the father of these activities before enrolling the child in them, however she admitted on cross-examination that at times the notice was as short as a couple of hours before the scheduled start of the activity. She further admitted to registering the child for activities without consulting the father when he did not respond to her attempts to communicate. For his part, the father admitted to not responding to some of the mother's communications and that the child had sometimes missed activities when in his care. He expressed concern that the mother's enrolling the child in activities every day of the week was causing the child undue stress and interfering with his parenting time. He further testified that he was hesitant to medicate the child without a prescription, but that once the child was prescribed medication, he followed the physician's guidance in administering it to the child. The father expressed a desire for the child to have down time when he could engage the child in activities in the home—rather than a scheduled activity nearly every day. He also testified that there had been seven Child Protective Services reports made against him or his family, none of which had been indicated; although the mother admitted to making one of those reports, the record does not reveal who made the remaining ones. Both parents recounted instances of breakdowns in communication via text and apps used to manage the child's educational and medical needs and further testified that they were unable to coparent with the other. Although not dispositive to our determination, we note that the appellate attorney for the child aligns with the father on appeal (*see Matter of Joseph E. v Crystal G.*, 233 AD3d 1285, 1286 n 3 [3d Dept 2024]).

Based on the foregoing, and having reviewed the *Lincoln* hearing testimony, we decline to disturb Family Court's determination. Although communication between the parties is clearly strained, the record reveals that they have been able to abide by the weekly custody exchanges since Family Court's initial temporary modification and have successfully communicated regarding administering the child's medication. By awarding the father sole decision-making authority over determinations involving the child's school and extracurricular activities, Family Court ameliorated his chief concern that the mother had overenrolled the child to the child's detriment—a point that had generated friction between the parties, including in public and in front of the child. But while we agree with

the parties that the breakdown in communication was sufficient to constitute a change in circumstances and trigger a best interests analysis, we cannot say that the breakdown was to such a degree as to make joint physical custody unworkable (see *Matter of Christie BB. v Isaiah CC.*, 194 AD3d 1130, 1133 [3d Dept 2021]). We are therefore satisfied that Family Court's order continuing joint physical custody has a sound and substantial basis in the record (see *Matter of Sheena PP. v Edward QQ.*, 238 AD3d at 1420; *Matter of Joseph E. v Crystal G.*, 233 AD3d at 1286; *Matter of Paluba v Paluba*, 152 AD3d 887, 889 [3d Dept 2017]; *Matter of Bailey v Blair*, 127 AD3d 1274, 1277 [3d Dept 2015]).

Lastly, as correctly highlighted by the appellate attorney for the child, we remind Family Court of its “paramount obligation” to protect a child’s confidentiality in the context of a *Lincoln* hearing (*Matter of Jeffrey SS. v Myah TT.*, 243 AD3d 1156, 1158 [3d Dept 2025] [internal quotation marks and citations omitted]). Although Family Court accurately described the hearing as private and its contents not to be divulged to the parents or anyone else, the court nonetheless impermissibly referenced the child’s preferences expressed during the *Lincoln* hearing in its written order. While Family Court may consider information shared by a child in a *Lincoln* hearing, “such considerations must remain silent to ensure that the child’s right to confidentiality is protected” (*Matter of C.M. v Z.N.*, 230 AD3d 1409, 1413 [3d Dept 2024] [internal quotation marks, emphasis and citation omitted]). The parties’ remaining contentions, to the extent not already addressed, have been considered and found to be either rendered academic or without merit.

Aarons, J.P., Pritzker, Reynolds Fitzgerald and Mackey, JJ., concur. Ordered that the order is affirmed, without costs.

10 The People of the State of New York, Respondent, v Eyzaiya Ortiz, Appellant. [— NYS3d —]—

Crimes—Sex Offenders—Sex Offender Registration Act—Assessment of Points for Use of Forcible Compulsion and Continuing Course of Sexual Misconduct Risk Factors

Crimes—Sex Offenders—Sex Offender Registration Act—Downward Departure from Presumptive Risk Level Two Not Warranted

Clark, J.P. Appeal from an order of the County Court of Ulster County (James Farrell, J.), entered April 3, 2024, which classified defendant as a risk level two sex offender pursuant to the Sex Offender Registration Act.

In 2021, defendant waived indictment and was charged in a superior court information with rape in the third degree, stem-

ming from allegations that, when he was between the ages of 22 and 23, he had sexual intercourse with someone under the age of 17. Pursuant to a negotiated plea agreement, which encompassed the superior court information and an uncharged offense, defendant pleaded guilty to the charged crime and was thereafter sentenced to a prison term of 2½ years, to be followed by 10 years of postrelease supervision. In anticipation of his release, the Board of Examiners of Sex Offenders prepared a risk assessment instrument pursuant to the Sex Offender Registration Act (*see* Correction Law art 6-C [hereinafter SORA]) that assigned him a total of 80 points and presumptively placed him in the risk level two classification. The People, in turn, prepared their own risk assessment instrument that also assigned defendant 80 points, adding 20 points under risk factor four for a continuing course of sexual misconduct that was not assessed by the Board, but omitting 20 points assessed by the Board under risk factor three for more than one victim, conceding that there was only one victim in this matter. Defendant opposed the assessment of points under various risk factors and, alternatively, sought a downward departure to a risk level one classification. Following a hearing, County Court agreed with the People's assessment of 80 points and further assessed defendant 10 points under risk factor 12 for failing to accept responsibility, for a total of 90 points, and classified him as a presumptive risk level two sex offender. The court also denied defendant's request for a downward departure. Defendant appeals.

"In determining a defendant's risk level classification under SORA, the People 'bear the burden of proving the facts supporting the determinations sought by clear and convincing evidence'" (*People v Dority*, 234 AD3d 1211, 1212 [3d Dept 2025], quoting Correction Law § 168-n [3]; *see People v Bellinger*, 233 AD3d 1331, 1332 [3d Dept 2024]). "The People may use reliable hearsay, including case summaries and victim statements, to establish the appropriateness of a point assessment" (*People v Smith*, 128 AD3d 1189, 1189 [3d Dept 2015] [citation omitted]; *see People v Mingo*, 12 NY3d 563, 571-574 [2009]; *People v Deming*, 155 AD3d 1262, 1262 [3d Dept 2017], *lv denied* 30 NY3d 911 [2018]).

Defendant challenges the 10 points assessed under risk factor 1 for use of forcible compulsion. According to the SORA guidelines, "[f]orcible compulsion means to compel by either '(a) use of physical force or (b) a threat, express or implied, which places a person in fear of immediate death or physical injury to himself, herself or another person'" (Sex Offender

Registration Act: Risk Assessment Guidelines and Commentary at 8 [2006], quoting Penal Law § 130.00 [8]). The People presented a statement from the victim that relayed the circumstances surrounding the uncharged crime that was encompassed by defendant's plea agreement.¹ In her statement, the victim described an incident that occurred after she turned 17 years of age, when, despite informing defendant that she did not want to have sex, defendant pulled her out of a car and forced her "to perform oral sex on him, ripped [her] pants down and forced himself on [her]." Given the foregoing, we find that clear and convincing evidence supports the assessment of 10 points under risk factor 1 for use of forcible compulsion (*see People v Aldous*, 231 AD3d 1243, 1244 [3d Dept 2024], *lv denied* 42 NY3d 913 [2025]; *People v Roubik*, 231 AD3d 1210, 1211 [3d Dept 2024]).

County Court also properly assessed 20 points under risk factor 4 for continuing course of sexual misconduct, as information in the case summary and the presentence report, including statements made by defendant, supports a finding that defendant engaged in "three or more acts of sexual contact over a period of at least two weeks" against the victim (Sex Offender Registration Act: Risk Assessment Guidelines and Commentary at 10 [2006]; *see People v Snay*, 122 AD3d 1012, 1013 [3d Dept 2014], *lv denied* 24 NY3d 916 [2015]; *People v Richards*, 50 AD3d 1329, 1330 [3d Dept 2008], *lv denied* 10 NY3d 715 [2008]). We further reject defendant's contention that he was erroneously assessed 5 points under risk factor 9, as County Court properly considered a prior youthful offender adjudication in making the assessment (*see People v Francis*, 30 NY3d 737, 749-751 [2018]; *People v Butler*, 161 AD3d 1232, 1232 [3d Dept 2018], *lv denied* 32 NY3d 904 [2018]).² Finally, in light of the foregoing, even if we were to agree with defendant that he

1. Contrary to defendant's contention, a victim's unsworn statement is admissible in a SORA proceeding (*see People v Sincerbeaux*, 27 NY3d 683, 688 [2016]; *People v Mingo*, 12 NY3d at 576-577). Moreover, when assessing points related to the current offense, the court is not limited to considering a defendant's current conviction but "may also assess points for clear and convincing evidence of other criminal acts presented in . . . statements from victims . . . or other reliable sources" (*People v Sincerbeaux*, 27 NY3d at 688).

2. Defendant relies on this Court's decision in *People v Norris* (223 AD3d 1060 [3d Dept 2024]) for the proposition that a prior youthful offender adjudication may only be considered when deciding whether to depart from the recommended risk level and cannot be used in the assessment of points under risk factor 9. Although our decision in *Norris* contains certain language supporting such proposition, as noted by County Court in assessing points under this risk factor, *Norris* is distinguishable insofar as it concerned a

(n. cont'd)

was erroneously assessed 10 points for failing to accept responsibility because he was not provided a meaningful opportunity to respond to that assessment, the remaining 80 points would still presumptively classify him as a risk level two sex offender.

Defendant also argues that County Court erred in denying his request for a downward departure. “As the party seeking the downward departure, defendant was required to demonstrate, by a preponderance of the evidence, the existence of mitigating factors not adequately taken into consideration by the risk assessment guidelines” (*People v Smith*, 211 AD3d 1127, 1128 [3d Dept 2022] [internal quotation marks and citations omitted]; accord *People v Sanders*, 228 AD3d 1184, 1186 [3d Dept 2024]). Although this Court may, in appropriate cases, exercise its “independent discretion” to grant a defendant a downward departure even where the trial court declined to do so (*People v Waterbury*, 231 AD3d 201, 208 [3d Dept 2024]), “[w]hether to grant a downward departure from the presumptive risk level is [typically] a matter within the sound discretion of the trial court” that is reviewed on appeal for an abuse of discretion (*People v Arroyo*, 202 AD3d 1212, 1213 [3d Dept 2022] [internal quotation marks and citations omitted], *lv denied* 38 NY3d 910 [2022]; see *People v Pardee*, 228 AD3d 1142, 1144 [3d Dept 2024], *lv denied* 42 NY3d 909 [2024]). County Court did not abuse its discretion in denying defendant’s request for a downward departure in this case and we discern no basis upon which to exercise our own independent discretion to grant such request.

Initially, inasmuch as the victim’s statement indicated that defendant used forcible compulsion to have sexual intercourse with her, his contention that her lack of consent was due only to her age warranting a downward departure is rejected (see *People v Legall*, 63 AD3d 1305, 1307 [3d Dept 2009], *lv denied* 13 NY3d 706 [2009]). Defendant further contends that a downward departure is appropriate due to what he considers to be his “exceptional” response to the sex offender treatment program while incarcerated (see Sex Offender Registration Act: Risk Assessment Guidelines and Commentary at 17 [2006]). In support, defendant relies on four monthly evaluations of his performance in the program from July 2023 to October 2023. Participants in the program are scored points for various

defendant’s *subsequent* youthful offender adjudication. Under the Court of Appeals precedent, a prior youthful offender adjudication may be used to assess points under risk factor 9 (see *People v Francis*, 30 NY3d at 749-751; see also Correction Law § 168-1 [b] [iii]).

behaviors exhibited, which are totaled, and participants are then ranked as either “highly motivated,” “motivated,” “needs improvement” or “below minimum standard.” Defendant’s evaluations reflect that he was scored as “motivated” in three of the months and “highly motivated” in the last month. Defendant also relies on the opinion of a former clinical social worker who had worked in the sex offender unit for the Ulster County Probation Department, and who reviewed defendant’s monthly evaluations and opined that “[m]ost [incarcerated individuals] score significantly lower than [defendant]” in the program and that his performance was exceptional as “compared to the typical [incarcerated individuals] who complete the program.” While defendant’s scores are commendable, we cannot conclude that the scores, and the clinical social worker’s associated opinion, demonstrate an exceptional response to treatment so as to serve as a basis for a downward departure (see *People v Salerno*, 224 AD3d 1016, 1017 [3d Dept 2024]; *People v Glowinski*, 208 AD3d 1392, 1394 [3d Dept 2022]). Additionally, the record reflects that defendant scored as an “[a]verage risk” to reoffend in a Static-99 test. Although the social worker opined that defendant’s results reflect a low risk to reoffend for someone who had been incarcerated, the results of a Static-99 test, “do not, standing alone, necessarily establish a mitigating factor” (*People v Roubik*, 231 AD3d at 1213 [internal quotation marks and citation omitted]; see *People v Saunders*, 209 AD3d 776, 778 [2d Dept 2022], *lv dismissed* 39 NY3d 1126 [2023]). Finally, defendant has not demonstrated by a preponderance of evidence that the expressed support of family and friends reduces his likelihood to reoffend (see *People v Dawson*, 243 AD3d 1024, 1026 [3d Dept 2025]; *People v Ojeda*, 216 AD3d 819, 820 [2d Dept 2023], *lv denied* 40 NY3d 906 [2023]). Given the totality of the circumstances, we find no abuse of discretion in the denial of defendant’s request for a downward departure (see *People v Roubik*, 231 AD3d at 1213; *People v Porter*, 201 AD3d 1152, 1154 [3d Dept 2022], *lv denied* 38 NY3d 908 [2022]; compare *People v Waterbury*, 231 AD3d at 208-209).

Aarons, Pritzker, McShan and Corcoran, JJ., concur. Ordered that the order is affirmed, without costs.

11 In the Matter of Todd EE., Appellant, v Elina FF., Respondent. (And Another Related Proceeding.) [— NYS3d —]

Parent, Child and Family—Visitation—Incarcerated Father Seeking Additional In-Person Visits with Child and Increased Telephone Contact

Garry, P.J. Appeals from two orders of the Family Court of

Fulton County (J. Gerard McAuliffe Jr., J.), entered August 7, 2024, which, among other things, partially granted petitioner's application, in a proceeding pursuant to Family Ct Act article 6, to modify a prior order of visitation.

Petitioner (hereinafter the father) and respondent (hereinafter the mother) are the parents of the subject child (born in 2014). In 2021, the father pleaded guilty to rape in the first degree for his sexual activity with an 11-year-old relative and was sentenced to 12 years in prison, to be followed by 20 years of postrelease supervision. Following his conviction, the parties consented to the mother having sole custody of the child and the father having one monthly supervised telephone call with him, to be overseen by the child's stepfather, as well as the ability to correspond with the child through letters, cards and gifts. The father also agreed to complete a variety of treatment programs and evaluations prior to seeking any modification of the consent order.

In May 2023, the father filed a modification petition, asserting, among other things, that the contemplated treatment was unavailable to him in prison or would not be available to him until closer to his release date, after the child would reach the age of majority, and seeking in-person visitation and increased telephonic access to the child.¹ Following a fact-finding hearing and a *Lincoln* hearing, Family Court partially granted the father's modification petition, crediting the father's unrefuted testimony that the conditions in the prior order were largely impossible for him to fulfill and granting the father two in-person visits per year at his current correctional facility or such other facility within 100 miles of the mother's residence, with transportation to be provided by the paternal grandmother. The court also increased the father's monthly telephone call from 15 to 30 minutes and provided that three calls annually could be converted to video calls if offered at the facility where the father was incarcerated. The father appeals, seeking additional in-person visits with the child and further increased telephonic access.

Family Court's change in circumstances finding is not in dispute, and the inquiry accordingly turns to whether the court's visitation arrangement is in the child's best interests (see *Matter of Gabrielle Q. v James R.*, 233 AD3d 1407, 1408 [3d Dept 2024]; *Matter of Giuseppe V. v Tiffany U.*, 224 AD3d 1122, 1123 [3d Dept 2024]). We begin with the premise that a meaningful relationship with both parents is presumed to be in

1. The father also filed a petition to enforce the same order, which was dismissed and is not at issue on this appeal.

a child's best interests, even when one of those parents is incarcerated (see *Matter of Granger v Misercola*, 21 NY3d 86, 91 [2013]; *Matter of Joenathan E. v Jennifer F.*, 242 AD3d 1339, 1340 [3d Dept 2025]). Visitation, however, is not limited to in-person contact at the prison, and meaningful access to a child can involve phone and video calls and other correspondence (see *Matter of Jaime T. v Ryan U.*, 238 AD3d 1257, 1259 [3d Dept 2025]; *Matter of Benjamin OO. v Latasha OO.*, 170 AD3d 1394, 1396 [3d Dept 2019], *lv denied* 33 NY3d 909 [2019]; *Matter of Ruple v Harkenreader*, 99 AD3d 1085, 1086 [3d Dept 2012]). Relevant factors in this context include the nature of the parent-child relationship before incarceration, the age of the child, the transportation burden that the visits would place on the custodial parent and/or the child, the child's wishes if of sufficient age and maturity, the nature of the relevant crime and the length of the remaining incarceration (see *Matter of Gary JJ. v Barbara KK.*, 244 AD3d 1620, 1622 [3d Dept 2025]; *Matter of Angelina H. v Derrick I.*, 187 AD3d 1357, 1358 [3d Dept 2020]; *Matter of Garraway v Laforet*, 68 AD3d 1192, 1194 [3d Dept 2009]). Ultimately, both the frequency and form of visitation are matters entrusted to the sound discretion of Family Court, and this Court will not disturb that discretionary determination if it is supported by a sound and substantial basis in the record (see *Matter of Joenathan E. v Jennifer F.*, 242 AD3d at 1340-1341; see *Matter of Benjamin OO. v Latasha OO.*, 170 AD3d at 1395).

The hearing evidence, which consisted only of testimony from the father and the paternal grandmother, established that the father had not seen the subject child in the four years preceding the hearing. However, the father had stayed home with the child for the first couple years of the child's life, and, as the child's primary caregiver, the two had a close relationship during that time. During his current monthly call with the father, the child referred to him as "dad," but the father was aware that the child otherwise referred to him by his first name. The paternal grandmother, who then had visitation with the child one weekend per month, testified that she would be willing to transport the child to the prison, approximately 45 minutes from her residence, and pay for the associated costs of visitation. In view of the extended period of nonvisitation, the length of the father's incarceration, and the nature of his crime, and upon our review of the *Lincoln* hearing transcript, we find the frequency of visitation provided for by Family Court to be supported by a sound and substantial basis in the record (see *Matter of Culver v Culver*, 82 AD3d 1296, 1296-1299 [3d Dept 2011], *appeal dismissed* 16 NY3d 884 [2011], *lv denied* 17 NY3d 710

[2011]; see also *Matter of Benjamin OO. v Latasha OO.*, 170 AD3d at 1394-1397; *Matter of Lapham v Senecal*, 125 AD3d 1210, 1211 [3d Dept 2015]; see generally *Matter of Kadio v Volino*, 126 AD3d 1253, 1256-1257 [3d Dept 2015]; *Matter of Carmen L.*, 37 AD3d 468, 469 [2d Dept 2007], *lvs denied* 8 NY3d 814 [2007]).² We similarly discern no basis upon which to disturb Family Court's parameters on telephonic contact. The father's remaining contentions, to the extent properly before us, have been evaluated and determined to be without merit.³

Clark, Pritzker, McShan and Corcoran, JJ., concur. Ordered that the orders are affirmed, without costs.

12 In the Matter of Jorge JJ., Appellant, v Erica II., Respondent. (And Two Other Related Proceedings.) [252 NYS3d 346]—

Parent, Child and Family—Custody—Modification—Effective Assistance of Counsel

Ceresia, J. Appeal from an order of the Family Court of Broome County (Brett Noonan, J.), entered September 25, 2024, which, among other things, dismissed petitioner's application, in a proceeding pursuant to Family Ct Act article 6, to modify a prior order of custody.

Petitioner (hereinafter the father) and respondent (hereinafter the mother) are the parents of the subject child (born in 2010). Going back at least as far as 2013, the mother has had primary physical custody of the child, with varying schedules of parenting time for the father (see *Matter of Jorge JJ. v Erica II.*, 191 AD3d 1188, 1189-1190 [3d Dept 2021]). As relevant here, in an April 2022 order, Family Court directed that the father would have a certain number of supervised visits and telephone calls which, if completed successfully, would then lead to a period of unsupervised visits and calls. Between August and December 2023, the father filed three modification petitions, each seeking physical custody of the child, among other things. Following a two-day hearing and a *Lincoln* hearing held between April and June 2024, Family Court denied the father's requested relief, finding that although it would not

2. Although not dispositive, we also note that the attorney for the child supports the arrangement fashioned by Family Court (see *Matter of Joenathan E. v Jennifer F.*, 242 AD3d at 1340 n 3).

3. To the extent that the father suggests that his current facility is outside of the geographic range articulated by Family Court, that claim may be the proper subject of a new modification petition (see *Matter of Granger v Misercola*, 21 NY3d at 92; *Matter of Lapham v Senecal*, 125 AD3d at 1211; *Matter of Moore v Schill*, 44 AD3d 1123, 1123 [3d Dept 2007]).

be in the child's best interests to reside primarily with the father, she should still have supervised visitation with him, albeit on a more specific schedule to remove any confusion as to its terms. The father appeals.

The father's sole contention on appeal is that he received ineffective assistance from his trial attorney.* "[T]o successfully maintain an ineffective assistance of counsel claim, a party must demonstrate that he or she was deprived of meaningful representation as a result of his or her lawyer's deficiencies" (*Matter of Carly W. v Mark V.*, 225 AD3d 984, 987 [3d Dept 2024] [internal quotation marks and citations omitted]). As the proponent of this argument, it is the father's burden "to demonstrate the absence of a legitimate or strategic reason for counsel's decisions" (*Matter of K.H. [J.H.]*, 241 AD3d 1640, 1641 [3d Dept 2025] [internal quotation marks, brackets and citation omitted]; see *Matter of Sheena PP. v Edward QQ.*, 238 AD3d 1417, 1421 [3d Dept 2025]). "So long as the evidence, the law, and the circumstances of a particular case, viewed in totality and as of the time of the representation, reveal that the attorney provided meaningful representation, [a party's] constitutional right to the effective assistance of counsel will have been met" (*Matter of Jacklyn PP. v Jonathan QQ.*, 221 AD3d 1293, 1298 [3d Dept 2023] [internal quotation marks, brackets and citations omitted]).

The father claims that his counsel should have called certain witnesses to testify at the hearing, including the child's therapist and school personnel, and introduced documentary evidence such as call logs, text messages and the child's report card. However, the father has failed to show that counsel lacked a valid, strategic purpose, and is merely speculating, with the benefit of hindsight, that such proof would have been helpful to his case (see *Matter of Richard CC. v Lacey DD.*, 243 AD3d 1186, 1190 [3d Dept 2025]; *Matter of Ann T. v James U.*, 241 AD3d 1662, 1666 [3d Dept 2025]). To be sure, with respect to the purported failure to call witnesses, we note that the father admits that counsel may have had strategic reasons not to call these individuals. As for the report card, the mother admitted that the child's grades were low and this was not a contested issue. Given the foregoing, and noting that trial counsel for the father made appropriate opening and closing statements, effectively examined the father and cross-examined the mother and successfully defeated two motions to dismiss the father's petitions, we find that the father was not deprived of the effec-

* The mother has not filed a brief in connection with this appeal, but the attorney for the child argues against the father's position.

tive assistance of counsel (see *Matter of Madelyn V. [Lucas W.—Jared V.]*, 199 AD3d 1249, 1252-1253 [3d Dept 2021], *lv denied* 38 NY3d 901 [2022]; *Matter of Audreanna VV. v Nancy WW.*, 158 AD3d 1007, 1011 [3d Dept 2018]). To the extent not specifically addressed herein, the father's remaining contentions have been considered and found to be without merit.

Garry, P.J., Aarons, Fisher and Mackey, JJ., concur. Ordered that the order is affirmed, without costs.

13 Gerald E. Briffa, Appellant, v New York State Department of Health, Respondent. [— NYS3d —]—

Civil Rights—Discrimination in Employment—Reasonable Accommodation—Refusal to Provide Three Days Per Week of Telecommuting for Chronic Fatigue Syndrome Disability

Employment Relationships—Constructive Discharge—Failure to Demonstrate Intolerable Work Environment Compelling Employee to Resign

Reynolds Fitzgerald, J. Appeal from an order of the Supreme Court (Denise Hartman, J.), entered September 4, 2024, in Albany County, which, among other things, granted defendant's cross-motion for summary judgment dismissing the complaint.

In March 2017, plaintiff, who has chronic fatigue syndrome and other ailments, was employed through the Governor's program designed to hire individuals with disabilities (see Civil Service Law §§ 55-b, 55-c). Plaintiff began his employment as a full-time senior attorney at the Bureau of Health Facility Planning and Development in the division of Legal Affairs—a unit of defendant. Plaintiff's primary assignment was reviewing nursing home and assisted living applications (hereinafter ALP), to reduce the 12-year backlog of said applications. Shortly after he was hired, plaintiff made a request for reasonable accommodations including the following: a private office equipped with a sofa, window and a suitable chair; that said office undergo an ergonomic analysis; that he be afforded the ability to work from home as much as possible, but no less than three days per week; and that he be afforded extra break periods beyond the allotted two 15-minute breaks for every day plaintiff worked on site. On April 21, 2017, defendant granted plaintiff's request to the extent that he was provided a private office and advised to file an application for telecommuting. Plaintiff subsequently filed two such applications and ultimately received two days of telecommuting per week. In July 2017, plaintiff requested a third day of telecommuting per week. By letter dated August 17, 2017, defendant denied plaintiff's request for the third day. By reason of explanation for the refusal, defendant cited that a third day of working

from home would cause an undue hardship and disruption in operations as it would limit plaintiff's ability to review the ALP applications, an essential function of his job assignment. On August 20, 2017, plaintiff submitted his resignation.

Plaintiff thereafter commenced this action alleging that defendant engaged in an unlawful discriminatory practice by refusing to provide him three days per week of telecommuting as a reasonable accommodation for his disabilities (*see* Executive Law § 296 [3] [a]). Following joinder of issue and discovery, plaintiff moved for summary judgment on liability only; defendant opposed plaintiff's motion and cross-moved for summary judgment dismissing the complaint. Supreme Court denied plaintiff's motion, granted defendant's cross-motion and dismissed the complaint in its entirety. Plaintiff appeals, and we affirm.

"The Human Rights Law requires an employer to provide a reasonable accommodation for an employee's known disability" (*Matter of Vinikoff v New York State Div. of Human Rights*, 83 AD3d 1159, 1162 [3d Dept 2011] [citations omitted]; *see Pimentel v Citibank, N.A.*, 29 AD3d 141, 145 [1st Dept 2006], *lv denied* 7 NY3d 707 [2006]). "A reasonable accommodation is one which permits an employee with a disability to perform in a reasonable manner the activities involved in the job and does not impose an undue hardship on the employer's business" (*Graham v New York State Off. of Mental Health*, 154 AD3d 1214, 1217 [3d Dept 2017] [internal quotation marks, brackets, ellipsis and citations omitted]; *see Matter of New Venture Gear Inc. v New York State Div. of Human Rights*, 41 AD3d 1265, 1266 [4th Dept 2007]). "To establish a prima facie case of discrimination based upon the denial of a reasonable accommodation, the plaintiff must prove that he or she is a person with a disability, that the employer had notice of the disability, that he or she could perform the essential functions of the job with a reasonable accommodation and that the employer refused that reasonable accommodation" (*Graham v New York State Off. of Mental Health*, 154 AD3d at 1217-1218 [citations omitted]; *see Nordenstam v State Univ. of N.Y. Coll. of Env'tl. Science & Forestry*, 184 AD3d 1157, 1158 [4th Dept 2020]).

The record establishes that plaintiff has a disability and that defendant had notice of said disability. As such, the issue distills to whether plaintiff could perform the essential functions of his job with a reasonable accommodation and whether defendant refused that reasonable accommodation. The essential functions of a job consist of "the fundamental duties to be performed in the position in question, but not functions that

are merely marginal. . . . [U]ltimately, the question whether a task constitutes an essential function depends on the totality of the circumstances” (*Rodal v Anesthesia Group of Onondaga, P.C.*, 369 F3d 113, 120 [2d Cir 2004] [internal quotation marks and citations omitted]). “Whether a job function is essential depends on multiple factors, including the employer’s judgment, written job descriptions, the amount of time spent on the job performing the function, the consequences of not requiring the plaintiff to perform the function, mention of the function in any collective bargaining agreement, the work experience of past employees in the job, and the work experience of current employees in similar jobs” (*Gill v Maul*, 61 AD3d 1159, 1160-1161 [3d Dept 2009] [internal quotation marks and citation omitted]). Based on plaintiff’s deposition, the depositions of plaintiff’s supervisor and the supervisor’s affirmations, it is undisputed that this was a full-time position, that at the time plaintiff was hired he had no experience in health care law and required training and that he was primarily hired to assist in the reduction of a 12-year backlog of ALP applications. Additionally, the ALP applications in question were paper documents containing confidential information and were not allowed to be removed from the office, telecommuting was rare and plaintiff’s request to telecommute at least three days per week was to be implemented over time.

With respect to plaintiff’s motion, he was unable to meet his initial burden to show that he could perform the essential functions of his job with the reasonable accommodation he requested. Plaintiff’s deposition testimony consists of him stating that since his diagnosis in the early 2000s he had never held a full-time position, and in fact had not worked any jobs for “more than a few hours a week . . . [s]o [that he] was able to rest,” and that “[i]deally, [he] needed five telecommuting days” to “rest periodically,” “nap during the day” and “do . . . meditation” in order to keep his mind “sharp.” These statements make it clear that plaintiff was unable to perform the essential function of his job with the proposed accommodation. As to reviewing the ALP applications, plaintiff acknowledged that he could not take the paper applications home and was required to review them at the office. Accordingly, Supreme Court properly denied plaintiff’s motion (see *Graham v New York State Off. of Mental Health*, 154 AD3d at 1220; *Gill v Maul*, 61 AD3d at 1161).

Turning to defendant’s cross-motion, when plaintiff was telecommuting, he was generally assigned to review certificate of need applications. Unlike ALP applications, these were ac-

cessible electronically, thus plaintiff could work on them from home. With respect to his performance, his supervisor averred that in comparison to the other attorneys in the office, plaintiff was slow in completing reviews of these applications while telecommuting and was improperly reviewing the ALP applications when he was working on site. Considering these factors, and assessing plaintiff's request for reasonable accommodation, defendant determined that because plaintiff was unable to review the ALP petitions while telecommuting—which was his major assigned task—and that he was in need of more training and proper supervision, it would cause an undue hardship to implement a third day of telecommuting.¹ Thus, Supreme Court properly granted defendant's cross-motion that sought dismissal of plaintiff's reasonable accommodation claim (see *Graham v New York State Off. of Mental Health*, 154 AD3d at 1220; *Gill v Maul*, 61 AD3d at 1161).

Plaintiff next asserts that Supreme Court erred in determining that defendant engaged in an interactive process. “An employer normally cannot obtain summary judgment on a denial of a reasonable accommodation claim unless the record demonstrates that there is no triable issue of fact as to whether the employer duly considered the requested accommodation by engaging in a good-faith interactive process that assessed the needs of the disabled individual and the reasonableness of the accommodation requested” (*Graham v New York State Off. of Mental Health*, 154 AD3d at 1218 [internal quotation marks, brackets and citations omitted]; see *Matter of Vinikoff v New York State Div. of Human Rights*, 83 AD3d at 1162-1163). “Both the employer and the employee have a duty to act in good faith once the interactive process begins, and an employee who is responsible for the breakdown of that interactive process may not recover for a failure to accommodate” (*Matter of Vinikoff v New York State Div. of Human Rights*, 83 AD3d at 1163 [internal quotation marks, brackets and citations omitted]).

Considering the interactive process that took place herein, the record demonstrates that after plaintiff made his original

1. Although plaintiff argues in his appellate brief that he was denied extra break periods, that defendant failed to offer alternative work assignments, he contests the admissibility of his reasonable accommodation documents and that the review of the ALP applications was not an essential function of his job, plaintiff's complaint only asserts a claim for disability discrimination due to the denial of three days of telecommuting. Accordingly, all other claims asserted in his brief are being raised for the first time and are unpreserved (see *Graham v New York State Off. of Mental Health*, 154 AD3d at 1216 n 1; *Matter of Tomarken v State of New York*, 100 AD3d 1072, 1076 [3d Dept 2012]).

request for reasonable accommodations, defendant requested medical documentation to assess plaintiff's request. Shortly thereafter, defendant partially granted plaintiff's request by providing a private office, a daylight desk lamp and an ergonomic chair. Defendant additionally advised plaintiff that he could submit a written request to telecommute and provided the telecommute policy and telecommute request form to plaintiff. Thereafter, plaintiff twice requested a day of telecommuting and defendant granted both days.² As to plaintiff's request for a third day of telecommuting, plaintiff argues that while his application was pending, he learned of defendant's imminent revision of its department-wide telecommuting policy, which was to include provisions that telecommuting privileges would not be extended to probationary employees and that all employees currently enjoying telecommuting privileges would have to reapply. When plaintiff asked defendant how he could be assured that he would receive his telecommuting accommodation, he was advised he had to reapply. Instead, plaintiff resigned a week prior to the implementation of the revised policy and failed to take any steps to file an application under this new policy. As such, it was plaintiff who caused the breakdown in the interactive process (*see Matter of Vinikoff v New York State Div. of Human Rights*, 83 AD3d at 1163). The record evinces that defendant fulfilled its obligation to investigate the feasibility of plaintiff's request for reasonable accommodations and gave due consideration to the requests (*see id.*; *Pimentel v Citibank, N.A.*, 29 AD3d at 149).

Supreme Court also properly dismissed plaintiff's claim that he was constructively discharged. "An employee is constructively discharged when her or his employer, rather than discharging the plaintiff directly, deliberately created working conditions so intolerable that a reasonable person in the plaintiff's position would have felt compelled to resign" (*Golston-Green v City of New York*, 184 AD3d 24, 44 [2d Dept 2020] [footnote and citation omitted]; *see White-Barnes v New York State Dept. of Corr. & Community Supervision*, 214 AD3d 1230, 1232 [3d Dept 2023]). Viewing the evidence in a light most favorable to plaintiff, his complaints do not demonstrate an intolerable work environment compelling him to resign. Plaintiff states in his deposition that he "had a great job" and "nice people to work with." His chief complaint is that defendant was in the process of changing its department-wide

2. During this period, defendant also granted plaintiff's request to park on site at the facility and additionally provided him with an anti-fatigue mat at his request.

telecommuting policy so as to prohibit probationary employees from receiving any telecommuting privileges and that he had been informed that nothing could be done to change that policy decision. However, fatal to his argument is that he had, in fact, been advised to reapply for this accommodation, but instead resigned prior to the effective date of the new policy and admittedly never reapplied. Furthermore, there is no evidence that defendant “*intentionally* created an intolerable work atmosphere that forced [plaintiff] to quit involuntarily” as the change in policy was not directed at him, but instead it impacted the entire department and was revised due to employees abusing the previous telecommuting policy (*Whidbee v Garzarelli Food Specialties, Inc.*, 223 F3d 62, 74 [2d Cir 2000] [internal quotation marks, brackets and citation omitted; emphasis added]). Thus, plaintiff failed to raise a triable issue of fact that would prevent the granting of summary judgment dismissing a cause of action predicated on a constructive discharge theory (see *Golston-Green v City of New York*, 184 AD3d at 44-45; *Whidbee v Garzarelli Food Specialties, Inc.*, 223 F3d at 74).

Clark, J.P., Ceresia, Powers and Corcoran, JJ., concur. Ordered that the order is affirmed, without costs.

14 In the Matter of Emily GG., Respondent, v India HH., Respondent, and Travis II., Appellant. [— NYS3d —]

**Parent, Child and Family—Custody—Cousin Commenced Third-Party Custody Proceeding Alleging Extraordinary Circumstances
Evidence—Business Records—Police Incident Reports Prepared in Response to Allegation of Family Violence**

Corcoran, J. Appeal from an order of the Family Court of Madison County (Rhonda Youngs, J.), entered September 27, 2024, which granted petitioner’s application, in a proceeding pursuant to Family Ct Act article 6, for custody of the subject child.

The subject child was born in 2018 to respondent Travis II. (hereinafter the father) and respondent India HH. (hereinafter the mother). A lengthy pattern of violent and threatening acts by the father toward the mother culminated in March 2023, when the father attempted to harm himself in the family residence while the child was present. After the mother intervened, the father struck her and left the residence. The father was located by police in a nearby parking lot, where, according to the officers, he kicked, bit and threatened them. The father was later hospitalized for psychiatric evaluation. Upon his release, he directed the mother and the child to leave the home, relegating them temporarily to a shelter. As the mother attempted to

secure stable housing—petitioner (hereinafter the cousin)—began caring for the child and, with the mother’s consent, she assumed primary caregiving responsibilities. In May 2023, the cousin commenced this third-party custody proceeding, alleging extraordinary circumstances. Following a fact-finding hearing, Family Court determined that extraordinary circumstances existed, awarded the cousin sole legal and physical custody of the child and granted the father four hours of biweekly parenting time. The father appeals, contending that Family Court deprived him of a fair trial through a series of evidentiary errors and that the limitation on his parenting time lacks a sound and substantial basis in the record.¹ We disagree and affirm.

Initially, the father contends that Family Court erred in admitting certified police records. The father does not dispute that the records were produced in response to a judicial subpoena and accompanied by a business records certification. Rather, he argues that the lack of testimony from a police department employee rendered the records inadmissible. Records produced in response to a judicial subpoena are admissible when accompanied by a certification pursuant to CPLR 3122-a stating that the records were made in the regular course of business, at or near the time of the events recorded, and that it was the regular course of business to make such records (see *Matter of Cherokee C. [Matthew C.]*, 173 AD3d 1573, 1574 [3d Dept 2019]; *Oropallo v Bank of Am. Home Loans, LP*, 162 AD3d 1420, 1423 [3d Dept 2018]). Because those foundational requirements were satisfied here, the records were admissible as certified business records under CPLR 4518 (a), and testimony from a records custodian or other employee was not required to establish authenticity (see *Matter of Cherokee C. [Matthew C.]*, 173 AD3d at 1574; compare *Matter of Aiden XX. [Jesse XX.]*, 104 AD3d 1094, 1096 [3d Dept 2013]).

Having determined that the proponent established that the police reports constituted admissible business records, we next address the father’s argument that certain statements contained therein were nonetheless inadmissible. Among the police records received in evidence were incident reports prepared in response to an allegation of family violence, as required by CPL 140.10 (5). That statute requires the respond-

1. Although the father challenges the limitation imposed on his parenting time, he does not otherwise contest Family Court’s determination awarding custody of the subject child to the cousin; any challenge to that determination is therefore abandoned (see *Matter of Jaime T. v Ryan U.*, 238 AD3d 1257, 1259 n 2 [3d Dept 2025]).

ing officer to prepare and file a written report of the incident. Accordingly, the officers were under a statutory duty, in the regular course of police business, to memorialize their observations, actions and the circumstances encountered. To the extent the reports reflect the responding officer's own observations and conduct, those entries were made pursuant to that duty and are admissible as part of the business record itself (see CPLR 4518 [a]; see generally *People v Patterson*, 28 NY3d 544, 550-551 [2016]). In addition, the father's recorded statements to police were admissible as admissions against interest of a party (see *Matter of M.G. [Marquise G.]*, 234 AD3d 575, 576 [1st Dept 2025]; *Matter of Amara C. [Wanda C.]*, 206 AD3d 424, 424-425 [1st Dept 2022]; *People v Finch*, 160 AD3d 1212, 1214 [3d Dept 2018]). To the extent the reports contained statements attributable to the mother, who was not under a business duty to report (see *Matter of Leon RR*, 48 NY2d 117, 122-123 [1979]), any error in their admission was harmless, as those same facts were established through both the mother's testimony and the father's admissions, such that properly admitted testimony amply supports Family Court's determination (see *Matter of Zaiden P. [Ashley Q.]*, 211 AD3d 1348, 1355 n 5 [3d Dept 2022], *lv denied* 39 NY3d 911 [2023]; *Matter of Carmela H. [Danielle F.]*, 185 AD3d 1460, 1461 [4th Dept 2020], *lv denied* 35 NY3d 915 [2020]; *Matter of Nicholas R. [Jason S.]*, 82 AD3d 1526, 1528 n [3d Dept 2011], *lv denied* 17 NY3d 706 [2011]; compare *Matter of Imani O. [Marcus O.]*, 91 AD3d 466, 467 [1st Dept 2012]).

The father's argument that he was denied a fair hearing when Family Court advised him, on the first day of the hearing, that it was too late to file a custody petition is without merit. Contrary to his assertions, the record reflects that the father was not precluded from filing a custody petition, but was advised only that he could not forestall the hearing by doing so. The record establishes that the cousin's third-party custody petition had been pending for approximately one year by the time of the hearing, during which the father, represented by counsel, actively litigated the matter and never sought affirmative custodial relief nor amended his pleadings. Trial courts "must have broad discretion in controlling their calendars and the progress of a trial" (*Matter of Angelica CC. v Ronald DD.*, 214 AD3d 1091, 1096 [3d Dept 2023], *lv denied* 39 NY3d 915 [2023]). Under these circumstances, Family Court's refusal to entertain a new custody petition immediately before the hearing constituted a proper exercise of its authority to manage the proceedings.

The father's contention that Family Court erred in admitting

uncorroborated hearsay evidence that he touched the child inappropriately is unpreserved because he failed to object to these statements in the fact-finding hearing (see *Matter of Tibor I. [Tibor H.]*, 239 AD3d 1074, 1076 n 2 [3d Dept 2025]).

We likewise reject the father's contention that Family Court improperly limited his recross-examination of the mother. The father was afforded a full and fair opportunity to cross-examine the mother, and he failed to identify any new matter elicited on redirect that would have entitled him to further questioning (see *Suchow v Suchow*, 200 AD3d 1359, 1361 [3d Dept 2021]; *Vickie F. v Joseph G.*, 195 AD3d 1064, 1066 [3d Dept 2021]).

Finally, Family Court's determination of the father's parenting time is guided by the child's best interests and is entitled to deference where, as here, it is supported by a sound and substantial basis in the record (see *Matter of Gary JJ. v Barbara KK.*, 244 AD3d 1620, 1622 [3d Dept 2025]; *Matter of Sherab X. v Michelle Y.*, 244 AD3d 1532, 1533 [3d Dept 2025]). In assessing the child's best interests, Family Court was required to consider, among other factors, the quality of the respective home environments, the child's need for stability, each party's past performance and relative fitness and each party's ability to provide for the child's emotional and developmental well-being (see *Matter of Benjamin V. v Shantika W.*, 207 AD3d 1017, 1018-1019 [3d Dept 2022]).

The fact-finding hearing established that the child had directly observed numerous instances of the father's violent conduct toward the mother, including incidents in which he threatened the mother with a knife to her throat and prompted police to respond to the residence. During those frightening incidents, the child cried and attempted to hide when the father's behavior escalated. Family Court appropriately credited that evidence in concluding that the child associated the father with those distressing events and that her contact with him coincided with increased emotional dysregulation, including difficulty with transitions and decreased focus at school. Family Court also properly found that the child thrived in the cousin's care. At the time of the hearing, the cousin and the child resided in an apartment, but the cousin was moving into her parents' home to better meet the child's needs. The cousin explained that the move would afford the child her own bedroom and dedicated play space, access to outdoor areas and daily support from her own parents, who had become like grandparents to the child. The cousin further testified that she maintained stable, full-time employment that allowed her the flexibility to work remotely or take time off to attend to the

child's educational and therapeutic needs. To the father's credit, he attended nearly all scheduled parenting time visits; however, he did not initiate contact to arrange those visits and provided no financial support for the child. Given the father's conduct, the effects of domestic violence on the child, and the stability provided in the cousin's care, Family Court's parenting-time determination is supported by a sound and substantial basis in the record and we decline to disturb it (*see Matter of Mackenzie OO. v Ian NN.*, 242 AD3d 1345, 1350 [3d Dept 2025]; *Matter of Gabrielle Q. v James R.*, 233 AD3d 1407, 1409-1410 [3d Dept 2024]; *Matter of Robert C. v Katlyn D.*, 230 AD3d 1392, 1394-1395 [3d Dept 2024]).²

Clark, J.P., Reynolds Fitzgerald, Ceresia and Powers, JJ., concur. Ordered that the order is affirmed, without costs.

15 In the Matter of Cynthia Lurry-Carter, Petitioner, v New York State and Local Retirement System et al., Respondents. [— NYS3d —]

Civil Service—Retirement and Pension Benefits—Denial of Untimely Application to Change Decedent's Retirement Option from Single Life Allowance to Joint Allowance Full Option Naming Petitioner as Beneficiary—Extension of Time to File Second Retirement Option Dependent on Reasonable Cause and Comptroller's Discretion

Pritzker, J. Proceeding pursuant to CPLR article 78 (transferred to this Court by order of the Supreme Court, entered in Albany County) to review a determination of respondent Comptroller denying petitioner's application to change decedent's retirement option.

Petitioner is the widow of James Carter (hereinafter decedent), who was a member of respondent New York State and Local Retirement System. As he was preparing to retire in December 2020, decedent submitted a retirement option selection form to the Retirement System in which he checked the box for the joint allowance full option that would provide for a reduced retirement allowance that would continue to be paid to petitioner, his beneficiary, upon his death (*see* Retirement and Social Security Law §§ 600 [a]; 610 [a]). He scribbled out that checkmark and wrote "mistake" next to it, however, and checked the box electing to receive retirement benefits under the single life allowance option, "a benefit option that pays benefits only during the member's lifetime and does not include the payment of any postretirement death benefits" (*Matter of Whitfield v Avent*, 192 AD3d 1250, 1250 [3d Dept 2021]; *see*

2. Although not dispositive, we note that the attorney for the child supports Family Court's determination.

Retirement and Social Security Law § 610 [a]). The form was deemed filed when received by the Retirement System on January 19, 2021 (*see* 2 NYCRR 341.3).

Decedent thereafter submitted an application for service retirement to the Retirement System that was filed on February 18, 2021. A few days later, he prepared, signed and had notarized a second retirement option election form in which he changed his election to the joint allowance full option and named petitioner as his beneficiary. Decedent was waiting for other requested paperwork to be completed before he submitted the form and, as a result, had not sent it in before he died unexpectedly from COVID pneumonia on February 27, 2021. Petitioner, who was required to obtain a death certificate for decedent and other information for the Retirement System, eventually submitted the second option form, and it was filed on June 3, 2021. By that point, however, the Retirement System had already processed the retirement application and notified petitioner that decedent's retirement had taken effect on February 19, 2021, and that he had selected the single life allowance option. Petitioner applied for a hearing and redetermination regarding the option selection and, following that hearing, a Hearing Officer determined that the second retirement option election form was properly rejected as untimely. Respondent Comptroller accepted the Hearing Officer's findings of fact and conclusions of law and denied petitioner's application, and this CPLR article 78 proceeding ensued.

"The Comptroller is vested with the exclusive authority to resolve applications for retirement benefits and the determination must be upheld if the interpretation of the controlling retirement statute is reasonable and the underlying factual findings are supported by substantial evidence" (*Matter of Gallante v DiNapoli*, 228 AD3d 1169, 1170 [3d Dept 2024] [internal quotation marks, brackets and citations omitted], *lv denied* 42 NY3d 909 [2024]; *see* Retirement and Social Security Law § 74 [b]; *Matter of Leisten v McCall*, 285 AD2d 897, 898 [3d Dept 2001], *lv denied* 97 NY2d 605 [2001]). Of note, "[w]here different inferences may be drawn from the proof presented, the determination is for [the Comptroller] to resolve" (*Matter of Wilson v DiNapoli*, 52 AD3d 931, 933 [3d Dept 2008]).

Here, the statutory language requires that a change in retirement option be filed "no later than [30] days following the date of payability of [the member's] retirement allowance" (Retirement and Social Security Law §§ 90 [e]; 610 [f]). The undisputed hearing evidence reflected that decedent's retirement became effective on February 19, 2021, and that retirement benefits

would have been paid for the first time on March 1, 2021. As the statute makes clear that an option form would have to be filed no later than March 31, 2021, under those circumstances, the second retirement option form, which was filed on June 3, 2021, was untimely (*see* Retirement and Social Security Law § 610 [f]).

However, Retirement and Social Security Law § 90 (bb) (1) grants “the [C]omptroller, for reasonable cause, . . . [the] power to extend the time for the election of an option, for a period or periods which shall expire not later than [60] days immediately after the effective date of a member’s retirement” (*see Matter of De Deo v McCall*, 255 AD2d 683, 684 [3d Dept 1998]). Indeed, at the hearing, one of the Retirement System’s employees testified that, pursuant to Retirement and Social Security Law § 90 (bb) (1), “there appears to be authority by a comptroller to extend the time for the option election past that March 31[, 2021] date.” This employee went on to testify that, pursuant to this subsection, the Comptroller “reserves up to 60 days to stretch that date out, and that would have been April 20[, 2021],” and thus the second retirement option form, received on June 3, 2021, would still be untimely. Relying on this testimony, the Hearing Officer determined that, even “[w]ith the additional time granted the [C]omptroller to extend the time to elect, that date would have been April 20[, 2021].”

To the extent preserved, petitioner contends that the Comptroller improperly disregarded the possibility that an extension longer than 60 days could be granted under the identical extension provision in Retirement and Social Security Law § 610 (d) (1). We agree. In *Matter of Estate of Clifford v New York State Empls. Retirement Sys.* (123 AD2d 1 [3d Dept 1986]), this Court affirmed the Comptroller’s interpretation of the 60-day time limit on the extension provided by Retirement and Social Security Law § 90 (bb) (1) as discretionary, rather than mandatory, given that the statute “does not expressly limit the authority of the Comptroller to act after the time period in question” (*id.* at 4). In fact, this Court held that the Comptroller’s interpretation that the extension can exceed 60 days “fosters sound policy and in most cases works to the benefit of a retiree” (*id.*). Thus, the Comptroller’s interpretation of the statutory language here as limiting any extension to 60 days, specifically April 20, 2021, “is irrational and, therefore, not entitled to deference” (*Matter of Pearlman v Mills*, 24 AD3d 837, 838 [3d Dept 2005]; *compare Matter of John v Regan*, 139 AD2d 827, 828 [3d Dept 1988]). Accordingly, the appropriate remedy is to remit the matter to the Comptroller for a determi-

nation as to whether, under the circumstances presented here, reasonable cause exists to extend the time for petitioner to file the second retirement option form, which this Court holds can be extended, at the Comptroller's discretion, beyond the 60-day limit set forth in Retirement and Social Security Law §§ 90 (bb) (1) and 610 (d) (1) (*see Matter of Estate of Clifford v New York State Empls. Retirement Sys.*, 123 AD2d at 4-5; *see generally Matter of Pearlman v Mills*, 24 AD3d at 838; *Matter of De Deo v McCall*, 255 AD2d at 684). Given this determination, we need not reach petitioner's remaining assertions.

Garry, P.J., Clark, McShan and Corcoran, JJ., concur. Adjudged that the determination is annulled, without costs, petition granted, and matter remitted to respondents for further proceedings not inconsistent with this Court's decision.

16 Quest Diagnostics Inc., Appellant, v CSRNC, LLC, Doing Business as Capstone Center for Rehabilitation and Nursing, Respondent. [— NYS3d —]—

Contracts—Breach or Performance of Contract—Provision of COVID-19 Diagnostic Testing to Long-Term Care Facilities at Agreed-Upon Rate Per Test—Failure to Invoice Monthly, as Set Forth in Agreement, Not Material Breach

Pritzker, J. Appeal from an order of the Supreme Court (Rebecca Slezak, J.), entered October 7, 2024, in Montgomery County, which denied plaintiff's motion for summary judgment.

Plaintiff provides diagnostic testing for various conditions, including COVID-19. Defendant is a long-term care facility located in the City of Amsterdam, Montgomery County. In May 2020, as a response to the COVID-19 pandemic, Governor Andrew Cuomo issued Executive Order No. 8.202.30, requiring all long-term care facilities within the state to "make arrangements for the testing of all personnel" for COVID-19 twice per week (Executive Order [A. Cuomo] No. 202.30 [9 NYCRR 8.202.30]). In furtherance of this executive order, the Department of Health entered into an agreement with plaintiff, under which plaintiff agreed to provide COVID-19 diagnostic testing to long-term care facilities throughout the state with a price cap of \$100 per COVID-19 test. In August 2020, plaintiff began providing COVID-19 diagnostic testing to defendant. Thereafter, plaintiff entered into an agreement with defendant—effective the date of signing, January 5, 2021—agreeing to provide defendant with COVID-19 testing services at a rate of \$100 per test. As relevant here, the agreement provided plaintiff with the right to bill defendant for the testing services performed. According to plaintiff, it sent invoices to defendant on a

monthly basis, beginning in January 2021. In June 2021, after defendant raised concerns over the cost of influenza diagnostic testing, the parties executed an amendment to their agreement which adjusted the cost of influenza tests and combined influenza/COVID-19 tests.¹ Plaintiff thereafter issued adjusted invoices to reflect the pricing set forth in the amended agreement; however, defendant refused to pay the outstanding balance, which is in excess of \$200,000.

Plaintiff commenced this action, seeking, as relevant here, to recover the unpaid fees under breach of contract and quantum meruit theories. Plaintiff subsequently moved for summary judgment on several causes of action, including breach of contract and quantum meruit, which defendant opposed. Supreme Court denied plaintiff's motion, concluding, in relevant part, that ambiguities existed in the parties' agreement, preventing summary judgment on the breach of contract claim, and that questions of fact remained as to plaintiff's quantum meruit claim. Plaintiff appeals.

Plaintiff contends that Supreme Court erred in denying its motion for summary judgment on its breach of contract claim. "A cause of action for breach of contract requires that the plaintiff show the existence of a contract, the performance of his or her obligations under the contract, the failure of the defendant to perform its obligations and damages resulting from the defendant's breach" (*Turner v Quinones*, 244 AD3d 1331, 1333 [3d Dept 2025] [internal quotation marks, brackets and citations omitted]).

In support of its motion for summary judgment, plaintiff proffered, among other things, invoices for COVID-19 and influenza testing performed between August 2020 and February 2022. Plaintiff also submitted the January 2021 agreement as well as the June 2021 amended agreement. Relevant here, the January 2021 agreement provided that plaintiff was to provide defendant with COVID-19 testing for defendant's residents and covered employees as requested or ordered by a physician. For its part, defendant was responsible for collecting and storing test specimens. Under the "Billing/Compensation" section of the agreement, plaintiff was to bill defendant for the testing services and defendant, in turn, agreed to pay defendant for the services performed pursuant to the rates set forth in the agreement. The agreement was effective the date of signing, January 5, 2021. Plaintiff also proffered the amended agreement, which was signed in June 2021, but specifically

1. The parties' original agreement is silent as to plaintiff's provision of influenza testing.

stated that the pricing in the amended agreement was effective as of May 2020. An attachment to the amended agreement demonstrates that the parties agreed that COVID-19 testing would be \$100, influenza A and B testing would be \$25, and combined COVID-19 and influenza A and B testing would be \$125.

Plaintiff also proffered an affidavit from its senior program manager, who explained that plaintiff billed and invoiced all testing services provided to defendant, including those rendered prior to the execution of the January 2021 agreement, with the first invoice being sent in January 2021, after the agreement was executed. Defendant soon after “objected to the pricing of the influenza detection and the combined COVID-19 and influenza detection” tests but never objected to the COVID-19 detection tests. Meanwhile, defendant continued to order testing from plaintiff, and plaintiff eventually agreed to retroactively reduce the pricing of the influenza detection and combined COVID-19 and influenza detection, which was memorialized in the amendment to the agreement. After executing the amendment, plaintiff issued new invoices in August 2021 adjusting the previously billed amounts to be consistent with the amendment. The senior program manager averred that defendant continued to order tests from plaintiff in February 2022 and that plaintiff invoiced defendant for that testing in March 2022. Finally, as to damages sought, the senior program manager represented that defendant had not paid any of the outstanding balance, and that the amount owed is in excess of \$200,000. Given the foregoing, which demonstrated a contract existed between the parties, that plaintiff performed its obligations and that defendant had not, amounting to damages exceeding \$200,000, “plaintiff established its prima facie entitlement to judgment as a matter of law on the issue of liability” as to the breach of contract cause of action (*Almark Holding Co., LLC v Abbas*, 241 AD3d 1410, 1412 [2d Dept 2025]; see *Ithaca Montessori Sch. v Pfeffer*, 239 AD3d 1128, 1131 [3d Dept 2025]; *Bank of Am., N.A. v Neroni*, 226 AD3d 1273, 1275 [3d Dept 2024]).

Defendant, in opposition to plaintiff’s motion for summary judgment, did not dispute the existence of the agreement and amended agreement, that testing services had been performed and the cost for those testing services, as set forth in the agreement and amended agreement. However, defendant argued that plaintiff’s failure to timely invoice was a material breach of the contract such that defendant’s performance—payment

for services rendered—was excused.² “A material breach is a failure to do something that is so fundamental to a contract that the failure to perform that obligation defeats the essential purpose of the contract. A material breach of a contract excuses the nonbreaching party’s performance and precludes the breaching party from bringing a claim under the contract” (*SCE Envtl. Group, Inc. v Murnane Bldg. Contrs., Inc.*, 242 AD3d 1457, 1460 [3d Dept 2025] [internal quotation marks and citations omitted]; see *Exportaciones Del Futuro Brands, S.A. De C.V. v Authentic Brands Group, LLC*, 201 AD3d 499, 500 [1st Dept 2022]).

Here, we do not find that any alleged failure to invoice monthly, as set forth in the agreement, constitutes a material breach (see *Willoughby Rehabilitation & Health Care Ctr., LLC v Webster*, 134 AD3d 811, 813-814 [2d Dept 2015]; *Wolfson v Faraci Lange, LLP*, 103 AD3d 1272, 1273 [4th Dept 2013]). Section 3.2 of the agreement states, as relevant here, that defendant agreed to pay plaintiff for laboratory services within 30 days of receiving an invoice and that defendant would be invoiced monthly. Defendant, however, did not establish that failing to invoice monthly constituted a material breach that was “so fundamental to [the agreement] that the failure to perform that obligation defeats the essential purpose of the contract” (*SCE Envtl. Group, Inc. v Murnane Bldg. Contrs., Inc.*, 242 AD3d at 1460 [internal quotation marks and citations omitted]; see *Wolfson v Faraci Lange, LLP*, 103 AD3d at 1273).

2. Defendant also asserted that there was a material issue of fact because the parties’ course of dealing established that the billing procedure was that plaintiff would send defendant monthly invoices for testing, defendant would then send plaintiff insurance information for test recipients and plaintiff would then bill the insurer directly. However, the agreement provides that plaintiff “shall have the right to bill [defendant] for the [t]esting [s]ervices performed pursuant to [the agreement], and [defendant] shall reimburse [plaintiff] for those [t]esting [s]ervices at the rates set forth in . . . [the agreement]” and that “[defendant] agrees to make payment to [plaintiff] by check, ACH payment, certified money order, or electronic wire within [30] days of the date of each . . . invoice for laboratory services.” Notably, there is no mention of plaintiff billing an insurance company directly in either the agreement or amended agreement. Because the agreement, as to the billing procedure, is “complete, clear and unambiguous on its face[, it] must be enforced according to the plain meaning of its terms” (*Town of Colonie v Global Contr. & Painting, Inc.*, 237 AD3d 1280, 1282 [3d Dept 2025] [internal quotation marks and citations omitted]; see *EDW Drywall Constr., LLC v U.W. Marx, Inc.*, 189 AD3d 1720, 1722 [3d Dept 2020]); thus, we need not look to parol evidence such as that offered by defendant regarding the parties’ course of dealing (see *Matter of Hirschfeld, Stern, Moyer & Ross*, 286 AD2d 611, 612 [1st Dept 2001]; compare *Mizrahi v Cohen*, 104 AD3d 917, 919 [2d Dept 2013], *lv dismissed* 21 NY3d 968 [2013]).

To that end, at the time that the January 2021 agreement was executed, plaintiff had been conducting COVID-19 testing for defendant for approximately five months and had not been sending monthly, or any, invoices. Despite this, there was not any language added to the agreement which supports that the failure to invoice timely would constitute a material breach (see *Bay St. Landing Homeowners Assn., Inc. v Meadow Partners, LLC*, 169 AD3d 985, 986-987 [2d Dept 2019]; compare *Andesco, Inc. v Page*, 137 AD2d 349, 355-356 [1st Dept 1988]). Nor was any language added when the June 2021 amended agreement was executed, despite the monthly invoicing allegedly still not occurring. While defendant points to timely invoicing as a significant concern so that insurance or Medicaid billing could occur, again, the agreement and amended agreement are silent on any insurance or Medicaid reimbursement. Rather, the agreement specifically states that “[defendant] agrees to make payment to [plaintiff] by check, ACH payment, certified money order, or electronic wire within [30] days of the date of each . . . invoice for laboratory services.” As such, defendant did not raise a triable issue of material fact such that plaintiff should be awarded summary judgment as to liability on the breach of contract cause of action, and the matter is remitted to Supreme Court for an inquest as to damages. In light of the foregoing, plaintiff’s arguments as to Supreme Court’s denial of quantum meruit are rendered academic, as “a party may not recover under both contract and quasi contract theories” (*Villnave Constr. Servs., Inc. v Crossgates Mall Gen. Co. Newco, LLC*, 201 AD3d 1183, 1185 [3d Dept 2022]).

Clark, J.P., Aarons, McShan and Corcoran, JJ., concur. Ordered that the order is modified, on the law, without costs, by reversing so much thereof as denied that part of plaintiff’s motion as to liability on the breach of contract cause of action; said motion granted to that extent and matter remitted to the Supreme Court for an inquest as to damages; and, as so modified, affirmed.

17 In the Matter of New York State Office of Victim Services, on Behalf of Wayne Reynolds, Respondent, v Anthony Marshall, Appellant. [— NYS3d —]—

Crimes—Crime Victims Board—Son of Sam Law—Preliminary Injunction to Preserve Funds of Convicted Person

Garry, P.J. Appeal from an order of the Supreme Court (Christina Ryba, J.), entered December 24, 2024, in Albany County, which, in a proceeding pursuant to Executive Law § 632-a, granted petitioner’s application for a preliminary injunction.

This proceeding arises under the Son of Sam Law (*see* Executive Law § 632-a). As relevant here, the statute requires that petitioner be notified of any “funds of a convicted person” in excess of \$10,000, excluding child support and earned income, so that petitioner may in turn notify the victims of the existence of such funds (Executive Law § 632-a [2] [a], [c]; *see* § 632-a [1] [c]; [4]). Respondent is such a person, having been convicted of aggravated harassment of an employee by an incarcerated individual in 2013 and sentenced to a prison term of 1½ to 3 years (*see* Executive Law § 632-a [1] [c] [i]), concurrent to the term he was already serving. In 2024, respondent entered into a settlement agreement with the Attorney General, on behalf of the Department of Corrections and Community Supervision and others, resolving litigation concerning his confinement for \$390,000. The State Comptroller provided the required notice to petitioner upon the impending disbursement of those funds. Petitioner notified the victim of respondent’s 2013 crime of the existence of the settlement funds on August 13, 2024; the victim thereafter submitted an affidavit expressing an intent to commence a civil action against respondent for money damages within the renewed limitations period (*see* Executive Law § 632-a [3]). Petitioner accordingly commenced this proceeding on behalf of the victim seeking a preliminary injunction restraining respondent from transferring, encumbering or otherwise disposing of any nonexempt portion of the settlement proceeds (*see* Executive Law § 632-a [3], [5], [6]; CPLR 5205 [k]). Respondent opposed, and Supreme Court granted the requested injunction. Respondent appeals.

To show that a preliminary injunction is warranted, the movant “must demonstrate a probability of success on the merits, danger of irreparable injury in the absence of an injunction and a balance of equities in its favor” (*Nobu Next Door, LLC v Fine Arts Hous., Inc.*, 4 NY3d 839, 840 [2005]; *see* CPLR 6301; *see generally Matter of New York State Crime Victims Bd. v Harris*, 68 AD3d 1269, 1271-1272 [3d Dept 2009]). “Ultimately, the decision to grant or deny a request for a preliminary injunction is committed to the sound discretion of the trial court, and our review is limited to whether Supreme Court has either exceeded or abused its discretion as a matter of law” (*R. Kelly Freedman Holding Group, LLC v P & M Brick, LLC*, 242 AD3d 1402, 1405 [3d Dept 2025] [internal quotation marks, brackets and citations omitted]; *see Matter of New York State Off. of Victim Servs. v Mobayed*, 245 AD3d 1085, 1086 [3d Dept 2026]).

245 AD3d 1085 Petitioner has established a likelihood of success on the merits. Respondent’s conviction is conclusive proof

of the underlying conduct for purposes of a civil suit (see *D'Arata v New York Cent. Mut. Fire Ins. Co.*, 76 NY2d 659, 667 [1990]; *S.T. Grand, Inc. v City of New York*, 32 NY2d 300, 305 [1973]; *Matter of New York State Off. of Victim Servs. v Alexis*, 233 AD3d 1248, 1250 [3d Dept 2024], *lv denied* 43 NY3d 905 [2025]). Contrary to respondent's claim, the law does not require a judicial assessment of the likelihood that the victim will ultimately commence suit; notice of such intent is all that is required to authorize preservation of assets (see Executive Law § 632-a [5] [c]).

Petitioner has also demonstrated irreparable harm in the absence of injunctive relief. Once the subject funds are distributed to respondent, they may be transferred, spent or otherwise dissipated beyond the reach of a potential judgment. The statutory scheme expressly directs petitioner to take action to avoid the wasting of such assets when notice of intent to sue has been provided (see Executive Law § 632-a [5] [c]). Courts have recognized that permitting unrestricted access to funds under these circumstances would defeat the legislative objective of preserving assets for potential victim compensation (see *Matter of New York State Crime Victims Bd. v Harris*, 68 AD3d at 1271). Requiring proof that respondent has already begun, or is on the verge of, dissipating funds would similarly undermine the statute.

Lastly, the balance of equities favors issuance of the injunction. The public policy underlying the Son of Sam Law reflects a legislative determination that preservation of assets for victim compensation outweighs a convicted person's interest in immediate access to nonexempt funds subject to potential recovery (see Governor's Approval Mem, Bill Jacket, L 2001, ch 62 at 1, 4; see also *Simon & Schuster, Inc. v Members of N. Y. State Crime Victims Bd.*, 502 US 105, 118 [1991]; *Matter of New York State Crime Victims Bd. v Harris*, 68 AD3d at 1271). Although respondent asserts hardship in being unable to access the settlement funds upon his release from incarceration, this hardship is tempered by the statutory framework itself, which contemplates only temporary restraint of funds pending the filing and resolution of a civil action by a victim and exempts certain funds from any restraint, including the first 10% of any compensatory damages award (see Executive Law § 632-a [3]; CPLR 5205 [k]). That 10% carve out has been made available to respondent.

Respondent's remaining contentions, to the extent not expressly addressed herein, have been evaluated and determined to be without merit. We ultimately discern no abuse of discretion in Supreme Court's issuance of the subject relief.

Clark, Pritzker, McShan and Corcoran, JJ., concur. Ordered that the order is affirmed, without costs.

18 In the Matter of the Claim of Olga Korotkaya, Appellant. Commissioner of Labor, Respondent. [— NYS3d —]—

Unemployment Insurance—Benefits—Disqualification—Willful Misrepresentations to Obtain Benefits

Appeal from a decision of the Unemployment Insurance Appeal Board, filed October 7, 2024, which ruled that claimant was ineligible to receive unemployment insurance benefits because she was not available for employment.

On March 6, 2022, claimant suffered injuries in a nonwork-related incident and did not return to work until September 19, 2022. Thereafter, she worked intermittently and she applied for unemployment insurance benefits in November 2022. Claimant ultimately stopped working in February 2023 and continued to certify for benefits. The Department of Labor issued a determination finding claimant ineligible to receive unemployment insurance benefits effective February 27, 2023, through August 6, 2023, because she was not capable of working during that time period, and charged her with recoverable overpayments and imposed monetary and forfeiture penalties based upon a finding that she made willful misrepresentations to obtain benefits. Following a hearing, an Administrative Law Judge upheld the determination and the Unemployment Insurance Appeal Board affirmed. This appeal ensued.

We affirm. “In order for a claimant to be eligible for unemployment insurance benefits, he or she must be ready, willing and able to work in his or her usual employment or in any other employment for which he or she is reasonably fitted by training and experience” (*Matter of Lynch [Commissioner of Labor]*, 217 AD3d 1309, 1310 [3d Dept 2023] [internal quotation marks, brackets and citations omitted]; see *Matter of Ejim [Commissioner of Labor]*, 238 AD3d 1461, 1462 [3d Dept 2025]). “Whether a claimant is ready, willing and able to work is a question of fact for the Board to resolve and its determination will not be disturbed if supported by substantial evidence” (*Matter of Henry [Commissioner of Labor]*, 211 AD3d 1296, 1297 [3d Dept 2022] [internal quotation marks and citations omitted]; accord *Matter of Moi-Thuk-Shung [Commissioner of Labor]*, 227 AD3d 1348, 1349 [3d Dept 2024]).

The record reflects that claimant’s treating physician informed the Department in September 2023 that claimant was unable to work “in any capacity or occupation” from, as relevant here, February 24, 2023, going forward, due to the

injuries suffered in March 2022. Moreover, claimant admitted that she was unable to work due to her injuries from February 27, 2023, to August 6, 2023, despite certifying for benefits during that time. In light of the foregoing, the Board's determination that claimant was ineligible for unemployment benefits for that time period because she was unable to work is supported by substantial evidence (*see Matter of Moi-Thuk-Shung [Commissioner of Labor]*, 227 AD3d at 1350; *Matter of Lynch [Commissioner of Labor]*, 217 AD3d at 1311).

"As to the penalties imposed, whether a claimant has made a willful misrepresentation to obtain benefits is a factual issue for the Board to resolve and will be upheld if supported by substantial evidence" (*Matter of Cruz [Commissioner of Labor]*, 215 AD3d 1203, 1204-1205 [3d Dept 2023] [internal quotation marks and citations omitted]). To the extent that claimant attributed any misrepresentations to bad advice she received from the Department, "a claimant may be found to have made a willful misrepresentation to obtain benefits even if the false statement was made unintentionally or was the result of confusion" (*Matter of Ficalora [Commissioner of Labor]*, 233 AD3d 1215, 1217 [3d Dept 2024] [internal quotation marks and citations omitted]). Given the evidence in the record that claimant was unable to perform any work during the relevant time period, substantial evidence supports the Board's finding that she made willful misrepresentations to obtain benefits and its imposition of recoverable overpayments of benefits and forfeiture and monetary penalties will not be disturbed (*see Matter of Ejim [Commissioner of Labor]*, 238 AD3d at 1464; *Matter of Moi-Thuk-Shung [Commissioner of Labor]*, 227 AD3d at 1350; *Matter of Augustine [Commissioner of Labor]*, 27 AD3d 937, 937-938 [3d Dept 2006]). Claimant's remaining arguments, to the extent not specifically addressed, have been examined and found to be without merit.

Clark, J.P., Aarons, Ceresia, Fisher and Powers, JJ., concur. Ordered that the decision is affirmed, without costs.

19 In the Matter of Marisol Y., Appellant, v Steven Z., Respondent. [— NYS3d —]

Contempt—Civil Contempt—Violation of Stipulation of Settlement in Custody Proceeding—Sufficiency of Petition

Corcoran, J. Appeal from an order of the Family Court of Saratoga County (Amy Knussman, J.), entered March 18, 2025, which, in a proceeding pursuant to Family Ct Act article 6, granted respondent's motion to dismiss the petition.

Petitioner (hereinafter the mother) and respondent (herein-

after the father) are the unmarried parents of the subject child (born in 2010). The counseled parties entered into a March 22, 2024 order of custody on consent incorporating a stipulation of settlement which provided the father with primary physical custody and the mother with parenting time. As relevant here, the stipulation provided that “any parenting time for the [m]other shall take into consideration the child’s wishes . . . and the child’s wishes shall prevail.” With respect to visitation, the stipulation stated that “[t]he [f]ather shall encourage the child to visit the [m]other,” but that “neither parent shall put unnecessary pressure on the child to visit or contact the [m]other,” and “[s]hould the child continue in his refusal to exercise parenting time with the [m]other, the [f]ather shall not be held in contempt of [c]ourt, nor shall he be the subject of a violation, solely on this basis.” The stipulation authorized each parent to obtain the child’s medical records directly and to communicate with the child’s health care providers but prohibited either party from preventing the other from doing the same.

In September 2024, the mother filed a violation petition alleging that she had seen the child only once in approximately two years and that the father failed to encourage visitation. She further alleged that when she went to the child’s pediatrician’s office in the Town of Clifton Park, Saratoga County, she was informed that she had been removed from the office’s “call list” and that the child was now receiving care in the City of Saratoga Springs, Saratoga County. At the initial appearance, the father made an oral motion, in effect, to dismiss the petition for failure to state a cause of action pursuant to CPLR 3211 (a) (7); the attorney for the child joined his motion. Family Court granted the father’s motion and dismissed the petition without conducting a hearing. The mother appeals, and we affirm.

A violation petition is subject to the pleading requirements of CPLR 3013 and must be sufficiently particular to provide the court and the opposing party with notice of the occurrences to be proved and the material elements of the alleged violation (see Family Ct Act § 165 [a]; *Matter of Tomomi N. v Michael G.*, 237 AD3d 436, 437 [1st Dept 2025]; *Matter of Tonya YY. v James ZZ.*, 220 AD3d 1149, 1149-1150 [3d Dept 2023]; *Matter of Miller v Miller*, 90 AD3d 1185, 1186 [3d Dept 2011], *lv dismissed* 18 NY3d 944 [2012]). “[A] party seeking a finding of civil contempt based upon the violation of a court order must establish by clear and convincing evidence that the party charged with contempt had actual knowledge of a lawful, clear

and unequivocal order, that the charged party disobeyed that order, and that this conduct prejudiced the opposing party's rights" (*Matter of Samantha E. v Nicholas F.*, 233 AD3d 1295, 1299 [3d Dept 2024] [internal quotation marks and citations omitted]). The proponent of a violation petition must "establish, by clear and convincing evidence, that there was a lawful court order in effect with a clear and unequivocal mandate, that the person who allegedly violated the order had actual knowledge of the order's terms, and that the alleged violator's actions or failure to act defeated, impaired, impeded or prejudiced a right of the proponent" (*Matter of Jason VV. v Brittany XX.*, 230 AD3d 1398, 1402 [3d Dept 2024] [internal quotation marks, brackets and citation omitted]).

"When reviewing a motion to dismiss pursuant to CPLR 3211 (a) (7), which is proper in Family Court proceedings because they are civil in nature, we afford the petition a liberal construction, accept the allegations contained therein as true, and grant the petitioner the benefit of every favorable inference" (*Matter of Koska v Koska*, 226 AD3d 780, 782 [2d Dept 2024] [internal quotation marks and citations omitted]). Dismissal without a hearing is warranted when the petition fails to set forth sufficient facts that, if established at a hearing, would provide a basis for granting the relief sought (*see Matter of Tonya YY. v James ZZ.*, 220 AD3d at 1150).

Here, Family Court properly dismissed the violation petition without a hearing. Even liberally construed, the mother's allegation that the father failed to encourage visitation over an approximately two-year period was too vague and conclusory to provide the father "with notice of a particular event or violation such that []he could prepare a defense" (*Matter of Miller v Miller*, 90 AD3d at 1186). Nor do the mother's remaining allegations, even if accepted as true, warrant a hearing or support a finding of contempt. The parties seemingly agreed that the subject child independently resisted parenting time with the mother based upon their stipulation that his refusal alone would not evince contemptuous conduct by the father. Accordingly, the allegation that the mother had limited contact with the child over an extended period, standing alone, does not establish a violation of the parties' stipulation or support a finding of contempt. Similarly, the stipulation authorized each parent to obtain medical records and communicate with providers and prohibited either parent from engaging in conduct that would prevent the other from doing so. However, the petition did not allege that the father interfered with the mother's ability to obtain medical information, nor did it allege that the

father impeded the mother's access to records. Instead, the petition merely described an apparent change by the medical practice in assigning a particular provider and removing the mother from an internal "call list," without alleging any conduct by the father that contravened the stipulation. Under these circumstances, the allegations set forth in the petition, even if accepted as true, were insufficient to support a finding of contempt, and Family Court properly dismissed the petition without a hearing.

Clark, J.P., Reynolds Fitzgerald, Ceresia and Powers, JJ., concur. Ordered that the order is affirmed, without costs.

20 In the Matter of Michael L. Johnson, as Chief Enforcement Counsel of the Division of Election Law Enforcement of the New York State Board of Elections, Respondent, v Devin McManus, as Treasurer of DSA For the Many, et al., Appellants. [— NYS3d —]—

Elections—Campaign Financing—Contribution Limits Exceeded—Civil Penalties

Mackey, J. Appeal from a judgment of the Supreme Court (Roger McDonough, J.), entered January 21, 2025, in Albany County, which granted petitioner's application, in a proceeding pursuant to Election Law § 3-104 (5) (a) and Election Law article 16, to confirm a determination of the New York State Board of Elections finding that respondents violated Election Law § 14-126 (2) and to impose a civil penalty in accordance with that determination.

In October 2022, the New York State Board of Elections (hereinafter the BOE) Division of Election Law Enforcement, of which petitioner is chief enforcement counsel, commenced an investigation into respondent DSA For the Many (hereinafter DSA), a registered multi-candidate committee organized to support candidates endorsed by the Democratic Socialists of America seeking office in the New York City area. Respondent Devin McManus is DSA's treasurer. The BOE's investigation sought to determine whether DSA was authorized to act on behalf of the 13 candidates it purported to represent in the 2022 election cycle and whether it made contributions to those candidates in excess of the contribution limits set forth in the Election Law. At the investigation's conclusion, petitioner determined that there was substantial reason to believe that respondents had violated the Election Law and an administrative enforcement proceeding was commenced.

Respondents waived their right to an evidentiary hearing and, based upon the parties' respective submissions, a BOE

Hearing Officer determined that respondents had failed to obtain authorization to represent 12 of the candidates at issue during at least part of the 2022 election cycle and that they had violated Election Law § 14-126 (2) by making contributions to the subject candidates in excess of applicable contribution limits under Election Law § 14-114. Accordingly, the Hearing Officer recommended the imposition of a civil penalty and fines totaling \$312,068.95. Petitioner thereafter commenced this proceeding pursuant to Election Law § 3-104 (5) (a) and Election Law article 16 to confirm the BOE's determination and impose civil penalties upon respondents. Respondents answered and opposed the petition. Supreme Court ultimately granted the petition, but reduced the total penalty imposed to \$212,068.95. Respondents appeal.

This Election Law matter rests upon a question of “pure statutory construction dependent only on accurate apprehension of legislative intent” (*Matter of City of Long Beach v New York State Pub. Empl. Relations Bd.*, 39 NY3d 17, 22 [2022] [internal quotation marks and citations omitted]; see *Matter of Fleetwood Drywall Inc. [Commissioner of Labor]*, 201 AD3d 1059, 1062 [3d Dept 2022]; *Matter of Brennan Ctr. for Justice at NYU Sch. of Law v New York State Bd. of Elections*, 159 AD3d 1301, 1307 n [3d Dept 2018, Egan Jr., J., concurring], *lv denied* 32 NY3d 912 [2019]). The best evidence of legislative intent is the plain language of the statute itself (see *Rodriguez v City of New York*, 31 NY3d 312, 317 [2018]; see also *Matter of Marzullo v DelConte*, 165 AD3d 1466, 1468 [3d Dept 2018]), and “[w]hen a statute is part of a broader legislative scheme, its language must be construed in context and in a manner that harmonizes the related provisions and renders them compatible” (*Matter of Kosmider v Whitney*, 34 NY3d 48, 55 [2019] [internal quotation marks and citations omitted]). We are further guided by the Court of Appeals’ repeated observations that, in view of the detailed procedural framework set forth in the Election Law, “there is no invitation for the courts to exercise flexibility in [the] statutory interpretation” thereof (*Matter of Gross v Albany County Bd. of Elections*, 3 NY3d 251, 258 [2004]; see *Matter of Seawright v Board of Elections in the City of N.Y.*, 35 NY3d 227, 233 [2020]).

Political committees are permitted under the Election Law to “aid or take part in the election or defeat of a candidate for public office” (Election Law § 14-100 [1]) and “to support more than one candidate” for this purpose (Election Law § 14-114 [4]). In doing so, the treasurer of each such committee is required to make a sworn report to the BOE reporting “any

money or other valuable thing or . . . any liability to pay money or its equivalent” received or spent in connection with an election (Election Law § 14-102 [1]), and each individual candidate is required to make a similar sworn report of contributions made to “aid his or her own nomination or election” (Election Law § 14-104 [1]). In lieu of filing his or her own financial disclosure statement, however, a candidate may execute a sworn statement in accordance with Election Law § 14-104, indicating that “such candidate has made no such expenditures and does not intend to make any such expenditures, except through a political committee authorized by such candidate” (Election Law § 14-104 [1]). In turn, “[a]ny political committee aiding or taking part in the election or nomination of any candidate” must file with the BOE a sworn statement “that the candidate has authorized the political committee to aid or take part in his [or her] election” (Election Law § 14-112). A committee so authorized may then “fulfill all of the filing requirements of [the Election Law] on behalf of such candidate” (Election Law § 14-104 [1]).

In facilitating campaign contributions, which are subject to prescribed statutory limits, the Election Law provides that contributions made to “a political committee authorized to support more than one candidate” are “deemed contributed to every candidate supported by such committee,” with each candidate’s portion thereof allocated pursuant to “any formula based upon reasonable standards established by the committee” (Election Law § 14-114 [4]). Accordingly, the relevant committee is required to report “the total amount received by the committee from each contributor on behalf of all such candidates and the amount of each such contribution allocated to each candidate by dollar amount and percentage” (Election Law § 14-114 [4]). Pertinent here, Election Law § 14-126 (2), upon which the penalties here were imposed, provides that “[a]ny person who, acting as or on behalf of a candidate or political committee, under circumstances evincing an intent to violate such law, unlawfully accepts a contribution in excess of a contribution limitation established in [Election Law article 14], shall be required to refund such excess amount and shall be subject to a civil penalty equal to the excess amount plus a fine of up to [\$10,000],” recoverable in a special proceeding or action by the BOE (Election Law § 14-126 [2]).

In finding respondents in violation of the Election Law, petitioner maintained that the BOE had “no record of any candidate authorizing” DSA to act on their behalf and that, although McManus had filed CF-03 committee authorization

forms purporting to list these candidates as having so authorized DSA, Election Law § 14-104 (1) further required each candidate to expressly authorize DSA by submission of a CF-16 candidate authorization form. Absent proper authorization, petitioner argued that DSA constituted an individual contributor pursuant to Election Law § 14-114 (1) and, by exceeding the applicable contributor limits under Election Law § 14-114 (1) (former [b]), penalties under Election Law § 14-126 (2) were warranted. Alternatively, even had DSA been properly authorized, petitioner asserted that DSA's expenditures on behalf of the subject candidates were in excess of the allocations reported to the BOE under Election Law § 14-114 (4) and, thus, likewise warranted penalties pursuant to Election Law § 14-126 (2).

We agree with respondents, however, that Election Law § 14-126 (2) is inapplicable to the circumstances presented here, as the conduct alleged by petitioner amounted only to the making, and not the acceptance, of contributions in support of the subject candidates. In fact, petitioner's arguments on appeal emphasize DSA's actions in "ma[king] expenditures resulting in in-kind contributions . . . in excess of contribution limits." There is no allegation that DSA's individual donors exceeded their contribution limits in providing funds to DSA, and petitioner conceded as much before the BOE. In contrast, the plain language of Election Law § 14-126 (2) penalizes a person "acting as or on behalf of a candidate or political committee" who "accepts" contributions in excess of applicable limitations, not those making contributions (emphasis added). This reading is consistent with the restorative remedies afforded under Election Law § 14-126 (2) requiring that an offending party "refund" any excess contribution amount, thus targeting those who receive and are consequently in possession of excess funds (see generally *Matter of Lauder v Pellegrino*, 153 AD3d 1114, 1118 [3d Dept 2017], *lv dismissed* 29 NY3d 1099 [2017]).* It is significant that Election Law § 14-114 (1), which addresses contributions and receipt limitations, likewise distinguishes between "mak[ing]" and "accept[ing]" a contribution (Election Law § 14-114 [1] [former (b)]; see generally *Matter of Kosmider v Whitney*, 34 NY3d at 55, 61). "[W]hen different terms are used in various parts of a statute or rule, it is reasonable to assume that a difference between them is intended" (*Com-*

* This distinction is further evidenced in Election Law § 14-126 (5)—although not the basis of the underlying factual allegations or penalties imposed here—which criminalizes not only "accept[ing]" an excess contribution but also "contribut[ing]," "aid[ing] or participat[ing] in the acceptance of" an excess contribution.

monwealth of the N. Mariana Is. v Canadian Imperial Bank of Commerce, 21 NY3d 55, 63 [2013] [internal quotation marks and citation omitted]; see *Matter of Perkins v Town of Dryden Planning Bd.*, 172 AD3d 1695, 1697 [3d Dept 2019]), and “[t]he Legislature is presumed to be aware of the distinction” between the terms used (*People v Elmer*, 19 NY3d 501, 507 [2012]; see *Commonwealth of the N. Mariana Is. v Canadian Imperial Bank of Commerce*, 21 NY3d at 62).

Moreover, even adopting petitioner’s position that respondents failed to obtain proper authorization to raise funds on behalf of the subject candidates and that they accepted funds in excess of prescribed contribution limits within the meaning of Election Law § 14-126 (2), we note that the statute further requires that such have taken place “under circumstances evincing an intent to violate” the Election Law. Such a finding is unsupported here, as the record reveals respondents’ attempts to obtain candidate authorization forms before a campaign treasurer raised concerns in this regard and confirmed with the BOE their understanding that those forms were not required. Moreover, one candidate at issue openly promoted her inclusion on DSA’s slate and numerous others thereafter indicated that they had authorized DSA to act on their behalf during the relevant election cycle. Respondents also submitted tabulations of their expenditures and contribution allocations to the BOE—albeit without detailing the same per candidate—shortly after the election in November 2022. The foregoing thus fails to demonstrate respondents’ intent to violate the Election Law as alleged. Accordingly, affording the language of Election Law § 14-126 (2) its “plain meaning” (*Matter of Peyton v New York City Bd. of Stds. & Appeals*, 36 NY3d 271, 280 [2020] [internal quotation marks and citation omitted]; see *Matter of Town of Southampton v New York State Dept. of Envtl. Conservation*, 194 AD3d 1310, 1315 [3d Dept 2021], *affd* 39 NY3d 201 [2023]; *Matter of Independence Party State Comm. v New York State Bd. of Elections*, 297 AD2d 459, 461 [3d Dept 2002]), we do not find it to be applicable to the facts presented here and, thus, Supreme Court erred in granting the petition and assessing penalties upon that basis.

Aarons, J.P., Pritzker, Reynolds Fitzgerald and Fisher, JJ., concur. Ordered that the judgment is reversed, on the law, without costs, and petition dismissed.

21 In the Matter of Devin Keitt, Petitioner, v Daniel F. Martuscello III, as Commissioner of Corrections and Community Supervision, Respondent. [252 NYS3d 347]—

Prisons and Incarcerated Individuals—Discipline—Assaulting Staff and Re-

fusing Direct Order—Hearing Officer Remedied Any Deficiencies in Employee Assistance

Proceeding pursuant to CPLR article 78 (transferred to this Court by order of the Supreme Court, entered in Albany County) to review a determination of respondent finding petitioner guilty of violating certain prison disciplinary rules.

Petitioner, an incarcerated individual, was charged in two misbehavior reports with violating several prison disciplinary rules in the wake of an incident in which he, among other things, purportedly refused orders to return to his unit and attacked the correction sergeant who gave them. Following a combined tier III disciplinary hearing at which the charges in one of the reports were dismissed, the Hearing Officer found petitioner guilty of assaulting staff and refusing a direct order. The determination was affirmed upon administrative appeal, and this CPLR article 78 proceeding ensued.*

We confirm. Petitioner asserts that he received inadequate employee assistance. The record reflects, however, that petitioner did not request any witnesses and that the Hearing Officer provided him with copies of much of the documentation he had requested and adjourned the hearing to permit him time to review it, read the remaining documentation aloud to him, and displayed the relevant photographic and video evidence during the hearing. Petitioner further fails to articulate how his defense was prejudiced by the purported flaws in assistance and, indeed, he acknowledged at the end of the hearing that he had no additional documentary evidence or testimony he wished to present. As such, we are satisfied that any deficiencies in employee assistance were remedied by the Hearing Officer (*see Matter of Breazil v Griffin*, 175 AD3d 1697, 1698 [3d Dept 2019]; *Matter of Lopez v Annucci*, 171 AD3d 1326, 1327-1328 [3d Dept 2019]). To the extent that they are not addressed by the foregoing, petitioner's remaining arguments have been examined and found to lack merit.

Pritzker, J.P., Ceresia, McShan, Mackey and Corcoran, JJ., concur. Adjudged that the determination is confirmed, without costs, and petition dismissed.

22 In the Matter of Attorneys in Violation of Judiciary Law § 468-a. Attorney Grievance Committee for the Third Judicial

* Although this proceeding was properly transferred to this Court since petitioner raised an issue of substantial evidence in the petition, he has abandoned that issue by not addressing it in his brief (*see Matter of Ortiz v Annucci*, 214 AD3d 1271, 1272 n [3d Dept 2023]; *Matter of Davison v Annucci*, 169 AD3d 1318, 1318 n [3d Dept 2019]).

Department, Petitioner; Venantius Tan, Respondent. (Attorney Registration No. 2823433.) [252 NYS3d 351]—

Attorney and Client—Reinstatement

Motion by respondent for an order reinstating him to the practice of law following his suspension by September 2024 order of this Court (*Matter of Attorneys in Violation of Judiciary Law* § 468-a, 230 AD3d 1498, 1519 [3d Dept 2024]; see Rules for Atty Disciplinary Matters [22 NYCRR] § 1240.16; Rules of App Div, 3d Dept [22 NYCRR] § 806.16).

Upon reading respondent's notice of motion and affidavit with exhibit sworn to February 3, 2026, affirmation of respondent's counsel with exhibit dated February 3, 2026, and the March 16, 2026 responsive correspondence from the Attorney Grievance Committee for the Third Judicial Department, and having determined, by clear and convincing evidence, that (1) respondent has complied with the order of suspension and the rules of this Court, (2) respondent has the requisite character and fitness to practice law, and (3) it would be in the public interest to reinstate respondent to the practice of law (see Rules for Atty Disciplinary Matters [22 NYCRR] § 1240.16 [a]), it is ordered that respondent's motion for reinstatement is granted; and it is further ordered that respondent is reinstated as an attorney and counselor-at-law, effective immediately.

Garry, P.J., Pritzker, Ceresia, Mackey and Ryba, JJ., concur.

23 In the Matter of Attorneys in Violation of Judiciary Law § 468-a. Attorney Grievance Committee for the Third Judicial Department, Petitioner; Qingjie Wang, Respondent. (Attorney Registration No. 3928942.) [252 NYS3d 348]—

Attorney and Client—Reinstatement

Motion by respondent for an order reinstating them to the practice of law following their suspension by October 2021 order of this Court (*Matter of Attorneys in Violation of Judiciary Law* § 468-a, 198 AD3d 1068, 1087 [3d Dept 2021]; see Rules for Atty Disciplinary Matters [22 NYCRR] § 1240.16; Rules of App Div, 3d Dept [22 NYCRR] § 806.16).

Upon reading respondent's notice of motion and affidavit with exhibits sworn to February 18, 2026, and the March 16, 2026 responsive correspondence from the Attorney Grievance Committee for the Third Judicial Department, and having determined, by clear and convincing evidence, that (1) respondent has satisfied the requirements of Rules of the Appellate Division, Third Department (22 NYCRR) § 806.16 (c) (5), (2) respondent has complied with the order of suspension and the

rules of this Court, (3) respondent has the requisite character and fitness to practice law, and (4) it would be in the public interest to reinstate respondent to the practice of law (*see* Rules for Atty Disciplinary Matters [22 NYCRR] § 1240.16 [a]), it is ordered that respondent's motion for reinstatement is granted; and it is further ordered that respondent is reinstated as an attorney and counselor-at-law, effective immediately.

Garry, P.J., Pritzker, Ceresia, Mackey and Ryba, JJ., concur.

24 In the Matter of Attorneys in Violation of Judiciary Law § 468-a. Attorney Grievance Committee for the Third Judicial Department, Petitioner; Jacob Hardie Wilson, Respondent. (Attorney Registration No. 4716700.) [252 NYS3d 350]—

Attorney and Client—Reinstatement—Proof of Compliance with Continuing Legal Education Condition

Motion by respondent for an order reinstating him to the practice of law following his suspension by September 2022 order of this Court (*Matter of Attorneys in Violation of Judiciary Law § 468-a*, 208 AD3d 1421, 1444 [3d Dept 2022]; *see* Rules for Atty Disciplinary Matters [22 NYCRR] § 1240.16; Rules of App Div, 3d Dept [22 NYCRR] § 806.16).

Upon reading respondent's notice of motion and affidavit with exhibits sworn to January 8, 2026, and the March 16, 2026 responsive correspondence from the Attorney Grievance Committee for the Third Judicial Department, and having determined, by clear and convincing evidence, that (1) respondent has complied with the order of suspension and the rules of this Court, (2) respondent has the requisite character and fitness to practice law, and (3) it would be in the public interest to reinstate respondent to the practice of law (*see* Rules for Atty Disciplinary Matters [22 NYCRR] § 1240.16 [a]), we grant his application. Notwithstanding his satisfaction of the substantive requirements for reinstatement, we direct respondent to (1) demonstrate his completion of six continuing legal education credits in the areas of Skills and/or Law Practice Management (*see* Rules of App Div, All Depts [22 NYCRR] § 1500.2 [d], [e]) that specifically relate to the practice of law in New York (*see* Rules of App Div, 3d Dept [22 NYCRR] § 806.16 [c] [5] [i]); and (2) provide proof of his compliance with this condition to both this Court and the Attorney Grievance Committee for the Third Judicial Department within 60 days of this Court's order. Accordingly, it is ordered that respondent's motion for reinstatement is granted; and it is further ordered that respondent is reinstated as an attorney and counselor-at-law, effective immediately, subject to the conditions set forth in this decision.

Garry, P.J., Pritzker, Ceresia, Mackey and Ryba, JJ., concur.

25 In the Matter of Andrew Paul Zweben, an Attorney. (Attorney Registration No.1480748.) [— NYS3d —]

Attorney and Client—Disciplinary Proceedings—Indefinite Suspension—Medical Incapacity

Attorney and Client—Disciplinary Proceedings—Interim Suspension—Default in Responding to Attorney Grievance Committee’s Repeated and Lawful Demands for Information and Documentation Regarding Attorney Escrow Account

Per Curiam. Respondent was admitted to practice by the First Department in 1973 and maintains a business address in Ulster County (*see* Rules for Atty Disciplinary Matters [22 NYCRR] § 1240.7 [a] [2]). In June 2025, the Attorney Grievance Committee for the Third Judicial Department (hereinafter AGC) commenced an investigation into respondent respecting his attorney escrow account. In sum, respondent’s bank had issued an Overdraft/Dishonored Check Report demonstrating that respondent had issued six escrow checks against insufficient funds. After respondent’s daughter informed AGC of respondent’s medical issues, respondent was granted two extensions of time to respond to AGC’s complaint. Respondent’s daughter ultimately responded to the complaint; however, the documents submitted did not comply with AGC’s demands. Accordingly, AGC now moves for respondent’s interim suspension based on his failure to comply with its lawful demands (*see* Rules for Atty Disciplinary Matters [22 NYCRR] § 1240.9 [a] [3]). Alternatively, AGC requests that this Court impose an indefinite suspension pursuant to the Rules for Attorney Disciplinary Matters (22 NYCRR) § 1240.14 (b) upon the ground of respondent’s medical incapacity.

We turn, first, to AGC’s request for respondent’s indefinite suspension due to medical incapacity. Rules for Attorney Disciplinary Matters (22 NYCRR) § 1240.14 (b) authorizes AGC to “apply to the Court for a determination that the respondent is incapacitated from practicing law by reason of mental disability or condition, alcohol or substance abuse, or any other condition that renders the respondent incapacitated from practicing law.” AGC is not obligated to support an application with medical evidence confirming a respondent’s incapacity (*see e.g. Matter of O’Phelan*, 225 AD3d 1095, 1095 [3d Dept 2024]; *Matter of Scharf*, 219 AD3d 1602, 1603 [3d Dept 2023]; *Matter of Purser*, 195 AD3d 1146, 1147 [3d Dept 2021]; *Matter of Hall*, 171 AD3d 1446, 1447-1448 [3d Dept 2019]). However, this Court has generally considered *credible* evidence with which the Court can be assured that the respondent is medi-

cally incapacitated, such as statements from the respondent or the respondent's attorney, correspondence from the respondent's treating physician, correspondence from the respondent's healthcare proxy or power of attorney or a foreign court order premised upon incapacity (see *Matter of O'Phelan*, 225 AD3d at 1096; *Matter of Scharf*, 219 AD3d at 1603; *Matter of Roussin*, 208 AD3d 174, 176-177 [1st Dept 2022]; *Matter of Purser*, 195 AD3d at 1147). In this case, this Court has only had the opportunity to review two emails from respondent's daughter that were sent to AGC, which suggest that respondent has serious medical issues that may have some impact upon respondent's ability to practice law, but also suggest that it is "crucial" that respondent maintains the ability to engage in the practice of law.* Accordingly, the scant record before us supports contradictory but equally plausible inferences concerning respondent's capacity and therefore does not support AGC's request for an indefinite suspension premised on medical incapacity.

Turning to the alternative basis for AGC's motion, "[a] respondent may be suspended from practice on an interim basis during the pendency of an investigation or proceeding . . . upon a finding by the Court that the respondent has engaged in conduct immediately threatening the public interest" (Rules for Atty Disciplinary Matters [22 NYCRR] § 1240.9 [a]). In this vein, "a respondent's demonstrated failure to cooperate and comply with AGC's lawful demands not only constitutes professional misconduct immediately threatening the public interest, it also clearly jeopardizes the effectiveness of the attorney disciplinary system" (*Matter of Figueroa*, 241 AD3d 1670, 1671 [3d Dept 2025] [internal quotation marks, brackets and citations omitted]). To that end, "the mere failure to comply with a lawful demand of AGC during its investigation is sufficient to form the basis for a suspension" (*Matter of Brown*, 232 AD3d 981, 982 [3d Dept 2024] [internal quotation marks and citations omitted]).

Our review of the record discloses sufficient evidence establishing respondent's default in responding to AGC's repeated and lawful demands for information and documentation (see Rules for Atty Disciplinary Matters [22 NYCRR] § 1240.9 [a] [3]). Respondent was provided with two extensions of time to respond to the complaint, and although respondent's

* One email was attached as an exhibit to AGC's motion, and one email was forwarded to this Court by AGC after the filing of its motion. To date, this Court has not received any correspondence from respondent or respondent's daughter respecting the pending motion.

daughter submitted some documentation, that submission was almost entirely deficient, despite her representation that she had assisted respondent with bookkeeping and had maintained diligent records. Moreover, although respondent's daughter advised AGC that she intended to respond to its request for information on respondent's behalf, AGC has notified this Court that it has received no further correspondence from respondent. Accordingly, based on these facts, respondent received ample notice of the complaint against him and was afforded multiple opportunities to respond, but has ultimately failed to substantially comply with the lawful demands of AGC (*see Matter of Fischer*, 239 AD3d 1229, 1230-1231 [3d Dept 2025]; *Matter of Krinsky*, 195 AD3d 1149, 1150-1151 [3d Dept 2021]). Therefore, we find that respondent's default constitutes professional misconduct that immediately threatens the public interest (*see* Rules for Atty Disciplinary Matters [22 NYCRR] § 1240.9 [a]), and that his conduct jeopardizes the effectiveness of the attorney disciplinary system (*see Matter of Brown*, 232 AD3d at 983; *Matter of Nestler*, 193 AD3d 1320, 1321-1322 [3d Dept 2021]). We therefore suspend respondent during the pendency of AGC's investigation and until further order of this Court, effective immediately. However, we note that our issuance of this order is without prejudice to respondent seeking to convert the suspension imposed herein to a medical-incapacity suspension pursuant to Rules of Professional Conduct (22 NYCRR) § 1240.14 (b), upon the presentation to this Court of sufficient medical proof demonstrating such an incapacity (*see Matter of Russell-Ward*, 179 AD3d 11, 13 [1st Dept 2019]; *Matter of Co*, 148 AD3d 142, 145 [1st Dept 2017]). Further, we remind respondent of his affirmative and ongoing obligation to respond or appear for further investigatory or disciplinary proceedings, and note that his failure to do so within six months of this order may result in his disbarment without further notice (*see Matter of Fischer*, 239 AD3d at 1232).

Garry, P.J., Aarons, McShan, Powers and Mackey, JJ., concur. Ordered that the motion of the Attorney Grievance Committee for the Third Judicial Department is granted in part and denied in part in accordance with the findings set forth in this decision; and it is further ordered that respondent is suspended from the practice of law, effective immediately, and until further order of this Court (*see generally* Rules for Atty Disciplinary Matters [22 NYCRR] § 1240.16); and it is further ordered that, for the period of suspension, respondent is commanded to desist and refrain from the practice of law in any form in the State of New York, either as principal or as agent, clerk or employee of another; and respondent is hereby forbidden to ap-

pear as an attorney or counselor-at-law before any court, judge, justice, board, commission or other public authority, or to give to another an opinion as to the law or its application, or any advice in relation thereto, or to hold himself out in any way as an attorney and counselor-at-law in this state; and it is further ordered that respondent shall comply with the provisions of the Rules for Attorney Disciplinary Matters regulating the conduct of suspended attorneys and shall duly certify to the same in his affidavit of compliance (*see* Rules for Atty Disciplinary Matters [22 NYCRR] § 1240.15); and it is further ordered that respondent shall, within 30 days of the date of this decision, surrender to the Office of Court Administration any Attorney Secure Pass issued to him; and it is further ordered that, within 20 days from the date of this decision, respondent may submit a request, in writing, to this Court for a postsuspension hearing (*see* Rules for Atty Disciplinary Matters [22 NYCRR] § 1240.9 [c]); and it is further ordered that respondent's failure to respond to or appear for further investigatory or disciplinary proceedings within six months from the date of this decision may result in his disbarment by the Court without further notice (*see* Rules for Atty Disciplinary Matters [22 NYCRR] § 1240.9 [b]).

26 In the Matter of Raymond Charles Rubino, an Attorney. (Attorney Registration No. 2923233.) [252 NYS3d 349]—

Attorney and Client—Resignation—Nondisciplinary Reasons—Ineligible Due to Delinquency in Attorney Registration Requirements

Per Curiam. Raymond Charles Rubino was admitted to practice by this Court in 1998 and lists a business address in Florham Park, New Jersey with the Office of Court Administration. Rubino now seeks leave to resign from the New York bar for nondisciplinary reasons (*see* Rules for Atty Disciplinary Matters [22 NYCRR] § 1240.22 [a]). The Attorney Grievance Committee for the Third Judicial Department (hereinafter AGC) opposes the application by correspondence from its Deputy Chief Attorney.

As is noted by AGC, Rubino is presently delinquent in his New York attorney registration requirements, having failed to register for one biennial period beginning in 2024 (*see* Judiciary Law § 468-a; Rules of Chief Admr of Cts [22 NYCRR] § 118.1). Inasmuch as Rubino is therefore subject to potential disciplinary action (*see* Judiciary Law § 468-a [5]; Rules of Prof Conduct [22 NYCRR 1200.0] rule 8.4 [d]; *see also Matter of Attorneys in Violation of Judiciary Law § 468-a*, 113 AD3d 1020, 1021 [3d Dept 2014]), he is ineligible for nondisciplinary resig-

nation and his application must be denied (*see Matter of Cluff*, 148 AD3d 1346, 1346 [3d Dept 2017]; *Matter of Bomba*, 146 AD3d 1226, 1226-1227 [3d Dept 2017]). Further, any future application by Rubino must be supported by proof of his full satisfaction of the requirements of Judiciary Law § 468-a and Rules of the Chief Administrator of the Courts (22 NYCRR) § 118.1 (*see Matter of Frank*, 146 AD3d 1228, 1228-1229 [3d Dept 2017]).

Garry, P.J., Reynolds Fitzgerald, Ceresia, Powers and Mackey, JJ., concur. Ordered that Raymond Charles Rubino's application for permission to resign is denied.

27 In the Matter of John Thomas Kirtley III, an Attorney. (Attorney Registration No. 4595211.) [252 NYS3d 352]—

Attorney and Client—Resignation—Nondisciplinary Reasons

Per Curiam. John Thomas Kirtley III was admitted to practice by this Court in 2008 and lists a business address in Dallas, Texas with the Office of Court Administration. Kirtley now seeks leave to resign from the New York bar for nondisciplinary reasons (*see* Rules for Atty Disciplinary Matters [22 NYCRR] § 1240.22 [a]). The Attorney Grievance Committee for the Third Judicial Department (hereinafter AGC) advises that it does not oppose Kirtley's application.

Upon reading Kirtley's affidavit sworn to February 24, 2026, and filed February 26, 2026, and upon reading the March 25, 2026 correspondence in response by the Deputy Chief Attorney for AGC, and having determined that Kirtley is eligible to resign for nondisciplinary reasons, we grant his application and accept his resignation.

Clark, J.P., Aarons, Reynolds Fitzgerald, Corcoran and Ryba, JJ., concur. Ordered that John Thomas Kirtley III's application for permission to resign is granted and his nondisciplinary resignation is accepted; and it is further ordered that John Thomas Kirtley III's name is hereby stricken from the roll of attorneys and counselors-at-law of the State of New York, effective immediately, and until further order of this Court (*see generally* Rules for Atty Disciplinary Matters [22 NYCRR] § 1240.22 [b]); and it is further ordered that John Thomas Kirtley III is commanded to desist and refrain from the practice of law in any form in the State of New York, either as principal or as agent, clerk or employee of another; and Kirtley is hereby forbidden to appear as an attorney or counselor-at-law before any court, judge, justice, board, commission or other public authority, or to give to another an opinion as to the law or its application, or any advice in relation thereto, or to hold himself

out in any way as an attorney and counselor-at-law in this state; and it is further ordered that John Thomas Kirtley III shall, within 30 days of the date of this decision, surrender to the Office of Court Administration any Attorney Secure Pass issued to him.

28 In the Matter of Rebecca L. Wittman, an Attorney. Attorney Grievance Committee for the Third Judicial Department, Petitioner; Rebecca L. Wittman, Respondent. (Attorney Registration No. 2389229.) [— NYS3d —]

Attorney and Client—Disciplinary Proceedings—Discipline upon Consent Arising out of Negligent Representation of Criminal Defendant on Appeal—Censure Appropriate Sanction

Per Curiam. Respondent was admitted to practice by the Fourth Department in 1991 and maintains a business address in Madison County (*see* Rules for Atty Disciplinary Matters [22 NYCRR] § 1240.7 [a] [2]). By petition of charges verified August 29, 2025, petitioner seeks to impose discipline upon respondent, alleging various violations of the Rules of Professional Conduct arising out of her representation of a criminal defendant on his appeal before the Appellate Division, Fourth Department. Respondent was heard in answer on September 30, 2025, and the parties have since filed their respective Statements of Disputed/Undisputed Facts. By joint motion marked returnable March 23, 2026, the parties have now moved for the imposition of discipline upon consent (*see* Rules for Atty Disciplinary Matters [22 NYCRR] § 1240.8 [a] [5]).

The parties' joint motion includes a stipulation of facts, aggravating and mitigating factors and an agreement as to the ultimate sanction (*see* Rules for Atty Disciplinary Matters [22 NYCRR] § 1240.8 [a] [5] [i] [a], [c], [d]). Moreover, respondent has provided an affidavit, wherein she admits to several rule violations regarding her representation of her client on his criminal appeal, including her failure to pursue the objectives of the client, her prejudice or damage to the client during the course of the representation, her failure to act with reasonable diligence and promptness in representing the client and her neglect of a legal matter entrusted to her (*see* Rules for Atty Disciplinary Matters [22 NYCRR 1200.0] rules 1.1 [c] [1], [2]; 1.3 [a], [b]), among other misconduct (*see* Rules of Atty Disciplinary Matters [22 NYCRR 1200.0] rules 1.4 [a] [2], [3], [4]; [b]; 1.16 [e]). Respondent's submissions also reveal that she freely, voluntarily and without duress or coercion consents to the joint motion and the agreed-upon sanction and that she is fully aware of the consequences of entering into such a stipulation (*see* Rules for Atty Disciplinary Matters [22 NYCRR]

§ 1240.8 [a] [5] [iii]). Given that the parties have satisfied the procedural requirements, we turn to the consideration of the appropriate sanction for the underlying misconduct (*see Matter of Chukwu*, 247 AD3d 1305, 1306 [3d Dept 2026]; *Matter of Orseck*, 227 AD3d 1222, 1224 [3d Dept 2024]).

While the parties agree to the imposition of a censure, such a sanction must nonetheless be commensurate with similar cases, and such sanction must protect the public, maintain the honor and integrity of the profession, or deter others from committing similar misconduct (*see* Rules for Atty Disciplinary Matters [22 NYCRR] § 1240.8 [b] [2]). We have generally imposed a censure in cases involving negligent representation—including in the criminal context—after consideration of the relevant mitigating evidence (*see Matter of Cruikshank*, 246 AD3d 1215, 1218 [3d Dept 2026]; *Matter of D’Amico*, 166 AD3d 1375, 1376 [3d Dept 2018]; *Matter of Shaw*, 137 AD3d 19, 20-21 [1st Dept 2016]; *see also Matter of Hoover*, 196 AD3d 994, 995-996 [3d Dept 2021]; *compare Matter of Swayze*, 230 AD3d 906, 907 [3d Dept 2024]; *Matter of Ezeala*, 163 AD3d 1348, 1349 [3d Dept 2018]).

In mitigation, respondent has admitted to the facts underlying the misconduct without attempting to excuse her conduct (*see generally* ABA Standards for Imposing Lawyer Sanctions standard 9.32 [l]), she did not have a selfish or dishonest motive (*see* ABA Standards for Imposing Lawyer Sanctions standard 9.32 [b]), and some of her conduct can be attributed to certain medical and personal issues that arose amidst her representation of the client (*see* ABA Standards for Imposing Lawyer Sanctions standard 9.32 [c], [h]). Conversely, in aggravation, petitioner cites respondent’s prior disciplinary history for similar misconduct (*see* ABA Standards for Imposing Lawyer Sanctions standard 9.22 [a], [c]; *see also Matter of Chukwu*, — AD3d at —, 2026 NY Slip Op 01266, *1-2 [3d Dept 2026]; *Matter of Sutton*, 232 AD3d 985, 986-987 [3d Dept 2024]; *Matter of Hogan*, 143 AD3d 1044, 1045 [3d Dept 2016]), as well as her substantial experience in the practice of law (*see* ABA Standards for Imposing Lawyer Sanctions standard 9.22 [i]; *see also Matter of White*, 243 AD3d 1112, 1114 [3d Dept 2025]). Given the totality of the circumstances, and in specific consideration of the mitigating circumstances presented, including but not limited to her admission of the underlying misconduct, we grant the parties’ motion and censure respondent (*see Matter of Sutton*, 232 AD3d 985, 987 [3d Dept 2024]).

Clark, J.P., Pritzker, Ceresia, McShan and Mackey, JJ.,

concur. Ordered that the joint motion by the parties is granted; and it is further ordered that respondent is censured.

(April 16, 2026)

1 The People of the State of New York, Respondent, v
Jonathan Guerin, Appellant. [— NYS3d —]—

Crimes—Plea of Guilty—Sufficiency of Allocution

McShan, J. Appeal from a judgment of the County Court of Clinton County (Keith Bruno, J.), rendered April 1, 2019, convicting defendant upon his plea of guilty of the crimes of driving while intoxicated, aggravated unlicensed operation of a motor vehicle in the first degree and circumvention of an ignition interlock device, the traffic infraction of unsafe lane movement, and the violation of unlicensed operation of a motor vehicle.

Defendant, who had last been convicted of driving while intoxicated in 2015, was arrested following an April 2018 incident in which he caused property damage while driving in the Town of Mooers, Clinton County, and then failed field sobriety tests. He waived indictment and was charged in an eight-count superior court information with offenses relating to the incident. As trial was about to get underway, defendant pleaded guilty to driving while intoxicated, aggravated unlicensed operation of a motor vehicle in the first degree, circumvention of an ignition interlock device, unsafe lane movement and unlicensed operation of a motor vehicle in full satisfaction of the charges against him. County Court made no commitment as to sentencing, and ultimately sentenced defendant to, as is relevant here, concurrent terms of incarceration that amounted to 1½ to 4½ years in prison. Defendant appeals.

We affirm. Defendant's challenge to the voluntariness of his plea is unpreserved in the absence of an appropriate postallocution motion that he had ample time to make (*see People v Tyrell*, 22 NY3d 359, 363-364 [2013]; *People v Kadar*, 244 AD3d 1669, 1671 [3d Dept 2025]; *People v Lewis*, 234 AD3d 1209, 1210 [3d Dept 2025], *lv denied* 43 NY3d 1009 [2025]). Contrary to his suggestion, he made no statements that negated an element of the crimes to which he pleaded guilty, cast doubt upon his guilt or called into question the voluntariness of his plea so as to trigger the narrow exception to the preservation rule (*see People v Tyrell*, 22 NY3d at 364; *People v Lopez*, 71 NY2d 662, 666 [1988]; *People v Apelles*, 185 AD3d 1298, 1299 [3d Dept 2020], *lv denied* 35 NY3d 1092 [2020]). We decline his further

invitation to take corrective action in the interest of justice. Defendant was advised that his plea to five of the counts in the superior court information would resolve the pending charges against him, and the fact that he agreed to County Court's description of those offenses during the colloquy rather than giving his own "factual exposition for each element of" them had no impact upon what the record otherwise shows to be a knowing, intelligent and voluntary plea (*People v Seeber*, 4 NY3d 780, 781 [2005]; see *People v Goldstein*, 12 NY3d 295, 301 [2009]; *People v Favreau*, 174 AD3d 1226, 1227 [3d Dept 2019], *lv denied* 34 NY3d 980 [2019]).

Defendant's further claim of ineffective assistance of counsel is similarly unpreserved in the absence of a postallocation motion (see *People v Quarterman*, 238 AD3d 1385, 1386 [3d Dept 2025]; *People v Lewis*, 234 AD3d at 1210). On his remaining argument that the sentence was harsh and excessive, because defendant "has reached the maximum expiration date of his sentence and" is presently incarcerated as a result of another conviction, that argument is moot (*People v Cotto*, 218 AD3d 1021, 1026 [3d Dept 2023], *lv denied* 40 NY3d 1039 [2023]).

Aarons, J.P., Pritzker, Reynolds Fitzgerald and Fisher, JJ., concur. Ordered that the judgment is affirmed.

2 The People of the State of New York, Respondent, v Amanda C. Diaz, Appellant. [— NYS3d —]—

Motor Vehicles—Operating Vehicle while Under Influence of Alcohol or Drugs—Aggravated Driving while Intoxicated with Child Passenger—Weight of Evidence

Crimes—Trial—Mistrial—Aggravated Driving while Intoxicated with Child Passenger—Improper Hearsay Testimony Elicited

Mackey, J. Appeal from a judgment of the County Court of Broome County (Kevin Dooley, J.), rendered October 21, 2021, upon a verdict convicting defendant of the crimes of aggravated driving while intoxicated with a child passenger, driving while intoxicated and endangering the welfare of a child.

On Halloween 2020, two off-duty paramedics discovered defendant in her motor vehicle, stopped but still running, in the middle of State Route 17 in Broome County. Defendant's young child was in the back seat. The off-duty paramedics pulled over their respective vehicles to assist and, finding defendant disoriented and uncooperative, they removed her from the vehicle and called emergency services. A state trooper soon arrived at the scene and, based upon his observations and certain of defendant's statements, he administered a field sobriety test, which defendant failed. Defendant was thereafter charged by indictment with aggravated driving while intoxicated with a

child passenger (count 1) (*see* Vehicle and Traffic Law § 1192 [2-a] [b]), driving while intoxicated (count 2) (*see* Vehicle and Traffic Law § 1192 [3]), and endangering the welfare of a child (count 3) (*see* Penal Law § 260.10 [1]). Following a jury trial, defendant was found guilty as charged. She was later sentenced to concurrent terms of incarceration of 1 to 3 years, to be followed by five years of probation, for counts 1 and 2 and to one year for count 3. Defendant appeals.

Defendant contends that her convictions for counts 1 and 2 are against the weight of the evidence. “In a weight of the evidence analysis, we view the evidence in a neutral light and determine whether a different verdict would have been unreasonable; if a different verdict would not have been unreasonable, we weigh the relative probative force of conflicting testimony and the relative strength of conflicting inferences that may be drawn from the testimony to determine if the verdict is supported by the weight of the evidence” (*People v Ferguson*, 193 AD3d 1253, 1254 [3d Dept 2021] [citations omitted], *lv denied* 37 NY3d 964 [2021]; *see People v Goberdhan*, 241 AD3d 992, 993 [3d Dept 2025], *lv denied* 44 NY3d 1011 [2025]). As charged here, a person is guilty of aggravated driving while intoxicated with a child passenger when he or she operates a motor vehicle “in violation of [Vehicle and Traffic Law § 1192 (3)] while a child who is [15] years of age or less is a passenger in such motor vehicle” (Vehicle and Traffic Law § 1192 [2-a] [b]). Relatedly, a person is guilty of driving while intoxicated when he or she “operate[s] a motor vehicle while in an intoxicated condition” (Vehicle and Traffic Law § 1192 [3]). “[A] driver is intoxicated when he or she has voluntarily consumed alcohol to the extent that he or she is incapable of employing the physical and mental abilities which he or she is expected to possess in order to operate a vehicle as a reasonable and prudent driver” (*People v Carota*, 93 AD3d 1072, 1073 [3d Dept 2012] [internal quotation marks, brackets and citation omitted]; *accord People v Varno*, 239 AD3d 1149, 1150 [3d Dept 2025], *lv denied* 44 NY3d 984 [2025]). “Generally, a driving while intoxicated verdict must be supported by evidence that the defendant was in an intoxicated condition when he or she operated the vehicle” (*People v Erfurt*, 234 AD3d 1120, 1121 [3d Dept 2025] [internal quotation marks and citations omitted], *lv denied* 43 NY3d 1008 [2025]).

At trial, the first of the two off-duty paramedics (hereinafter the first paramedic) testified that, at approximately 2:20 p.m., he observed defendant’s vehicle stopped in the middle of the road. He and the second off-duty paramedic (hereinafter the

second paramedic) approached and turned off defendant's vehicle. The first paramedic observed defendant in the driver seat and a child in the back seat, noting that defendant "had mascara running down her face and was very disoriented to person, place and time." After removing defendant from the vehicle, he called 911 to report the incident. According to the first paramedic, defendant's respiration and pulse rate were normal but she was confused, disoriented and unable to walk. The second paramedic echoed the first paramedic's testimony, however, she further averred that during her assessment of defendant "[t]here was a faint odor of an alcoholic-like beverage on [defendant's] breath."

A state trooper who responded to the scene testified that defendant's "eyes were very red, bloodshot, and they were very glossy," she was unable to stand, had "mumbled speech" and could not make "complete, full sentences." According to the trooper, when he asked defendant whether she had consumed alcohol, she responded in the affirmative but did not know how much. The trooper testified that, having been trained to administer standardized field sobriety testing, he then administered a horizontal gaze nystagmus test to defendant—which defendant failed, having scored six out of six possible indicators of intoxication. At the hospital, where defendant was later transferred, the trooper observed defendant's behavior deteriorate as she became "irate" with staff. A second state trooper, who provided support at the scene and later at the hospital, likewise testified that he observed defendant to be "quite belligerent" at the hospital, "out of control" and unfocused, and that her speech was "slurred and for the most part incoherent."

In contrast, defendant's sister testified that on the day of the incident she had been with defendant and the child, who was born in 2013, from late morning until approximately 1:00 p.m. During that time, the sister maintained that she did not witness defendant consume alcohol, nor did she observe defendant to be disoriented or otherwise acting in a concerning manner. In view of this testimony, and in the absence of chemical testing, a different verdict would not have been unreasonable (*see e.g. People v Erfurt*, 234 AD3d at 1122). Nevertheless, the jury was entitled to reject the sister's testimony and instead credit that of the other witnesses. According due deference to the jury's credibility determinations, we find that defendant's convictions for driving while intoxicated and aggravated driving while intoxicated with a child passenger are not against the weight of the evidence (*see id.* at 1122-1123; *People v Carota*,

93 AD3d at 1074-1075; *People v McDonald*, 27 AD3d 949, 950 [3d Dept 2006]).

Finally, we are unpersuaded by defendant's contention that County Court erred in denying her motion for a mistrial based upon certain hearsay testimony. "The decision to grant or deny a motion for a mistrial is within the trial court's discretion and its decision will not be disturbed unless it amounts to an abuse of discretion" (*People v Reynolds*, 239 AD3d 1098, 1100 [3d Dept 2025] [quotation marks and citations omitted]; see *People v Ferrara*, 243 AD3d 962, 967 [3d Dept 2025]; *People v Birch*, 228 AD3d 991, 993 [3d Dept 2024], *lv denied* 42 NY3d 969 [2024]). At trial, the People elicited testimony from the second paramedic that she had asked the child during the incident whether the child knew "what was wrong" with defendant, and that the child had responded that defendant was "high." Defense counsel objected on hearsay grounds and, notwithstanding the People's assertion that their intent was to elicit testimony that the child was not aware of defendant having any medical issue, County Court immediately instructed the jury to disregard the child's alleged response. Defense counsel thereafter moved for a mistrial on the basis of prosecutorial misconduct. After discussion with both counsel, in which the People reiterated that they had been attempting to elicit testimony as to defendant's alleged absence of an "acute medical problem," the court denied defendant's motion but again instructed the jury "to totally disregard the response of the child, that there was a question asked of the child, [and] what the child said."

To the extent that the People elicited improper hearsay testimony, any prejudice was mitigated upon defendant's sustained objection and County Court's prompt and repeated instruction to the jury to disregard the challenged testimony (see *People v Varno*, 239 AD3d at 1152; *People v Lamb*, 211 AD3d 1345, 1347 [3d Dept 2022]; *People v Hovan*, 146 AD3d 498, 499 [1st Dept 2017], *lv denied* 29 NY3d 1033 [2017]). Moreover, any such error was harmless considering the overwhelming evidence of defendant's guilt, unrelated to her possible use of drugs (see Vehicle and Traffic Law § 1192 [2-a] [b]; [3]; see generally *People v Erickson*, 156 AD2d 760, 763 [3d Dept 1989], *lv denied* 75 NY2d 966 [1990]). As to defense counsel's assertion that the People's line of questioning constituted prosecutorial misconduct, "the record does not reflect that [such questioning] was part of a flagrant and pervasive pattern causing substantial prejudice to defendant, particularly considering the overwhelming evidence of defendant's guilt"

(*People v Johnson*, 225 AD3d 927, 935 [3d Dept 2024], *lv denied* 42 NY3d 927 [2024]; *see People v Davis*, 200 AD3d 1200, 1205 [3d Dept 2021]). Upon this record, we do not find that County Court's denial of defendant's request for a mistrial was an abuse of discretion nor did it deprive defendant of a fair trial (*see People v Johnson*, 225 AD3d at 935; *People v McCarty*, 221 AD3d 1360, 1368 [3d Dept 2023], *lv denied* 40 NY3d 1093 [2024]; *People v Hovan*, 146 AD3d at 499).

Defendant's remaining contentions, to the extent not expressly addressed herein, have been considered and found to be lacking in merit.

Reynolds Fitzgerald, J.P., Ceresia, Fisher and Powers, JJ., concur. Ordered that the judgment is affirmed.

3 The People of the State of New York, Respondent, v David Host, Appellant. [— NYS3d —]

Crimes—Plea of Guilty—Voluntariness of Plea and Mental Health Issues

Appeal from a judgment of the County Court of Sullivan County (James Farrell, J.), rendered April 29, 2022, convicting defendant upon his plea of guilty of the crime of murder in the first degree.

In February 2022, defendant pleaded guilty to murder in the first degree (multiple victims arising from the same criminal transaction) in satisfaction of an 11-count indictment charging him and his codefendant with various crimes stemming from an incident where they broke into a residence and killed two people. The plea agreement also required defendant to waive his right to appeal both orally and in writing. In accordance with the terms of the plea agreement, defendant was sentenced to a prison term of 25 years to life. Defendant appeals.

We affirm. “Defendant’s challenge to the voluntariness of his plea survives his appeal waiver—regardless of its validity” (*People v Scully*, 242 AD3d 1259, 1259 [3d Dept 2025] [citations omitted], *lv denied* 44 NY3d 1068 [2026]; *see People v Oliveira*, 244 AD3d 1411, 1411 [3d Dept 2025]). Defendant’s challenge, however, to the voluntariness of his plea based upon his psychiatric history and a statement made during his presentence investigation that he did not intend to kill anyone when he entered the residence is unpreserved for our review as there is no indication that he made an appropriate postallocution motion despite having had ample opportunity to do so (*see People v Clark*, 246 AD3d 1150, 1151 [3d Dept 2026]; *People v Mahood*, 238 AD3d 1433, 1434 [3d Dept 2025], *lv denied* 44 NY3d 983 [2025]; *People v Taylor*, 194 AD3d 1264, 1265 [3d Dept 2021], *lv denied* 37 NY3d 975 [2021]). In addition, the

narrow exception to the preservation requirement was not triggered as defendant made no statement during the plea proceeding that “‘clearly casts significant doubt upon the defendant’s guilt or otherwise calls into question the voluntariness of the plea’” (*People v Rios*, — NY3d —, —, 2026 NY Slip Op 00963, *1 [2026], quoting *People v Lopez*, 71 NY2d 662, 666 [1988]). In any event, were we to consider defendant’s claim upon the record before us including the plea minutes, we would find that there is no indication that defendant’s mental health issues interfered with his ability to understand and participate in the plea proceedings or impacted upon the voluntariness of the plea (see *People v Dolison*, 189 AD3d 1779, 1780-1781 [3d Dept 2020], *lv denied* 36 NY3d 1119 [2021]; *People v Taft*, 169 AD3d 1266, 1267 [3d Dept 2019], *lv denied* 33 NY3d 1074 [2019]; *People v White*, 153 AD3d 1041, 1042 [3d Dept 2017]). Finally, defendant’s challenge to the sentence imposed as unduly harsh and severe is foreclosed by his unchallenged appeal waiver (see *People v Kozik*, 235 AD3d 1065, 1066 [3d Dept 2025], *lv denied* 43 NY3d 964 [2025]).

Garry, P.J., Clark, Reynolds Fitzgerald, Corcoran and Ryba, JJ., concur. Ordered that the judgment is affirmed.

4 The People of the State of New York, Respondent, v Nsikak K. Okure, Appellant. [252 NYS3d 849]—

Crimes—Appeal—Valid Waiver of Right to Appeal

Crimes—Plea Bargaining—Enforcement of Agreement

Appeal from a judgment of the County Court of Albany County (Andra Ackerman, J.), rendered April 26, 2023, convicting defendant upon his plea of guilty of the crimes of aggravated vehicular homicide and leaving the scene of an incident without reporting.

Defendant was charged in an 11-count indictment with various offenses arising from a September 14, 2022, incident in which he drove his vehicle while intoxicated and, as is relevant here, fatally struck a pedestrian in the City of Albany and left the scene without contacting authorities. In satisfaction of the indictment, defendant pleaded guilty to aggravated vehicular homicide and leaving the scene of an incident without reporting upon the understanding that he would receive a prison sentence of no less than 7 to 21 years and no more than 8 to 24 years on the aggravated vehicular homicide conviction and a concurrent prison sentence of 2¹/₃ to 7 years on the leaving the scene conviction. The plea agreement also contemplated that defendant would waive his right to appeal. County Court thereafter imposed concurrent sentences that amounted to 8 to 24 years in prison. Defendant appeals.

We affirm. Defendant's sole contention on appeal is that the sentence, which fell within the confines of the plea bargain, is harsh and excessive. However, defendant's unchallenged and valid appeal waiver precludes this argument (*see People v Lopez*, 6 NY3d 248, 255 [2006]; *People v Sealey*, 234 AD3d 1184, 1185 [3d Dept 2025]; *People v Anderson*, 177 AD3d 1031, 1032 [3d Dept 2019]).

Clark, J.P., Ceresia, McShan, Mackey and Ryba, JJ., concur. Ordered that the judgment is affirmed.

5 The People of the State of New York, Respondent, v Abdallah A. Aboueida, Appellant. [252 NYS3d 847]—

Crimes—Appeal—Valid Waiver of Right to Appeal

Crimes—Plea Bargaining—Enforcement of Agreement

Appeal from a judgment of the County Court of Albany County (William Little, J.), rendered October 23, 2023, convicting defendant upon his plea of guilty of the crime of attempted burglary in the third degree.

Defendant waived indictment and agreed to plead guilty to a superior court information charging him with attempted burglary in the third degree. The plea agreement also required that defendant waive the right to appeal. County Court thereafter sentenced defendant to the agreed-upon sentence of five years of probation. Defendant appeals.

We affirm. Defendant's sole contention on appeal—that the imposed sentence is unduly harsh—is precluded by his unchallenged appeal waiver (*see People v Thompson-Webb*, 241 AD3d 1675, 1675 [3d Dept 2025], *lv denied* 44 NY3d 1029 [2025]; *People v Brown*, 197 AD3d 1440, 1440 [3d Dept 2021]).

Aarons, J.P., Ceresia, Fisher, Powers and Ryba, JJ., concur. Ordered that the judgment is affirmed.

6 The People of the State of New York, Respondent, v Alex M. Ferrer, Appellant. [— NYS3d —]—

Crimes—Right to Counsel—Effective Representation—Legitimate Explanation for Failure to Object to Use of Stun Cuff

Crimes—Fair Trial—Use of Stun Cuff Attached to Lower Leg Did Not Prevent High Security Risk Defendant from Testifying—Defendant Repeatedly Stood Up and Walked over to Participate in Side Bar Conferences within View of Jury

Fisher, J. Appeal, by permission, from an order of the County Court of Broome County (Joseph Cawley, J.), entered July 3, 2024, which denied defendant's motion pursuant to CPL 440.10 to vacate the judgment convicting him of the crime of burglary in the second degree (two counts), after a hearing.

In 2020, defendant was charged by indictment with two counts of burglary in the second degree in connection with two home invasions. Following a jury trial, defendant was found guilty as charged and sentenced to a term of incarceration, to be followed by a period of postrelease supervision. Defendant subsequently moved to vacate the judgment of conviction under CPL 440.10 on several grounds, including ineffective assistance of counsel. County Court (Dooley, J.) denied the motion, without a hearing. Defendant appealed from the judgment of conviction and, by permission, the denial of his CPL article 440 motion. This Court affirmed defendant's conviction on the direct appeal, and modified the order denying his CPL article 440 motion, remitting the matter to County Court to conduct a hearing on the issue "as to whether [defense] counsel was ineffective for failing to object to the use of an electric stun belt restraint on defendant during the trial" (224 AD3d 1092, 1096 [3d Dept 2024], *lv denied* 41 NY3d 1018 [2024]).

At the ensuing hearing before County Court (Cawley, J.), the undisputed evidence established that defendant was classified as a high security risk by the Broome County Sheriff's office (hereinafter BCSO). As a result of such classification, defendant was required to wear a stun cuff attached to his lower leg underneath his clothing, for which he signed two BCSO acknowledgement forms advising him of the device's capabilities, purpose and when it would be activated by deputies.¹ In addition, members of the Sheriff's Emergency Response Team (hereinafter SERT) maintained a presence around defendant in the courthouse—remaining near him during the testimonial portions of the trial. Although County Court (Dooley, J.) was not advised of the stun cuff on defendant's leg and therefore did not perform the requisite *Buchanan* inquiry (*see People v Buchanan*, 13 NY3d 1, 4 [2009]), the court was alerted by a court officer that jurors were inquiring why there were BCSO deputies in the courtroom and what "SERT" meant on their uniforms/vests. Following a conference with the attorneys in defendant's presence, and adopting requests from defense counsel, County Court issued curative instructions to the jury that the security arrangements were not relevant to their deliberations and should play no role in their determination, and that no independent research was permitted.

The disagreement in the record distills to whether defendant told defense counsel about the stun cuff on his leg. Defendant

1. A stun cuff is a device that could remotely discharge 80,000 volts of electricity to temporarily subdue and immobilize the wearer, such as in the event of an altercation or attempt to escape from custody.

testified at the hearing that he told defense counsel before jury selection about the stun cuff and that it was hurting him, and that defense counsel assured defendant that he would raise the issue with County Court but ultimately did not do so. Defendant further testified that he raised it again with defense counsel, who was more dismissive of him because it was understood to be part of BCSO policy. Defendant claims defense counsel's failure to object to the stun cuff had a chilling effect on his participation during the trial—dissuading him from testifying on his own behalf because he did not want to be erroneously shocked or for the jurors to see the “bulge” caused by the device under his clothing. In contrast, defense counsel testified that he was not told about the stun cuff, which was a device that he did not know existed and had never seen before in his approximately 35 years of experience practicing law. Although defense counsel recalled quite a bit of security for defendant's trial, he explained that he had observed SERT officers in a few other trials and did not question it. He further testified that, by virtue of the SERT officers being present in the courtroom, he would not have thought there were other additional security measures in place. A sergeant for the BCSO also testified on behalf of the People, explaining the dimensions of the stun cuff and averring that it was not visible under clothing.² Due to this, the sergeant explained that a stun cuff was used as an alternate means when shackles and handcuffs were not permissible in a location—such as in a courtroom due to the presumption of innocence.

County Court (Cawley, J.), crediting the testimony of defense counsel over defendant, rejected defendant's explanation that the stun cuff compelled him to not testify because defendant repeatedly stood up in front of the jury to attend all side bar conferences during the trial, and therefore found that defendant's right to a fair trial had not been impaired. County Court also found that defense counsel was not advised of the use of a stun cuff on defendant during the trial, did not see the device and otherwise was unaware that such a device even existed, which we interpret to be a finding that defendant's trial counsel had a legitimate explanation for not raising an objection as to the use of a stun cuff. Based on these findings, and when viewing the totality of defense counsel's representation, County Court concluded that defendant was afforded meaningful representation and denied defendant's motion to vacate the judgment of conviction. Defendant, by permission, appeals.

2. The sergeant testified that the stun cuff was approximately 2.5 to 3.5 inches in length, 6.5 to 8.5 inches in width, and about 1.5 inches in diameter/thickness.

Defendant contends that County Court erred in denying his ineffective assistance of counsel claim because defense counsel failed to challenge the conceded use of a stun cuff on defendant during the trial without an identified security reason—a so-called *Buchanan* violation (see *People v Buchanan*, 13 NY3d at 4)—and there was no legitimate explanation for declining to object (see *People v Bradford*, 40 NY3d 938, 939-940 [2023]). When seeking to vacate a judgment under CPL article 440, a defendant has “the burden of proving by a preponderance of the evidence every fact essential to support the motion at a hearing thereon” (*People v Dunham*, 231 AD3d 1437, 1438 [3d Dept 2024] [internal quotation marks and citation omitted], *lv denied* 43 NY3d 963 [2025]). To prevail on an ineffective assistance claim, “a defendant must establish that counsel failed to provide meaningful representation and thus deprived defendant of a fair trial” (*People v Clark*, 28 NY3d 556, 562 [2016]). A single error can rise to the level of ineffective assistance, but only where the issue is “so clear-cut and dispositive that no reasonable defense counsel would have failed to assert it, and it must be evident that the decision to forgo the contention could not have been grounded in legitimate . . . strategy” (*People v Kent*, 235 AD3d 1094, 1096 [3d Dept 2025] [internal quotation marks and citations omitted], *lv denied* 43 NY3d 964 [2025]). The onus is on defendant to demonstrate “the absence of strategic or other legitimate explanations . . . for the alleged deficiencies of counsel” (*People v Maffei*, 35 NY3d 264, 269 [2020] [internal quotation marks and citations omitted]). Although under the NY Constitution “a showing of prejudice is a significant but not indispensable element” (*People v Salas*, 44 NY3d 374, 383 [2025] [internal quotation marks, brackets and citation omitted]), we nevertheless “remain skeptical of ineffective assistance of counsel claims where the defendant is unable to demonstrate any prejudice at all” (*People v Alvarez*, 33 NY3d 286, 290 [2019] [internal quotation marks and citation omitted]).

Here, according “great deference on appeal” to the factual findings and credibility assessments of County Court (*People v Ayala*, 194 AD3d 1255, 1257 [3d Dept 2021] [internal quotation marks and citations omitted], *lv denied* 37 NY3d 970 [2021]), we perceive no error in County Court’s denial of defendant’s CPL article 440 motion. Nothing in the record suggests that the stun cuff was visible to jurors or that anyone in the courtroom was aware or became aware of the device on defendant’s leg except for law enforcement and defendant (see *People v Alexander*, 127 AD3d 1429, 1432 [3d Dept 2015], *lv denied* 25 NY3d 1197 [2015]). To this point, it is axiomatic that defense

counsel cannot raise an argument premised on a fact that he does not know. Although defendant contends that his experienced defense counsel should have investigated the reasons behind the heightened security at trial and whether additional security protocols were implemented against defendant, which could have led to the discovery of the stun cuff, such contention is rooted in speculation and insufficient to demonstrate a lack of strategy or other legitimate explanation (*see People v Thibeault*, 244 AD3d 1320, 1323 [3d Dept 2025]; *People v Pottorff*, 145 AD3d 1095, 1097 [3d Dept 2016], *lv denied* 30 NY3d 1063 [2017]; *see also People v Henry*, 207 AD3d 1062, 1064 [4th Dept 2022], *lv denied* 39 NY3d 940 [2022]).

Nevertheless, defense counsel cannot be faulted for failing to make an objection which has little to no chance of success, and in light of defendant's criminal and disciplinary history—including his alleged assaults on other incarcerated individuals and a correction officer while awaiting trial—some form of restraints would have been properly ordered (*see People v Brooks*, 139 AD3d 1391, 1392 [4th Dept 2016], *lv denied* 28 NY3d 1026 [2016]).³ Since the alternative to a stun cuff would have been handcuffs or shackles, which are unquestionably more visible forms of restraints, seeking a change from a discreet to more obvious form of restraints would have been inconsistent with defense counsel's strategy of deemphasizing the security measures at the courthouse in front of the jurors based on his comments during his request for curative instructions (*see People v Washington*, 89 AD3d 1140, 1142 [3d Dept 2011], *lv denied* 18 NY3d 963 [2012]). To the extent that defendant further alleges that the stun cuff compromised his right to a fair trial by preventing him from testifying because he "didn't want to get up . . . didn't want to move" to avoid being shocked, such allegations are belied by the record which confirms defendant repeatedly stood up and walked over to participate in all side bar conferences within the view of the jury. Accordingly, as defendant has not demonstrated the absence of a strategic choice or legitimate explanation, the failure to object to the use of a stun cuff does not constitute ineffective assistance of counsel under these circumstances (*see People v Schrock*, 108 AD3d 1221, 1222 [4th Dept 2013], *lv denied* 22 NY3d 998 [2013]; *see also People v Ashline*, 124 AD3d 1258, 1261 [4th Dept 2015], *lv denied* 27 NY3d 1128 [2016]).

3. We note that County Court (Cawley, J.) performed a *Buchanan* inquiry at the commencement of the CPL article 440 hearing, determining that there was a sufficient predicate justifying the use of physical restraints on defendant during the proceeding.

We have examined defendant's remaining contentions and have found them to be without merit or rendered academic.

Garry, P.J., Aarons, Ceresia and Mackey, JJ., concur. Ordered that the order is affirmed.

7 The People of the State of New York, Respondent, v Robert F. Whitbeck Jr., Appellant. [— NYS3d —]—

Crimes—Verdict—Weight of Evidence—Multiple Sex Offenses Committed against Victim—Testimony of Victim, Daughter's Corroborating Observations and Material Admissions in Text Messages from Defendant

Crimes—Right to Counsel—Effective Representation—Cogent Defense Highlighted Credibility Issues and Lack of Physical Evidence, Vigorous Cross-Examination, and Appropriate Motions/Objections

Corcoran, J. Appeal from a judgment of the County Court of Schoharie County (Ryan McAllister, J.), rendered August 19, 2024, upon a verdict convicting defendant of the crimes rape in the third degree, criminal sexual act in the first degree, attempted rape in the first degree, criminal obstruction of breathing or blood circulation, unlawful imprisonment in the second degree and criminal contempt in the second degree (10 counts).

Defendant was charged by indictment with rape in the third degree, rape in the first degree, criminal sexual act in the first degree, attempted rape in the first degree, criminal obstruction of breathing or blood circulation, unlawful imprisonment in the second degree and 10 counts of criminal contempt in the second degree.¹ Following a jury trial, defendant was acquitted of rape in the first degree and convicted of the remaining charges. County Court sentenced defendant to a determinate term of 18 years of incarceration, to be followed by 20 years of postrelease supervision, upon his conviction of criminal sexual act in the first degree; a determinate term of 12 years of incarceration, to be followed by 15 years of postrelease supervision, upon his conviction of attempted rape in the first degree; and a determinate term of four years of incarceration, to be followed by 10 years of postrelease supervision, upon his conviction of rape in the third degree. Defendant was further sentenced to one-year terms of incarceration on each of the remaining misdemeanor convictions, with all sentences to run concurrently. Defendant appeals, and we affirm.

The indictment alleged that defendant committed multiple

1. The criminal contempt convictions arose from defendant's violations of orders of protection issued for the benefit of the victim and her daughter. Defendant admitted the charged conduct at trial and he does not challenge those convictions on this appeal. Defendant was also initially charged with aggravated sexual abuse in the third degree and forcible touching, but those counts were dismissed on motion by defendant.

sex offenses against the victim on November 19 or 20, 2022, and again on December 4, 2022. Defendant first contends that the verdict is against the weight of the evidence, that the victim's testimony was incredible as a matter of law and that he presented "airtight alibi[]" evidence for the relevant dates. We disagree. When conducting a weight of the evidence review, we must "view the evidence in a neutral light to determine whether a contrary verdict would have been unreasonable; if not, we defer to the jury's credibility determinations and consider the relative probative force of conflicting testimony and the relative strength of the conflicting inferences that may be drawn therefrom to determine whether the weight of the evidence supports the verdict" (*People v Benton*, 243 AD3d 1118, 1119 [3d Dept 2025] [internal quotation marks and citations omitted]). As charged here, criminal sexual act in the first degree requires proof that a person engaged in oral sexual conduct, meaning contact between the mouth and the vulva, with another person by forcible compulsion (*see* Penal Law former § 130.50 [1]; § 130.00 [former (2) (a)]). A person is guilty of rape in the third degree when he or she engages in sexual intercourse with another person without that person's consent (*see* Penal Law § 130.25 [former (3)]). Attempted rape in the first degree requires proof that, with intent to commit rape in the first degree, a person engaged in conduct tending to effect the commission of that crime by forcible compulsion (*see* Penal Law §§ 110.00, 130.35 [former (1)]). Criminal obstruction of breathing or blood circulation requires proof that a person applied pressure to another person's throat or blocked that person's nose or mouth, thereby impeding normal breathing or blood circulation (*see* Penal Law § 121.11). A person is guilty of unlawful imprisonment in the second degree when he or she restrains another person (*see* Penal Law § 135.05).

The trial established that the parties lived together in a residence owned by the victim until they separated in October 2022. Defendant then relocated to his own apartment but left some personal property at the victim's home. According to the victim, defendant contacted her in November 2022, asking to retrieve his remaining property. She agreed to meet him at her home and, once inside a detached garage, defendant attempted to hug her. When she refused, defendant shoved the victim's head into a cabinet, forced her pants down and engaged in nonconsensual vaginal intercourse with her. On cross-examination, the victim acknowledged that she could not conclusively state whether the incident occurred on November 19 or November 20, 2022, and that she neither immediately reported the incident to law enforcement nor sought medical treatment.

Defendant's workplace manager described the company's time-keeping system and cited a timecard showing that he clocked in at 7:46 a.m. on November 19, 2022, and clocked out at 3:17 p.m., though she did not personally see him. Defendant testified that he was at work on November 19, 2022, and did not go to the victim's residence. Defendant claimed that he also went to work on November 20, 2022, although it was his day off; he offered no corresponding documentary evidence to support an alibi for this date.

In the following weeks, the parties communicated about defendant's remaining property. They agreed that the victim would bring additional items to defendant's apartment at approximately 6:00 p.m. on December 4, 2022. The victim testified that she went alone because she did not want any witnesses if defendant became angry or attempted to initiate sexual contact. After the victim entered the apartment, defendant became aggressive, pushed her onto a bed and attempted to force vaginal intercourse. When she screamed, defendant placed a pillow over her face, put his hands around her neck and engaged in forced sexual contact with her. The victim left defendant's apartment immediately thereafter. The victim's daughter testified that on the evening of December 4, 2022, she observed that the victim was crying and upset, there were marks around her neck, her hair and face appeared disheveled and her shirt was torn. On cross-examination, the victim acknowledged that she continued to communicate with defendant after the assaults.

Turning to defendant's alibi defense for this incident, defendant's two adult daughters and their romantic partners testified that defendant spent December 4, 2022, at one daughter's residence in another county celebrating his birthday. All four witnesses saw defendant socializing with relatives, eating and remaining at the residence throughout the celebration. Defendant also introduced photographs purportedly depicting him at the gathering that day, when the People claimed he was assaulting the victim in his own apartment. Defendant testified that he arrived at his daughter's house between 10:00 a.m. and 10:30 a.m. and left between 6:00 p.m. and 6:30 p.m., and he denied that the victim came to his apartment that day.

The prosecution argued that defendant made several admissions to the victim. Specifically, the People introduced defendant's text messages to the victim between December 2022 and early January 2023, in which he stated, among other things, that he was "sorry" for his conduct and that he "wish[ed] he could take it all back." In one message, he asked the victim not

to report him to the police. Several months later, in early June 2023, defendant sent the victim an electronic message stating, “[y]es I raped you and [assaulted] you and I am sorry and greatly ashamed of what I have done.” A State Police investigator who interviewed defendant testified that defendant admitted authoring these messages but denied assaulting the victim.

A different verdict would not have been unreasonable if the jury had credited defendant’s alibi evidence or rejected the victim’s account. Nevertheless, viewing the evidence in a neutral light and according deference to the jury’s credibility determinations, we conclude that the verdict is not against the weight of the evidence (*see People v Hoffman*, 244 AD3d 1588, 1595 [3d Dept 2025]; *People v Cruz*, 238 AD3d 1327, 1330-1331 [3d Dept 2025], *lv denied* 43 NY3d 1054 [2025]). Defendant principally challenged the victim’s credibility, emphasizing her delayed disclosure, her continued communication with him and her decision to go alone to his apartment on December 4, 2022, despite her allegation that he had recently raped her. Those contentions, as well as any arguable inconsistencies in her account, were thoroughly explored at trial and the jury evidently credited the victim’s testimony (*see People v Hoffman*, 244 AD3d at 1595; *People v Kane*, 232 AD3d 1064, 1065 [3d Dept 2024]).² The jury also considered expert testimony explaining why victims may delay reporting abuse or express uncertainty about specific details. The jury was entitled to assess whether defendant’s work records and family members’ testimony persuasively established his alibi and whether to accept or reject his claim that the victim fabricated the allegations (*see People v George*, 242 AD3d 1447, 1451 [3d Dept 2025]; *People v Deas*, 236 AD3d 1105, 1108 [3d Dept 2025], *lv denied* 43 NY3d 1007 [2025]). Ultimately, the conflicting testimony presented a classic credibility determination for the jury to resolve (*see People v Robbins*, 236 AD3d 1097, 1100 [3d Dept 2025]; *People v Muniz*, 93 AD3d 871, 874 [3d Dept 2012], *lv denied* 19 NY3d 965 [2012]). Given the victim’s testimony, her daughter’s corroborating observations and the text messages in which defendant seemingly made material admissions, the verdict is supported by the weight of the evidence (*see People v Christie*, 224 AD3d 1097, 1100 [3d Dept 2024]).

Defendant next contends that he was deprived of a fair trial, claiming that the victim’s daughter and the social worker

2. Defendant contends that his acquittal of rape in the first degree arising from the November incident reflects the jury’s wholesale rejection of the victim’s credibility; this is belied by his conviction of rape in the third degree based on the same incident.

improperly bolstered the victim's credibility, the social worker and the State Police investigator offered improper opinions, and County Court should have conducted a voir dire of the jury after observing the victim become upset in the gallery. These claims are unpreserved for appellate review, as defendant failed to raise timely and specific objections at trial (*see People v Goberdhan*, 241 AD3d 992, 998 [3d Dept 2025], *lv denied* 44 NY3d 1011 [2025]; CPL 470.05 [2]).

Finally, we reject defendant's contention that he was denied the effective assistance of counsel. To prevail on such a claim, a defendant must demonstrate the absence of strategic or other legitimate explanations for counsel's alleged shortcomings (*see People v Clark*, 244 AD3d 1613, 1615 [3d Dept 2025]; *People v Rickett*, 244 AD3d 1284, 1288 [3d Dept 2025], *lv denied* 45 NY3d 938 [2026]; *People v Thibeault*, 244 AD3d 1320, 1322 [3d Dept 2025]). A claim of ineffective assistance fails where the evidence, the law and the circumstances of the case, viewed in totality and as of the time of the representation, reveal that counsel provided meaningful representation (*see People v Rivera*, 212 AD3d 942, 948 [3d Dept 2023], *lv denied* 39 NY3d 1113 [2023]).

Here, the record belies defendant's assertion that trial counsel failed to renew the motion for a trial order of dismissal; counsel expressly renewed the motion at the close of all proof. To the extent defendant argues that the motion for a trial order of dismissal was perfunctory or lacked sufficient detail regarding the alibi evidence, that evidence did not conclusively refute the People's case and any such arguments would have had little likelihood of success (*see Matter of Lucas Y.*, 223 AD3d 1057, 1060 [3d Dept 2024], *lv denied* 41 NY3d 909 [2024]; *People v Rivera*, 212 AD3d at 949; *People v Barzee*, 190 AD3d 1016, 1021 [3d Dept 2021], *lv denied* 36 NY3d 1094 [2021]). Our review of the record demonstrates that counsel presented a cogent defense, vigorously cross-examined witnesses, highlighted credibility issues and the lack of physical evidence and made appropriate motions and objections throughout the proceedings. Viewed in totality, defendant was provided with meaningful representation. We have examined defendant's remaining contentions and find them to be without merit.

Clark, J.P., Aarons, Pritzker and McShan, JJ., concur. Ordered that the judgment is affirmed.

8 Dmitry Kruglov, Appellant, v Allstate Insurance Company et al., Respondents, et al., Defendant. [— NYS3d —]

Via Certified Mail Improper**Appeal—Appeal as of Right—No Appeal of Order Merely Requesting Additional Proof to Aid in Disposition of Motion Which Remained Pending and Undecided Not Affecting Substantial Right**

Fisher, J. Appeal from an order of the Supreme Court (Kevin Bryant, J.), entered December 1, 2023, in Ulster County, which, among other things, granted defendants' cross-motions to dismiss the complaint.

In December 2018, plaintiff, a self-represented litigant, commenced an action against multiple defendants asserting various causes of action sounding in fraud, conversion, conspiracy and negligent hiring and supervision. Such allegations were in connection with the sales of salvaged vehicle and auto parts to plaintiff by defendant Copart of Connecticut, Inc. (hereinafter Copart). Supreme Court ultimately granted each defendant's motion to dismiss the complaint for failure to state a cause of action (*see* CPLR 3211 [a] [7]). In May 2023, still proceeding *pro se*, plaintiff commenced the underlying action asserting substantially similar allegations and causes of action against the same defendants. Copart joined issue by serving an answer, and plaintiff moved for a default judgment against the remaining defendants Allstate Insurance Company, AT&T Services Inc., Chubb Lloyds Insurance Company of Texas (hereinafter Chubb)¹ and State Farm Insurance (hereinafter collectively referred to as the moving defendants). The moving defendants separately cross-moved to dismiss the complaint on the grounds of lack of personal jurisdiction for improper service and as barred by *res judicata*. Chubb also claimed that plaintiff engaged in frivolous conduct by filing a near-identical complaint which failed to correct the defects determined to exist in the previously dismissed complaint, and therefore sought counsel fees and costs. Supreme Court, determining that service of process was improper, denied plaintiff's motion for a default judgment and granted the moving defendants' cross-motions—dismissing the complaint against all defendants, including Copart. Supreme Court also determined that *res judicata* barred the action and granted Chubb leave to submit a supplemental application for counsel fees and costs. Plaintiff appeals.²

In opposing a motion to dismiss the complaint for a lack of personal jurisdiction, a plaintiff has the “burden of proving by a preponderance of the evidence that jurisdiction over the defendant[s] was obtained by proper service of process” (*Cedar*

1. Named in the complaint as “Chubb Group.”

2. Copart did not participate in this appeal.

Run Homeowners' Assn., Inc. v Adirondack Dev. Group, LLC, 173 AD3d 1330, 1330 [3d Dept 2019] [internal quotation marks and citations omitted]). Here, plaintiff was required to serve the summons and complaint on the moving defendants by personal delivery on any of the corporate representatives listed under CPLR 311 (a) (1), to any other agent authorized by appointment or law to receive service under Business Corporation Law §§ 306 or 307, or in compliance with the requirements for personal service by mail under CPLR 312-a. By sending the summons and complaint via certified mail, none of these strict statutory requirements were satisfied, and therefore plaintiff did not obtain jurisdiction over the moving defendants (see *Matter of Basile v New York State Off. of Temporary & Disability Assistance*, 233 AD3d 1226, 1227 [3d Dept 2024]). To the extent that plaintiff seeks leave to amend the complaint and correct the defects in service, such request is not properly before us because it was not raised before the trial court (see *Cedar Dev. E., LLC v Board of Educ. of the Onteora Cent. Sch. Dist.*, 229 AD3d 950, 953 [3d Dept 2024], *lv dismissed & denied* 43 NY3d 934 [2025]; *Matter of Colihan v State of New York*, 211 AD3d 1432, 1435 [3d Dept 2022]). Therefore, Supreme Court properly dismissed the complaint against the moving defendants for lack of personal jurisdiction.

We do, however, agree with plaintiff that Supreme Court erred in dismissing the complaint against Copart. Before any of the moving defendants sought dismissal for lack of proper service or *res judicata*, Copart joined issue by serving an answer—which did not assert either of these grounds as an affirmative defense (see CPLR 3211 [e]). When the moving defendants subsequently cross-moved, our review of the record reveals that Copart was concurrently engaged in active disclosure with plaintiff—not joining any of the motions, despite being served or copied with same. Accordingly, we modify the order of Supreme Court to reinstate the complaint against Copart. In light of this determination, the branch of Supreme Court's order that denied, as moot, plaintiff's motion to compel the production of certain documents against Copart must also be reinstated and remitted for consideration.

Lastly, plaintiff challenges the branch of Supreme Court's order which directed Chubb to submit a supplemental application for counsel fees and costs. In doing so, plaintiff does not dispute the finding of frivolous conduct under 22 NYCRR 130-1.1. Rather, plaintiff limits his contentions to Chubb's counsel being entitled to such relief, which is without merit (see 22 NYCRR 130-1.1 [a]), and as to the propriety of the total amount

sought by counsel, which has not yet been decided. Since this portion of the order merely requested additional proof to aid in the disposition of a motion, which remains pending and undecided, it does not affect a substantial right and is therefore not appealable as of right (*see* CPLR 5701 [a] [2] [v]; *Bank of N.Y. v Segui*, 120 AD3d 1369, 1370 [2d Dept 2014]; *see also Matter of Torres v Moran*, 143 AD3d 730, 732 [2d Dept 2016]; *see generally Sholes v Meagher*, 100 NY2d 333, 335 [2003]). We have considered the parties' remaining contentions, and have found them to be without merit, academic or not properly before us.

Garry, P.J., Aarons, Ceresia and Mackey, JJ., concur. Ordered that the order is modified, on the law, without costs, by reversing so much thereof as dismissed the complaint against defendant Copart of Connecticut, Inc. and denied plaintiff's motion to compel; and, as so modified, affirmed.

9 In the Matter of Juan Carlos Ocasio, Appellant, v Raymond Shields, as Adjutant General of the Division of Military and Naval Affairs, Respondent. [— NYS3d —]

Courts—Justiciable Questions—Intra-Military Immunity Doctrine—Honorable Discharge from New York Guard
 Records—Freedom of Information Law—Failure to Exhaust Administrative Remedies—Request to Division of Military and Naval Affairs for Disciplinary Records

Mackey, J. Appeal from a judgment of the Supreme Court (Adam Silverman, J.), entered April 8, 2024, in Albany County, which, among other things, in a proceeding pursuant to CPLR article 78, granted respondent's cross-motion to dismiss the petition.

Petitioner previously served as a noncommissioned officer with the New York Guard (hereinafter the NY Guard).¹ During his service, he was counseled over a series of months regarding various disciplinary incidents, including violating the chain of command and failing to comply with a direct order. Most relevant here, petitioner made unauthorized inquiries into the number and identities of NY Guard service members who had been awarded State Guard Association of the United States

1. Akin to the National Guard, the NY Guard is authorized by article VIII of the Military Law and maintained at the Governor's discretion (*see* Military Law § 165 [1]). The NY Guard is made up of unpaid volunteers; the volunteer force "augments and supports the New York National Guard," but they "are not federal military reservists like members of the Army and Air National Guard" (Division of Military and Naval Affairs, <https://dmna.ny.gov/nyg/> [last accessed Mar. 13, 2026]).

(hereinafter SGAUS) ribbons.² In March 2023, after petitioner attempted to initiate court martial proceedings by purporting to file formal charges with the Division of Military and Naval Affairs (hereinafter DMNA)³ against several officers involved in his disciplinary proceedings, he was honorably discharged from the NY Guard.

Petitioner thereafter submitted a Freedom of Information Law (*see* Public Officers Law art 6 [hereinafter FOIL]) request to DMNA seeking, among other things, records related to the charges he had attempted to file. Two days after submitting his initial request, he contacted DMNA's FOIL officer further requesting a copy of his discharge order and the identity of DMNA's authorized agent for service of process. One month later, petitioner commenced the instant CPLR article 78 proceeding challenging his discharge from the NY Guard and respondent's purported failure to respond to his FOIL requests.⁴ Respondent cross-moved pre-answer to dismiss the petition on the grounds that petitioner's challenge to his discharge was nonjusticiable and, separately, that he had failed to exhaust his administrative remedies as to his FOIL claims. Petitioner in turn moved for sanctions. Supreme Court (Silverman, J.) granted respondent's cross-motion and dismissed the proceeding, finding that petitioner's challenge to his discharge was barred by the intra-military immunity doctrine and that his FOIL challenge was moot. The court further denied petitioner's motion for sanctions. Petitioner appeals.

The doctrine of intra-military immunity—which applies to both the federal armed forces and state organized militia—“bars a lawsuit if ‘the injuries [for which a plaintiff seeks to recover] arise out of or are in the course of activity incident to [the plaintiff's military] service’ ” (*Overton v New York State Div. of Military & Nav. Affairs*, 373 F3d 83, 88-89 [2d Cir 2004], quoting *Feres v United States*, 340 US 135, 146 [1950]). As such, the doctrine restricts civilian judicial review of internal personnel matters of the military inasmuch as such concern the “composition, training, equipping, and control of a military

2. SGAUS is a non-profit organization that advocates “for the advancement and support of regulated state military forces” and provides, among other things, emergency management training to state defense forces (*see* SGAUS, <https://sgaus.org>).

3. DMNA is a division of the Executive Department and includes the state's organized militia, which in turn includes the NY Guard (*see* Executive Law §§ 31 [2]; 190 [2]; Military Law § 2 [1]; *Matter of State of New York v Public Empl. Relations Bd.*, 103 AD2d 876, 876 [3d Dept 1984]).

4. Supreme Court (Hummel, J.) transferred the proceeding from Bronx County, where it had been commenced, to Albany County.

force[, which] are essentially professional military judgments, subject always to civilian control of the Legislative and Executive Branches” (*Gilligan v Morgan*, 413 US 1, 10 [1973] [emphasis omitted]). It follows then that “[a]s a general rule, ‘[c]ivilian courts must, at the very least, hesitate long before entertaining a suit which asks the court to tamper with the established relationship between enlisted military personnel and their superior officers’” (*Matter of Figueroa v Maguire*, 37 AD3d 829, 831 [2d Dept 2007], quoting *Chappell v Wallace*, 462 US 296, 300 [1983]). “Particularly where, as here, a petitioner is seeking judicial review of a discrete military personnel decision that would unquestionably require a fact-specific inquiry into an area affecting military order and discipline, civilian courts must tread cautiously” (*Matter of Figueroa v Maguire*, 37 AD3d at 831 [citation omitted]).

To be sure, the “non-justiciability of discretionary military decisions is not absolute” and courts may nevertheless review facial challenges to the constitutionality of military regulations as well as claims that the military failed to follow its own regulations in a manner that substantially prejudiced a service member (*Jones v New York State Div. of Military & Nav. Affairs*, 166 F3d 45, 52 [2d Cir 1999]; see *Doolen v Wormuth*, 5 F4th 125, 133-134 [2d Cir 2021]). Petitioner, however, makes no such claims here and his challenge to DMNA’s decision to honorably discharge him from the NY Guard instead concerns solely, under the facts presented, a military personnel decision stemming from questions of military order and discipline. Accordingly, petitioner’s challenge in this regard is nonjusticiable under the intra-military immunity doctrine (see *Matter of Figueroa v Maguire*, 37 AD3d at 832; *Zaccaro v Parker*, 249 AD2d 1003, 1003 [4th Dept 1998]). Petitioner’s unsupported assertion that his discharge was retaliatory does not necessitate a contrary conclusion (see generally *Martinez v McCarthy*, 838 Fed Appx 611, 613 [2d Cir 2020]). Similarly, contrary to petitioner’s contentions, the status of SGAUS as a nonmilitary organization is of no moment inasmuch as petitioner’s misconduct underlying his honorable discharge stems from his actions related to his service in the NY Guard.

Supreme Court likewise properly dismissed petitioner’s FOIL claims as moot, inasmuch as the record reflects that he received responses to his requests (see *Matter of Maidenbaum & Sternberg, LLP v New York State Dept. of Taxation & Fin.*, 243 AD3d 1054, 1055 [3d Dept 2025]; *Matter of Prisoners’ Legal Servs. of N.Y. v New York State Dept. of Corr. & Community Supervision*, 209 AD3d 1208, 1210-1211 [3d Dept 2022], *affd* 42

NY3d 936 [2024]). As to petitioner's claim that respondent's disclosures were nevertheless inadequate, he has failed to exhaust his administrative remedies by first pursuing an administrative appeal (*see Matter of Jewish Press, Inc. v New York State Educ. Dept.*, 212 AD3d 916, 918 [3d Dept 2023]; *Matter of Wilkerson v Annucci*, 137 AD3d 1444, 1446 [3d Dept 2016]). Finally, the court did not abuse its discretion in denying petitioner's motion for sanctions against respondent based upon alleged misrepresentations, among other things, as his claims are unsupported by the record (*see Matter of Roth & Roth, LLP v Long Is. R.R.*, 237 AD3d 506, 508 [1st Dept 2025]; *Matter of Cobado v Benziger*, 163 AD3d 1103, 1107 [3d Dept 2018]). Petitioner's remaining arguments, to the extent properly before us, have been considered and found to be lacking in merit.

Garry, P.J., Aarons, Ceresia and Fisher, JJ., concur. Ordered that the judgment is affirmed, without costs.

10 In the Matter of the Claim of James Brognano III, Claimant, v County of Oneida, Appellant. Workers' Compensation Board, Respondent. [— NYS3d —]

Workers' Compensation—Injuries Arising out of and in Course of Employment—Employer Failed to Rebut Presumption of Compensability Set Forth in Workers' Compensation Law § 21 (1)—Significant Blunt Force Trauma to Head upon Falling onto Hard Surface at Work

Garry, P.J. Appeal from a decision of the Workers' Compensation Board, filed July 12, 2024, which ruled that claimant sustained an accidental injury arising out of and in the course of his employment.

Claimant worked as a caseworker for the self-insured employer. On January 19, 2021, he returned to work after being out for several days on quarantine leave and then sick leave. He was living with his parents at the time, and his mother observed nothing out of the ordinary about him before he left for work that morning. Upon his arrival at work, he appeared pale but told one of his supervisors that he was feeling much better and was ready to be back. He left work a few hours later and went home on his lunch break. His mother saw nothing unusual about him while he was home, and he sounded normal when they spoke on the phone around 12:15 p.m. as he was driving back to the office from having a COVID-19 test. After claimant returned to the office, the person sitting next to him heard a "kaboom" in his cubicle and heard him call out her name several times. Claimant complained to her that he did not feel good and had a headache. The supervisor who had spoken to him that morning soon arrived, and, although he

denied having fallen, claimant reiterated that “his head was killing him” and he appeared “[c]lammy” and “shaky,” with facial disfigurement and swelling around one of his eyes. The supervisor called 911 and requested an ambulance.

Claimant rapidly became incoherent, and, after he was transported to the hospital, he was observed to have bruising on the right side of his head and was diagnosed with an orbital roof fracture and a traumatic epidural hematoma.* He was transported to another hospital to undergo emergency surgery to drain the blood pressing on his brain, and his brain injuries required extensive further treatment. Claimant’s treating neurosurgeon was clear that the hematoma had been caused by blunt force trauma to the head, such as that caused by “a fall from standing onto a hard surface,” although the surgeon noted that claimant could have remained “lucid” and “conscious for a short period of time” immediately after the injury. No one could confirm how claimant sustained that trauma, however, as claimant had no memory of what occurred and no one observed any accident.

The present claim for workers’ compensation benefits was filed in February 2021. The claim was controverted by the employer, and, following a hearing, a Workers’ Compensation Law Judge (hereinafter WCLJ) found *prima facie* medical evidence for a traumatic brain injury and directed, among other things, that witnesses be deposed. After considering claimant’s medical records and the deposition testimony, which included that of his mother, the person who heard the noise in his cubicle and the supervisor who interacted with him at work on January 19, 2021, the WCLJ found that claimant had not demonstrated that an accident had occurred at work and disallowed the claim. The Workers’ Compensation Board reversed and established the claim for the head and a traumatic brain injury, finding that the evidence showed that an accident had occurred and that the employer had failed to rebut the presumption of compensability set forth in Workers’ Compensation Law § 21 (1). The employer appeals.

We affirm. First, “[w]hether a compensable accident has occurred is a question of fact to be resolved by the Board and its determination will not be disturbed when supported by

* “An epidural hematoma . . . is bleeding between the inside of the skull and the outer covering of the brain (called the *dura mater*)” that, if severe enough, pools and increases the pressure inside the skull (*Epidural hematoma*, MedlinePlus, National Lib of Medicine, National Insts of Health [Aug. 2024], *available at* <https://medlineplus.gov/ency/article/001412.htm> [last accessed Apr. 9, 2026]).

substantial evidence” (*Matter of Zobel v Chemung County*, 136 AD3d 1140, 1140 [3d Dept 2016] [internal quotation marks and citations omitted], *lv denied* 27 NY3d 907 [2016]; see *Matter of Silvestri v New York City Tr. Auth.*, 153 AD3d 1069, 1071 [3d Dept 2017]). As noted above, the medical proof reflected that significant blunt force trauma was the cause of claimant’s injuries. The Board, relying upon the testimony of the nearby employee who heard a “kaboom” in claimant’s cubicle after he returned from his lunch break, the testimony describing his new complaints and the changes in his appearance and behavior after that noise, and the discovery of bruising on his forehead when he was examined at the hospital later that afternoon, found that the proof showed claimant to have sustained his injuries after he returned to work. “‘[T]he Board has broad authority to make credibility determinations and to draw reasonable inferences from record evidence’ ” and, notwithstanding the employer’s speculation as to what caused the noise in claimant’s cubicle and its less-than-compelling attempts to call the timeline of events relied upon by the Board into question, we are satisfied from the foregoing proof that the Board’s “finding that claimant established that a workplace accident had occurred is supported by substantial evidence” (*Matter of Ellis v Frito Lay Inc.*, 138 AD3d 1363, 1363-1364 [3d Dept 2016], quoting *Matter of Klamka v Consolidated Edison Co. of N.Y., Inc.*, 84 AD3d 1527, 1528 [3d Dept 2011]; see *Matter of Buccinna v Pembroke Cent. Sch. Dist.*, 165 AD3d 1369, 1370-1371 [3d Dept 2018]).

The Board having determined that claimant was injured during his employment, “it is presumed that the accident and injury arose out of claimant’s employment, and the employer may overcome the presumption of compensability by presenting substantial evidence to the contrary” (*Matter of Ellis v Frito Lay Inc.*, 138 AD3d at 1364; see Workers’ Compensation Law § 21 [1]; *Matter of Thompson v Genesee County Sheriff’s Dept.*, 43 AD3d 1252, 1253 [3d Dept 2007]). Although the employer pointed out the uncertainty as to exactly how the accident unfolded and questioned the quality of the medical evidence presented, it failed, as required, “to present any proof to overcome the Workers’ Compensation Law § 21 presumption that claimant’s accidental injury arose out of employment” (*Matter of Keevins v Farmingdale UFSD*, 304 AD2d 1013, 1014 [3d Dept 2003]; see *Matter of Buccinna v Pembroke Cent. Sch. Dist.*, 165 AD3d at 1371; *Matter of Thompson v Genesee County Sheriff’s Dept.*, 43 AD3d at 1254). Thus, substantial evidence supports the Board’s decision to establish the claim for benefits.

Reynolds Fitzgerald, Powers, Mackey and Ryba, JJ., concur. Ordered that the decision is affirmed, without costs.

11 In the Matter of the Claim of Carlos Villalba, as Executor of the Estate of Ramon Galeas, Deceased, and as Guardian of Daniel Galeas, Claimant, v Rite Aid Pharmacy et al., Appellants. Workers' Compensation Board, Respondent. [— NYS3d —]—

Workers' Compensation—Death Benefits—Dependency—Substantial Evidence That Son was Dependent on Decedent at Time of His Death

Aarons, J. Appeal from a decision of the Workers' Compensation Board, filed August 21, 2024, which ruled, among other things, that decedent's son was dependent on decedent at the time of decedent's death pursuant to Workers' Compensation Law § 16.

In March 2020, Ramon Galeas (hereinafter decedent) died after contracting COVID-19 while working. Decedent was not married at the time of his death and he had one child (born in 1991, hereinafter the son). Claimant, the son's half brother and legal guardian,* filed a claim for workers' compensation death benefits on behalf of decedent's estate and the son as a dependent. Following various hearings, a Workers' Compensation Law Judge (hereinafter WCLJ) found that decedent sustained a work-related injury resulting in his death but determined that the son was not a dependent of decedent. The WCLJ awarded decedent's estate a \$50,000 death benefit and funeral expenses. Upon review, the Workers' Compensation Board modified the WCLJ's decision, finding that the son was dependent upon decedent. In so finding, the Board noted that, in order to be eligible for death benefits, claimant was also required to demonstrate that the son has a total and permanent incapacity. Finding that the record needed to be more fully developed on this issue, the Board returned the matter for that purpose, rescinding, without prejudice, the \$50,000 death benefit award. The employer and its workers' compensation carrier appeal.

Initially, we disagree with the Board's contention that this appeal has been improperly taken from an interlocutory decision. Whether the son was dependent upon decedent is a potentially dispositive threshold legal issue (*see* Workers' Compensation Law § 16 [1-a]; *Matter of Plew-Jourdanais v Adirondack Heating & Frost Insulators, Inc.*, 80 AD3d 1111, 1111-1112 [3d Dept 2011]). "Our policy to discourage piecemeal review of the main issues in a compensation claim should not be applied in such a manner as to preclude, as in this case, the prompt review of threshold legal issues which may be dispositive" (*Matter of Howard v Stature Elec., Inc.*, 72 AD3d 1167,

* Claimant was also the executor of decedent's estate.

1169 [3d Dept 2010] [internal quotation marks, brackets, ellipsis and citations omitted], *aff'd* 20 NY3d 522 [2013]).

Turning to the merits, Workers' Compensation Law § 16 provides, as relevant here, that a surviving dependent child of any age who is physically disabled is entitled to 66²/₃% of a decedent's average weekly wage (*see* Workers' Compensation Law § 16 [3-a]). "This death benefit is payable to dependent children of any age who are mentally incapacitated as well, provided the incapacity is total and permanent" (*Matter of Plew-Jourdanais v Adirondack Heating & Frost Insulators, Inc.*, 80 AD3d at 1111; *see Matter of Kelly v Sugarman*, 12 NY2d 298, 300 [1963]). "The issue of dependency is a factual question for resolution by the Board and generally will be sustained if the determination is supported by substantial evidence" (*Matter of Tyrell v Bouyea Baking Co.*, 194 AD2d 832, 833 [3d Dept 1993] [citations omitted]; *see Matter of Ellis v Cyclone Coasters*, 269 AD2d 649, 649-650 [3d Dept 2000]). "Substantial evidence is a minimal standard and demands only that a given inference is reasonable and plausible, not necessarily the most probable" (*Matter of Vaughan v Heritage Air Sys., Inc.*, 208 AD3d 1562, 1564 [3d Dept 2022] [internal quotation marks and citations omitted]; *accord Matter of Freyta v Calvin Maintenance Inc.*, 220 AD3d 1036, 1038 [3d Dept 2023]). "In reviewing determinations of the Board regarding dependency for purposes of entitlement to death benefits pursuant to Workers' Compensation Law § 16, we have consistently based our decisions on the existence of some proof that the loss of a decedent's financial contribution had an adverse or detrimental effect on the claimant" (*Matter of Plew-Jourdanais v Adirondack Heating & Frost Insulators, Inc.*, 80 AD3d at 1112 [citations omitted]; *see Matter of Umanzor v General Telecom*, 9 AD3d 591, 592 [3d Dept 2004], *lv denied* 5 NY3d 703 [2005]).

Claimant testified that the son lives with him and their mother and that he became the son's legal guardian when the son turned 21 years old. According to claimant, the son is autistic and needs constant care. Claimant works as a cashier at a drugstore, the same job that decedent had prior to his death. The son's mother does not speak English, and she stopped working in 1998 to stay home and care for the son, leaving claimant as the sole wage earner. Claimant further testified that decedent would visit the son weekly and take him out to dinner. Decedent would also buy the son clothes and he provided \$300 a month in cash to the son's mother, which was used to help pay for the son's "regular" expenses. According to claimant, decedent rented out a room in his apartment

in order to help him support the son. The record reflects that decedent also provided health insurance for the son through his job at the drugstore. “As the sole arbiter of witness credibility, the Board has broad authority to resolve factual issues based on credibility of witnesses and draw any reasonable inference from the evidence in the record” (*Matter of Fonseca v Platinum Carpentry Inc.*, 238 AD3d 1444, 1447 [3d Dept 2025] [internal quotation marks, brackets and citations omitted]; see *Matter of Duta-Zumba v Urban Atelier Group, LLC*, 242 AD3d 1264, 1265 [3d Dept 2025]). Deferring to the Board’s resolution of the credibility of claimant’s testimony, its determination that the loss of decedent’s financial contributions has a detrimental effect on the son is supported by substantial evidence and its resultant finding of a dependency will not be disturbed (see *Matter of Giglia v Berger Indus.*, 127 AD2d 959, 960 [3d Dept 1987]; *Matter of Torres v Laurel Hill Nursery*, 98 AD2d 904, 904 [3d Dept 1983], *affd* 64 NY2d 895 [1985]).

Clark, J.P., Ceresia, McShan and Corcoran, JJ., concur. Ordered that the decision is affirmed, without costs.

12 David J. Gennett, Appellant, v New York State Electric & Gas Corporation et al., Defendants. Ronald R. Benjamin, Respondent. [— NYS3d —]—

Courts—Ripeness Doctrine—Denial of Plaintiff’s Motion to Determine Amount of Second Attorney’s Charging Lien on Basis of Quantum Meruit Prior to Conclusion of Action

Appeal—Academic and Moot Questions—Case Settled during Pendency of Appeal

Ceresia, J. Appeal from an order of the Supreme Court (Oliver Blaise III, J.), entered September 23, 2024, in Broome County, which denied plaintiff’s motion to determine the amount of Ronald R. Benjamin’s charging lien prior to the conclusion of the action.

In 2014, plaintiff was injured in a workplace accident at a construction site. In 2017, this action was commenced on plaintiff’s behalf by his first attorney. Two years later, the first attorney withdrew from representation of plaintiff, and Supreme Court issued an order providing that the first attorney’s legal fees, if any, would be determined at the conclusion of the case. Plaintiff then hired his second attorney, whose retainer agreement provided for a one-third contingency fee. In 2024, plaintiff wrote a letter to the court that, while never filed on any court docket, apparently contained negative allegations about his relationship with his second attorney, who then moved to withdraw from representing plaintiff.

Before the withdrawal motion was decided, plaintiff filed a

pro se motion to “determine and fix the amount of [his second attorney’s] charging lien for a fixed dollar amount on the basis of quantum meruit.” Plaintiff claimed that he needed to know the exact amount of his second attorney’s counsel fees and out-of-pocket expenses so that he could pay them and more easily retain a third attorney. Plaintiff also argued that his second attorney had demanded, and he had paid, a substantial cash payment during the representation, thereby converting the fee arrangement from contingency to hourly. The second attorney opposed, alleging that the contingency fee agreement remained in place and that the calculation of fees for plaintiff’s attorneys should await the final resolution of the matter. Supreme Court ordered that the second attorney’s fee, like that of the first attorney, would be calculated at the case’s conclusion. Plaintiff appeals.

To the extent that plaintiff claims that he was entitled to an immediate ruling on his motion rather than the court delaying its determination until the end of the case, this contention has been rendered moot, given that the case settled during the pendency of this appeal (*see Stein v Paes*, 165 AD3d 1510, 1510-1511 [3d Dept 2018], *lv denied* 32 NY3d 916 [2019]; *Matter of Tompkins County [Tompkins County Deputy Sheriffs’ Assn., Inc.]*, 126 AD3d 1156, 1157 [3d Dept 2015]). As for plaintiff’s argument that the second attorney’s fees should be calculated on a quantum meruit rather than contingency basis, we note that Supreme Court has yet to decide this issue. Indeed, pending such a determination, the court has ordered a portion of the settlement funds to be held in escrow, not to be distributed until it finally resolves the fee issues relative to each of plaintiff’s attorneys. Therefore, this question is not ripe for our review (*see 517-525 W. 45 LLC v Avrahami*, 202 AD3d 611, 613 [1st Dept 2022]; *CGM Constr., Inc. v Sydor*, 144 AD3d 1434, 1438 [3d Dept 2016]).

Clark, J.P., Reynolds Fitzgerald, Powers and Corcoran, JJ., concur. Ordered that the appeal is dismissed, as partially moot and partially unripe, without costs.

13 In the Matter of Veronica LL., Respondent, v Ethan LL., Appellant. [— NYS3d —]

Parent, Child and Family—Family Offense Proceeding—Right to Counsel—Notice of Withdrawal of Assigned Counsel—Irretrievable Breakdown of Attorney-Client Relationship

Attorney and Client—Assignment of Counsel—Forfeiture of Right—Repeated Rejection of Sound Professional Advice, Improper Demands and Engaging in Conduct That Caused Breakdown of Multiple Attorney-Client Relationships

Corcoran, J. Appeal from an order of the Family Court of

Saratoga County (Jeffrey Wait, J.), entered November 25, 2024, which, in a proceeding pursuant to Family Ct Act article 8, granted respondent's assigned counsel's motion for leave to withdraw and denied respondent's request for the appointment of new assigned counsel.

In October 2023, petitioner commenced this family offense proceeding pursuant to Family Ct Act article 8, alleging that respondent sent her threatening communications related to ongoing legal disputes and posted social media videos accusing petitioner of kidnapping the parties' children, which allegedly prompted third-party threats against her. Before a fact-finding hearing was held on her petition, respondent's assigned counsel moved to withdraw on the ground that the attorney-client relationship had irretrievably broken down. Respondent opposed the motion and sought, in the alternative, the appointment of new counsel. Family Court granted counsel's application to withdraw and denied respondent's motion seeking new counsel, concluding that moving counsel could no longer effectively represent respondent and that respondent forfeited his right to further assignment of counsel. Respondent appeals, and we affirm.¹

Initially, respondent contends that he lacked notice of counsel's motion to withdraw and was thus deprived of due process. "Once counsel has been assigned, an attorney of record may withdraw from representation only upon reasonable notice to his or her client" (*Matter of Richard TT. [Kara VV.]*, 223 AD3d 1070, 1071 [3d Dept 2024] [citations omitted], *appeal dismissed* 41 NY3d 989 [2024]; *see Matter of Alicia EE. [Adam FF.]*, 72 AD3d 1155, 1156 [3d Dept 2010]). Here, the record establishes that respondent received a copy of counsel's motion to withdraw and submitted papers opposing the motion on the merits. Under these circumstances, respondent was afforded notice and a meaningful opportunity to be heard (*compare Matter of Richard TT. [Kara VV.]*, 223 AD3d at 1071-1072; *Matter of Calvin L.W. [Dominique H.]*, 196 AD3d 1181, 1182 [4th Dept 2021]; *Matter of Menghi v Trotta-Menghi*, 162 AD3d 771, 772 [2d Dept 2018]).

Contrary to respondent's contention, the record supports Family Court's determination that the attorney-client relationship between respondent and assigned counsel had irretriev-

1. The order granting assigned counsel's motion to be relieved is nondispositional in nature and, thus, not appealable as of right (*see* Family Ct Act § 1112 [a]). Nevertheless, we will treat respondent's notice of appeal as a motion for leave to appeal and grant it (*see Matter of Casey Q. v Jeffrey O.*, 244 AD3d 1519, 1521 [3d Dept 2025]).

ably broken down. “The decision to grant or deny permission for counsel to withdraw lies within the discretion of the trial court, and the court’s decision should not be overturned absent a showing of an improvident exercise of discretion” (*Applebaum v Einstein*, 163 AD3d 905, 907 [2d Dept 2018] [internal quotation marks and citations omitted]). An attorney may withdraw from representing a client if the “client fails to cooperate in the representation or otherwise renders the representation unreasonably difficult for the lawyer to carry out employment effectively” (Rules of Prof Conduct [22 NYCRR 1200.0] rule 1.16 [c] [7]).

Here, assigned counsel moved to be relieved based upon respondent’s express accusation that counsel was acting against his interests and participating in a broader judicial conspiracy against him, claims that inhibited a functional attorney-client relationship. Family Court reviewed counsel’s motion and respondent’s submissions (which included written communications between counsel and respondent) and properly determined that there was “good and sufficient cause” for withdrawal (*Matter of Richard TT. [Kara VV.]*, 223 AD3d at 1072).

The record also supports Family Court’s determination that respondent forfeited his right to assignment of further counsel in the proceeding. Family Ct Act article 8 proceedings implicate a litigant’s statutory right to assigned counsel (*see* Family Ct Act § 262 [a] [ii]; *Matter of Yanique S. v Frederick T.*, 151 AD3d 1222, 1223 [3d Dept 2017]). An indigent party’s right to assigned counsel under the Family Ct Act, however, is not absolute (*see Matter of Burley v Richmond*, 243 AD3d 1372, 1374 [4th Dept 2025]). Indeed, “egregious conduct by a [party] can lead to a deemed forfeiture of the fundamental right to counsel, but only as a matter of extreme, last-resort analysis” (*People v Shanks*, 37 NY3d 244, 253 [2021] [internal quotation marks, brackets, ellipsis and citation omitted]; *see Matter of Sa’Nai F.B.M.A. [Chaniece T.]*, 232 AD3d 597, 599 [2d Dept 2024]). A litigant may forfeit the right to assigned counsel through a “persistent pattern of threatening, abusive, obstreperous, and uncooperative behavior with successive assigned counsel” (*Matter of State of New York v Victor H.*, 231 AD3d 837, 838 [2d Dept 2024] [internal quotation marks and citation omitted], *lv denied* 43 NY3d 904 [2025]).

Here, Family Court relied on the cumulative nature of respondent’s conduct toward eight assigned attorneys in Family Court and local courts, each of whom were relieved from representation upon their motions or at respondent’s behest. Family Court appropriately found that respondent repeatedly rejected

sound professional advice, made improper demands and engaged in conduct that caused the breakdown of multiple attorney-client relationships. As noted by Family Court, due to respondent's threats of litigation against the assigned counsel program, that program declined to process any further applications on his behalf, requiring Family Court to make direct assignments of counsel to respondent. Under these circumstances, Family Court correctly determined that further appointments would be futile.²

Respondent's remaining claims do not require extended discussion. Certain claims, including those premised on alleged violations of the Americans with Disabilities Act, allegations of judicial bias and challenges to Family Court's recusal determination are unpreserved, as they were not asserted in opposition to counsel's motion to withdraw or prior to the issuance of the November 25, 2024 order. Respondent's other arguments and applications, including requests to discipline petitioner's counsel and the assigned counsel program, do not relate to the order appealed from and are not properly before this Court (*see Smith v Smith*, 277 AD2d 531, 532 [3d Dept 2000]). Respondent's remaining contentions, including his request for sanctions, have been examined and found to be without merit.

Aarons, J.P., Ceresia, McShan and Mackey, JJ., concur. Ordered that the order is affirmed, without costs.

14 Ernastiaze Moore, Appellant, v State of New York, Respondent. [— NYS3d —]

State—Claim against State—Jurisdictionally Defective Claim for Failure to State Correct Year of Alleged Sexual Assaults against Incarcerated Individual by Correction Officer

Clark, J.P. Appeal from an order of the Court of Claims (Catherine Schaewe, J.), entered November 22, 2024, which denied claimant's motion to amend the claim and dismissed the claim.

In November 2023, claimant, an incarcerated individual, filed a claim against defendant under the Adult Survivors Act (*see* CPLR 214-j [hereinafter ASA]), seeking damages for two alleged sexual assaults perpetrated against him by a correction officer. The claim described the nature and circumstances of the incidents, specified the name of the correction officer who allegedly perpetrated the assaults, and set forth January 20, 2022, and June 9, 2022, as the incident dates. Defendant

2. Contrary to respondent's contention, the November 2024 order, by its express terms, is limited to this proceeding and does not purport to bar respondent from seeking assigned counsel in unrelated future proceedings.

answered and raised various affirmative defenses, including that the claim failed to comport with the requirements of Court of Claims Act § 11 (b) insofar as it did not specify sufficient information about the time, place and nature of the conduct to enable defendant to adequately investigate.

During a virtual court conference in February 2024, claimant's counsel revealed that the year of the alleged incidents as set forth in the claim was incorrect and that the correct dates were January 20, 2023, and June 9, 2023, respectively. Claimant's counsel thereafter sent an email to defendant's counsel that included a copy of a proposed amended claim reflecting the correct year of the incidents, seeking for counsel to stipulate to a correction of the year. After defendant declined to do so, claimant moved to amend the claim to reflect the correct dates of the alleged sexual assaults. Defendant opposed the motion. The Court of Claims denied claimant's motion and dismissed the claim, finding that it failed to satisfy the pleading requirements of Court of Claims Act § 11 (b) insofar as it set forth incorrect dates of the alleged assaults and that the defect was jurisdictional. Claimant appeals.¹

We are constrained to affirm. With the enactment of the Court of Claims Act, the State has waived its sovereign immunity from suits for money damages “provided [that] the claimant complies with the limitations” set forth in article II of the Act (Court of Claims Act § 8; see *Kolnacki v State of New York*, 8 NY3d 277, 280 [2007]). Court of Claims Act § 11 (b)—which is contained within article II—requires a claim to state “(1) ‘the nature of the claim’; (2) ‘the time when’ it arose; (3) the ‘place where it arose’; (4) ‘the items of damage or injuries claimed to have been sustained’; and (5) ‘the total sum claimed’” (*Wright v State of New York*, 43 NY3d 532, 538 [2025], quoting *Lepkowski v State of New York*, 1 NY3d 201, 207 [2003]). “To adequately plead when the claim arose, the claimant must allege the date of the tort or other claim, as the case may be, with sufficient definiteness to enable the State to investigate the claim promptly and ascertain its potential liability” (*Matter of Geneva Foundry Litig.*, 173 AD3d 1812, 1813 [4th Dept 2019] [citation omitted]). “‘Because suits against the

1. Prior to oral argument on the appeal, defense counsel provided a letter to this Court advising that the Legislature recently added a new subdivision (d) to Court of Claims Act § 11, which exempts certain claims relating to injuries suffered while in custody from the jurisdictional requirements set forth in Court of Claims Act § 11 (b). Defendant's counsel argued in the letter that the claim here does not fit within the parameters of that subdivision and claimant's counsel conceded as much during oral argument before this Court.

State are allowed only by the State's waiver of sovereign immunity and in derogation of the common law, [the conditions of Court of Claims Act § 11 (b)] must be strictly construed' ” (*Wright v State of New York*, 43 NY3d at 538, quoting *Dreger v New York State Thruway Auth.*, 81 NY2d 721, 724 [1992]; see *Kolnacki v State of New York*, 8 NY3d at 280; *Lichtenstein v State of New York*, 93 NY2d 911, 913 [1999]), and “ [t]he failure to satisfy any of the conditions is a jurisdictional defect’ mandating dismissal” (*Wright v State of New York*, 43 NY3d at 539, quoting *Kolnacki v State of New York*, 8 NY3d at 281).

Claimant argues that, unlike situations where a claim fails to set forth any date of the alleged incident or lacks specificity in that regard, the claim here was not jurisdictionally defective since it comported with the “literal requirements” of Court of Claims Act § 11 (b) by setting forth two specific dates of the alleged assaults, with only a one-digit mistake in the year. The point is well taken. However, inasmuch as the requirements of Court of Claims Act § 11 (b) are to be “ ‘strictly construed’ ” (*Wright v State of New York*, 43 NY3d at 538, quoting *Dreger v New York State Thruway Auth.*, 81 NY2d at 724), courts of this State have consistently held that the failure to “correctly identify the date” on which the claim arose constitutes a jurisdictional defect (*Sacher v State of New York*, 211 AD3d 867, 876 [2d Dept 2022]; see *Musumeci v State of New York*, 220 AD3d 877, 879 [2d Dept 2023]; *Matter of DeMairo v State of New York*, 172 AD3d 856, 857 [2d Dept 2019]; compare *Gang v State of New York*, 177 AD3d 1300, 1304 [4th Dept 2019]). We discern no basis to depart from those holdings and conclude that the claim here was jurisdictionally defective for failing to state the correct year of the alleged assaults.

Claimant additionally argues that the Court of Claims abused its discretion in declining to grant his motion to amend the claim to correct the error, citing Court of Claims Act § 9 (8) as the statutory mechanism authorizing such an amendment. Although such provision vests the Court of Claims with broad authority to “amend, correct, or modify any . . . claim . . . in furtherance of justice for any error in form or substance,” such amendment authority applies to nonjurisdictional defects (Court of Claims Act § 9 [8]; see *Gang v State of New York*, 177 AD3d at 1305). Here, by contrast, the defect deprived the court of subject matter jurisdiction and “c[ould not] be cured through an amendment” (*Hogan v State of New York*, 59 AD3d 754, 755 [3d Dept 2009]; accord *Dinerman v NYS Lottery*, 69 AD3d 1145, 1146 [3d Dept 2010], *lv dismissed* 15 NY3d 911 [2010]; compare *Harris v State of New York*, 38 AD3d 144, 150 [2d Dept 2007];

Central School Dist. No. 1, Towns of Lake George, Queensbury, Bolton & Fort Ann v State of New York, 28 AD2d 1062, 1062 [3d Dept 1967]).² Accordingly, the Court of Claims had no authority to grant claimant's motion to amend and properly denied the motion.

Claimant's remaining contentions regarding equitable estoppel and lack of prejudice are also unavailing (see *Wright v State of New York*, 43 NY3d at 539; *Pagano v New York State Thruway Auth.*, 235 AD2d 408, 408 [2d Dept 1997], *lv denied* 90 NY2d 804 [1997]). We recognize that the result in this case is "harsh, [but] it is for the Legislature, not this Court, to set the terms of the State's waiver of immunity" (*Viscuso v State of New York*, 238 AD3d 1402, 1405 [3d Dept 2025], quoting *Kolnacki v State of New York*, 8 NY3d at 281). Defendant's remaining contentions, to the extent not expressly addressed, have been considered and found unavailing. Accordingly, the order must be affirmed.

Reynolds Fitzgerald, Ceresia, Powers and Corcoran, JJ., concur. Ordered that the order is affirmed, without costs.

15 In the Matter of Luisa JJ., Respondent, v Joseph II., Appellant. (And Another Related Proceeding.) [— NYS3d —]

Parent, Child and Family—Custody—International Child Abduction—Father Wrongfully Retained Child in United States But Raised Sufficient Issues of Fact Warranting Hearing on Application of Grave Risk and Age and Maturity Exceptions under Hague Convention—Remittal to Consider Appropriateness of Fee Award to Mother

Ceresia, J. Appeal from an order of the Supreme Court (Martin Auffredou, J.), entered December 19, 2024, in Warren County, which, in two proceedings pursuant to Domestic Relations Law article 5-a, granted petitioner's application for fees.

Petitioner (hereinafter the mother) and respondent (hereinafter the father) are the parents of the subject child (born in 2013). Following the parties' separation in 2019, they evidently filed a written stipulation in an Italian court whereby they agreed that the child would live primarily in Italy with the mother and would spend extended periods of time in New York with the father. In December 2022, shortly after arriving in New York for a visit, the child disclosed to the father that he

2. Contrary to claimant's contention, the Second Department's decision in *Buonincontro v State of New York* (241 AD3d 486 [2d Dept 2025]), which held that the Court of Claims erred in failing to allow the claimant to amend an unverified notice of intention to file a claim to comport with the verification requirements of Court of Claims Act § 11 (b), is distinguishable and does not support a finding that the Court of Claims had the authority to permit an amendment in this case.

had been sexually abused several times in Italy by a minor relative of the mother's boyfriend. According to the father, the child indicated that the mother had not intervened to stop the abuse even after the child told her about it. Based upon this disclosure, the father chose not to return the child to Italy at the end of the visit but instead retained the child in New York. The mother then commenced a proceeding for the return of the child to Italy pursuant to the Hague Convention on the Civil Aspects of International Child Abduction (1343 UNTS 89, TIAS No. 11670 [1980] [hereinafter the Hague Convention]). The father moved for, among other things, dismissal of the petition or, in the alternative, a hearing. Supreme Court summarily ordered the child's return to Italy. This Court reversed on appeal, finding that although the mother had established that the father had wrongfully retained the child, the father had raised sufficient issues of fact to warrant a hearing with respect to the application of the "grave risk" and "age and maturity" exceptions under the Hague Convention (219 AD3d 1628, 1634-1635 [3d Dept 2023]).

Following remittal, an eight-day fact-finding hearing was held, at the conclusion of which Supreme Court granted the mother's petition and ordered the child's return to Italy. The mother thereafter moved to recover counsel fees and other expenses pursuant to 22 USC § 9007 (b) (3), a provision of the International Child Abduction Remedies Act (*see* 22 USC § 9001 *et seq.* [hereinafter ICARA]), which implements the Hague Convention. The father opposed. Supreme Court granted the mother's motion, awarding her \$108,491.83, and the father appeals.

In accordance with ICARA, "[a]ny court ordering the return of a child pursuant to [the Hague Convention] shall order the respondent to pay necessary expenses incurred by or on behalf of the petitioner, including court costs, legal fees . . . and transportation costs related to the return of the child, unless the respondent establishes that such order would be clearly inappropriate" (22 USC § 9007 [b] [3]; *see Souratgar v Lee Jen Fair*, 818 F3d 72, 75 [2d Cir 2016]; *Ozaltin v Ozaltin*, 708 F3d 355, 374 [2d Cir 2013]). The burden rests with the respondent to show that such an award would be clearly inappropriate (*see Souratgar v Lee Jen Fair*, 818 F3d at 79; *Ozaltin v Ozaltin*, 708 F3d at 375). This inquiry is equitable in nature and involves consideration of factors including, as relevant here, whether the respondent is able to pay the award (*see Souratgar v Lee Jen Fair*, 818 F3d at 81) and whether the respondent had a "reasonable basis for thinking at the time of removing

the child[] . . . that [his or] her actions were consistent with [applicable] law” (*Ozaltin v Ozaltin*, 708 F3d at 375).

If the court finds that an award would not be clearly inappropriate, it must then determine the proper amount of the fee. The aforementioned equitable factors are frequently used in making that calculation (see e.g. *Ozaltin v Ozaltin*, 708 F3d at 376; *Mendoza v Silva*, 987 F Supp 2d 910, 916-917 [ND Iowa 2014]). In addition, federal case law directs the application of the lodestar method (see *Tereshchenko v Karimi*, 2024 WL 3342759, *2, 2024 US Dist LEXIS 120033, *3 [SD NY, July 9, 2024, No. 23 cv 2006 (DLC)]; *Tavarez v Jarrett*, 252 F Supp 3d 629, 641 [SD Tex 2017]). “Under the lodestar method, the court determines the reasonable hourly rate and multiplies it by the reasonable number of hours expended, then adjusts the fee based upon certain subjective criteria” (*Flemming v Barnwell Nursing Home & Health Facilities, Inc.*, 56 AD3d 162, 165 [3d Dept 2008] [citations omitted], *affd* 15 NY3d 375 [2010]), such as “the skill and experience of the attorney and the complexity of the case” (*Board of Trustees of the Vil. of Groton v Pirro*, 170 AD3d 1479, 1480 [3d Dept 2019]; see *Loughlin v Meghji*, 240 AD3d 875, 877 [2d Dept 2025]). “The task of determining a fair fee requires a conscientious and detailed inquiry into the validity of the representations that a certain number of hours were usefully and reasonably expended” (*Lunday v City of Albany*, 42 F3d 131, 134 [2d Cir 1994]). “While the determination as to the proper amount of an award of counsel fees lies largely within the discretion of the court, th[at] discretion is not unlimited” (*Flemming v Barnwell Nursing Home & Health Facilities, Inc.*, 56 AD3d at 165 [internal quotation marks, brackets and citations omitted]; see *Souratgar v Lee Jen Fair*, 818 F3d at 78; *Ozaltin v Ozaltin*, 708 F3d at 374-375).

In his opposition to the mother’s motion, the father argued that an award of counsel fees and expenses to the mother was clearly inappropriate and should be denied for three reasons. First, the father contended that he was unable to pay the amount requested, submitting an affidavit and statement of net worth in support of his claim that he lacked assets and carried heavy debt. Second, the father maintained that he had a reasonable basis to retain the child in New York in light of the child’s disclosure of sexual abuse in Italy while in the mother’s care, and pointed to Supreme Court’s earlier finding in the case that “there is evidence of some sort of sexual encounter between the child and the Italian minor.” Third, the father asserted that the mother had failed to adequately document her

claimed expenses, providing a chart listing billing entries that were improperly block-billed, vague or excessive.

Supreme Court ruled in conclusory fashion that the mother's request for fees was not clearly inappropriate and the amount sought—\$108,491.83—was not unreasonable. The court gave no indication that it had considered the equitable factors typically examined in an ICARA fee determination, nor did it set forth any analysis concerning the claimed deficiencies with the billing entries. As a result, we are unable to review the propriety of the court's exercise of its discretion (*see Fleig Servs. Inc. v American Recycling & Mfg. Co., Inc.*, 191 AD3d 1346, 1346 [4th Dept 2021]; *Matter of HSBC Bank USA, N.A. [Vaida]*, 151 AD3d 1712, 1713 [4th Dept 2017]). We must therefore remit for Supreme Court to consider all of the appropriate factors and arguments raised by the father, resolve whether a fee award would be clearly inappropriate in the first instance and, if it would not be, determine the proper amount of the award.

Reynolds Fitzgerald, J.P., Fisher, Powers and Mackey, JJ., concur. Ordered that the order is reversed, on the law, without costs, and matter remitted to the Supreme Court for further proceedings not inconsistent with this Court's decision.

16 In the Matter of the Claim of Karen Figueroa, Appellant, v Sing Sing Correctional Facility et al., Respondents. Workers' Compensation Board, Respondent. [— NYS3d —]

Workers' Compensation—Workers' Compensation Board—Independent Medical Examination Report—Substantial Compliance with Workers' Compensation Law § 137—Applicable Notice and Filing Requirements Satisfied

Powers, J. Appeal from a decision of the Worker's Compensation Board, filed March 7, 2025, which denied claimant's Workers' Compensation Law § 137 request to preclude an independent medical examination report.

In September 2022, claimant was injured at work when her left arm was hit by a gate while attempting to close it. Her claim for workers' compensation benefits was established for an injury involving the left shoulder and, following a course of treatment, a permanency report was filed indicating that she had sustained a 40% schedule loss of use (hereinafter SLU) of the left arm. On August 31, 2023, the State Insurance Fund (hereinafter SIF) filed an IME-5 form (Claimant's Notice of Independent Medical Examination) notifying claimant of an independent medical examination (hereinafter IME) scheduled for September 13, 2023, to address and comment on, among other things, permanency and, if appropriate, SLU. Following that IME, on September 25, 2023, SIF's medical consultant

produced and filed an IME-4 (Cover Sheet for Report of Independent Medical Examination) and medical report finding that claimant's injury had reached permanency and that she had sustained a 22.5% SLU of the left arm. Claimant's treating physician also evaluated claimant for permanency and, finding that the injury had reached permanency, opined that she had sustained a 40% SLU of the left arm. On April 18, 2024, following depositions of the physicians who evaluated claimant and a hearing, claimant submitted a written summation requesting preclusion of the September 2023 IME-4 report, arguing that the instructions that were attached to the IME-5 form constituted a separate communication that required, pursuant to Workers' Compensation Law § 137, the filing of a separate IME-3 form which was not done here.¹ In a May 2024 reserved decision, a Workers' Compensation Law Judge (hereinafter WCLJ) declined to preclude the September 2023 report and found the medical opinion of the carrier's consultant more credible with respect to his finding that claimant had sustained a 22.5% SLU of the left arm. Upon administrative review, the Workers' Compensation Board affirmed the decision of the WCLJ in its entirety. As is relevant here, the Board found that the September 2023 IME report need not be precluded because it was in substantial compliance with Workers' Compensation Law § 137 and, therefore, may be considered. Claimant appeals.²

In addition to providing a prohibition against "the improper influencing or attempt by any person improperly to influence the medical opinion of any physician who has treated or examined an injured employee" (Workers' Compensation Law § 13-a [6] [a]; *accord Matter of Petti v Asplundh Constr. Corp.*, 244 AD3d 1539, 1540 [3d Dept 2025]; *see* Workers' Compensation Bd Release Subject No. 046-1749 [Mar. 21, 2025]; Workers' Compensation Bd Release Subject No. 046-124 [Nov. 24, 2003]),³ the Workers' Compensation Law provides certain provisions

1. The IME-3 form may be used by a practitioner to report a request for information regarding a claimant's IME and/or to otherwise satisfy their filing obligations under Workers' Compensation Law § 137.

2. Although the Board's decision addressed SLU and credited the impairment percentage found by the carrier's consultant, claimant has failed to raise any substantive arguments in her brief regarding that portion of the Board's decision and has thus abandoned any claims in that regard (*see Matter of James v Premier Home Health Care*, 232 AD3d 1017, 1018 n [3d Dept 2024]).

3. To the extent that claimant argues that there was improper influence under Workers' Compensation Law § 13-a (6), this claim was never advanced before the Board and is therefore not properly before us (*see Matter of Murrah v Jain Irrigation, Inc.*, 157 AD3d 1088, 1089 [3d Dept 2018]).

and rules applicable solely to IMEs (*see* Workers' Compensation Law § 137; 12 NYCRR 300.2). As relevant here, the Workers' Compensation Law provides that "[i]f a practitioner who has performed or will be performing an [IME] of a claimant receives a request for information regarding the claimant, including faxed or electronically transmitted requests, the practitioner shall submit a copy of the request for information to the [B]oard within [10] days of receipt of the request" (Workers' Compensation Law § 137 [1] [b]; *see* Workers' Compensation Bd Release Subject No. 046-1749 [Mar. 21, 2025]). Copies of all responses to such requests for information regarding a claimant (such as an IME), including all materials which are provided in response to such a request, are required to be "submitted by the responding practitioner to the [B]oard within [10] days of submission of the response to the requestor" (Workers' Compensation Law § 137 [1] [c]; *see* Workers' Compensation Bd Release Subject No. 046-1749 [Mar. 21, 2025]).

The Board's rules provide that a request for information, for purposes of Workers' Compensation Law § 137 (1) (b), "means any substantive communication with an independent medical examiner, or his or her office, regarding the claimant from any person or entity, including a claimant, an insurance carrier, or a third party administrator, that takes place or is initiated outside of the [IME], including a request or referral for examination and any communication related thereto, questions or inquiries related to the claimant or the examination, and the provision of information to the examiner for review in connection with a request for the examiner's professional opinion with regard to the claimant or the examination" (12 NYCRR 300.2 [b] [11]).⁴ "A report of an examination[, or request for an IME,] that does not substantially comply with the requirements of Workers' Compensation Law [§] 137 . . . shall not be admissible as evidence" for various enumerated purposes including, as relevant here, SLU (12 NYCRR 300.2 [d] [12]; *see* § 300.2 [b] [4]; *Matter of Olczyk v Verizon N.Y., Inc.*, 33 AD3d 1109, 1109 [3d Dept 2006]). A party requesting preclusion of an IME report must do so in a "timely manner" (12 NYCRR 300.2 [d] [12]; *see Matter of Page v Liberty Cent. Sch. Dist.*, 188 AD3d 1373, 1376 [3d Dept 2020]).

"The Chair [of the Board] has prescribed the IME-3 form as

4. Although disclosure of substantive communication with the medical provider is required, the Board's rules do not require further filing with the Board when documents or records constituting the substantive communication are already part of the Board's file and are accessible to all parties (*see* 12 NYCRR 300.2 [b] [11]; *see also* Workers' Compensation Bd Release Subject No. 046-769 [July 9, 2015]).

the proper form for the independent medical examiner to file concerning both the submission of a request for information, and for the examiner's response to that request" (*Employer: NYC Transit Auth.*, 2026 WL 124802, *2, 2026 NY Wrk Comp G3452976, *1 [WCB No. G345 2976, Jan. 13, 2026]; *accord Employer: FOJP Serv. Corp.*, 2024 WL 294045, *3, 2024 NY Wrk Comp LEXIS 344, *7 [WCB No. G151 1069, Jan. 18, 2024]). However, in cases where an IME-3 form is not timely filed or not filed at all, the Board has consistently declined requests to preclude IME reports where the carrier properly filed an IME-5 form and instructions that included the purpose of the IME and the questions being posed to the carrier's consultant (*see e.g. Employer: Tishman Speyer Prop. LP*, 2026 WL 200333, *2, 2026 NY Wrk Comp LEXIS 301, *3 [WCB No. G343 2971, Jan. 16, 2026]; *Employer: NYC Transit Auth.*, 2026 WL 124802, *2, 2026 NY Wrk Comp G3452976, *1 [WCB No. G345 2976, Jan. 13, 2026]; *Employer: FOJP Service Corporation*, 2024 WL 294045, *3, 2024 NY Wrk Comp LEXIS 344, *7 [WCB No. G151 1069, Jan. 18, 2024]).

The record reflects that SIF issued and filed an IME-5 form, along with instructions for the examiner, on August 31, 2023, and the IME report was then filed on September 25, 2023. Claimant, however, did not object to the IME report until her written summation on April 18, 2024. Despite having seven months and ample time to raise her objection, claimant did not do so. We therefore discern no abuse of discretion in the Board's finding that claimant did not raise her objection to the IME report in a "timely manner" (12 NYCRR 300.2 [d] [12]; *see Matter of Page v Liberty Cent. Sch. Dist.*, 188 AD3d at 1376). Nevertheless, as the Board found, there was no basis to preclude the September 2023 IME report. Although no IME-3 form was filed, the IME-5 and the instructions for the examiner were filed and received by the Board at the same date and time. The instructions for the examiner identified the specific body parts to be examined and requested that the examiner render findings on, among other things, maximum medical improvement, permanency and impairment percentage for the site of injury. Additionally, neither Workers' Compensation Law § 137 nor the Board's rules expressly require the use of an IME-3 form to satisfy the applicable notice and filing requirements (*see Workers' Compensation Law § 137*; 12 NYCRR 300.2), and claimant does not argue or otherwise suggest that she lacked notice of

the scheduling of the September 2023 IME.⁵ In view of the foregoing, we discern no abuse of discretion in the Board's alternative finding that there was substantial compliance with Workers' Compensation Law § 137 and 12 NYCRR 300.2 and that the September 2023 IME report should therefore not be precluded (*see Employer: Tishman Speyer Prop. LP*, 2026 WL 200333, *2, 2026 NY Wrk Comp LEXIS 301, *3 [WCB No. G343 2971, Jan. 16, 2026]; *Employer: NYC Transit Auth.*, 2026 WL 124802, *2, 2026 NY Wrk Comp G3452976, *1 [WCB No. G345 2976, Jan. 13, 2026]; *Employer: FOJP Serv. Corp.*, 2024 WL 294045, *3, 2024 NY Wrk Comp LEXIS 344, *7 [WCB No. G151 1069, Jan. 18, 2024]). Accordingly, we will not disturb the Board's decision in this respect.

To the extent that claimant's remaining contentions are properly before us and have not been rendered academic by our decision, they have been considered and found to be without merit.

Clark, J.P., Ceresia, Fisher and Corcoran, JJ., concur. Ordered that the decision is affirmed, without costs.

17 Ellis Hospital, Respondent, v Lori D. Dalrymple, Appellant. [— NYS3d —]—

Hospitals—Payment for Services Rendered—Recovery of Outstanding Hospital Bills—Consent of Health Care Proxy Not Required—Defendant Not Incapacitated on Dates in Question and Played Active Role in Her Medical Care

Clark, J. Appeal from a judgment of the Supreme Court (Thomas Buchanan, J.), entered March 20, 2025, in Schenectady County, which partially granted plaintiff's motion for summary judgment.

Plaintiff commenced this action to recover \$5,048.55, plus interest, for unpaid hospital bills pertaining to services rendered to defendant on May 31, 2023, and June 1, 2023. Defendant, proceeding in a self-represented capacity, answered the complaint and served plaintiff with discovery demands requesting, among other things, information about the services performed and a "detailed breakdown of all interest and fees"

5. Notably, the IME-3 form itself states that "[i]f the request for information is limited to a request for scheduling of an [IME], you need not file this form. However, you must send a copy of Form IME-5 . . . to the Workers' Compensation Board" (Workers' Compensation Board, Independent Examiner's Report of Request for Information/Response to Request Regarding Independent Medical Examination, available at <https://www.wcb.ny.gov/content/main/forms/ime3.pdf> [last accessed Mar. 20, 2026]). This suggests that, under the circumstances presented here, the filing of the IME-3 would not be necessary.

requested by plaintiff. Shortly thereafter, plaintiff moved for summary judgment on liability and for an order striking defendant's answer, arguing that defendant was liable for the unpaid medical bills and had no viable defense. Defendant opposed the motion, arguing, among other things, that plaintiff had sent the billing statements demanding payment for the tendered services to the wrong mailing address and, thus, she could not be considered "delinquent" in paying invoices of which she had no notice. In her opposition papers, defendant also requested an order directing plaintiff to provide her with an itemized bill for services "and the chronological order in which such services were performed with the time of day stamped." In reply, plaintiff contested the proposition that defendant did not receive notice of the billing statements, emphasizing that it had sent them "to the address defendant provided at registration and [that] no statement sent by plaintiff was returned [as] undeliverable." Defendant thereafter filed additional papers that she denominated an "Answer," to which she annexed a copy of a healthcare proxy form designating her husband as her healthcare agent and argued that plaintiff performed services without the husband's consent.

By decision and order entered October 10, 2024, Supreme Court held plaintiff's motion for summary judgment in abeyance, ordered plaintiff to file and serve "a supplemental affidavit from a person with knowledge further defining the amounts alleged to be owed by [d]efendant for the care she received," and granted defendant 45 days from the date she was served with such supplemental affidavit to file "any specific written objections to the charges listed in the supplemental affidavit." Pertinent here, the court found that there was a question of fact as to whether defendant had received any billing statements from plaintiff and, thus, whether she failed to object to such bills within a reasonable amount of time, thereby precluding judgment as a matter of law on a claim for an account stated. As for plaintiff's attempt to recover the unpaid bills under a breach of contract theory, the court noted that plaintiff had "submitted a copy of a written guaranty of payment for hospital services signed by defendant's husband," as well as "an itemized statement of the services rendered, the cost of such services, and the medical insurance payments credited against the amount owed," finding that such proof would ordinarily be sufficient to "show [d]efendant's liability for the subject charges." However, because the court could not reconcile the amount requested in the complaint with the bill annexed to plaintiff's motion papers, it held resolution of plaintiff's summary judgment motion in abeyance pending

receipt of a supplemental affidavit and any objections by defendant. In accordance with Supreme Court's directive, plaintiff filed a supplemental affidavit further detailing the amount allegedly owed by defendant. Defendant objected to the charges, contending that she was billed for services that were not medically necessary and that had not been authorized by her husband in his capacity as health care proxy.

By decision and order entered March 20, 2025, Supreme Court partially granted plaintiff's motion to the extent of awarding it a judgment against defendant in the amount of \$5,048.55, plus costs and disbursements, finding that plaintiff had tendered sufficient evidence to satisfy its prima facie burden of demonstrating its entitlement to judgment as a matter of law on its claim for recovery of the unpaid medical bills and that defendant did not raise a triable issue of fact in opposition. A corresponding judgment memorializing the March 20, 2025 order was subsequently issued. Defendant appeals from the March 20, 2025 judgment.*

We affirm. Initially, the record does not support defendant's claim of judicial bias and, to the extent properly before us, we reject such claim outright (*see Steuhl v CRD Metalworks, LLC*, 159 AD3d 1182, 1184 [3d Dept 2018]; *Matter of Flanigan v Smyth*, 148 AD3d 1249, 1253 [3d Dept 2017], *lv dismissed* 29 NY3d 1046 [2017]). Nor did Supreme Court err in initially holding plaintiff's motion for summary judgment in abeyance and ordering the production of additional documentation in support of the motion (*see* CPLR 3212 [f]). Contrary to defendant's contention, Supreme Court also appropriately construed her supplemental papers filed in response to plaintiff's reply papers on the summary judgment motion as a surreply. Since the record is devoid of evidence that defendant sought leave to file a surreply, the court properly declined to consider such papers (*see* CPLR 2214 [b], [c]; *HSBC Bank USA, N.A. v Roumiantseva*, 130 AD3d 983, 985 [2d Dept 2015]).

Turning to the underlying merits of the appeal, we discern no basis upon which to disturb Supreme Court's grant of summary judgment to plaintiff and directing the entry of the judgment it sought against defendant. On a motion for summary judgment, the moving party has the initial burden of establishing its entitlement to judgment as a matter of law "by presenting competent evidence that demonstrates the absence of any material issue of fact" (*White Knight Constr. Contrs., LLC v Haugh*, 216 AD3d 1345, 1346 [3d Dept 2023] [internal quota-

* This Court denied defendant's motion for a stay pending appeal (*see* 2025 NY Slip Op 73802[U] [3d Dept 2025]).

tion marks and citations omitted]; see *Voss v Netherlands Ins. Co.*, 22 NY3d 728, 734 [2014]). Upon satisfying such initial burden, the burden then shifts to the nonmoving party “to present evidence demonstrating the existence of a triable issue of fact” in opposition (*White Knight Constr. Contrs., LLC v Haugh*, 216 AD3d at 1346-1347 [internal quotation marks and citations omitted]; see *Durr v Capital Dist. Transp. Auth.*, 198 AD3d 1238, 1239 [3d Dept 2021]). “Evidence produced by the movant must be viewed in the light most favorable to the nonmovant, affording the nonmovant every favorable inference” (*White Knight Constr. Contrs., LLC v Haugh*, 216 AD3d at 1347 [internal quotation marks, brackets and citations omitted]; see *Vickers v Parcells*, 198 AD3d 1160, 1161 [3d Dept 2021]).

In support of its motion, plaintiff proffered evidence establishing that it rendered hospital and medical services to defendant from May 31, 2023, to June 1, 2023, produced an itemized bill for such services, and demonstrated that, after billing defendant’s insurance, \$5,048.55 in outstanding charges remained, representing the amount of defendant’s deductible. Plaintiff also submitted a copy of a written services agreement signed by defendant’s husband on the date of defendant’s hospitalization, in which he consented to the tendering of medical services to defendant. Notably, the agreement provided that the signatory “or the patient” would be “financially responsible for charges not paid” by defendant’s insurer. Such evidence satisfied plaintiff’s prima facie burden to demonstrate its entitlement to judgment as a matter of law on its claim seeking recovery of the outstanding medical bills from defendant, thereby shifting the burden to plaintiff to establish a triable issue of fact in opposition (see *Albany Med. Ctr. Hosp. v Armlin*, 146 AD2d 866, 866 [3d Dept 1989]; *Samaritan Hosp. v Chodikoff*, 97 AD2d 937, 938 [3d Dept 1983]).

We agree with Supreme Court that, even when construing the evidence in the light most favorable to defendant and affording her the benefit of every favorable inference, she did not demonstrate any triable issues of fact in opposition sufficient to compel the denial of plaintiff’s motion. As for defendant’s claim that plaintiff rendered services to her without the consent of her husband in his capacity as health care proxy, the medical notes in the record demonstrate that defendant was not incapacitated on the dates in question and that she played an active role in her medical care. Thus, the husband did not assume the role of health care proxy on those dates and plaintiff was not obligated to follow the husband’s demands to

not treat defendant without his consent. To the extent defendant challenges the existence of a contract obligating her to pay for the services rendered on the ground that she did not execute the written agreement for services form containing the guaranty of payment, the husband signed the services agreement as defendant's "[a]uthorized [r]epresentative" and the agreement expressly provided that either he or "the patient" would be financially responsible for charges not paid by defendant's insurance provider. Defendant thereafter ratified such agreement by accepting services thereunder (*see Seton Health at Schuyler Ridge Residential Health Care v Dziuba*, 127 AD3d 1297, 1300 [3d Dept 2015]). Upon reviewing the record, we conclude that defendant did not demonstrate the existence of any triable issues of fact in opposition to plaintiff's motion for summary judgment and, therefore, Supreme Court properly granted plaintiff's motion. Defendant's remaining arguments, to the extent not specifically addressed, have been considered and found unavailing.

Garry, P.J., Pritzker, McShan and Corcoran, JJ., concur. Ordered that the judgment is affirmed, without costs.

18 J.M. et al., Appellants, v New York State et al., Defendants, and Unified Court System of the State of New York, Respondent. [— NYS3d —]

**Parties—Standing—Organizational Standing of Disability Rights New York—Individuals with Disabilities Subjected to Illegal and Discriminatory Guardianships under SCPA Article 17-A—Failure to Prove Injury-in-Fact
Limitation of Actions—Three-Year Statute of Limitations—Date of Injury to Individuals with Intellectual or Developmental Disabilities was Their Placement under SCPA Article 17-A Guardianships—Continuing Violation Doctrine Inapplicable**

Pritzker, J. Appeal from an order of the Supreme Court (Kimberly O'Connor, J.), entered December 12, 2024, in Albany County, which granted a motion by defendant Unified Court System of the State of New York to dismiss the amended complaint.

Plaintiffs—consisting of four individuals and Disability Rights New York (hereinafter DRNY)—commenced an action against defendant New York State, defendant Unified Court System of the State of New York (hereinafter UCS), defendant Rowan D. Wilson, as Chief Judge of the State of New York, and defendant Joseph A. Zayas, as Chief Administrative Judge, seeking declaratory relief, injunctive relief and compensatory damages pertaining to the alleged invalidity and unconstitutionality of SCPA article 17-a and, more specifically, defendants' "administration and endorsement" of same. Plaintiffs al-

leged that defendants subjected the individual plaintiffs and other individuals with disabilities to illegal and discriminatory guardianships under SCPA article 17-a. In this regard, they contended, as pertinent here, that defendants violated their substantive and procedural due process rights under the Americans with Disabilities Act (42 USC § 12132 *et seq.* [hereinafter the ADA]) and section 504 of the Rehabilitation Act of 1973 (29 USC § 701 *et seq.*). Plaintiffs also alleged, among other things, that UCS's forms and website assist individuals seeking SCPA article 17-a guardianships and therefore support the use of unconstitutional and discriminatory provisions.

UCS filed a motion to dismiss the amended complaint for, among other reasons, lack of standing and commencement outside the statute of limitations. Supreme Court granted UCS's motion and dismissed the complaint against UCS finding that DRNY lacked standing in the action, that UCS had sovereign immunity as to the first, second, third and sixth causes of action and that the fourth and fifth causes of action were time-barred.* Plaintiffs appeal the dismissal of the amended complaint as against UCS. We affirm.

We turn first to plaintiffs' contention that DRNY has organizational standing. "Standing is a threshold determination and a litigant must establish standing in order to seek judicial review, with the burden of establishing standing being on the party seeking review" (*Matter of Gronbach v New York State Educ. Dept.*, 221 AD3d 1385, 1387 [3d Dept 2023] [internal quotation marks and citations omitted], *lv denied* 41 NY3d 906 [2024]; *see Matter of Long Is. Pure Water, Ltd. v New York State Dept. of Health*, 209 AD3d 1128, 1129 [3d Dept 2022], *lv denied* 39 NY3d 911 [2023]). "In order to establish standing to pursue this litigation, petitioners must show that they have suffered injury-in-fact and that the injury is within the zone of interests protected by the statute at issue" (*Matter of Gronbach v New York State Educ. Dept.*, 221 AD3d at 1387 [internal quotation marks, brackets and citation omitted]; *see Matter of Lansingburgh Cent. Sch. Dist. v New York State Educ. Dept.*, 196 AD3d 937, 939 [3d Dept 2021]). "The critical element is demonstrating an injury-in-fact, which must be based on more than conjecture or speculation" (*Matter of Gronbach v New York State Educ. Dept.*, 221 AD3d at 1387 [internal quotation marks and citations omitted]).

* Plaintiffs do not assert, and therefore have abandoned, any arguments on appeal regarding dismissal of the four causes of action based upon UCS having sovereign immunity (*see Matter of United Jewish Community of Blooming Grove, Inc. v Washingtonville Cent. Sch. Dist.*, 207 AD3d 9, 15 n 2 [3d Dept 2022], *affd* 42 NY3d 348 [2024]).

As relevant here, “an organization can demonstrate standing in its own right to seek judicial relief from injury to itself and to vindicate whatever rights and immunities the association itself may enjoy” (*Matter of Mental Hygiene Legal Serv. v Daniels*, 33 NY3d 44, 51 [2019] [internal quotation marks and citation omitted]; see *Matter of Lawyers for Children v New York State Off. of Children & Family Servs.*, 218 AD3d 913, 914 [3d Dept 2023]). “In this respect, an organization—just like an individual—must show that it has suffered an injury in fact and that its concerns fall within the zone of interests sought to be protected by the statutory provision under which the government agency has acted” (*Matter of Lawyers for Children v New York State Off. of Children & Family Servs.*, 218 AD3d at 914 [internal quotation marks and citations omitted]; see *Matter of Borrello v Hochul*, 221 AD3d 1484, 1488 [4th Dept 2023]).

Initially, there exists no dispute that DRNY satisfied the zone of interests requirement. As to the injury-in-fact requirement for organizational standing, as asserted in the complaint, DRNY is authorized to pursue legal, administrative and other appropriate remedies and approaches to ensure the protection of, and advocacy for, the rights of individuals with intellectual and developmental disabilities. Plaintiffs detailed that DRNY has used its authority to advocate for individuals with intellectual or developmental disabilities who are under SCPA article 17-a guardianship or facing such guardianship and those who wish to terminate or prevent a guardianship. Plaintiffs allege that DRNY has expended significant resources advocating for such individuals in these pursuits. However, they did not demonstrate, nor even contend, that expending these significant resources has caused DRNY to drain its resources beyond that of its authorized purpose, or that expending these resources frustrated DRNY’s purpose (see *Matter of Mental Hygiene Legal Serv. v Daniels*, 33 NY3d at 53; compare *Matter of Lawyers for Children v New York State Off. of Children & Family Servs.*, 218 AD3d at 915; *Mixon v Grinker*, 157 AD2d 423, 426 [1st Dept 1990]). Accordingly, Supreme Court properly determined that DRNY lacked standing because it failed to prove that it had suffered any injury-in-fact.

Plaintiffs contend that the individual plaintiffs’ claims under the ADA and the Rehabilitation Act (fourth and fifth causes of action) are timely. If a federal statute lacks a specific limitations period, federal courts look to “the most appropriate or analogous state statute of limitations” (*Vega-Ruiz v Northwell Health*, 992 F3d 61, 63 [2d Cir 2021] [internal quotation marks

and citations omitted]; see *Purcell v New York Inst. of Tech. - Coll. of Osteopathic Medicine*, 931 F3d 59, 62-63 [2d Cir 2019]). Neither the Rehabilitation Act nor the ADA includes an express statute of limitations, thus, courts apply the limitations period of a state's personal-injury laws (see *Vega-Ruiz v Northwell Health*, 992 F3d at 63; *Purcell v New York Inst. of Tech. - Coll. of Osteopathic Medicine*, 931 F3d at 63). In New York, this period is three years and "begins to run on the date of the injury" (*Haynes v Williams*, 162 AD3d 1377, 1378 [3d Dept 2018], *lv denied* 32 NY3d 906 [2018]; see CPLR 214 [5]). As relevant here, the continuing violation doctrine "provides an exception to the normal knew-or-should-have-known accrual date—meaning an exception to how accrual normally works" (*Olivieri v Stifel, Nicolaus & Co., Inc.*, 112 F4th 74, 88 [2d Cir 2024] [internal quotation marks and citations omitted]). The exception applies to "claims that are composed of a series of separate acts that collectively constitute one unlawful practice" (*id.* [internal quotation marks, ellipsis and citations omitted]).

Here, Supreme Court properly dismissed the amended complaint as time-barred. Inasmuch as the ADA and Rehabilitation Act lack an express statute of limitations, New York's three-year statute of limitations rule for personal injury actions applies and the limitations period here began to accrue on the date of the injury (see CPLR 214 [5]; *Snyder v Town Insulation*, 81 NY2d 429, 432 [1993]; see generally *Purcell v New York Inst. of Tech. - Coll. of Osteopathic Medicine*, 931 F3d at 63). The record establishes that the date of the injury to the individual plaintiffs is the date in which they were placed under SCPA article 17-a guardianships, which was in 2001, 2007, and 2011. Thus, the instant action is time-barred because it was commenced in 2024, decades after the individual plaintiffs were placed under guardianship. We find unpersuasive plaintiffs' argument that the continuing violation doctrine should apply. As Supreme Court correctly determined, "[t]he individual plaintiffs do not allege any use of the forms provided by UCS within the three years prior to commencement of this action . . . [and the individual plaintiffs'] generalized claims fail to identify an alleged discriminatory practice by UCS against the individual plaintiffs themselves" (see generally *Selkirk v State of New York*, 249 AD2d 818, 819 [3d Dept 1998]; *Valtchev v City of New York*, 400 Fed Appx 586, 589 [2d Cir 2010]; *Samuels v City of New York*, 2023 WL 5717892, *5, 2023 US Dist LEXIS 156539, *13 [SD NY 2023]). Accordingly, Supreme Court did not err in declining to apply the continuing violations doctrine and finding the fourth and fifth causes of action to be time-barred. Finally, plaintiffs' equitable tolling

argument is unpreserved as they did not raise this contention before Supreme Court (*see Kumar v Franco*, 211 AD3d 1437, 1441 [3d Dept 2022]). In light of the foregoing determinations, we need not reach UCS's alternative grounds for affirmance asserted in its brief.

Aarons, J.P., McShan and Corcoran, JJ., concur. Ordered that the order is affirmed, without costs.

19 In the Matter of Tyrone Winston, Petitioner, v LT. Burns, as Hearing Officer at Auburn Correctional Facility, et al., Respondents. [252 NYS3d 850]—Proceeding pursuant to CPLR article 78 (transferred to this Court by order of the Supreme Court, entered in Albany County) to review a determination of the Superintendent of Auburn Correctional Facility finding petitioner guilty of violating a prison disciplinary rule.

Determination confirmed. No opinion.

Garry, P.J., Reynolds Fitzgerald, Ceresia, McShan and Ryba, JJ., concur. Adjudged that the determination is confirmed, without costs, and petition dismissed.

20 Harvey Brody, Individually and as Administrator of the Estate of Barbara Brody, Deceased, Appellant, v Bassett Healthcare Network, Respondent. [— NYS3d —]—

Physicians and Surgeons—Malpractice—Failure of Nurse Practitioner to Keep Decedent for Further Observation and Treatment after Presenting with Extensive History of Medical Problems Including Diabetes, Hypertension, and Chronic Respiratory Symptoms

Pritzker, J. Appeal from an order of the Supreme Court (John Lambert, J.), entered April 10, 2025, in Otsego County, which granted defendant's motion for summary judgment dismissing the complaint.

On Friday, July 23, 2021, Barbara Brody (hereinafter decedent) presented to FoxCare medical facility (hereinafter the facility), owned by defendant, complaining of worsening shortness of breath along with several other symptoms, including chest pain. Decedent was evaluated and examined by a nurse practitioner employed by defendant (hereinafter the NP), who noted that decedent had several chronic diseases including coronary artery disease, morbid obesity and Type 2 diabetes. In response to decedent's chief complaints, the NP performed an ECG¹ which did not show significant changes from one that was conducted only two months earlier; the

1. It is noted that ECG, as used throughout the record, and EKG are abbreviations for the same test, which measures the electrical activity of the heart.

earlier ECG had shown a slowed heartbeat and a right bundle branch block. The NP then recommended that decedent return to the facility on Monday, July 26, 2021, for updated blood work to assist in ascertaining the root cause of her shortness of breath. On July 26, a warm summer day, decedent drove herself to the facility; she parked in a handicap parking spot near the entrance to the facility and proceeded to walk to the entrance. At the entrance, she was assisted by a security officer who provided her a wheelchair and transported her to the laboratory. From there, decedent was seen by a phlebotomist employed by defendant. After several attempts, the phlebotomist was unable to draw decedent's blood and instructed her to return to the facility the next day after hydrating. The phlebotomist then wheeled decedent back to her car in the parking lot where decedent was able to move herself into the driver's seat of her car and indicated to the phlebotomist that she was "fine." The phlebotomist did not wait for decedent to start her car and she returned to the facility. Nearly five hours later, around 5:15 p.m., decedent was discovered unresponsive in her car by a nurse employed by defendant. The nurse began CPR and called for more medical assistance. Unfortunately, resuscitation efforts failed.

Plaintiff, individually and as administrator of decedent's estate, commenced this action alleging that defendant's negligence in failing to properly supervise the parking lot and render timely medical care caused decedent's death. Discovery commenced and defendant moved to compel plaintiff to submit a certificate of merit or, if not, striking his claims sounding in medical malpractice. Despite plaintiff's opposition to this motion, Supreme Court (Burns, J.) granted defendant's motion (hereinafter the prior order) and plaintiff subsequently filed a certificate of merit. Thereafter, defendant moved for summary judgment dismissing the complaint, arguing that defendant did not owe decedent a duty to protect her in the parking lot and that defendant's agents did not depart from the standard of care in rendering medical treatment. Plaintiff opposed the motion, and Supreme Court (Lambert, J.), finding that the prior order "ruled" that the case was one sounding in medical malpractice, granted defendant's motion. Specifically, the court found that defendant met its prima facie burden of establishing entitlement to judgment as a matter of law through its expert affidavit and that plaintiff's expert affidavit was insufficient to overcome defendant's showing. Furthermore, the court found that plaintiff improperly raised a new theory of liability in response to defendant's motion for summary judgment based on the NP's departure from the standard of care. Plaintiff appeals.

We turn first to plaintiff's contentions relative to the granting of defendant's motion for summary judgment as to plaintiff's claims sounding in common-law negligence. Initially, plaintiff and defendant agree, as does this Court, that Supreme Court erred in holding that the prior order "ruled" that this action sounded solely in medical malpractice and thereby erroneously precluded discussion of the negligence aspect of the case.² As such, we turn first to the question of whether defendant's motion for summary judgment as to common-law negligence should be granted. As relevant here, "[t]he proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact" as to the presence of a duty, any breach of that duty or whether the breach was an actual or proximate cause of the harm (*Thomas v Albany Hous. Auth.*, 216 AD3d 1381, 1381 [3d Dept 2023] [internal quotation marks and citations omitted]; see *Myers v Home Energy Performance by Halco*, 188 AD3d 1327, 1328-1329 [3d Dept 2020]). "Failure to make such prima facie showing requires a denial of the motion, regardless of the sufficiency of the opposing papers" (*McEleney v Riverview Assets, LLC*, 201 AD3d 1159, 1160 [3d Dept 2022] [internal quotation marks and citations omitted]). If, however, the moving party satisfies its burden, "the burden then shifts to the nonmovant to demonstrate that a triable issue of fact exists" (*Vickers v Parcels*, 198 AD3d 1160, 1161 [3d Dept 2021] [internal quotation marks and citations omitted]). "As with any liability in tort, the scope of a hospital's duty is circumscribed by those risks which are reasonably foreseeable" (*N.X. v Cabrini Med. Ctr.*, 97 NY2d 247, 253 [2002] [citations omitted]; see *Ellis v Lansingburgh Cent. Sch. Dist.*, 163 AD3d 1146, 1147 [3d Dept 2018]).

In support of its motion for summary judgment, defendant submitted, among other proof, excerpts of decedent's medical record, deposition transcripts containing testimony from plaintiff, the security officer and the phlebotomist, decedent's death certificate, the security officer's work log from July 26, 2021, and an expert affirmation from Lawrence Solomon. The security officer testified that he sits in what used to be an information booth near the front doors at the main entrance of the facility. He explained that he is trained in the use of first aid CPR and the use of an AED, which is located approximately

2. To be clear, there appears to be no dispute that plaintiff's theory of liability sounds in negligence as to the monitoring of the parking lot and medical malpractice as to decedent's treatment at the hospital.

50 feet from his booth. The security officer also testified that the handicap parking spaces are approximately 40 feet from his booth. As part of his job responsibilities, he conducts “tours” of defendant’s parking lot throughout his shift, usually a “[c]ouple times a day.” During these tours, he looks for anything “[i]rregular” or “out of place” and he stated that it is not a very big parking lot. He also explained that he does not walk through the parking lot, rather he walks on the sidewalk around the building and typically does his last round of the day around 3:00 p.m. to make sure all exterior doors are locked. Prior to decedent’s death, the security officer did not have any knowledge of any deaths occurring in the parking lot, nor any instances where urgent medical care was required. He recalled that the day decedent died, he noticed her standing by the doors of the main entrance and asked her if she needed assistance with a wheelchair because she was elderly and looked “out of breath,” which she accepted. He wheeled her to the lab registration window, where she remained in the wheelchair, and returned to his post at the front of the building. The security officer testified that he did not see her later exit through the facility doors near his booth. The security officer’s work log from July 26, 2021, confirmed that he clocked in for his shift at 6:00 a.m., walked the complex hourly from 7:00 a.m. to 4:00 p.m. and observed no problems at any point. He transported several patients to various areas within the facility throughout the day including at 7:45 a.m., 9:15 a.m. and 12:30 p.m. The following day when the security officer arrived for his shift, he read the blotter report and became aware that hospital security was called down to the facility for an incident in the parking lot during which decedent was found unresponsive in her vehicle parked in a marked handicap spot.

The phlebotomist testified as to her interactions with decedent on the day she died. She explained that it is not unheard of that a phlebotomist may not be able to draw blood from a patient and that if a person has not had adequate food or water, he or she may be asked to leave the lab area to hydrate before trying again, or they may come back the next day. When she called decedent in for her blood draw, the phlebotomist noted that she was in a wheelchair. Despite several attempts, the phlebotomist was unable to draw decedent’s blood and instructed her to come back the following day. The phlebotomist then wheeled decedent back outside to her car, via the entrance by the security booth, where decedent was able to get out of the wheelchair and into the car herself and told the phlebotomist that she was “fine.” Lawrence Solomon, a physician, opined that patients who are discharged from de-

fendant's facility are presumed stable and healthy enough to return home on their own. According to Solomon, decedent arrived at the facility on her own and, given the absence of any indication that she was unstable at the time of her release, the standard of care did not require the facility to monitor her once she reached her car. Thus, in Solomon's expert opinion, any failure of defendant to act was not a departure from the standard of care. Based on the foregoing, defendant met its prima facie burden such that the burden shifts to plaintiff to raise a dispute of material fact (*see Inger v PCK Dev. Co., LLC*, 97 AD3d 895, 897-898 [3d Dept 2012], *lv denied* 19 NY3d 816 [2012]).

In opposition to defendant's motion for summary judgment, plaintiff submitted, as relevant here, an affirmation in opposition to the motion, the job description written by defendant for its security officers and pictures of the handicap spaces wherein decedent's car was parked when she died. The security officer's job description as written explicitly requires security personnel to patrol the building and parking lots associated with their assigned areas. Furthermore, the description gives security personnel the responsibility for patrolling or maintaining watch at designated parking areas "for assistance and enforcement." Under the heading "Essential Job Functions" and the subheading "Security and Safety," security personnel are required to patrol all assigned areas including parking lots—not just the perimeter of the property—to check for suspicious occurrences. This responsibility is also reiterated in terms of their parking enforcement duties wherein security personnel are to perform "patrols of parking lots, or maintain[] watch at designated parking area for assistance and enforcement." Given the foregoing, plaintiff raised an issue of material fact such that summary judgment should have been denied as to the negligence claim. While defendant's security officer job description does not explicitly place upon its employees the duty to monitor patients leaving the building for medical emergencies, it does suggest that defendant assumed a duty to protect the safety and security of its patrons through their security personnel patrolling, among other areas, the facility parking lots. This runs directly contrary to the security officer's testimony that he was only required to patrol the perimeter of the facility. Additionally, the picture of the parking spot where decedent's car was parked illustrates that decedent sat in a hot car for *several* hours in a parking space *within plain view* of the security officer. Therefore, plaintiff raised issues of material fact as to the whether defendant assumed a duty in this case such that defendant's motion for summary judgment as to plaintiff's claim

sounding in general negligence should have been denied (see *Kirschler v Village of N. Collins*, 229 AD3d 1264, 1266 [4th Dept 2024]; *Hyer v Fuller*, 107 AD3d 1235, 1236-1237 [3d Dept 2013]).

We turn now to plaintiff's contentions regarding Supreme Court's granting of defendant's motion for summary judgment as to the claims sounding in medical malpractice. In that regard, plaintiff first argues that the court erred in finding that he raised a new theory of recovery based upon the negligent actions of the NP who examined decedent on July 23, 2021, specifically failing to keep decedent for further observation and treatment after presenting in such a distressed state. "A plaintiff cannot raise a new or materially different theory of recovery against a party from those pleaded in the complaint and the bill of particulars for the first time in opposition to a motion for summary judgment" (*Fasce v Catskill Regional Med. Ctr.*, 209 AD3d 1138, 1139-1140 [3d Dept 2022] [internal quotation marks and citations omitted]; see *Henderson v Takemoto*, 223 AD3d 996, 1001 [3d Dept 2024]). Thus, the inquiry distills to whether the theory of liability was asserted "in the complaint as amplified by the bill of particulars" (*Conti v Albany Med. Ctr. Hosp.*, 159 AD2d 772, 773 [3d Dept 1990], *lv denied* 76 NY2d 702 [1990]; see *Henderson v Takemoto*, 223 AD3d at 1001). A review of the complaint and the bill of particulars demonstrates that although the complaint centers almost entirely around the events of July 26, 2021, there is an allegation of medical negligence against a "nurse" who knew of plaintiff's underlying medical conditions and failed to take appropriate action. Only two nurses were involved in the events surrounding decedent's death—the NP who examined decedent on July 23 and the nurse who found decedent unresponsive in her car on July 26. As such, it appears that it is the NP plaintiff is referring to here because through her treatment of decedent, she conducted an extensive review of her medical history.³ Additionally, the record does not show that the nurse who found decedent would have any such knowledge. Accordingly, given this context, it is evident from the pleadings that plaintiff intended to pursue claims of medical malpractice based on the NP's actions and thus it is not a new theory of liability (see *Walker v Jamaica Hosp. Med. Ctr.*, 208 AD3d 714, 716 [2d Dept 2022]; compare *Larcy v Kamler*, 185 AD3d 564, 566 [2d Dept 2020]). As such, we turn to the merits of defendant's summary judgment motion.

3. We note that, in Soloman's expert affidavit in support of defendant's motion for summary judgment, he did specifically discuss the examination by the NP on July 23, 2021.

“To meet the initial burden on a summary judgment motion in a medical malpractice action, the defendant[] must present factual proof, generally consisting of affidavits, deposition testimony and medical records, to rebut the claim of malpractice by establishing that they complied with the accepted standard of care or did not cause any injury to the patient” (*Marshall v Rosenberg*, 196 AD3d 817, 818 [3d Dept 2021] [internal quotation marks, brackets and citations omitted]; see *Cole v Champlain Val. Physicians’ Hosp. Med. Ctr.*, 116 AD3d 1283, 1285 [3d Dept 2014]). If the defendant meets this burden, then “the burden shift[s] to [the] plaintiff to present expert medical opinion evidence that there was a deviation from the accepted standard of care and that this departure was a proximate cause of decedent’s injury” (*Schwenzfeier v St. Peter’s Health Partners*, 213 AD3d 1077, 1080 [3d Dept 2023] [internal quotation marks, brackets and citations omitted]; see *Goldschmidt v Cortland Regional Med. Ctr., Inc.*, 190 AD3d 1212, 1214 [3d Dept 2021]).

In support of its motion for summary judgment, defendant proffered the deposition testimony of the NP wherein she discussed her examination of decedent on July 23, 2021. The NP testified that she is an adult-geriatric NP employed by defendant practicing at the facility and that she is assigned to a cardiologist employed by defendant, who is her collaborating physician. As a new patient, the NP recalled seeing decedent for approximately a 40-minute visit on July 23 to address decedent’s complaints of shortness of breath. The NP noted decedent’s chronic medical conditions and decedent’s report that the shortness of breath had been on and off since January 2020, that she was also retaining fluid, experiencing intermittent chest pain and feeling exhausted. A physical examination of decedent as well as an ECG were conducted which revealed no significant change from her prior examination. She also extensively reviewed decedent’s medical history including previous studies noted in her chart. Decedent’s medical record indicates that the NP consulted with her consulting physician, who also reviewed the results of the ECG. The NP testified that she ordered decedent to return to the facility within the next few days to have blood work to rule out whether certain conditions were the cause of decedent’s shortness of breath. Although the NP could not recall if she considered hospitalizing decedent, she indicated that she did recommend that decedent get the blood work done as soon as possible so they could get an idea of what was going on given decedent’s gradually worsening symptoms. For his part, Solomon opined that considering the results of the NP’s examination of decedent, combined with her conditions and recent complaints, the stan-

dard of care required that blood work be conducted as soon as possible. Given the limited hours of the lab on site, Solomon concluded that the NP did not depart from the standard of care when she directed decedent to return for blood work as soon as the lab was open again. Solomon also discussed that, by all accounts, decedent appeared in good health on July 26 and that the phlebotomist's inability to draw decedent's blood alone is not evidence that something is acutely wrong. The foregoing proof was sufficient to meet defendant's prima facie burden (see *Schultz v Albany Med. Ctr. Hosp.*, 238 AD3d 1286, 1288-1289 [3d Dept 2025]; *Kelly v Herzog*, 224 AD3d 1189, 1191 [3d Dept 2024]). Thus, the burden shifted to plaintiff to raise an issue of material fact.

Plaintiff, in opposition, proffered, as relevant here, an expert affidavit from Arthur Fass, a licensed physician who is board certified in internal medicine and cardiology. In his expert affidavit, Fass opined that, based on his review of decedent's medical record as well as deposition testimony and other documentation related to this case, the NP's failure to order immediate hospital evaluation departed from the standard of care. Fass further explained that decedent presented to the NP with an extensive history of medical problems including diabetes, hypertension, chronic respiratory symptoms and many others. Her records also indicated that only seven weeks prior to her visit with the NP, decedent had a stent placed to resolve arterial blockage and decedent reported gaining approximately 20 pounds within the last two months. Based on her history and presentation as described, Fass concluded that these were likely signs of cardiac ischemia (lack of blood flow) and congestive heart failure thus necessitating immediate referral to a hospital for further evaluation and treatment. He further concluded that had the NP "ordered immediate hospital evaluation, [decedent] would have received the follow-up evaluation and care she needed." Accordingly, when viewed in the light most favorable to plaintiff, we find that the foregoing was sufficient to raise an issue of fact as to whether the NP's failure to order such hospitalization was a departure from the standard of care which contributed to decedent's death (see *Lubrano-Birken v Ellis Hosp.*, 229 AD3d 873, 879 [3d Dept 2024]; *Schwenzfeier v St. Peter's Health Partners*, 213 AD3d at 1084).

Garry, P.J., Clark, McShan and Corcoran, JJ., concur. Ordered that the order is reversed, on the law, with costs, and motion denied.

21 In the Matter of Adebukola Ogunsanya, an Attorney. (Attorney Registration No. 5679816.) [— NYS3d —]

Attorney and Client—Disciplinary Proceedings—Immediate Interim Suspension—Failure to Respond to Attorney Grievance Committee Demands and Inquiries and to Appear at Examination under Oath

Per Curiam. Respondent was admitted to practice by this Court in 2019 and Office of Court Administration records list her business address in New Jersey. The Attorney Grievance Committee for the Third Judicial Department (hereinafter AGC) advises that it is presently investigating six complaints of professional misconduct filed against respondent, which include allegations that respondent and a nonattorney—Sean Mescall—engaged in a fraudulent legal practice that operated under multiple names in New York City, including Prospection Legal Group. Citing respondent's failure to respond to the complaints and to appear at an examination under oath, AGC seeks respondent's interim suspension; despite being duly noticed of AGC's motion, respondent has not submitted a response thereto.

We may suspend an attorney from practice during the pendency of an investigation or proceeding upon our finding that the attorney has engaged in conduct immediately threatening the public interest (*see Matter of Gearing*, 228 AD3d 1055, 1055-1056 [3d Dept 2024]; Rules for Atty Disciplinary Matters [22 NYCRR] § 1240.9 [a]). As AGC possesses broad authority to obtain records and documents in furtherance of its investigative responsibilities (*see Matter of Caruso*, 205 AD3d 1264, 1264 [3d Dept 2022]), Rules for Attorney Disciplinary Matters (22 NYCRR) § 1240.9 (a) (3) provides that the mere failure to comply with the lawful demand of AGC during its investigation provides a sufficient basis to suspend the attorney (*see e.g. Matter of Fischer*, 239 AD3d 1229, 1230 [3d Dept 2025]; *Matter of Brown*, 232 AD3d 981, 983 [3d Dept 2024]; *Matter of Barry*, 198 AD3d 1255, 1258 [3d Dept 2021]). Similarly, an attorney's failure to respond to, among other things, a notice to appear for an examination under oath provides a sufficient basis for his or her immediate suspension (*see Matter of Canizio*, 210 AD3d 1187, 1188 [3d Dept 2022]; Rules for Atty Disciplinary Matters [22 NYCRR] § 1240.9 [a] [1]).

Here, the record produced by AGC indicates that respondent failed to provide any responses to two of the six complaints, despite being notified of same, and that she likewise failed to appear at the examination under oath and produce certain records sought by AGC in order to aid in its investigations of the complaints. While respondent did submit brief responses to four of the six complaints, the responses largely denied any familiarity with the relevant clients and focused instead on

Mescall's conduct and respondent's purported resignation from the firm upon learning of same. Regardless of her knowledge of Mescall's conduct or her attempts to distance herself from Mescall and the firm, respondent has an affirmative obligation, as an attorney licensed to practice law in New York, to respond to AGC's demands and inquiries, and to appear at an examination under oath if so directed. Accordingly, respondent's failure to respond to AGC's notices and to appear at the examination—which conduct is only magnified by respondent's failure to respond to AGC's instant motion—constitutes professional misconduct that immediately threatens the public interest, jeopardizes the effectiveness of the attorney-disciplinary system and, as a consequence, warrants her interim suspension (*see Matter of Figueroa*, 241 AD3d 1670, 1672 [3d Dept 2025]). Accordingly, we grant AGC's motion and suspend respondent from the practice of law immediately and until further order of this Court. In suspending respondent, we remind her of her affirmative and ongoing obligation to respond or appear for further investigatory or disciplinary proceedings, and note that her failure to do so within six months of this order may result in her disbarment without further notice (*see Matter of Fischer*, 239 AD3d at 1232; Rules for Atty Disciplinary Matters [22 NYCRR] § 1240.9 [b]).

Garry, P.J., Ceresia, Fisher, Corcoran and Ryba, JJ., concur. Ordered that the motion by the Attorney Grievance Committee for the Third Judicial Department is granted; and it is further ordered that respondent is suspended from the practice of law, effective immediately, and until further order of this Court (*see generally* Rules for Atty Disciplinary Matters [22 NYCRR] § 1240.16); and it is further ordered that, for the period of the suspension, respondent is commanded to desist and refrain from the practice of law in any form in the State of New York, either as principal or as agent, clerk or employee of another; and respondent is hereby forbidden to appear as an attorney or counselor-at-law before any court, judge, justice, board, commission or other public authority, or to give to another an opinion as to the law or its application, or any advice in relation thereto, or to hold herself out in any way as an attorney and counselor-at-law in this state; and it is further ordered that respondent shall comply with the provisions of the Rules for Attorney Disciplinary Matters regulating the conduct of suspended attorneys and shall duly certify to the same in her affidavit of compliance (*see* Rules for Atty Disciplinary Matters [22 NYCRR] § 1240.15); and it is further ordered that respondent shall, within 30 days of the date of this decision, surrender to the Office of Court Administration any Attorney

Secure Pass issued to her; and it is further ordered that, within 20 days from the date of this decision, respondent may submit a request, in writing, to this Court for a postsuspension hearing (*see* Rules for Atty Disciplinary Matters [22 NYCRR] § 1240.9 [c]); and it is further ordered that respondent's failure to respond to or appear for further investigatory or disciplinary proceedings within six months from the date of this decision may result in her disbarment by the Court without further notice (*see* Rules for Atty Disciplinary Matters [22 NYCRR] § 1240.9 [b]).

22 In the Matter of Neal Mitchel Frank, an Attorney. (Attorney Registration No. 1787258.) [252 NYS3d 848]—

Attorney and Client—Resignation—Nondisciplinary Reasons

Per Curiam. Neal Mitchel Frank was admitted to practice by this Court in 1982 and lists a business address in Ramsey, New Jersey with the Office of Court Administration. Frank now seeks leave to resign from the New York bar for nondisciplinary reasons (*see* Rules for Atty Disciplinary Matters [22 NYCRR] § 1240.22 [a]). The Attorney Grievance Committee for the Third Judicial Department (hereinafter AGC) advises that it does not oppose Frank's application.

Upon reading Frank's affidavit sworn to February 19, 2026, and filed February 25, 2026, and upon reading the April 7, 2026 correspondence in response by the Deputy Chief Attorney for AGC, and having determined that Frank is eligible to resign for nondisciplinary reasons, we grant his application and accept his resignation.

Aarons, J.P., Pritzker, Ceresia, Fisher and McShan, JJ., concur. Ordered that Neal Mitchel Frank's application for permission to resign is granted and his nondisciplinary resignation is accepted; and it is further ordered that Neal Mitchel Frank's name is hereby stricken from the roll of attorneys and counselors-at-law of the State of New York, effective immediately, and until further order of this Court (*see generally* Rules for Atty Disciplinary Matters [22 NYCRR] § 1240.22 [b]); and it is further ordered that Neal Mitchel Frank is commanded to desist and refrain from the practice of law in any form in the State of New York, either as principal or as agent, clerk or employee of another; and Frank is hereby forbidden to appear as an attorney or counselor-at-law before any court, judge, justice, board, commission or other public authority, or to give to another an opinion as to the law or its application, or any advice in relation thereto, or to hold himself out in any way as an attorney and counselor-at-law in this state; and it is

further ordered that Neal Mitchel Frank shall, within 30 days of the date of this decision, surrender to the Office of Court Administration any Attorney Secure Pass issued to him.

23 In the Matter of Elizabeth Marie Mills, an Attorney. (Attorney Registration No. 5537758.) [252 NYS3d 845]—

Attorney and Client—Resignation—Nondisciplinary Reasons

Per Curiam. Elizabeth Marie Mills was admitted to practice by this Court in 2017 and lists a business address in Woodstock, Illinois with the Office of Court Administration. Mills now seeks leave to resign from the New York bar for nondisciplinary reasons (*see* Rules for Atty Disciplinary Matters [22 NYCRR] § 1240.22 [a]). The Attorney Grievance Committee for the Third Judicial Department (hereinafter AGC) advises that it does not oppose Mills' application.

Upon reading Mills' affidavit sworn to February 6, 2026, and filed February 10, 2026, and upon reading the April 7, 2026 correspondence in response by the Deputy Chief Attorney for AGC, and having determined that Mills is eligible to resign for nondisciplinary reasons, we grant her application and accept her resignation.

Aarons, J.P., Pritzker, Ceresia, Fisher and McShan, JJ., concur. Ordered that Elizabeth Marie Mills' application for permission to resign is granted and her nondisciplinary resignation is accepted; and it is further ordered that Elizabeth Marie Mills' name is hereby stricken from the roll of attorneys and counselors-at-law of the State of New York, effective immediately, and until further order of this Court (*see generally* Rules for Atty Disciplinary Matters [22 NYCRR] § 1240.22 [b]); and it is further ordered that Elizabeth Marie Mills is commanded to desist and refrain from the practice of law in any form in the State of New York, either as principal or as agent, clerk or employee of another; and Mills is hereby forbidden to appear as an attorney or counselor-at-law before any court, judge, justice, board, commission or other public authority, or to give to another an opinion as to the law or its application, or any advice in relation thereto, or to hold herself out in any way as an attorney and counselor-at-law in this state; and it is further ordered that Elizabeth Marie Mills shall, within 30 days of the date of this decision, surrender to the Office of Court Administration any Attorney Secure Pass issued to her.

24 In the Matter of Attorneys in Violation of Judiciary Law § 468-a. Attorney Grievance Committee for the Third Judicial Department, Petitioner; Anson Carlton Asaka, Respondent. (Attorney Registration No. 2923340.) [252 NYS3d 846]—

Attorney and Client—Reinstatement

Motion by respondent for an order reinstating him to the practice of law following his suspension by May 2019 order of this Court (*Matter of Attorneys in Violation of Judiciary Law § 468-a*, 172 AD3d 1706, 1710 [3d Dept 2019]; see Rules for Atty Disciplinary Matters [22 NYCRR] § 1240.16; Rules of App Div, 3d Dept [22 NYCRR] § 806.16).

Upon reading respondent's notice of motion and affidavit with exhibit sworn to February 9, 2026, respondent's supplemental affidavit with exhibit of February 18, 2026, and the March 16, 2026 responsive correspondence from the Attorney Grievance Committee for the Third Judicial Department, and having determined, by clear and convincing evidence, that (1) respondent has satisfied the requirements of Rules of the Appellate Division, Third Department (22 NYCRR) § 806.16 (c) (5), (2) respondent has complied with the order of suspension and the rules of this Court, (3) respondent has the requisite character and fitness to practice law, and (4) it would be in the public interest to reinstate respondent to the practice of law (see Rules for Atty Disciplinary Matters [22 NYCRR] § 1240.16 [a]), it is ordered that respondent's motion for reinstatement is granted; and it is further ordered that respondent is reinstated as an attorney and counselor-at-law, effective immediately.

Clark, J.P., Reynolds Fitzgerald, Fisher, Powers and Corcoran, JJ., concur.

25 In the Matter of Attorneys in Violation of Judiciary Law § 468-a. Attorney Grievance Committee for the Third Judicial Department, Petitioner; Wengang He, Respondent. (Attorney Registration No. 4289302.) [252 NYS3d 353]—

Attorney and Client—Reinstatement

Motion by respondent for an order reinstating them to the practice of law following their suspension by May 2019 order of this Court (*Matter of Attorneys in Violation of Judiciary Law § 468-a*, 172 AD3d 1706, 1727 [3d Dept 2019]; see Rules for Atty Disciplinary Matters [22 NYCRR] § 1240.16; Rules of App Div, 3d Dept [22 NYCRR] § 806.16).

Upon reading respondent's notice of motion and affidavit with exhibits sworn to February 10, 2026, the March 16, 2026 responsive correspondence from the Attorney Grievance Committee for the Third Judicial Department and respondent's supplemental correspondence of March 17, 2026, and having determined, by clear and convincing evidence, that (1) respondent has satisfied the requirements of Rules of the Appellate

Division, Third Department (22 NYCRR) § 806.16 (c) (5), (2) respondent has complied with the order of suspension and the rules of this Court, (3) respondent has the requisite character and fitness to practice law, and (4) it would be in the public interest to reinstate respondent to the practice of law (*see* Rules for Atty Disciplinary Matters [22 NYCRR] § 1240.16 [a]), it is ordered that respondent's motion for reinstatement is granted; and it is further ordered that respondent is reinstated as an attorney and counselor-at-law, effective immediately.

Clark, J.P., Reynolds Fitzgerald, Fisher, Powers and Corcoran, JJ., concur.

26 In the Matter of Attorneys in Violation of Judiciary Law § 468-a. Attorney Grievance Committee for the Third Judicial Department, Petitioner; Zhe Sang, Respondent. (Attorney Registration No. 5256391.) [252 NYS3d 843]—

Attorney and Client—Reinstatement

Motion by respondent for an order reinstating them to the practice of law following their suspension by September 2024 order of this Court (*Matter of Attorneys in Violation of Judiciary Law § 468-a*, 230 AD3d 1498, 1518 [3d Dept 2024]; *see* Rules for Atty Disciplinary Matters [22 NYCRR] § 1240.16; Rules of App Div, 3d Dept [22 NYCRR] § 806.16).

Upon reading respondent's affidavit sworn to February 3, 2026, and the March 12, 2026 responsive correspondence from the Attorney Grievance Committee for the Third Judicial Department, and having determined, by clear and convincing evidence, that, (1) respondent has complied with the order of suspension and the rules of this Court, (2) respondent has the requisite character and fitness to practice law, and (3) it would be in the public interest to reinstate respondent to the practice of law (*see* Rules for Atty Disciplinary Matters [22 NYCRR] § 1240.16 [a]), it is ordered that respondent's motion for reinstatement is granted; and it is further ordered that respondent is reinstated as an attorney and counselor-at-law, effective immediately. Clark, J.P., Reynolds Fitzgerald, Fisher, Powers and Corcoran, JJ., concur.

27 In the Matter of Lawrence Martin Brody, an Attorney. (Attorney Registration No. 4749883.) [252 NYS3d 846]—

Attorney and Client—Resignation—Nondisciplinary Reasons

Per Curiam. Lawrence Martin Brody was admitted to practice by this Court in 2009 and lists a business address in Tinton Falls, New Jersey with the Office of Court Administration. Brody now seeks leave to resign from the New York bar

for nondisciplinary reasons (*see* Rules for Atty Disciplinary Matters [22 NYCRR] § 1240.22 [a]). The Attorney Grievance Committee for the Third Judicial Department (hereinafter AGC) advises that it does not oppose Brody's application.

Upon reading Brody's affidavit sworn to February 10, 2026, and filed February 13, 2026, and upon reading the April 7, 2026 correspondence in response by the Deputy Chief Attorney for AGC, and having determined that Brody is eligible to resign for nondisciplinary reasons, we grant his application and accept his resignation.

Garry, P.J., Clark, Fisher, Mackey and Ryba, JJ., concur. Ordered that Lawrence Martin Brody's application for permission to resign is granted and his nondisciplinary resignation is accepted; and it is further ordered that Lawrence Martin Brody's name is hereby stricken from the roll of attorneys and counselors-at-law of the State of New York, effective immediately, and until further order of this Court (*see generally* Rules for Atty Disciplinary Matters [22 NYCRR] § 1240.22 [b]); and it is further ordered that Lawrence Martin Brody is commanded to desist and refrain from the practice of law in any form in the State of New York, either as principal or as agent, clerk or employee of another; and Brody is hereby forbidden to appear as an attorney or counselor-at-law before any court, judge, justice, board, commission or other public authority, or to give to another an opinion as to the law or its application, or any advice in relation thereto, or to hold himself out in any way as an attorney and counselor-at-law in this state; and it is further ordered that Lawrence Martin Brody shall, within 30 days of the date of this decision, surrender to the Office of Court Administration any Attorney Secure Pass issued to him.

28 In the Matter of Hideaki Kubo, an Attorney. (Attorney Registration No. 2431583.) [252 NYS3d 844]—

Attorney and Client—Resignation—Nondisciplinary Reasons

Per Curiam. Hideaki Kubo was admitted to practice by this Court in 1991 and lists a business address in Tokyo, Japan with the Office of Court Administration. Kubo now seeks leave to resign from the New York bar for nondisciplinary reasons (*see* Rules for Atty Disciplinary Matters [22 NYCRR] § 1240.22 [a]). The Attorney Grievance Committee for the Third Judicial Department (hereinafter AGC) advises that it does not oppose Kubo's application.

Upon reading Kubo's affidavit sworn to February 16, 2026, and filed February 27, 2026, and upon reading the April 7, 2026 correspondence in response by the Deputy Chief Attorney

for AGC, and having determined that Kubo is eligible to resign for nondisciplinary reasons, we grant their application and accept their resignation.

Garry, P.J., Clark, Fisher, Mackey and Ryba, JJ., concur. Ordered that Hideaki Kubo's application for permission to resign is granted and their nondisciplinary resignation is accepted; and it is further ordered that Hideaki Kubo's name is hereby stricken from the roll of attorneys and counselors-at-law of the State of New York, effective immediately, and until further order of this Court (*see generally* Rules for Atty Disciplinary Matters [22 NYCRR] § 1240.22 [b]); and it is further ordered that Hideaki Kubo is commanded to desist and refrain from the practice of law in any form in the State of New York, either as principal or as agent, clerk or employee of another; and Kubo is hereby forbidden to appear as an attorney or counselor-at-law before any court, judge, justice, board, commission or other public authority, or to give to another an opinion as to the law or its application, or any advice in relation thereto, or to hold themselves out in any way as an attorney and counselor-at-law in this state; and it is further ordered that Hideaki Kubo shall, within 30 days of the date of this decision, surrender to the Office of Court Administration any Attorney Secure Pass issued to them.

(April 23, 2026)

1 The People of the State of New York, Respondent, v Anthony Nesbitt, Appellant. [253 NYS3d 425]—

Crimes—Appeal—Invalid Waiver of Right to Appeal

Crimes—Plea Bargaining—Enforcement of Agreement—Imposition of Agreed-upon Consecutive Sentences Not Improper or Unduly Harsh and Severe

Mackey, J. Appeal from a judgment of the County Court of Schenectady County (Mark Caruso, J.), rendered August 30, 2021, convicting defendant upon his plea of guilty of the crimes of criminal contempt in the first degree, attempted assault in the second degree and menacing in the second degree.

In satisfaction of an 11-count indictment, defendant pleaded guilty to the crimes of criminal contempt in the first degree, attempted assault in the second degree and menacing in the second degree. The plea agreement also required defendant to waive his right to appeal. County Court thereafter sentenced defendant, as a second felony offender, to the agreed-upon consecutive terms of imprisonment of 2 to 4 years on the two felony convictions and to a lesser concurrent sentence on the menac-

ing conviction. Defendant appealed, and this Court rejected counsel's *Anders* brief, withheld decision and assigned new counsel to represent defendant on appeal (237 AD3d 1366 [3d Dept 2025]).

Initially, we agree with defendant that his appeal waiver is invalid. The written waiver signed by defendant indicates that it "mark[s] the end of [his] case" and advises that he is waiving the right to appeal any matters "which [he] may collaterally attack in any state or federal court." While the written waiver and the brief oral colloquy do advise that some direct appellate review survives, neither clarified that defendant's right to seek collateral relief also survives. Accordingly, defendant's appeal waiver is not knowing, intelligent or voluntary (*see People v Appiah*, 218 AD3d 1060, 1061 [3d Dept 2023], *revd on different grounds* 41 NY3d 949 [2024]). As a result, defendant's challenge to the severity of his sentence is not precluded (*see People v Paige*, 243 AD3d 1022, 1023 [3d Dept 2025]; *People v Gouge*, 239 AD3d 1143, 1144 [3d Dept 2025]). That said, we do not find the imposition of the agreed-upon consecutive sentences to be improper (*see People v Loadholt*, 234 AD3d 1188, 1189 [3d Dept 2025]) or unduly harsh or severe (*see* CPL 470.15 [6] [b]), and we decline defendant's invitation to modify his sentence in the interest of justice (*see* CPL 470.15 [3] [c]). Finally, although defendant contends that County Court failed to follow through with its commitment at sentencing to attach a letter of support written by his fiancée to his presentence report, any request for such relief should be addressed to County Court.

Garry, P.J., Reynolds Fitzgerald, Powers and Ryba, JJ., concur. Ordered that the judgment is affirmed.

2 The People of the State of New York, Respondent, v Jose Martinez, Appellant. [252 NYS3d 851]—

Crimes—Appeal—Valid Waiver of Right to Appeal

Appeal from a judgment of the County Court of Albany County (Andra Ackerman, J.), rendered March 24, 2022, convicting defendant upon his plea of guilty of the crime of robbery in the third degree.

In satisfaction of numerous pending charges, defendant waived indictment and pleaded guilty to a superior court information charging him with robbery in the third degree and agreed to waive his right to appeal. Pursuant to the terms of the plea agreement, defendant was placed on interim probation for one year, with the understanding that, upon successful completion thereof, he would be sentenced to a period of probation. Defendant was advised that, if he did not successfully

complete the period of interim probation, a maximum prison term of $2\frac{1}{3}$ to 7 years could be imposed. Defendant was subsequently arrested several times. As a result of his unsuccessful compliance with the terms of his interim probation, County Court sentenced defendant to $2\frac{1}{3}$ to 7 years in prison. Defendant appeals.

Notwithstanding defendant's challenges to the alleged insufficiencies regarding the overbreadth and execution of the written appeal waiver, we find that the oral colloquy was sufficient to ensure that defendant understood the nature and consequences of his appeal waiver. To that end, County Court advised defendant that the appeal waiver was separate and distinct from the rights automatically forfeited by his guilty plea and made clear that certain appellate issues survived appellate review. Defendant, who acknowledged having discussed the appeal waiver with counsel, assured the court that he understood the nature and consequences of waiving his right to appeal. Upon our review of the record, we are satisfied that the totality of the circumstances reflects that defendant knowingly, voluntarily and intelligently waived his right to appeal (see *People v Rowe*, 239 AD3d 1202, 1202 [3d Dept 2025], *lv denied* 44 NY3d 984 [2025]; *People v Williams*, 235 AD3d 1066, 1067 [3d Dept 2025]). Given the valid appeal waiver, and that defendant was informed of the maximum sentencing exposure in the event that his performance on interim probation was unsuccessful, his challenge to the severity of the sentence imposed is foreclosed (see *People v Peters*, 238 AD3d 1391, 1392 [3d Dept 2025]; *People v Ashley*, 211 AD3d 1174, 1174-1175 [3d Dept 2022]).

Clark, J.P., Aarons, Pritzker, McShan and Mackey, JJ., concur. Ordered that the judgment is affirmed.

3 The People of the State of New York, Respondent, v Jerry Ellington, Appellant. [252 NYS3d 850]—

Crimes—Plea of Guilty—Sufficiency of Allocution—Attempted Promoting Prison Contraband

Fisher, J. Appeal from a judgment of the County Court of Washington County (Kelly McKeighan, J.), rendered May 20, 2022, convicting defendant upon his plea of guilty of the crime of attempted promoting prison contraband in the first degree.

In October 2021, an individual visiting defendant, an incarcerated individual, was found to have drugs and two razor blades in her possession. After an investigation revealed that defendant was involved in the plan to smuggle those items into the facility, he was charged by indictment with three counts of

promoting prison contraband in the first degree, criminal possession of a controlled substance in the fifth degree and promoting prison contraband in the second degree. Defendant agreed to plead guilty, in full satisfaction of the indictment, to the reduced charge of attempted promoting prison contraband in the first degree. He did so upon the understanding that he would be sentenced, as a second felony offender, to a prison term of 1½ to 3 years that would run consecutive to the prison sentence he was already serving. County Court imposed the agreed-upon sentence, and defendant appeals.

We affirm. Defendant's challenge to the voluntariness of his plea, as well as his related claim that ineffective assistance of counsel impacted upon the voluntariness of that plea, are unpreserved for our review given his apparent failure to raise those issues in an appropriate postallocation motion despite having had ample time to do so (*see People v Hendrie*, 242 AD3d 1258, 1258 [3d Dept 2025]; *People v Guilder*, 235 AD3d 1044, 1045-1046 [3d Dept 2025], *lv denied* 43 NY3d 963 [2025]).* Our review of the record leaves us satisfied that the narrow exception to the preservation requirement was not triggered (*see People v Hendrie*, 242 AD3d at 1258; *People v Leroux*, 234 AD3d 1214, 1214-1215 [3d Dept 2025]). We would reject the claims, in any event, as "the record reflects that County Court sufficiently informed defendant of the trial-related rights he was forfeiting by pleading guilty and defendant affirmed that he had sufficient time to confer with counsel, was satisfied with counsel's representation and understood the consequences of entering a guilty plea," after which defendant admitted to committing the crime at issue (*People v Hawkins*, 207 AD3d 814, 815-816 [3d Dept 2022]; *see People v Hendrie*, 242 AD3d at 1258; *People v Leroux*, 234 AD3d at 1214-1215). As such, we perceive no reason to take corrective action in the interest of justice.

Lastly, we reject defendant's contention that the agreed-upon prison sentence received by defendant was unduly harsh or severe, as it was the minimum allowed by law (*see* Penal Law §§ 70.06 [3] [e]; [4] [b]; 110.05 [6]; 205.25 [1]; *People v Lilliard*, 206 AD3d 1241, 1244 [3d Dept 2022]). We have examined defendant's remaining contentions and have found them to be academic or without merit.

* To the extent that defendant's claim of ineffective assistance is premised upon matters outside of the record like counsel's alleged failure to sufficiently investigate potential defenses, such "is more appropriately raised in a CPL article 440 motion" (*People v Ward*, 161 AD3d 1488, 1489 [3d Dept 2018], *lv denied* 32 NY3d 942 [2018]).

Clark, J.P., Ceresia, Powers and Corcoran, JJ., concur. Ordered that the judgment is affirmed.

4 The People of the State of New York, Respondent, v Robert W. Randolph, Appellant. [252 NYS3d 852]—

Crimes—Appeal—Valid Waiver of Right to Appeal as Condition of Plea Agreement

Ceresia, J. Appeal from a judgment of the County Court of Broome County (Joseph Cawley, J.), rendered March 3, 2023, convicting defendant upon his plea of guilty of the crime of criminal possession of a controlled substance in the third degree.

In November 2021, defendant was charged in an 11-count indictment with offenses related to his possession of drugs and drug paraphernalia. Defendant pursued pretrial motion practice, including two unsuccessful applications to dismiss the indictment on statutory speedy trial grounds premised upon the alleged invalidity of the People’s certificate of compliance with their discovery obligations under CPL article 245. He thereafter agreed to plead guilty to one count of criminal possession of a controlled substance in the third degree in satisfaction of the indictment upon the understanding that he would be sentenced to a prison term of five years, to be followed by two years of postrelease supervision, that sentence to run consecutively to an unexpired period of parole supervision arising from a prior conviction. The plea agreement also required defendant to waive his right to appeal. County Court imposed the agreed-upon sentence, and this appeal by defendant ensued.

We affirm. To begin, defendant’s challenge to his appeal waiver is unavailing. Defendant was advised during the plea colloquy that a waiver of his right to appeal was a condition of the plea agreement, as well as that the right to appeal was separate and distinct from the ones he was giving up by pleading guilty, and he acknowledged that he understood. Defendant also executed a written appeal waiver, and he confirmed during the colloquy that he had signed that “waiver after reviewing it with counsel, who had answered his questions, and that he understood that he was waiving his appellate rights as set forth therein, which also delineated the appellate rights not encompassed by the waiver” (*People v Terry*, 244 AD3d 1378, 1379 [3d Dept 2025]). The foregoing satisfies us that defendant’s waiver of the right to appeal is valid (*see id.*; *People v Fassett*, 243 AD3d 1023, 1024 [3d Dept 2025]; *People v Lewis*, 234 AD3d 1209, 1209-1210 [3d Dept 2025], *lv denied* 43 NY3d 1009 [2025]).

Defendant argues that his guilty plea was not knowing, voluntary and intelligent because he was not advised of his right against self-incrimination and because his plea allocution was insufficient. This claim survives his appeal waiver, but is unpreserved in the absence of an appropriate postallocution motion that he had sufficient time to make, and the narrow exception to the preservation rule was not triggered (*see People v Guilianelle*, 233 AD3d 1179, 1180 [3d Dept 2024], *lv denied* 43 NY3d 1009 [2025]; *People v Johnson*, 221 AD3d 1172, 1173-1174 [3d Dept 2023], *lv denied* 41 NY3d 965 [2024]). Upon review of the record, we decline defendant's invitation to take corrective action in the interest of justice (*see People v O'Connor*, 229 AD3d 1380, 1381 [4th Dept 2024]).

Next, "defendant's challenge to the validity of the certificate of compliance issued by the People was forfeited by his guilty plea, and his related claim that he was deprived of his statutory right to a speedy trial is precluded by his valid appeal waiver" (*People v Martinez*, 245 AD3d 1071, 1073-1074 [3d Dept 2026]; *see People v Sheehan*, 242 AD3d 1260, 1261-1262 [3d Dept 2025], *lv denied* 44 NY3d 1054 [2025]; *People v Berry*, 236 AD3d 1199, 1200-1201 [3d Dept 2025], *lv denied* 44 NY3d 1064 [2026]). His further argument that his constitutional right to a speedy trial was violated survives his guilty plea and appeal waiver, but is unpreserved for our review given his failure to raise it before County Court (*see People v Sheehan*, 242 AD3d at 1262; *People v Rivera*, 201 AD3d 1132, 1134 [3d Dept 2022]).* In any event, notwithstanding the fact that defendant was incarcerated for the 16-month period between his initial arrest in August 2021 and his guilty plea in December 2022, the charges against him were serious, the delay was not unreasonable by itself and was partially attributable to his own pretrial motion practice, and he does not allege that his defense was prejudiced by it. Thus, were we to consider the factors set forth in *People v Taranovich* (37 NY2d 442, 445 [1975]), we would find that defendant was afforded the due process to which he is entitled (*see People v Sheehan*, 242 AD3d at 1262; *People v Hatch*, 230 AD3d 908, 914 [3d Dept 2024], *lv denied* 42 NY3d 1020 [2024]; *People v Rivera*, 201 AD3d at 1134; *People v Arrington*, 31 AD3d 801, 802 [3d Dept 2006], *lv denied* 7 NY3d 865 [2006]).

Clark, J.P., Aarons, McShan and Corcoran, JJ., concur. Ordered that the judgment is affirmed.

* Although defendant's notices of motion made reference to seeking dismissal on both statutory and constitutional speedy trial grounds, his arguments were limited to the statutory basis for dismissal (*see People v Brown*, 167 AD3d 1331, 1333 [3d Dept 2018]).

5 The People of the State of New York, Respondent, v Duane MM., Appellant. [— NYS3d —]—

Crimes—Sentence—Resentencing under Domestic Violence Survivors Justice Act—Child Sexual Abuse Not Significant Contributing Factor to Defendant’s Criminal Conduct

Pritzker, J. Appeal from an order of the County Court of Rensselaer County (Debra Young, J.), entered August 28, 2024, which denied defendant’s motion for resentencing pursuant to CPL 440.47, after a hearing.

In 1996, defendant was convicted following a jury trial of two counts of murder in the second degree, two counts of grand larceny in the fourth degree and three counts of petit larceny. The charges stemmed from the shooting deaths of victim A and his son, victim B, in their home by defendant, who was then 16 years old and living in the victims’ home. Defendant then absconded in victim B’s vehicle after pilfering cash and jewelry from the home. Defendant was sentenced to consecutive prison terms of 25 years to life for each of the murder convictions and 1¹/₃ to 4 years for each grand larceny conviction, as well as concurrent one-year jail terms for the petit larceny convictions. In 2022, defendant requested and was granted permission to file an application for resentencing pursuant to the Domestic Violence Survivors Justice Act (hereinafter the DVSJA) (*see* CPL 440.47; Penal Law § 60.12, as amended by L 2019, ch 31, § 1; L 2019, ch 55, § 1, part WW, § 1). Following a hearing, County Court denied defendant’s application finding that, although defendant suffered unthinkable sexual abuse for years at the hands of his father until defendant was approximately 10 years old, the abuse was not a significant contributing factor to defendant’s criminal conduct and, given the nature and circumstances of the crime, the sentence was not unduly harsh. Defendant appeals.

The DVSJA was enacted “in recognition of the national epidemic of domestic violence and the failure of prior law to allow judges discretion to fully consider the impact of domestic violence in making sentencing determinations . . . [and] permits courts to sentence defendants to an alternative, less severe sentence if the defendant was a victim of domestic violence and convicted of certain eligible offenses” (*People v Brenda WW.*, 44 NY3d 594, 598 [2025] [internal quotation marks and citation omitted]; *accord People v Hernandez*, 44 NY3d 630, 634 [2025]). Pursuant to the DVSJA, a court may apply an alternative sentencing scheme when it determines, after a hearing, that the defendant has established by a preponderance of the evidence “three factors listed in Penal

Law § 60.12 (1): that (a) at the time of the instant offense, the defendant was a victim of domestic violence subjected to substantial physical, sexual or psychological abuse inflicted by a member of the same family or household as the defendant; (b) such abuse was a significant contributing factor to the defendant's criminal behavior; and (c) having regard for the nature and circumstances of the crime and the history, character and condition of the defendant, a standard sentence of imprisonment would be unduly harsh and a reduced sentence warranted" (*People v Angela VV.*, 44 NY3d 1061, 1062 [2025] [internal quotation marks, ellipses, brackets and citations omitted]; see *People v Ava OO.*, 233 AD3d 1186, 1187 [3d Dept 2024]).

In an attempt to demonstrate that the sexual abuse was a significant contributing factor in the murders pursuant to the second prong of the DVSJA analysis, defendant relied upon the testimony of Adrienne Meier, a forensic psychologist, who testified that defendant's sexual abuse and resulting trauma played a significant factor in the commission of the crimes, and that alleged taunting of defendant by victim A about such abuse triggered defendant's reaction of rage and anger with no rational thought. However, although Meier reviewed, among other things, some prior psychological reports and the defense portion of the trial transcript, she never met or spoke with defendant, did not review defendant's detailed statement regarding the crimes, did not review any materials, evaluations or reports performed at or near the time of the offenses and was unaware of relationship dynamics defendant had with the victims' family or how defendant came to live with them. Further, while Meier opined that defendant's prior sexual abuse was a significant contributing factor in the murder of victim A, Meier offered no nexus between defendant's sexual abuse history and the murder of victim B. Thus, our independent review of the record reveals that, in light of these failings, little weight should be given to Meier's testimony (see *People v Brenda WW.*, 44 NY3d at 600-601).

As for defendant's comprehensive statement detailing the events that led to the crimes, it too offers no causal nexus between the sexual abuse suffered by him and his actions in, among other things, the murder of the victims. That statement recounts that, on the day of the murders, defendant skipped school as he was too tired after staying up all night watching pornographic movies. Defendant reported that, when victim A came home in the afternoon, he started harassing defendant about disrupting the family, which "pissed off" defendant. De-

defendant then described going to the basement, retrieving and loading the rifle, then running up the second floor to victim A's bedroom where victim A had his back to the door reading something, yelling his name and, as victim A turned around, firing a shot from the rifle striking victim A. Defendant recounted that, when he tried to fire the rifle again, it jammed. Defendant reported that, at that point, he was "scared" and "wanted to kill [victim A] so [that] he could [not] call the police," so he ran to his bedroom—a bedroom he shared with victim B—to stash the rifle then ran back to the basement where he retrieved and loaded a shotgun. Defendant then described how he shot victim A—who was yelling defendant's name and asking "why"—four more times, the last of which was a shot to victim A's head. At that point, defendant reported that he heard victim B's car pulling into the front of the house, so he picked up the spent rounds off the floor and stairwell, went to his bedroom and reloaded the shotgun with several more rounds. Defendant recounted that he knew he either had to get out of the house "or kill [victim B] so [that] he would [not] call the police," so he "decided . . . to kill him." According to defendant, he went downstairs under the guise of asking victim B how to clean a gun and emptied all but one shell from the shotgun, handing the rounds to victim B. The two went into the basement where victim B put the shells away and, as victim B reached for the gun to put it away, defendant "pointed the barrel up toward [victim B's] face and pulled the trigger," shooting him in the neck and killing him. Defendant stated that he then removed money and car keys from victim B's pockets, packed some clothes, stole jewelry from various rooms in the house and, after making two trips to load victim B's car, drove away.

Defendant's statement continues to recount how he then drove to his friend's house, stashed the shotgun under a porch, then he—along with his friend and two others—drove to another friend's house where they "partied." Defendant also explained how he disposed of victim B's car that evening by pushing it over a cliff and distributed the jewelry among his friends. In view of the foregoing, the record fails to establish by a preponderance of the evidence that the trauma from the sexual abuse suffered by defendant as perpetrated by his father was a significant contributing factor in his criminal behavior (see *People v Angela VV.*, 229 AD3d 955, 957-958 [3d Dept 2024], *affd* 44 NY3d 1061 [2025]; compare *People v Brenda WW.*, 222 AD3d 1188, 1192 [3d Dept 2023], *mod* 44 NY3d 594 [2025]).

We further conclude that, given the nature and circum-

stances of the crimes, particularly as set forth in defendant's statement regarding the crimes and lack of any information regarding defendant's conduct while incarcerated, defendant has failed to establish by a preponderance of the evidence the third prong of the DVSJA analysis that the sentence imposed is unduly harsh (see Penal Law § 60.12 [1] [c]; *People v Boyd P.*, 232 AD3d 1000, 1002 [3d Dept 2024], *lv denied* 43 NY3d 1006 [2025]). As defendant failed to sustain his burden of demonstrating that exercise of a sentencing reduction is warranted, defendant's application for resentencing was properly denied (see generally *People v Angela VV.*, 44 NY3d at 1063).

Aarons, J.P., Reynolds Fitzgerald, Fisher and McShan, JJ., concur. Ordered that the order is affirmed.

6 In the Matter of Willie Williams, Petitioner, v Daniel F. Martuscello III, as Commissioner of Corrections and Community Supervision, Respondent. [— NYS3d —]

Prisons and Incarcerated Individuals—Discipline—Sufficiency of Misbehavior Report

Fisher, J. Proceeding pursuant to CPLR article 78 (transferred to this Court by order of the Supreme Court, entered in Albany County) to review a determination of respondent finding petitioner guilty of violating a prison disciplinary rule.

A search of petitioner's cell resulted in the discovery of a cell phone, a pair of altered headphones and a homemade phone charger. Petitioner was charged in a misbehavior report with possession of contraband and, following a tier III disciplinary hearing, was found guilty as charged. This determination was affirmed upon administrative review, and petitioner commenced this CPLR article 78 proceeding.

We confirm. The misbehavior report, the unusual incident report and supporting documentation and the hearing testimony provide substantial evidence to support the finding of guilt (see *Matter of Belgrave v Martuscello*, 243 AD3d 1106, 1107 [3d Dept 2025]; *Matter of Dean v Martuscello*, 236 AD3d 1223, 1223 [3d Dept 2025]). Contrary to petitioner's contention, the misbehavior report, written by a correction officer who participated in the search, was properly endorsed by a sergeant who had personal knowledge of the facts providing a basis for the report (see *Matter of Shearer v Annucci*, 155 AD3d 1277, 1278 [3d Dept 2017]). Moreover, the fact that the other correction officer that was involved in the search did not endorse the misbehavior report "does not render such report defective," as the record demonstrates that "petitioner received a copy of the misbehavior report and the report adequately apprised him of

the charges against him” (*Matter of Santana v Senkowski*, 269 AD2d 638, 638 [3d Dept 2000]). “In any event, petitioner has failed to demonstrate that any prejudice resulted from this technical error” (*id.* [citation omitted]; see *Matter of Jones v Annucci*, 166 AD3d 1174, 1176 [3d Dept 2018]). Further, any inconsistencies between the unusual incident report and the hearing testimony presented factual and credibility issues to be resolved by the Hearing Officer (see *Matter of Liggan v Annucci*, 171 AD3d 1325, 1326 [3d Dept 2019]).

We reject petitioner’s contention that he was denied a fair and impartial hearing. There is no indication in the record that the Hearing Officer witnessed, participated in or investigated the subject incident (see 7 NYCRR 254.1; *Matter of Keitt v Annucci*, 231 AD3d 1455, 1456 [3d Dept 2024], *lv denied* 43 NY3d 906 [2025]), and her off-the-record confirmation that the misbehavior report was properly endorsed in response to petitioner’s objection at the hearing constituted tangential involvement that did not warrant her disqualification (see generally *Matter of Caldara v Annucci*, 160 AD3d 1173, 1174 [3d Dept 2018]). Moreover, the record reveals that the hearing “was conducted in a fair and impartial manner and that the determination of guilt flowed from the evidence presented and not from any alleged bias on the part of the Hearing Officer” (*Matter of Pierre v Annucci*, 219 AD3d 990, 991-992 [3d Dept 2023]; see *Matter of Caldara v Annucci*, 160 AD3d at 1174).

Lastly, we are unpersuaded by petitioner’s claim that he was improperly denied the ability to call certain witnesses on his behalf. There was no indication in the testimony or documentary evidence presented during the hearing that the requested correction officer was present for the search or otherwise involved in any part in the incident, therefore making his testimony irrelevant to the charges against petitioner (see *Matter of Barzee v Venettozzi*, 173 AD3d 1580, 1581 [3d Dept 2019]; see also *Matter of Thomas v Annucci*, 237 AD3d 1323, 1324 [3d Dept 2025]). Petitioner’s contention that he was improperly denied the ability to testify on his own behalf is not properly before us as it was not raised in the verified petition (see *Matter of Baxter v Annucci*, 244 AD3d 1380, 1381 [3d Dept 2025]; *Matter of Gonzalez v Annucci*, 171 AD3d 1265, 1266 [3d Dept 2019]). Petitioner’s remaining contentions have been considered and found to be without merit.

Aarons, J.P., Pritzker, Reynolds Fitzgerald and McShan, JJ., concur. Adjudged that the determination is confirmed, without costs, and petition dismissed.

7 In the Matter of the Claim of Samuel Davis, Claimant, v Gia Quinto Masonry et al., Appellants, et al., Respondents. Workers' Compensation Board, Respondent. [— NYS3d —]

Workers' Compensation—Occupational Disease—Causal Relation—Brick Mason's Repetitive Work-Related Trauma to Bilateral Hands, Wrists, and Knees

Corcoran, J. Appeal from a decision of the Workers' Compensation Board, filed November 29, 2024, which, among other things, ruled that claimant sustained an occupational disease.

Claimant, employed as a brick mason for over 25 years, filed a claim for workers' compensation benefits for an occupational disease for bilateral hands/wrists and bilateral knees, asserting that such conditions were caused by repetitive work-related trauma. Following a hearing and various medical depositions, a Workers' Compensation Law Judge (hereinafter WCLJ) established the claim for an occupational disease involving claimant's bilateral hands, wrists and knees. The employer and its workers' compensation carrier (hereinafter collectively referred to as the carrier) appealed the WCLJ's decision.

While that administrative appeal was pending and over the objection of claimant's counsel, the carrier unilaterally subpoenaed and conducted a third medical deposition of claimant's treating physician, Robert Hecht. Thereafter, claimant filed a Request for Further Action and, at the ensuing hearing, sought the imposition of a penalty against the carrier for (1) the frivolous nature of the proceedings to depose Hecht for a third time without direction or approval from the Workers' Compensation Board while an administrative appeal was pending, and (2) for deposing Hecht on issues not yet relevant or in existence (i.e., claimant's degree of disability where there had been no lost time). At the conclusion of the hearing, the WCLJ imposed a \$2,500 penalty against the carrier for initiating a frivolous proceeding. The carrier administratively appealed that decision. In a combined decision filed November 29, 2024, the Board affirmed the establishment of the occupational disease claim but modified the penalty against the carrier by reducing it to \$500. The carrier appeals.

We affirm. "To be entitled to workers' compensation benefits for an occupational disease, a claimant must establish a recognizable link between his or her condition and a distinctive feature of his or her occupation through the submission of competent medical evidence" (*Matter of Velez v Eger Health Care & Rehab Ctr.*, 217 AD3d 1095, 1096 [3d Dept 2023] [internal quotation marks and citations omitted]; *accord Matter of Kretunski v Citywide Envtl. Servs. LLC*, 233 AD3d 1218,

1218-1219 [3d Dept 2024]). “The Board’s decision regarding the presence and classification of a medical condition—i.e., an occupational disease—is a factual consideration that will not be disturbed if it is supported by substantial evidence” (*Matter of Powers v State Material Mason Supply*, 202 AD3d 1265, 1266 [3d Dept 2022] [internal quotation marks and citations omitted], *lv denied* 38 NY3d 914 [2022]), “even where there is record evidence that could support a contrary result” (*Matter of Morgan v Kinray, Inc.*, 226 AD3d 1288, 1290 [3d Dept 2024] [internal quotation marks and citation omitted]).

We are unpersuaded by the carrier’s contention that Hecht only had a generalized understanding of claimant’s specific job duties, which was insufficient to demonstrate a recognizable link between claimant’s job and his bilateral hand/wrist and bilateral knee conditions. When he sought medical treatment from Hecht in September 2022, claimant relayed that he worked as a brick mason for over 25 years, working 35 to 40 hours a week. He reported that his job duties required repetitive lifting, carrying heavy boxes, bending, squatting, troweling, hammering, climbing ladders and scaffolding, and using vibrating power tools, chipping guns and wet saws.* Based upon his examinations of claimant, claimant’s denial of any relevant prior injuries and review of diagnostic tests, including MRIs revealing broad radial tears of the medial meniscus in both knees and positive Tinsel tests for carpal tunnel syndrome in both wrists, Hecht opined that claimant’s bilateral hand/wrist and bilateral knee conditions were consistent with and causally related to the repetitive nature of claimant’s occupational duties. In crediting Hecht’s testimony, the Board noted, and the record supports, that Hecht was aware of claimant’s specific repetitive duties as a brick mason and the length of time he was engaged in such duties. Although the carrier presented a conflicting medical opinion from its consultant who found no causal link between the nature of claimant’s work and his bilateral hand/wrist and bilateral knee conditions and generally attributed them to various degenerative and other factors, the Board’s assessment and resolution of the conflicting medical evidence is entitled to great deference (*see Matter of Manka v Goodyear Tire & Rubber Co.*, 123 AD3d 1172, 1173 [3d Dept 2014], *lv denied* 25 NY3d 909 [2015]). Given the nature of claimant’s work and reported duties, and deferring to the Board’s resolution of the conflicting medical opinions, we find that substantial evidence supports the

* Testimony at the hearing reflects that claimant would set between 100 and 300 bricks/stones a day in building a wall.

Board's decision that claimant sustained an occupational disease and, as such, it will not be disturbed (*see e.g. Matter of Freyta v Calvin Maintenance Inc.*, 220 AD3d 1036, 1038 [3d Dept 2023]; *Matter of Camby v System Frgt., Inc.*, 105 AD3d 1237, 1238 [3d Dept 2013]; *see also Matter of Scott v Bimbo Bakeries USA, Inc.*, 171 AD3d 1421, 1423 [3d Dept 2019]; *Matter of Garcia v MCI Interiors, Inc.*, 158 AD3d 907, 908 [3d Dept 2018]).

Turning to the carrier's challenge to the penalty, there is no dispute that the carrier unilaterally and without a directive from the WCLJ subpoenaed Hecht for a third deposition while its administrative appeal was pending. Accordingly, we find no basis to disturb the Board's determination that a penalty for instituting a frivolous proceeding was warranted (*see Workers' Compensation Law* § 114-a [3] [i]). To the extent not specifically addressed, the carrier's remaining contentions are without merit.

Clark, J.P., Aarons, Ceresia and McShan, JJ., concur. Ordered that the decision is affirmed, without costs.

8 Kimberly A. Gillespie, Individually and as Executor of the Estate of James D. Gillespie, Deceased, Respondent, v Nathan Littauer Hospital and Nursing Home et al., Appellants. [—NYS3d —]

Physicians and Surgeons—Malpractice—Deviation from Accepted Standards of Care—Proximate Causation

Ceresia, J. Appeal from an order of the Supreme Court (Richard Kupferman, J.), entered November 21, 2024, in Saratoga County, which denied defendants' motions for summary judgment dismissing the complaint.

On December 30, 2018, plaintiff and her husband, James D. Gillespie (hereinafter decedent), residents of New Jersey, were visiting family for the holidays in the City of Gloversville, Fulton County. Early that morning, decedent awakened plaintiff with a complaint of severe pain in his back on the upper left side and difficulty breathing. He was doubled over in pain and struggling to walk and talk. Plaintiff took decedent to the emergency room at defendant Nathan Littauer Hospital and Nursing Home. There, he was seen by defendant Trevor E. Black, a licensed physician employed by defendant Schumacher Group of New York, Inc. (hereinafter collectively referred to as the provider defendants), and two nurses. Black examined decedent and diagnosed him with pneumonia based upon a chest X-ray as well as decedent's report of pain and a recent cough. Black prescribed pain medication and an antibiotic and

told decedent to return if the condition worsened. On January 3, 2019, after plaintiff and decedent had gone back to New Jersey, they were having a conversation when decedent's face suddenly went blank and he became sweaty and pale. Plaintiff called 911 and, while decedent was being transported by ambulance to a local hospital, he suffered a fatal heart attack.

Plaintiff subsequently brought this personal injury and wrongful death action sounding in medical malpractice against Nathan Littauer Hospital and Nursing Home and defendant Nathan Littauer Hospital Association (hereinafter collectively referred to as the hospital) and the provider defendants. According to plaintiff, Black and the nurses failed to take a complete medical history from decedent that would have disclosed risk factors for cardiac issues, neglected to properly recognize his symptoms and failed to order an electrocardiogram (hereinafter EKG) and a troponin test, which would have revealed a heart attack in progress on December 30, 2018. Following joinder of issue and discovery, the hospital and the provider defendants separately moved for summary judgment dismissing the complaint. Plaintiff opposed the motions, and Supreme Court denied them, finding that while defendants met their initial burdens of proof, plaintiff raised questions of material fact. Defendants appeal.

To prevail on a motion for summary judgment on a medical malpractice claim, a defendant bears “the initial burden of demonstrating that [it] did not deviate from accepted medical practice or that any such deviation was not a proximate cause of the claimed injuries” (*Scott v Santiago*, 230 AD3d 933, 935 [3d Dept 2024]; see *Cho-Bodnar v Adirondack Maxillofacial Surgery*, 215 AD3d 1101, 1102-1103 [3d Dept 2023]). A defendant must “present factual proof, generally consisting of affidavits, deposition testimony and medical records, to rebut the claim of malpractice” (*Marshall v Rosenberg*, 196 AD3d 817, 818 [3d Dept 2021] [internal quotation marks and citations omitted]; see *Cole v Champlain Val. Physicians’ Hosp. Med. Ctr.*, 116 AD3d 1283, 1285 [3d Dept 2014]). To that end, defendants submitted, among other things, the deposition testimonies of Black, the two nurses and plaintiff; decedent’s medical records; the hospital’s nursing policy and procedure manual; and the affidavits of two experts—Joseph Bove and Joel Bartfield, both licensed physicians board certified in emergency medicine.

Bove opined that Black did not depart from the standard of care in ruling out cardiac issues because decedent presented with musculoskeletal pain in his back that was reproduced when Black stimulated it by touch, unlike pain associated with

an adverse cardiac event that is located in the front of the chest and cannot be reproduced through touching or palpating. The location and nature of this pain, along with decedent's normal heart rhythm and lack of other typical cardiac symptoms, allowed Black to properly rule out a cardiac event. According to Bove, even if an EKG and troponin test had been ordered, these would not have changed decedent's outcome because his heart attack four days later was acute, as evidenced by the EKG that was conducted in the ambulance shortly before he died. In Bartfield's view, the nurses acted in accordance with the standard of care and the hospital's policies and procedures by deferring to Black, who saw decedent within two minutes after he first encountered a nurse. This proof satisfied defendants' initial burden, such that it was then incumbent upon plaintiff to establish issues of fact as to whether there was a departure from accepted standards of care that proximately caused decedent's injuries (*see Schultz v Albany Med. Ctr. Hosp.*, 238 AD3d 1286, 1288 [3d Dept 2025]; *Sovocool v Cortland Regional Med. Ctr.*, 218 AD3d 947, 950 [3d Dept 2023]).

In that regard, plaintiff offered the expert affidavits of a board-certified cardiologist and an emergency physician. It was the opinion of the cardiologist that, based upon decedent's age of 53, his severe chest pain, his increasing shortness of breath and the absence of many of the symptoms of pneumonia, the standard of care under the circumstances required an EKG and bloodwork. According to the cardiologist, chest pain "means more than pain in the chest" and encompasses the back pain exhibited by decedent. The cardiologist stated that Black should have questioned why decedent's pain was only on the left side if pneumonia was suspected in both lungs. The emergency physician opined that the standard of care and hospital policy confirm that all patients presenting with possible cardiac-related chest pain should be assumed to be having a heart attack until proven otherwise, and the care provided by Black and the nurses did not meet those standards. This physician highlighted that, pursuant to the medical records and deposition testimony, decedent had high cholesterol and his father had suffered a heart attack at age 51. Nevertheless, a complete personal and family medical history was not taken. As for the issue of proximate cause, the cardiologist noted that the EKG conducted on January 3, 2019, revealed Q waves, showing that decedent had suffered a previous heart attack. The cardiologist considered this evidence in conjunction with decedent's age and the physical symptoms that he was experiencing on December 30, 2018, and opined, to a reasonable degree of medi-

cal certainty, that decedent was suffering a heart attack on that date and that proper care would have saved his life. The foregoing proof was sufficient to meet plaintiff's shifted burden of demonstrating material factual questions as to a divergence from accepted medical standards as well as proximate causation (see *Matney v Boyle*, 237 AD3d 1382, 1385 [3d Dept 2025]; *Lubrano-Birken v Ellis Hosp.*, 229 AD3d 873, 878-879 [3d Dept 2024]; *McCarthy v Town of Massena, N.Y. [Massena Mem. Hosp.]*, 218 AD3d 1082, 1090-1091 [3d Dept 2023]; *Kielb v Bascara*, 217 AD3d 756, 757 [2d Dept 2023]).

Finally, defendants claim that plaintiff impermissibly raised a new theory of recovery in opposition to summary judgment. More specifically, recognizing that the complaint referenced "left sided chest pain" and the bills of particulars mentioned "pain from jaw to umbilicus," it is defendants' position that plaintiff's expert cardiologist improperly expanded the definition of chest pain by indicating that this term includes pain in both the front and the back of the torso. We disagree. The cardiologist's explanation was neither contrary to nor inconsistent with that which had been pleaded in the complaint and bills of particulars (compare *Fasce v Catskill Regional Med. Ctr.*, 209 AD3d 1138, 1139-1140 [3d Dept 2022]; *Darrisaw v Strong Mem. Hosp.*, 74 AD3d 1769, 1770 [4th Dept 2010], *affd* 16 NY3d 729 [2011]). Under these circumstances, we cannot say that plaintiff raised a theory that was new or materially different from that previously pleaded (see *Henderson v Takemoto*, 223 AD3d 996, 1001 [3d Dept 2024]; compare *Valette v Correa*, 216 AD3d 500, 500 [1st Dept 2023]).

Clark, J.P., Reynolds Fitzgerald, Powers and Corcoran, JJ., concur. Ordered that the order is affirmed, with costs.

9 In the Matter of the Claim of Jorge Ferra, Respondent, v Paramount Global et al., Appellants. Workers' Compensation Board, Respondent. [253 NYS3d 426]—

Workers' Compensation—Disqualification for False Representation—No Compelling Evidence of Material Fraud—Claimant's Admitted Intoxication Not Sole Cause of Motor Vehicle Accident

Reynolds Fitzgerald, J. Appeal from a decision of the Workers' Compensation Board, filed January 2, 2025, which, among other things, ruled that claimant did not violate Workers' Compensation Law § 114-a.

On October 24, 2022, at approximately 9:00 p.m., claimant was driving from his home in New Jersey to a job assignment in the City of Buffalo, Erie County, when he was involved in a minor motor vehicle accident with another vehicle as they were

both attempting to change lanes. Although claimant was not injured and there did not appear to be any physical damage, he pulled to the shoulder of the road and exited his vehicle to speak with the other driver. Claimant returned to his vehicle and, while sitting in his vehicle attempting to document some information, his vehicle was hit by a third vehicle, resulting in serious injuries to claimant. Upon treatment at the hospital, a toxicology screening disclosed that claimant had a blood alcohol level of .18, reflecting that he was legally intoxicated. Claimant thereafter applied for workers' compensation benefits and, following a hearing at which claimant testified and did not challenge the toxicology report, the Workers' Compensation Law Judge (hereinafter WCLJ) found that claimant was injured in an accident arising out of and in the course of his employment and that the employer and its workers' compensation carrier (hereinafter collectively referred to as the carrier) failed to establish that claimant's intoxication was the sole reason for the accident. As such, the claim was established for various injuries and an award of benefits made. The Workers' Compensation Board affirmed that decision, which decision was affirmed by this Court on appeal (236 AD3d 1267 [3d Dept 2025], *lv denied* 44 NY3d 906 [2025]).

Shortly thereafter, the carrier filed a request for further action—relying on a toxicology analysis of claimant's blood alcohol level at the time he was treated at the hospital following the motor vehicle accident—and raised an issue of fraud in violation of Workers' Compensation Law § 114-a, seeking, among other things, that claimant's benefits be suspended based upon allegations that claimant perjured himself during his initial testimony regarding when he last consumed alcohol prior to the motor vehicle accident in furtherance of his claim for benefits. At the ensuing hearing, the WCLJ, as relevant here, declined to entertain the Workers' Compensation Law § 114-a request, noting that the issue of claimant's intoxication had previously been litigated. To the extent relevant here, the Board, in a decision filed January 2, 2025, found that the carrier presented no persuasive reason, inclusive of the toxicology analysis report, to litigate the alleged Workers' Compensation Law § 114-a violation as claimant admitted to drinking prior to the motor vehicle accident and his intoxication was considered in the establishment of the claim. Finding no compelling evidence of material fraud, the Board affirmed the WCLJ's decision. The carrier appeals.

We are unpersuaded by the carrier's assertion that the Board erred in finding insufficient proof demonstrating a Workers'

Compensation Law § 114-a violation. Although the carrier asserts that claimant denied consuming any alcohol the day of the motor vehicle accident, a more thorough reading of the record reveals that claimant, in fact, admitted to consuming alcohol the morning thereof. Specifically, claimant initially stated that he last consumed alcohol during a celebration at home the evening before the motor vehicle accident; however, upon further inquiry, claimant affirmatively acknowledged that he had consumed alcohol the morning of the motor vehicle accident. Even if claimant was not fully forthcoming as to the extent of when he last consumed alcohol, the record nevertheless belies that carrier's assertion that he denied any alcohol consumption on the date of the motor vehicle accident (*compare Employer: Las Vegas Sports Bar Inc.*, 2010 WL 5114077, *1-3, 2010 NY Wrk Comp LEXIS 10280, *1-7 [WCB No. 2080 52236, Dec. 9, 2010]). Although compensability of a claim where intoxication is an issue does not necessarily preclude the possibility of a Workers' Compensation Law § 114-a violation (*see e.g. id.*), here, in light of claimant's admission during his hearing testimony that he had been drinking prior to the motor vehicle accident, we find that substantial evidence supports the Board's decision that there was no compelling evidence of material fraud to support a Workers' Compensation Law § 114-a violation, as such issue was essentially determined when, in crediting claimant's testimony and finding that intoxication was not the sole cause of the accident, the claim was established (*see e.g. Matter of Harmon v Faxton Sunset St. Luke's Health Care Ctr. Inc.*, 242 AD3d 1288, 1290 [3d Dept 2025]).

Garry, P.J., Powers, Mackey and Ryba, JJ., concur. Ordered that the decision is affirmed, without costs.

10 Kerry Small, Respondent, v Riding High Dude Ranch, Inc., Appellant. [— NYS3d —]

Negligence—Assumption of Risk—Horseback Riding at Dude Ranch—Wrangler's Assistance in Mounting Horse Proximate Cause of Injury

Corcoran, J. Appeal from an order of the Supreme Court (Robert Muller, J.), entered January 30, 2025, in Warren County, which denied defendant's motion for summary judgment dismissing the complaint.

Plaintiff sued to recover damages for injuries allegedly sustained while participating in horseback riding activities at defendant's dude ranch and resort in June 2021. Plaintiff alleged that defendant's wrangler negligently assisted her in mounting a horse and that she required surgery to repair knee ligaments torn when he forcefully pushed her right leg over

the horse. Following joinder of issue and discovery, defendant moved for summary judgment dismissing the complaint, contending that plaintiff assumed the risks inherent in horseback riding and that she could not prove the cause of her injury. Supreme Court denied the motion, and defendant appeals.

We affirm. “[T]he proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact” (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). When considering such a motion, courts must view the evidence in the light most favorable to the nonmoving party and accord that party the benefit of every reasonable inference, without making credibility determinations (see *Vega v Restani Constr. Corp.*, 18 NY3d 499, 503 [2012]; *Lubrano-Birken v Ellis Hosp.*, 229 AD3d 873, 876 [3d Dept 2024]; *Ali-Hasan v St. Peter’s Health Partners Med. Assoc., P.C.*, 226 AD3d 1199, 1200 [3d Dept 2024], *lv denied* 42 NY3d 906 [2024]). Under the doctrine of primary assumption of risk, a voluntary participant in a sporting or recreational activity consents to those commonly appreciated risks that are inherent in and arise out of the nature of the activity and flow from such participation, thereby limiting the scope of a defendant’s duty of care (see *Stanhope v Burke*, 220 AD3d 1122, 1124 [3d Dept 2023]; *Sara W. v Rocking Horse Ranch Corp.*, 169 AD3d 1342, 1343 [3d Dept 2019]). Application of the doctrine “is not to be determined in a vacuum, but instead measured against the background of the skill and experience of the particular plaintiff” (*Katleski v Cazenovia Golf Club, Inc.*, 225 AD3d 1030, 1038 [3d Dept 2024] [internal quotation marks, brackets and citations omitted], *affd* 44 NY3d 212 [2025]).

It is well settled that the inherent risks of horseback riding include falling from a horse or sustaining injuries caused by a horse’s sudden or unintended actions (see *Stanhope v Burke*, 220 AD3d at 1125; *Dalton v Adirondack Saddle Tours, Inc.*, 40 AD3d 1169, 1171 [3d Dept 2007]). However, participants are not deemed to have assumed risks that are concealed or unreasonably enhanced by a defendant’s conduct (see *Grady v Chenango Val. Cent. Sch. Dist.*, 40 NY3d 89, 95 [2023]; *Stanhope v Burke*, 220 AD3d at 1125; *Fritz v Walden Playboys M.C. Inc.*, 217 AD3d 1293, 1294 [3d Dept 2023]). Thus, where an injury arises not from a rider’s fall or a horse’s unexpected behavior, but instead from the manner in which a defendant’s employee assists a rider, questions about whether the defend-

ant enhanced the usual dangers inherent in horseback riding may preclude summary judgment (see *Sara W. v Rocking Horse Ranch Corp.*, 169 AD3d at 1344; *Valencia v Diamond F. Livestock, Inc.*, 110 AD3d 1334, 1335-1336 [3d Dept 2013]; *Corica v Rocking Horse Ranch, Inc.*, 84 AD3d 1566, 1567-1568 [3d Dept 2011]). For example, an injured rider may raise a triable issue of fact by showing that the defendant heightened the inherent risks of participation through negligent assistance with mounting procedures or direction of a rider's movements (see *Sara W. v Rocking Horse Ranch Corp.*, 169 AD3d at 1344; *Jones v Smoke Tree Farm*, 161 AD3d 1590, 1591 [4th Dept 2018]; *Georgiades v Nassau Equestrian Ctr. at Old Mill, Inc.*, 134 AD3d 887, 888-889 [2d Dept 2015]).

Plaintiff concededly was an experienced horseback rider who participated in advanced riding at defendant's dude ranch for two days. She had previously used different methods to mount a horse, including ascending from the ground with wrangler assistance and alternatively stepping on a mounting block. Upon her arrival at the ranch, she executed a written liability release acknowledging that she understood injuries could occur in the course of horseback riding. On the first day of riding, she mounted her horse with the assistance of a wrangler and completed an advanced ride without incident or complaint. On the second day, plaintiff again prepared for an advanced trail ride on a bigger horse. Before mounting, she asked to use a mounting block. The wrangler declined her request and instead advised that he would help her mount the horse from the ground, a method commonly used at the ranch. Plaintiff placed her left foot in the stirrup and the wrangler used his hands to lift her right foot, applying more force than expected based on her previous experience, causing her to feel and hear a pop in her right knee. At his deposition, the wrangler denied recollection of the particular incident but explained that he typically supported a rider by positioning his shoulder beneath the rider while he stood up. Notably, he conceded that the procedure described by plaintiff, i.e., placing a rider's foot in his hands and pushing the rider's leg over the horse, was inconsistent with defendant's training, policies and procedures. Although plaintiff did not report an injury upon dismounting, she reported increasing knee pain, swelling and discomfort to defendant's staff later that day. She did not ride the following day. Two days later, she fell while attempting to enter a vehicle due to instability in her knee. She was later diagnosed with knee injuries, including a detached ACL and a torn meniscus.

Here, defendant met its prima facie burden by establishing

that plaintiff was a highly experienced rider who assumed the inherent risks of horseback riding, including the risk of injury while mounting or dismounting. Defendant also demonstrated that mounting a horse with wrangler assistance from the ground was a generally accepted practice, as supported by expert opinions. In opposition, plaintiff raised triable issues of fact sufficient to defeat summary judgment through evidentiary proof that the wrangler applied excessive force while pushing her leg over the saddle. The wrangler conceded that the technique described by plaintiff was inconsistent with defendant's training, policies or procedures; his faulty memory prevented him from contradicting plaintiff's account of the mechanism of her alleged injury. Viewed in the light most favorable to plaintiff, material questions of fact remain as to whether the wrangler's conduct unreasonably increased the risks inherent in horseback riding (*see Corica v Rocking Horse Ranch, Inc.*, 84 AD3d at 1567-1568).

We are likewise unpersuaded by defendant's contention that plaintiff's proof of proximate cause is fatally speculative. A plaintiff "can demonstrate proximate cause solely through circumstantial evidence, so long as that evidence renders other causes sufficiently remote such that the jury can base its verdict on logical inferences drawn from the evidence, not merely on speculation" (*Weichsel v State of New York*, 231 AD3d 1459, 1463 [3d Dept 2024] [internal quotation marks, brackets and citation omitted]; *see Mulligan v R&D Props. of N.Y. Inc.*, 162 AD3d 1301, 1301-1302 [3d Dept 2018]; *Acton v 1906 Rest. Corp.*, 147 AD3d 1277, 1278 [3d Dept 2017]). However, she need not "positively exclude every other possible cause of the accident" (*Weichsel v State of New York*, 231 AD3d at 1463 [internal quotations marks and citation omitted]; *see Scurry v New York City Hous. Auth.*, 39 NY3d 443, 453 [2023]). Defendant emphasizes that plaintiff completed her trail ride immediately after her alleged knee injury, dismounted without assistance and did not seek prompt medical treatment; it cites her fall two days later as the more likely cause for her injury. However, viewing the facts in the light most favorable to the nonmovant, plaintiff's uncontroverted description of the occurrence and her subsequent symptoms along with her report of the incident established a logical, nonspeculative nexus between the wrangler's alleged conduct and her injury. Defendant may persuade the factfinder that plaintiff's version of events is implausible, but a jury could conclude that the proximate cause of her injury was the unexpected, undue force applied by the wrangler. Under these circumstances, defendant failed to establish, as a matter of law, that a jury could not find

that defendant caused plaintiff's injury without resort to speculation (*see Weichsel v State of New York*, 231 AD3d at 1464). Accordingly, Supreme Court properly denied defendant's motion for summary judgment.

Garry, P.J., Clark, Pritzker and McShan, JJ., concur. Ordered that the order is affirmed, with costs.

11 In the Matter of the Claim of Omar Ebanks, Appellant, v Sing Sing Correctional Facility et al., Respondents. Workers' Compensation Board, Respondent. [— NYS3d —]—

Workers' Compensation—Workers' Compensation Board—Denial of Claimant Injured Corrections Officer's Request to Preclude Independent Medical Examination Report

Ceresia, J. Appeal from a decision of the Workers' Compensation Board, filed March 18, 2025, which denied claimant's Workers' Compensation Law § 137 request to preclude an independent medical examination report.

In January 2023, claimant, a correction officer, was injured at work and, in July 2023, his subsequent claim for workers' compensation benefits was established for various injuries. In October 2023, claimant's treating physician evaluated his injuries for permanency, and, upon determining that claimant's injuries had reached maximum medical improvement (hereinafter MMI) and that permanency had been demonstrated, found that claimant had sustained a 27% schedule loss of use (hereinafter SLU) of the right leg (knee), a 25% SLU of the right ankle, a 35% SLU of the right shoulder, a 5% SLU of the right elbow and a 25% SLU of the right wrist. Following a request made by the State Insurance Fund (hereinafter SIF) that claimant's injuries be evaluated for permanency, a Workers' Compensation Law Judge (hereinafter WCLJ) directed that claimant undergo an independent medical examination (hereinafter IME) by the carrier's consultant, which was conducted on April 26, 2024. In an IME-4 (Cover Sheet for Report of Independent Medical Examination) medical report, permanency was found for only two injury sites, and claimant was assessed with a 20% SLU of the right shoulder and a 10% SLU of the right knee. Claimant subsequently requested that the April 2024 IME report be precluded under Workers' Compensation Law § 137 and 12 NYCRR 300.2 because an IME-3 form (Independent Examiner's Report of Request

Regarding Independent Medical Examination)¹ was never filed when SIF filed an April 2, 2024 IME-5 (Claimant's Notice of Independent Medical Examination) form, along with instructions, scheduling the April 26, 2024 IME. At a May 2024 hearing, a WCLJ declined to preclude the April 2024 IME report. Upon administrative review, the Workers' Compensation Board affirmed the decision of the WCLJ in its entirety. The Board found that the April 2024 IME report should not be precluded, and may be considered, because it was in substantial compliance with Workers' Compensation Law § 137. Claimant appeals.

In addition to prohibiting "the improper influencing or attempt by any person improperly to influence the medical opinion of any physician who has treated or examined an injured employee" (Workers' Compensation Law § 13-a [6] [a]; *accord Matter of Petti v Asplundh Constr. Corp.*, 244 AD3d 1539, 1540 [3d Dept 2025]; *see* Workers' Compensation Bd Release Subject No. 046-1749 [Mar. 21, 2025]; Workers' Compensation Bd Release Subject No. 046-124 [Nov. 24, 2003]),² the Workers' Compensation Law contains certain provisions and rules applicable solely to IMEs (*see* Workers' Compensation Law § 137; 12 NYCRR 300.2). As relevant here, the Workers' Compensation Law states that "[i]f a practitioner who has performed or will be performing an [IME] of a claimant receives a request for information regarding the claimant, including faxed or electronically transmitted requests, the practitioner shall submit a copy of the request for information to the [B]oard within [10] days of receipt of the request" (Workers' Compensation Law § 137 [1] [b]; *see* Workers' Compensation Bd Release Subject No. 046-1749 [Mar. 21, 2025]). Copies of all responses to requests for information regarding a claimant (such as an IME), including all materials which are provided in response to such a request, are required to be "submitted by the responding practitioner to the [B]oard within [10] days of submission of the response to the requestor" (Workers' Compensation Law § 137 [1] [c]; *see* Workers' Compensation Bd Release Subject No. 046-1749 [Mar. 21, 2025]).

The Board's rules provide that a request for information, for purposes of Workers' Compensation Law § 137 (1) (b), "means

1. The IME-3 form may be used by a practitioner to report a request for information regarding a claimant's IME and/or to otherwise satisfy their filing obligations under Workers' Compensation Law § 137.

2. To the extent that claimant argues that there was improper influence under Workers' Compensation Law § 13-a (6), this claim was never advanced before the Board and is therefore not properly before us (*see Matter of Murah v Jain Irrigation, Inc.*, 157 AD3d 1088, 1089 [3d Dept 2018]).

any substantive communication with an independent medical examiner, or his or her office, regarding the claimant from any person or entity, including a claimant, an insurance carrier, or a third party administrator, that takes place or is initiated outside of the [IME], including a request or referral for examination and any communication related thereto, questions or inquiries related to the claimant or the examination, and the provision of information to the examiner for review in connection with a request for the examiner's professional opinion with regard to the claimant or the examination" (12 NYCRR 300.2 [b] [11]).³ "A report of an examination that does not substantially comply with the requirements of Workers' Compensation Law [§] 137 . . . shall not be admissible as evidence" for various enumerated purposes including, as relevant here, SLU (12 NYCRR 300.2 [d] [12]; see *Matter of Olczyk v Verizon N.Y., Inc.*, 33 AD3d 1109, 1109 [3d Dept 2006]). "The Chair [of the Board] has prescribed the IME-3 form as the proper form for the independent medical examiner to file concerning both the submission of a request for information, and for the examiner's response to that request" (*Employer: New York City Tr. Auth.*, 2026 WL 124802, *2 [WCB No. G345 2976, Jan. 13, 2026]; see *Employer: FOJP Serv. Corp.*, 2024 WL 294045, *3, 2024 NY Wrk Comp LEXIS 344, *7 [WCB No. G151 1069, Jan. 18, 2024]). However, in cases where an IME-3 form is not timely filed or not filed at all, the Board has consistently declined requests to preclude IME reports where the carrier properly filed an IME-5 form and instructions that included the purpose of the IME and the questions being posed to the carrier's consultant (see e.g. *Employer: Tishman Speyer Props. LP*, 2026 WL 200333, *2, 2026 NY Wrk Comp LEXIS 301, *3 [WCB No. G343 2971, Jan. 16, 2026]; *Employer: New York City Tr. Auth.*, 2026 WL 124802, *2 [WCB No. G345 2976, Jan. 13, 2026]; *Employer: FOJP Serv. Corp.*, 2024 WL 294045, *3, 2024 NY Wrk Comp LEXIS 344, *7 [WCB No. G151 1069, Jan. 18, 2024]).

Here, the record reflects that SIF issued an IME-5 form, along with instructions for the examiner and attachments relating to claimant's job duties. Although no IME-3 form was filed, the IME-5 and instructions for the examiner were received by the Board on the same date and time. Moreover,

3. Although disclosure of substantive communication with the medical provider is required, the Board's rules do not require further filing with the Board when documents or records constituting the substantive communication are already part of the Board's file and are accessible to all parties (see 12 NYCRR 300.2 [b] [11]; see also Workers' Compensation Bd Release Subject No. 046-769 [July 9, 2015]).

the detailed instructions for the examiner that were filed with the IME-5 indicate the specific body parts to be examined at the April 2024 IME and requested that the examiner render findings on, among other things, MMI and permanency as well as the impairment percentage for all schedulable sites examined. The parties were also served with the IME-5 and instructions, and claimant does not argue otherwise or contend that he lacked notice of the scheduling of the April 2024 IME. In addition, the record demonstrates, as found by the Board, that an IME-4 form was timely filed along with the April 2024 IME medical report, that the report was served upon the parties and that it lists all the documents that were provided to the examiner in preparation for the IME (*see* Workers' Compensation Law §§ 13-a [4] [e]; 137; 12 NYCRR 300.2 [d] [4]). Contrary to claimant's contention, "[a]s a result of the 2014 amendments to 12 NYCRR 300.2 (d), only a form IME-4 and not an additional form IME-3 need be filed with a consultant's [IME] report" because the IME-3 would be redundant (*Employer: FOJP Serv. Corp.*, 2024 WL 294045, *3, 2024 NY Wrk Comp LEXIS 344, *7 [WCB No. G151 1069, Jan. 18, 2024]; *see* 12 NYCRR 300.2 [b] [11]; *see also* Workers' Compensation Bd Release Subject No. 046-769 [July 9, 2015]). We also note that neither Workers' Compensation Law § 137, nor the Board's rules, expressly require the use of an IME-3 form to satisfy the applicable notice and filing requirements (*see* Workers' Compensation Law § 137; 12 NYCRR 300.2).⁴ In view of the foregoing, we discern no abuse of discretion in the Board's finding that there was substantial compliance with Workers' Compensation Law § 137 and 12 NYCRR 300.2 and that the April 2024 IME-4 report should therefore not be precluded (*see Employer: Tishman Speyer Props. LP*, 2026 WL 200333, *2, 2026 NY Wrk Comp LEXIS 301, *3 [WCB No. G343 2971, Jan. 16, 2026]; *Employer: New York City Tr. Auth.*, 2026 WL 124802, *2 [WCB No. G345 2976, Jan. 13, 2026]; *Employer: FOJP Serv. Corp.*, 2024 WL 294045, *3, 2024 NY Wrk Comp LEXIS 344, *7 [WCB No. G151 1069, Jan. 18, 2024]). Accordingly, we will not disturb the Board's decision. To the extent that claimant's

4. Language contained on the IME-3 form also suggests that, under the circumstances present here where an IME-5 form scheduling an IME along with instructions for the examiner were already filed, the filing of an IME-3 form was not necessary: "[i]f the request for information is limited to a request for scheduling of an [IME], you need not file this form. However, you must send a copy of Form IME-5" (Workers' Compensation Board, Independent Examiner's Report of Request for Information/Response to Request Regarding Independent Medical Examination, available at <https://www.wcb.ny.gov/content/main/forms/ime3.pdf> [last accessed Mar. 20, 2026]).

remaining contentions are properly before us and have not been rendered academic by our decision, they have been considered and found to be without merit.

Clark, J.P., Fisher, Powers and Corcoran, JJ., concur. Ordered that the decision is affirmed, without costs.

12 In the Matter of the Claim of Warren Knights, Appellant. Commissioner of Labor, Respondent. [— NYS3d —]—

Unemployment Insurance—Benefits—Disqualification—Not Totally Unemployed—Willful Misrepresentation to Obtain Benefits

Appeal from a decision of the Unemployment Insurance Appeal Board, filed August 28, 2024, which ruled, among other things, that claimant was ineligible to receive unemployment insurance benefits because he was not totally unemployed.

Claimant filed an original claim for unemployment insurance benefits that became effective in April 2022, as well as another that became effective in April 2023. He received an unemployment insurance handbook shortly after the first claim was approved that advised him that he was required to report all work, including part-time work, self-employment and freelance work. The handbook also advised that he would receive partial benefits if he worked 30 hours or fewer and earned \$504 or less in a given week. Claimant went on to perform grocery shopping and delivery services for Maplegear Inc., Doing Business as Instacart (hereinafter Instacart), for significant periods in 2022 and 2023, but failed to report that information when he was certifying for benefits until a Department of Labor representative advised him to do so in July 2023.

After learning of his work for Instacart, the Department issued revised initial determinations in September 2023 that found claimant ineligible to receive benefits for periods between April 2022 and October 2022, as well as periods between April 2023 and July 2023, and charged him with recoverable overpayments and forfeiture penalties based upon his willful misrepresentations to obtain benefits. Following further proceedings, those determinations were sustained by an Administrative Law Judge. Upon administrative appeal, the Unemployment Insurance Appeal Board, in relevant part, agreed that claimant had made willful misrepresentations to obtain benefits and upheld the penalties. Claimant appeals.*

We affirm. There is no dispute that claimant inaccurately

* We note that, in his brief, claimant relies upon several “cases” that do not exist. The “submission of fabricated legal authorities is completely without merit in law and therefore constitutes frivolous conduct” within the meaning of 22 NYCRR part 130 (*Deutsche Bank Natl. Trust Co. v LeTennier*,

represented that he was totally unemployed when certifying for benefits during the periods at issue, leaving the question of whether those misrepresentations were willful and warranted the imposition of penalties (see Labor Law §§ 522 [1]; 591 [former (1)]; 594). Claimant suggests that he failed to report his paid work for Instacart because he simply misunderstood his obligation to do so, but “it is well settled that a claimant is responsible for accurate reporting and must disclose any employment activity when certifying for unemployment insurance benefits, and there is no acceptable defense to making a false statement and a claim that the misrepresentation was unintentional is not sufficient” (*Matter of Dai Kwang Lim [Supreme Home Care Agency of NY Inc.—Commissioner of Labor]*, 246 AD3d 1177, 1178 [3d Dept 2026] [internal quotation marks and citations omitted]; see *Matter of Carmody [Commissioner of Labor]*, — NY3d —, —, 2025 NY Slip Op 06963, *1 [2025]; *Matter of Schneider [Commissioner of Labor]*, 158 AD3d 882, 883 [3d Dept 2018]). “The Board, as the sole arbiter of credibility, was . . . entitled to reject claimant’s exculpatory testimony, including his claims that his inaccurate certifications were made as a result of an inadvertent error and/or an honest mistake” (*Matter of Dai Kwang Lim [Supreme Home Care Agency of NY Inc.—Commissioner of Labor]*, 246 AD3d at 1180 [citations omitted]; see *Matter of Knehnetsky [Commissioner of Labor]*, 239 AD3d 1218, 1219-1220 [3d Dept 2025]; compare *Matter of Valvo [Ross]*, 57 NY2d 116, 127 [1982] [nothing in record to suggest the claimant would recognize that occasional unpaid work fell within legal definition of “employment disqualifying her from all benefits throughout the entire period”]). Thus, substantial evidence supports the Board’s finding that claimant made a willful misrepresentation to obtain benefits, and we perceive “no basis to disturb the Board’s imposition of a monetary penalty and forfeiture of future benefit days” (*Matter of Dai Kwang Lim [Supreme Home Care Agency of NY Inc.—Commissioner of Labor]*, 246 AD3d at 1180; see *Matter of Cruz [Commissioner of Labor]*, 215 AD3d 1203, 1205 [3d Dept 2023]). To the extent that they are not addressed above, claimant’s contentions have been examined and found to be lacking in merit.

Garry, P.J., Pritzker, Fisher, Mackey and Corcoran, JJ., concur. Ordered that the decision is affirmed, without costs.

— AD3d —, —, 2026 NY Slip Op 00040, *4-5 [3d Dept 2026]; see 22 NYCRR 130-1.1 [c] [1]; 130-1.1a [b] [1]). Although we are authorized to impose sanctions (see 22 NYCRR 130-1.1 [d]), we instead sternly warn petitioner not to engage in this conduct again.

13 In the Matter of Century Indemnity Company, Appellant, v Office of the New York Attorney General, Respondent. [253 NYS3d 432]—

Records—Freedom of Information Law—Law Enforcement Statutory Exemption—Active Investigations into Sexual Abuse Allegations at Eight Roman Catholic Dioceses

Fisher, J. Appeal from a judgment of the Supreme Court (Adam Silverman, J.), entered February 19, 2025, in Albany County, which dismissed petitioner’s application, in a proceeding pursuant to CPLR article 78, to review a determination of respondent denying petitioner’s Freedom of Information Law request.

In 2018, respondent announced separate investigations into sexual abuse allegations at the eight Roman Catholic Dioceses within New York. As part of these investigations, respondent issued civil subpoenas to each diocese—including, as relevant here, the Diocese of Ogdensburg (hereinafter the Diocese). In February 2024, petitioner, an insurance company, submitted a Freedom of Information Law (*see* Public Officers Law art 6 [hereinafter FOIL]) request to respondent, seeking all documents the Diocese produced to respondent in response to (1) the initial subpoena, and (2) all other subpoenas, investigation demands or any other requests made by respondent after issuance of the initial subpoena. Respondent denied the request, citing an active investigation into the Diocese, and affirmed this denial on administrative appeal. Petitioner then commenced this CPLR article 78 proceeding seeking an order directing respondent to produce all responsive records to its FOIL request and counsel fees. Supreme Court dismissed the petition, finding that respondent had adequately invoked the law enforcement statutory exemption to the disclosure requirements under FOIL. Petitioner appeals.

We affirm. “FOIL imposes a broad duty of disclosure on government agencies and all agency records are presumptively available for public inspection and copying” (*Matter of Appellate Advocates v New York State Dept. of Corr. & Community Supervision*, 233 AD3d 1130, 1131 [3d Dept 2024] [internal quotation marks and citations omitted], *lv denied* 44 NY3d 902 [2025]; *see Matter of Lost Lake Holdings LLC v Hogue*, 231 AD3d 1406, 1408 [3d Dept 2024]). However, an agency may withhold records under certain narrowly construed exemptions, with the burden “on the agency seeking to prevent disclosure to demonstrate that the requested materials fall squarely within a FOIL exemption by articulating a particularized justification for denying access” (*Matter of New York State*

Corr. Officers & Police Benevolent Assn., Inc. v New York State Dept. of Corr. & Community Supervision, 224 AD3d 974, 975 [3d Dept 2024] [internal quotation marks and citations omitted]; see *Matter of Munson v New York State Div. of Criminal Justice Servs.*, 228 AD3d 1119, 1120 [3d Dept 2024]). The law enforcement exemption is one such instance—when invoked, “the reviewing court is required to evaluate (1) whether the records were compiled for law enforcement purposes; and (2) whether disclosure of the records would interfere with law enforcement investigations or judicial proceedings” (*Matter of Disability Rights N.Y. v New York State Commn. of Corr.*, 194 AD3d 1230, 1232 [3d Dept 2021] [internal quotation marks and citation omitted]; see Public Officers Law § 87 [2] [e] [i]). Where an agency relies on this exemption, it “may fulfill its burden to articulate a factual basis for the exemption under FOIL by identifying the generic kinds of documents for which the exemption is claimed, and the generic risks posed by disclosure of those categories of documents” (*Matter of Abdur-Rashid v New York City Police Dept.*, 31 NY3d 217, 227 [2018] [internal quotation marks, brackets and citation omitted]; accord *Matter of Disability Rights N.Y. v New York State Commn. of Corr.*, 194 AD3d at 1232).

Neither party disputes that the documents were compiled for law enforcement purposes, therefore our analysis focuses on the second prong and whether their disclosure would interfere with law enforcement or judicial proceedings. In support of this inquiry, respondent submitted the attorney affirmation of its FOIL appeals officer who authored the administrative appeal determination. She referenced such determination and averred that the investigation into the Diocese was “ongoing,” identifying five categories of documents that the requested records fell under. She explained the risks of disclosing documents from any of these categories of records, notably that such disclosure could hinder respondent’s investigation by affecting interactions with the Diocese’s counsel, witness interviews, the willingness of witnesses to speak with investigators and could bring unwanted publicity to the investigation. Respondent also submitted the attorney affirmation of its assistant counsel, who served with the enforcement section of respondent’s Charities Bureau, and averred that the ongoing investigation of the Diocese involves an approximately 70-year period with hundreds of witnesses. He outlined that disclosing the records obtained during the ongoing investigation could result in the revelation of attorney work product and litigation strategies, and result in third parties contacting witnesses concerning issues respondent is investigating before it has an opportunity to

conclude its investigation—impairing respondent’s ability to obtain candid, unprepared testimony from relevant witnesses.

Based on the foregoing, we agree with Supreme Court that respondent met its burden of articulating a particularized and specific justification for denying disclosure under the law enforcement exemption. Contrary to petitioner’s assertion, the administrative appeal determination and supporting affirmations were sufficient to establish that an investigation was active regardless of whether it was described as “open,” “active” or “ongoing,” as the potential risks from disclosure that they described could only affect an investigation that has not yet concluded (*see Matter of Disability Rights N.Y. v New York State Commn. of Corr.*, 194 AD3d at 1234; *Matter of DeLuca v New York City Police Dept.*, 261 AD2d 140, 141 [1st Dept 1999]). By identifying the categories of documents for which the exemption was claimed and the associated risks that would flow from their disclosure, respondent provided an adequate factual basis demonstrating that disclosure would interfere with a law enforcement investigation (*see Matter of Madeiros v New York State Educ. Dept.*, 30 NY3d 67, 78 [2017]; *Matter of Disability Rights N.Y. v New York State Commn. of Corr.*, 194 AD3d at 1234; *Matter of Judicial Watch, Inc. v City of New York*, 178 AD3d 540, 541 [1st Dept 2019]; *compare Matter of Vertucci v New York State Dept. of Transp.*, 195 AD3d 1209, 1211 [3d Dept 2021], *lv denied* 37 NY3d 917 [2022]; *Rebello v Thomas Dale Commr. Nassau County Police Dept.*, 2014 NY Slip Op 31424[U], *6 [Sup Ct, NY County 2014] [wherein the respondent agency failed to identify any categories of documents requested at all or articulate the impact that their disclosure would have on the investigation]). Given our holding, petitioner has not established its entitlement to counsel fees (*see* Public Officers Law § 89 [4] [c]; *Matter of Disability Rights N.Y. v New York State Commn. of Corr.*, 194 AD3d at 1235). To the extent not already addressed, petitioner’s remaining contentions have been examined and found to be without merit or rendered academic.

Reynolds Fitzgerald, J.P., Ceresia, Powers and Mackey, J.J., concur. Ordered that the judgment is affirmed, without costs.

14 In the Matter of the Claim of Michael Martinez, Appellant, v Sing Sing Correctional Facility et al., Respondents. Workers’ Compensation Board, Respondent. [— NYS3d —]

Workers’ Compensation—Workers’ Compensation Board—Denial of Claimant Injured Worker’s Request to Preclude Independent Medical Examination Report as to Schedule Loss of Use—Bilateral Wrists, Elbows, and Shoulders

Clark, J.P. Appeal from a decision of the Workers’ Compensa-

tion Board, filed May 2, 2025, which denied claimant's Workers' Compensation Law § 137 request to preclude an independent medical examination report.

In January 2023, claimant was injured at work while manually cranking the inside of an inner gate to open it. The underlying claim for workers' compensation benefits ensued and the claim was ultimately established for various work-related injuries. Following a course of active treatment, claimant's treating physician rendered findings in a medical report as to schedule loss of use (hereinafter SLU) for various sites of injury involving statutory members. On December 1, 2023, an IME-5 form (Claimant's Notice of Independent Medical Examination),¹ dated November 30, 2023, was filed with the Board indicating a scheduled independent medical examination (hereinafter IME) with the carrier's consultant and minimally stating, under the "purpose of examination/special instructions," to "see attached and please bring photo ID." That same day, the State Insurance Fund (hereinafter SIF) separately filed correspondence stating that the purpose of the IME was to examine claimant's bilateral wrists, bilateral elbows and bilateral shoulders and that the examiner should "[p]lease take a complete and detailed accident and treatment history" and comment on, among other things, "whether claimant has reached [maximum medical improvement]" (hereinafter MMI). If MMI had been reached and permanency found by the examiner, the correspondence directed the examiner to make findings on, among other things, SLU as to each site of injury. On December 20, 2023, the carrier's consultant performed the scheduled IME of claimant, found that claimant's injuries had reached MMI and that permanency had been established and found that claimant had sustained a causally related 17.5% SLU of each shoulder, a 0% SLU of each elbow and a 15% SLU of each wrist. At a subsequent May 2024 hearing, claimant's counsel requested that the December 2023 IME report be precluded because an IME-3 form (Independent Examiner's Report of Request Regarding Independent Medical Examination) was never filed in relation to the December 2023 IME, in violation of Workers' Compensation Law § 137.² Given the absence of an IME-3 form in the file, the Workers' Compensation Law Judge (hereinafter WCLJ), among other things,

1. The IME-5 form notifies a claimant of the date of an IME and is accompanied by any written communication for the physician, such as instructions.

2. The IME-3 form may be used by a practitioner to report a request for information regarding a claimant's IME and/or to otherwise satisfy their filing obligations under Workers' Compensation Law § 137.

granted claimant's request to preclude the December 2023 IME report. The SIF sought administrative review with the Workers' Compensation Board, which reversed the decision of the WCLJ. The Board found that the December 2023 IME report should not be precluded, and may be considered, because, even though an IME-3 had not been filed, SIF's properly filed IME-5 form was accompanied by separately scanned and filed IME-5 instructions that included the purpose of the IME and the questions to be answered by the examiner. Claimant appeals.

In addition to providing a prohibition against "the improper influencing or attempt by any person improperly to influence the medical opinion of any physician who has treated or examined an injured employee" (Workers' Compensation Law § 13-a [6] [a]; *accord Matter of Petti v Asplundh Constr. Corp.*, 244 AD3d 1539, 1540 [3d Dept 2025]; *see* Workers' Compensation Bd Release Subject No. 046-1749 [Mar. 21, 2025]; Workers' Compensation Bd Release Subject No. 046-124 [Nov. 24, 2003]), the Workers' Compensation Law provides certain provisions and rules applicable solely to IMEs (*see* Workers' Compensation Law § 137; 12 NYCRR 300.2). As relevant here, the Workers' Compensation Law provides that "[i]f a practitioner who has performed or will be performing an [IME] of a claimant receives a request for information regarding the claimant, including faxed or electronically transmitted requests, the practitioner shall submit a copy of the request for information to the [B]oard within [10] days of receipt of the request" (Workers' Compensation Law § 137 [1] [b]; *see* Workers' Compensation Bd Release Subject No. 046-1749 [Mar. 21, 2025]). Copies of all responses to such requests for information regarding a claimant (such as an IME), including all materials which are provided in response to such a request, are required to be "submitted by the responding practitioner to the [B]oard within [10] days of submission of the response to the requestor" (Workers' Compensation Law § 137 [1] [c]; *see* Workers' Compensation Bd Release Subject No. 046-1749 [Mar. 21, 2025]).

The Board's rules provide that a request for information, for purposes of Workers' Compensation Law § 137 (b) (1), "means any substantive communication with an independent medical examiner, or his or her office, regarding the claimant from any person or entity, including a claimant, an insurance carrier, or a third party administrator, that takes place or is initiated outside of the [IME], including a request or referral for examination and any communication related thereto, questions or inquiries related to the claimant or the examination, and the provision of information to the examiner for review in connec-

tion with a request for the examiner's professional opinion with regard to the claimant or the examination" (12 NYCRR 300.2 [b] [11]).³ "A report of an examination[, or request for an IME,] that does not substantially comply with the requirements of Workers' Compensation Law [§] 137 . . . shall not be admissible as evidence" for various enumerated purposes (12 NYCRR 300.2 [d] [12]; *see Matter of Olczyk v Verizon N.Y., Inc.*, 33 AD3d 1109, 1109 [3d Dept 2006]), which include "evaluating or providing an opinion with respect to schedule loss, degree of disability, validation of treatment plan or diagnosis, causal relationship, diagnosis or treatment of disability, [MMI], ability to return to work, permanency, appropriateness of treatment, necessity of treatment, proper treatment, extent of disability, second opinion or any other purpose recognized or requested by the [B]oard" (12 NYCRR 300.2 [b] [4]).

"The Chair [of the Board] has prescribed the IME-3 form as the proper form for the independent medical examiner to file concerning both the submission of a request for information, and for the examiner's response to that request" (*Employer: New York City Tr. Auth.*, 2026 WL 124802, *2 [WCB No. G345 2976, Jan. 13, 2026]; *accord Employer: FOJP Serv. Corp.*, 2024 WL 294045, *3, 2024 NY Wrk Comp LEXIS 344, *7 [WCB No. G151 1069, Jan. 18, 2024]). However, in cases where an IME-3 form is not timely filed or not filed at all, the Board has consistently declined requests to preclude IME reports where the carrier properly filed an IME-5 form and instructions that included the purpose of the IME and the questions being posed to the carrier's consultant (*see e.g. Employer: Tishman Speyer Props. LP*, 2026 WL 200333, *2, 2026 NY Wrk Comp LEXIS 301, *3 [WCB No. G343 2971, Jan. 16, 2026]; *Employer: New York City Tr. Auth.*, 2026 WL 124802, *2 [WCB No. G345 2976, Jan. 13, 2026]; *Employer: FOJP Serv. Corp.*, 2024 WL 294045, *3, 2024 NY Wrk Comp LEXIS 344, *7 [WCB No. G151 1069, Jan. 18, 2024]).

Here, the record reflects that an IME-5 form, along with its instructions for the examiner, were separately scanned and filed by SIF. As the Board found, however, the separate scanning and filing of these documents appears to be an inadvertent error as both documents were filed with the Board on the

3. Although disclosure of substantive communication with the medical provider is required, the Board's rules do not require further filing with the Board when documents or records constituting the substantive communication are already part of the Board's file and are accessible to all parties (*see* 12 NYCRR 300.2 [b] [11]; *see also* Workers' Compensation Bd Release Subject No. 046-769 [July 9, 2015]).

same day. Our review of the IME-5 form and the detailed instructions for the examiner that were filed by SIF indicates that SIF's instructions identified the specific body parts to be examined at the December 2023 IME and requested that the examiner opine on, among other things, MMI and permanency as well as the impairment percentage for all schedulable sites examined. Although no IME-3 form was filed, we note that neither Workers' Compensation Law § 137 nor the Board's rules expressly require the use of an IME-3 form to satisfy the applicable notice and filing requirements (*see* Workers' Compensation Law § 137; 12 NYCRR 300.2).⁴ In view of the foregoing, we discern no abuse of discretion in the Board's finding that the IME-5 and accompanying instructions for the examiner satisfied the requirements of, and complied with, Workers' Compensation Law § 137 and the Board's rules by timely providing the parties with all of the pertinent information as to what body parts were to be examined and what issues the examiner was to address (*see Employer: Tishman Speyer Props. LP*, 2026 WL 200333, *2, 2026 NY Wrk Comp LEXIS 301, *3 [WCB No. G343 2971, Jan. 16, 2026]; *Employer: New York City Tr. Auth.*, 2026 WL 124802, *2 [WCB No. G345 2976, Jan. 13, 2026]; *Employer: FOJP Serv. Corp.*, 2024 WL 294045, *3, 2024 NY Wrk Comp LEXIS 344, *7 [WCB No. G151 1069, Jan. 18, 2024]).⁵ Accordingly, we will not disturb the Board's decision to deny preclusion of the December 2023 IME report. To the extent that claimant's remaining contentions are properly before us and have not been rendered academic by our decision, they have been considered and found to be without merit.

Ceresia, Fisher, Powers and Corcoran, JJ., concur. Ordered that the decision is affirmed, without costs.

15 In the Matter of the Claim of Peirce Screen, Appellant. A&K Automotive, Respondent; Commissioner of Labor, Re-

4. Language contained on the IME-3 form also suggests that, under the circumstances present here where an IME-5 form scheduling an IME along with instructions for the examiner were already filed, the filing of an IME-3 form was not necessary: "[i]f the request for information is limited to a request for scheduling of an [IME], you need not file this form. However, you must send a copy of Form IME-5 . . . to the Workers' Compensation Board" (Workers' Compensation Board, Independent Examiner's Report of Request for Information/Response to Request Regarding Independent Medical Examination, available at <https://www.wcb.ny.gov/content/main/forms/ime3.pdf> [last accessed Mar. 20, 2026]).

5. Notably, claimant does not argue that he was unaware or lacked notice of the IME-5 and accompanying instructions for the December 2023 IME or otherwise argue that he was prejudiced in any way due to an IME-3 not being filed. These facts belie any claim that claimant was denied due process or was prejudiced.

spondent. [253 NYS3d 429]—Appeal from a decision of the Unemployment Insurance Appeal Board, filed August 6, 2025, which ruled that claimant was disqualified from receiving unemployment insurance benefits because his employment was terminated due to misconduct.

Decision affirmed. No opinion.

Garry, P.J., Clark, Pritzker, Fisher and Mackey, JJ., concur. Ordered that the decision is affirmed, without costs.

16 In the Matter of Attorneys in Violation of Judiciary Law § 468-a. Attorney Grievance Committee for the Third Judicial Department, Petitioner; Norika Kunii, Respondent. (Attorney Registration No. 4964722.) [253 NYS3d 430]—

Attorney and Client—Reinstatement

Motion by respondent for an order reinstating her to the practice of law following her suspension by October 2021 order of this Court (*Matter of Attorneys in Violation of Judiciary Law § 468-a*, 198 AD3d 1068, 1079 [3d Dept 2021]; see Rules for Atty Disciplinary Matters [22 NYCRR] § 1240.16; Rules of App Div, 3d Dept [22 NYCRR] § 806.16).

Upon reading respondent's notice of motion and affidavit with exhibits sworn to February 27, 2026, and the April 1, 2026 responsive correspondence from the Attorney Grievance Committee for the Third Judicial Department, and having determined, by clear and convincing evidence, that (1) respondent has satisfied the requirements of Rules of the Appellate Division, Third Department (22 NYCRR) § 806.16 (c) (5), (2) respondent has complied with the order of suspension and the rules of this Court, (3) respondent has the requisite character and fitness to practice law, and (4) it would be in the public interest to reinstate respondent to the practice of law (see Rules for Atty Disciplinary Matters [22 NYCRR] § 1240.16 [a]), it is ordered that respondent's motion for reinstatement is granted; and it is further ordered that respondent is reinstated as an attorney and counselor-at-law, effective immediately.

Clark, J.P., Ceresia, Fisher, Powers and Corcoran, JJ., concur.

17 In the Matter of Attorneys in Violation of Judiciary Law § 468-a. Attorney Grievance Committee for the Third Judicial Department, Petitioner; Natalie Sirouhi Shahinian, Respondent. (Attorney Registration No. 4075784.) [253 NYS3d 428]—

Attorney and Client—Reinstatement

Motion by respondent for an order reinstating her to the

practice of law following her suspension by September 2024 order of this Court (*Matter of Attorneys in Violation of Judiciary Law § 468-a*, 230 AD3d 1498, 1518 [3d Dept 2024]; see Rules for Atty Disciplinary Matters [22 NYCRR] § 1240.16; Rules of App Div, 3d Dept [22 NYCRR] § 806.16).

Upon reading respondent's notice of motion and affidavit sworn to February 28, 2026, and the April 1, 2026 responsive correspondence from the Attorney Grievance Committee for the Third Judicial Department, and having determined, by clear and convincing evidence, that (1) respondent has complied with the order of suspension and the rules of this Court, (2) respondent has the requisite character and fitness to practice law, and (3) it would be in the public interest to reinstate respondent to the practice of law (see Rules for Atty Disciplinary Matters [22 NYCRR] § 1240.16 [a]), it is ordered that respondent's motion for reinstatement is granted; and it is further ordered that respondent is reinstated as an attorney and counselor-at-law, effective immediately.

Clark, J.P., Ceresia, Fisher, Powers and Corcoran, JJ., concur.

18 In the Matter of Attorneys in Violation of Judiciary Law § 468-a. Attorney Grievance Committee for the Third Judicial Department, Petitioner; Amanda Wurah, Respondent. (Attorney Registration No. 5619457.) [253 NYS3d 431]—

Attorney and Client—Reinstatement

Motion by respondent for an order reinstating her to the practice of law following her suspension by September 2024 order of this Court (*Matter of Attorneys in Violation of Judiciary Law § 468-a*, 230 AD3d 1498, 1521 [3d Dept 2024]; see Rules for Atty Disciplinary Matters [22 NYCRR] § 1240.16; Rules of App Div, 3d Dept [22 NYCRR] § 806.16).

Upon reading respondent's notice of motion and affidavit with exhibits sworn to March 4, 2026, and the April 7, 2026 responsive correspondence from the Attorney Grievance Committee for the Third Judicial Department, and having determined, by clear and convincing evidence, that (1) respondent has complied with the order of suspension and the rules of this Court, (2) respondent has the requisite character and fitness to practice law, and (3) it would be in the public interest to reinstate respondent to the practice of law (see Rules for Atty Disciplinary Matters [22 NYCRR] § 1240.16 [a]), it is ordered that respondent's motion for reinstatement is granted; and it is further ordered that respondent is reinstated as an attorney and counselor-at-law, effective immediately.

Clark, J.P., Ceresia, Fisher, Powers and Corcoran, JJ., concur.

19 In the Matter of Attorneys in Violation of Judiciary Law § 468-a. Attorney Grievance Committee for the Third Judicial Department, Petitioner; Baidu Xu, Respondent. (Attorney Registration No. 5679329.) [253 NYS3d 429]—

Attorney and Client—Reinstatement

Motion by respondent for an order reinstating her to the practice of law following her suspension by September 2024 order of this Court (*Matter of Attorneys in Violation of Judiciary Law § 468-a*, 230 AD3d 1498, 1521 [3d Dept 2024]; *see* Rules for Atty Disciplinary Matters [22 NYCRR] § 1240.16; Rules of App Div, 3d Dept [22 NYCRR] § 806.16).

Upon reading respondent's notice of motion and affidavit sworn to February 8, 2026, and the April 7, 2026 responsive correspondence from the Attorney Grievance Committee for the Third Judicial Department, and having determined, by clear and convincing evidence, that (1) respondent has complied with the order of suspension and the rules of this Court, (2) respondent has the requisite character and fitness to practice law, and (3) it would be in the public interest to reinstate respondent to the practice of law (*see* Rules for Atty Disciplinary Matters [22 NYCRR] § 1240.16 [a]), it is ordered that respondent's motion for reinstatement is granted; and it is further ordered that respondent is reinstated as an attorney and counselor-at-law, effective immediately.

Clark, J.P., Ceresia, Fisher, Powers and Corcoran, JJ., concur.

(April 30, 2026)

1 The People of the State of New York, Respondent, v Shannon Dickinson, Appellant. [— NYS3d —]—

Crimes—Vacatur of Judgment of Conviction—Judge's Law Clerk Former Assistant Prosecutor Responsible for Defendant's Indictment, Prosecution, and Conviction

Fisher, J. Appeal, by permission, from an order of the County Court of Warren County (Robert Smith, J.), entered August 16, 2021, which denied defendant's motion pursuant to CPL 440.10 to vacate the judgment convicting him of the crimes of sexual abuse in the first degree, luring a child and endangering the welfare of a child, without a hearing.

The underlying facts of this appeal are familiar, as this Court

previously affirmed defendant's judgment of conviction on direct appeal (182 AD3d 783 [3d Dept 2018], *lv denied* 35 NY3d 1065 [2020]). Briefly, defendant was indicted for crimes related to an incident involving a minor at a hotel in the Town of Queensbury, Warren County. Following a jury trial, defendant was convicted of sexual abuse in the first degree, luring a child and endangering the welfare of a child. County Court (Hall Jr., J.) sentenced defendant, as a persistent felony offender, to concurrent prison terms of 15 years to life for his convictions of sexual abuse in the first degree and luring a child, and to a lesser concurrent term of incarceration on the remaining conviction. Defendant subsequently moved to vacate his judgment of conviction under CPL 440.10 on several grounds, which was denied by County Court (Smith, J.), without a hearing. Defendant, by permission, appeals from the denial of his CPL article 440 motion.

While this appeal was pending, the People informed defendant and this Court that, at the time defendant's CPL article 440 motion was decided, County Court's law clerk had been a former assistant prosecutor for the District Attorney who had prosecuted defendant. Although it did not "appear" from their review of the file that the law clerk was "involved in any substantive way" in handling defendant's case, the People conceded that "it is possible that [the law clerk] did appear on behalf of the People while the matter was pending as a felony in Queensbury Town Court." As a result of this revelation, defendant contends that the denial of his CPL article 440 motion must be reversed.

We agree. "A judge must always avoid even the appearance of impropriety and must always act in a manner that promotes public confidence in the judiciary's integrity and impartiality" (Advisory Comm on Jud Ethics Op 23-151 [2023] [citations omitted]; see *People v Novak*, 30 NY3d 222, 226 [2017]). As an extension of the judge that they serve, "a law clerk is probably the one participant in the judicial process whose duties and responsibilities are most intimately connected with the judge's own exercise of the judicial function" (*People v Thornton*, 213 AD3d 987, 988 [3d Dept 2023] [internal quotation marks, brackets and citations omitted]; see *Oliva v Heller*, 839 F2d 37, 40 [2d Cir 1988]). Indeed, law clerks serve as "[n]on-judges who perform judicial functions within the judicial system" (Advisory Comm on Jud Ethics Op 24-66 [2024] [internal quotation marks and citation omitted]), and therefore a law clerk's conflict may require the judge they serve to "disqualify in a proceeding in which the judge's impartiality 'might reasonably

be questioned’ ” (Advisory Comm on Jud Ethics Op 25-40 [2025], quoting Rules Governing Jud Conduct [22 NYCRR] § 100.3 [E] [1]). Although such disqualification is not automatic, a judge must insulate their law clerk from all matters in which the law clerk had any personal involvement as an attorney during the law clerk’s prior employment and disclose the law clerk’s involvement and insulation to the parties—“even where the law clerk’s involvement in the matter consisted of only a single court appearance” (Advisory Comm on Jud Ethics Op 23-96 [2023]; *see* Advisory Comm on Jud Ethics Op 21-42 [2021]). In doing so, a judge must prohibit their law clerk from participating in any way with the proceeding, including conferencing, performing legal research or drafting decisions (*see* Advisory Comm on Jud Ethics Op 23-117 [2023]). The failure to do so constitutes reversible error (*see People v Thornton*, 213 AD3d at 988-989; *People v Roshia*, 206 AD3d 1057, 1057-1058 [3d Dept 2022]; *People v Hymes*, 193 AD3d 975, 977 [2d Dept 2021], *lv denied* 37 NY3d 972 [2021]).

Here, it is undisputed that defense counsel was not notified of the law clerk’s prior employment with the prosecutor’s office responsible for defendant’s indictment, prosecution and conviction until this appeal was pending. Since the letter advising of this conflict conceded that it was “possible” the law clerk made a court appearance as an assistant prosecutor against defendant, we disagree with the People’s characterization that it can be said the law clerk had “absolutely no involvement” so as to not require insulation and notification (Advisory Comm on Jud Ethics Op 25-40 [2025]). Since the record before us also lacks insight into the law clerk’s involvement with the determination of defendant’s CPL article 440 motion, given the well-established recognition of a law clerk’s special and integral role in the judicial process with their judge, we conclude that it was an improvident exercise of discretion for the judge to decide defendant’s motion under these circumstances (*see People v Thornton*, 213 AD3d at 988; *People v Roshia*, 206 AD3d at 1057-1058; *People v Hymes*, 193 AD3d at 977). Given the context in which this issue arose, “we deem this to be an appropriate matter in which to take corrective action in the interest of justice” by reversing the order and remitting this matter to a different County Court judge for resolution of defendant’s CPL article 440 motion (*People v Thornton*, 213 AD3d at 988). As a result of our determination, defendant’s contentions relating to the merits of his postconviction motion are academic.

Clark, J.P., Ceresia and Powers, JJ., concur. Ordered that the order is reversed, as a matter of discretion in the interest

of justice, and matter remitted to the County Court of Warren County for further proceedings not inconsistent with this Court's decision before a different judge.

2 The People of the State of New York, Respondent, v Eugene Cobbins, Appellant. [— NYS3d —]—

Crimes—Confession—Knowing Waiver of *Miranda* Rights during Video-Recorded Custodial Interview—Suppression of Statements Not Warranted
Crimes—Sentence—Fundamental Right to be Present at Resentencing Violated

Pritzker, J. Appeals (1) from a judgment of the County Court of Columbia County (E. Danielle Jose-Decker, J.), rendered November 30, 2023, convicting defendant upon his plea of guilty of the crimes of robbery in the first degree, robbery in the second degree, grand larceny in the fourth degree (two counts) and assault in the third degree, and (2) from a judgment of said court, rendered February 9, 2024, which resentenced defendant.

Defendant and the codefendant were jointly charged by indictment; for his part, defendant was charged with the crimes of robbery in the first degree, robbery in the second degree, two counts of grand larceny in the fourth degree and assault in the third degree, stemming from a September 2022 robbery and assault in the City of Hudson, Columbia County. After County Court (Nichols, J.) denied defendant's request to suppress statements, defendant pleaded guilty to all charges, without a sentencing commitment from County Court (Jose-Decker, J.). Defendant was sentenced to a prison term of 10 years, to be followed by five years of postrelease supervision, for the robbery in the first degree conviction, and concurrent prison terms of seven years, to be followed by five years of postrelease supervision, for the robbery in the second degree conviction, 2 to 4 years for each of the grand larceny in the fourth degree convictions and a sentence not to exceed 364 days for the assault in the fourth degree conviction. However, after receiving notification from the Department of Corrections and Community Supervision (hereinafter DOCCS), County Court amended defendant's sentence as to the two grand larceny in the fourth degree convictions to reflect a prison term of 1 $\frac{1}{3}$ to 4 years. Defendant appeals from the judgment of conviction and the judgment resentencing him.

Defendant contends that statements he made during a recorded custodial interrogation were involuntarily made and, therefore, must be suppressed pursuant to CPL 710.20 (3). Specifically, defendant argues (1) that the police withheld filing the charges against defendant to improperly circumvent his in-

delible right to counsel and (2) that defendant's *Miranda* waiver was not made knowingly and voluntarily. The first issue, however, is not properly before this Court. To that end, the record is clear that, at the time of the police interrogation, the criminal complaint had not yet been filed formally commencing the action, thus, defendant's right to counsel had not yet attached (*see People v Grice*, 100 NY2d 318, 321 [2003]; *People v Phoenix*, 115 AD3d 1058, 1059 [3d Dept 2014], *lv denied* 23 NY3d 1024 [2014]). Because this right had not yet attached, all defendant is left with are claims regarding whether any violation of his statutory right to the filing of charges and arraignment without "unnecessary delay" affected the voluntariness of his statements during the police interview, claims which require preservation (CPL 140.20 [1]; *see People v Ramos*, 99 NY2d 27, 37 [2002]; *People v Andino*, 185 AD3d 1218, 1219 [3d Dept 2020], *lv denied* 35 NY3d 1110 [2020]; *People v Rumrill*, 40 AD3d 1273, 1274 [3d Dept 2007], *lv denied* 9 NY3d 926 [2007]). Defendant's assertion otherwise is merely an attempt to "convert an unpreserved statutory claim [that his arraignment was unnecessarily delayed] into a constitutional right-to-counsel claim—and thus gain appellate review—by merely labeling the claim constitutional" (*People v Ramos*, 99 NY2d at 37). Accordingly, to the extent defendant is contending that a perceived delay in arraignment affected the voluntariness of his statements, these arguments were not raised in County Court and, as such, are not preserved (*see People v Andino*, 185 AD3d at 1219; *People v Rumrill*, 40 AD3d at 1274).

We turn now to defendant's second contention relative to his statements during the police interrogation. Specifically, he asserts that the waiver of his *Miranda* rights was not knowing and voluntary because the warnings were not administered in clear and unequivocal terms because they were read "too quickly" and "mechanically" and were effectively treated as an "unimportant procedural formality." We disagree. The video from the interview room demonstrates that, as soon as the detective entered the room, he read defendant his *Miranda* rights directly from a preprinted card prior to asking any questions. Defendant unambiguously acknowledged that he understood these rights. Furthermore, after giving the *Miranda* warning, the detective again questioned defendant whether he wanted to speak about what happened, to which defendant replied in the affirmative. Moreover, contained in the record is the preprinted *Miranda* waiver, which mirrors the words the detective read in the video, which defendant signed. After the acknowledgment was signed, the detective again stated that he wanted to discuss what occurred the other day and questioned

whether defendant knew why he was there. Shortly thereafter, defendant indicated he wanted to speak with an attorney, and the detective immediately stopped the interview. Given the totality of the circumstances, County Court (Nichols, J.) did not err in finding that, based upon the video from the interview room, “defendant knowingly waived his *Miranda* rights and voluntarily spoke to the detective” (*People v Smith*, 193 AD3d 1260, 1265 [3d Dept 2021], *lv denied* 37 NY3d 968 [2021]; see *People v Bermudez*, 217 AD3d 1261, 1264 [3d Dept 2023], *lv denied* 40 NY3d 996 [2023]). Accordingly, suppression of the statements is not warranted.

Defendant also raises arguments as to the imposed sentence. Initially, defendant’s contentions relative to having pleaded guilty to inclusory concurrent counts are foreclosed by his guilty plea (see *People v Bova*, 232 AD3d 939, 940 [3d Dept 2024]; see also *People v Redden*, 182 AD3d 926, 928 [3d Dept 2020], *lv denied* 35 NY3d 1115 [2020]). However, as to defendant’s assertion that his fundamental right to be present at resentencing was violated, we agree. Here, County Court (Jose-Decker, J.) received a letter from DOCCS informing the court that defendant’s two sentences of 2 to 4 years for the underlying grand larceny convictions were not in compliance with state law, and, therefore, an amendment was required. The record reflects that defendant was not produced at either the preceding conference or the resentencing proceeding. The record merely indicates that defense counsel stated, orally and in writing, that defendant’s presence was not necessary, yet there is no acknowledgment that defendant was even aware of the resentencing proceeding. As such, defendant’s fundamental right to be present at his resentencing was violated, and the matter must be remitted to County Court for resentencing on the grand larceny convictions (see CPL 380.40; *People v Stewart*, 28 NY3d 1091, 1092 [2016]; *People v Berry*, 206 AD3d 755, 756 [2d Dept 2022], *lv denied* 38 NY3d 1149 [2022]).

Finally, we have carefully reviewed defendant’s argument that the sentence imposed for the conviction of robbery in the first degree is harsh and severe and his request that this Court reduce it in the interest of justice. We decline to do so. The current sentence is within the statutory allowances, and notably, the 10-year sentence is only two years more than the statutory minimum for a second felony offender (see Penal Law § 70.06 [6] [a]). Moreover, in view of defendant’s contradictory statements made between his plea and his interview for the presentence report, as well as the inconsistencies between current and past presentence reports, and in consideration of the

nature of the crime and defendant's extensive criminal history, the sentence is not unduly harsh or severe and we decline to reduce it in the interest of justice (*see People v Faublas*, 216 AD3d 1358, 1359 [3d Dept 2023], *lv denied* 40 NY3d 934 [2023]; *People v Jenkins*, 215 AD3d 1118, 1122-1123 [3d Dept 2023], *lv denied* 40 NY3d 997 [2023]).

Aarons, J.P., Reynolds Fitzgerald, Fisher and McShan, JJ., concur. Ordered that the judgment rendered November 30, 2023, is affirmed. Ordered that the judgment rendered February 9, 2024, is reversed, on the law, and matter remitted to the County Court of Columbia County for resentencing on the two convictions of grand larceny in the fourth degree.

3 The People of the State of New York, Respondent, v Cendno Rahaman, Appellant. [— NYS3d —]

Crimes—Vacatur of Judgment of Conviction—Trial Counsel Ineffective for Failing to Object to Empaneling of Anonymous Jury
Crimes—Jurors—Anonymous Jury—Fair Trial

Fisher, J. Appeal, by permission, from an order of the County Court of Saratoga County (James Murphy III, J.), entered November 26, 2024, which denied defendant's motion to, among other things, renew a motion pursuant to CPL 440.10 to vacate the judgment of conviction.

In June 2019, following a jury trial, defendant was convicted of three counts of attempted assault in the first degree, assault in the second degree, attempted murder in the second degree and tampering with physical evidence. County Court sentenced defendant to various concurrent and consecutive prison terms, followed by a period of postrelease supervision. On direct appeal, this Court affirmed defendant's convictions but directed that all sentences run concurrently to each other; the greatest of the concurrent terms being a prison term of 25 years, to be followed by five years of postrelease supervision (189 AD3d 1709, 1714 [3d Dept 2020], *lv denied* 36 NY3d 1059 [2021]).

Thereafter, defendant unsuccessfully moved three times to vacate his judgment of conviction under CPL article 440 on the basis that his trial counsel was ineffective. At issue here is the denial of his CPL article 440 motion made in June 2024, which raised for the first time that his trial counsel was ineffective for failing to object to the empaneling of an anonymous jury. County Court denied the motion, without a hearing, determining that defendant's ineffective assistance of counsel claim could be summarily denied as a successive CPL article 440 motion because defendant was aware of the underlying facts and could have raised them on direct appeal or in his prior mo-

tions, but did not do so (*see* CPL 440.10 [3] [c]; 440.30 [2] [a]). Defendant appeals by permission.

Defendant contends that County Court erred by summarily denying his CPL 440.10 motion without considering whether it was otherwise meritorious. We find this contention to be persuasive, since a trial court commits reversible error by empaneling an anonymous jury “without any factual predicate for the extraordinary procedure” (*People v Flores*, 32 NY3d 1087, 1088 [2018]; *see People v Heidrich*, 226 AD3d 1096, 1099 [3d Dept 2024], *lv denied* 42 NY3d 927 [2024]; *see also* CPL 270.15 [1-a], [1-b]; *People v Cassell*, — AD3d —, —, 2026 NY Slip Op 02173, *5 [3d Dept 2026]; *People v Tenace*, 229 AD3d 908, 911 [3d Dept 2024]). Although a trial court may deny a successive CPL article 440 motion when “the defendant was in a position adequately to raise the ground or issue underlying the present motion but did not do so[,] . . . in the interest of justice and for good cause shown [the court] may in its discretion grant the motion if it is otherwise meritorious and vacate the judgment” (CPL 440.10 [3] [c]; *see People v Rasul*, 242 AD3d 1308, 1310 [3d Dept 2025]). Under appropriate circumstances, even where the denial of a claim would constitute a provident exercise of discretion under CPL 440.10 (3) (c), the failure to consider an ineffective assistance of counsel claim on the merits in the interest of justice could constitute an abuse of discretion (*see People v Hamilton*, 115 AD3d 12, 28 [2d Dept 2014]; *see also People v Fowler*, 244 AD3d 1677, 1679 [3d Dept 2025]; *People v Perez*, 185 AD3d 1156, 1158 [3d Dept 2020]; *People v Pett*, 148 AD3d 1524, 1524 [4th Dept 2017]).

Here, defendant contends that his trial counsel was ineffective for failing to object when County Court empaneled an anonymous jury. In support of his motion, defendant submitted the affidavit of his trial counsel, who acknowledged that the decision to empanel an anonymous jury “did not sound right” at the time, but that he did not become aware that this was possibly a reversible error until April 2024, when this Court handed down *Heidrich*. Defendant’s trial counsel further stated that he “had not researched the issue before . . . trial” and that the “failure to object was not a result of any strategy on [his] part.” Although the People contend that the leading case on the anonymous jury issue existed prior to defendant’s trial and had not been expanded upon by *Heidrich*, the People acknowledge on appeal that “the empaneling of an anonymous jury in violation of CPL 270.15 constitutes a per se denial of a defendant’s right to a fair trial that cannot be subjected to harmless error analysis.” Indeed, a single error may qualify as

ineffective assistance where it “compromise[s] a defendant’s right to a fair trial” (*People v Watkins*, 42 NY3d 635, 640 [2024] [internal quotation marks and citation omitted], *cert denied* 604 US —, 145 S Ct 459 [2024]), particularly where, like here, the jurors were only identified by numbers and the record fails to reveal whether their names were ever provided to defense counsel—“which materially heightens the risk of prejudice” (*People v Cassell*, — AD3d at —, 2026 NY Slip Op 02173, *5; *see* CPL 270.15; *compare* *People v Flores*, 153 AD3d 182, 191-192 [2d Dept 2017], *affd* 32 NY3d 1087 [2018], *with* *People v Reinfurt*, 241 AD3d 1015, 1021 [3d Dept 2025], *lv denied* 44 NY3d 1067 [2026], *and* *People v Goberdhan*, 241 AD3d 992, 999-1000 [3d Dept 2025], *lv denied* 44 NY3d 1011 [2025]). Accordingly, under the unique circumstances of this particular case and where the legal basis for the motion is undisputed through sworn allegations (*see* CPL 440.30 [3]), we substitute our discretion for that of the motion court and grant defendant’s motion to vacate the judgment of conviction (*see* *People v Mower*, 242 AD3d 1377, 1380 [3d Dept 2025]; *People v Hamilton*, 115 AD3d at 28; *see also* *People v Tenace*, 229 AD3d at 912; *People v Heidrich*, 226 AD3d at 1099). As such, remittal for a new trial is required.

Clark, J.P., Ceresia, Powers and Corcoran, JJ., concur. Ordered that the order is reversed, as a matter of discretion in the interest of justice, motion granted, and matter remitted to the County Court of Saratoga County for a new trial.

4 In the Matter of Joseph S., Respondent, v Jennifer R. et al., Appellants. (Proceeding No. 1.) In the Matter of Jennifer R., Appellant, v Joseph S., Respondent, and Amber T. et al., Appellants. (Proceeding No. 2.) [— NYS3d —]—

Parent, Child and Family—Visitation Rights of Grandparents—One Weekend Per Month

Parent, Child and Family—Custody—Continuation of Supervised Parenting Time for Mother

Ceresia, J. Appeal from an order of the Family Court of Clinton County (Keith Bruno, J.), entered July 2, 2024, which (1) granted petitioner’s application, in proceeding No. 1 pursuant to Family Ct Act article 6, to modify a prior order of custody, and (2) dismissed petitioner’s application, in proceeding No. 2 pursuant to Family Ct Act article 6, to modify a prior order of parenting time.

Jennifer R. (hereinafter the mother) and Joseph S. (hereinafter the father) are the parents of the subject child (born in 2011). The mother and the father also have two older children in common, who live with the father. When the subject child

was born, the mother and the father were separated, and another individual was initially presumed to be the child's father. That individual's parents, Amber T. and Curtis T. (hereinafter the grandparents), were granted legal and physical custody of the child when she was five months old, partly due to the mother's drug use. Soon afterward, the father filed a paternity petition and, in 2013, an order of filiation was entered confirming his paternity of the child. At the same time, a custody order entered on consent granted joint legal custody to the grandparents and the father, with primary physical custody to the grandparents and parenting time for the father every week, from Sunday morning through Tuesday night. Given that the father lives in Rensselaer County and the grandparents live three hours north in Clinton County, this arrangement required the child to spend six hours in the car for each weekly visit with the father. The order also provided supervised parenting time to the mother, who lives in Clinton County, as arranged with and supervised by the grandparents and/or the father. A 2016 consent order continued this arrangement, except the father's parenting time was switched to Friday night through Sunday night.

In 2023, the father filed a modification petition seeking sole legal and physical custody of the child, with weekend visitation for the grandparents and supervised parenting time for the mother. The mother then filed a modification petition wherein she sought unsupervised parenting time. Family Court held a fact-finding hearing on both petitions between late 2023 and early 2024, and also conducted a *Lincoln* hearing, after which the court granted primary physical custody to the father, with visitation for the grandparents one weekend per month and at other specified times. The court dismissed the mother's petition and ordered that her supervised parenting time would continue. The grandparents and the mother appeal.*

Turning first to the grandparents' appeal, they do not challenge Family Court's award of primary physical custody to the father. Instead, they argue that they should have been granted visitation every other weekend rather than one weekend per month, given that they had raised the child since infancy and were strongly bonded with her. "Family Court has considerable discretion in fashioning a grandparent visitation schedule in the child's best interests, and this Court will not disturb such an award if it is supported by a sound and substantial basis in the record" (*Matter of Donald UU. v Shirleen UU.*, 242 AD3d

* The attorney for the child is supportive of Family Court's order in all respects.

1342, 1342 [3d Dept 2025] [citations omitted]; see *Matter of Anne MM. v Vasiliki NN.*, 203 AD3d 1476, 1481 [3d Dept 2022]).

Family Court recognized the grandparents' loving relationship with the child, while also acknowledging the heavy toll that the existing schedule of extensive travel had taken on her. That is, the child was unable to participate in sports and other activities that she enjoyed due to being away every weekend, and she was in therapy to treat the anxiety that she suffered as a result of the frequent household changes. The court thoughtfully balanced these competing factors, acknowledging that its overriding concern was for the child's best interests. The court ultimately saw fit to award the grandparents one weekend of visitation per month, together with substantial additional visitation throughout the year on holidays, school breaks and in the summer. Upon our review of the record of the fact-finding and *Lincoln* hearings, we find no basis to modify the visitation schedule ordered by the court (see *Matter of Melissa X. v Javon Y.*, 200 AD3d 1451, 1454 [3d Dept 2021]; *Matter of Deborah Z. v Alana AA.*, 185 AD3d 1174, 1178 [3d Dept 2020]).

As for the mother's appeal, she argues that Family Court abused its discretion in denying her request for unsupervised parenting time with the child. "An order of supervised parenting time will be warranted where the court finds that unsupervised parenting time would be detrimental to the child[]'s safety because the parent is either unable or unwilling to discharge his or her parental responsibility properly" (*Matter of Lynn X. v Donald X.*, 162 AD3d 1276, 1277 [3d Dept 2018] [internal quotation marks, brackets and citations omitted]; accord *Matter of Kelly SS. v Justin TT.*, 244 AD3d 1345, 1346 [3d Dept 2025]). Family Court's determination as to whether parenting time should be supervised is entitled to great deference unless it lacks a sound and substantial basis in the record (see *Matter of Ann T. v James U.*, 241 AD3d 1662, 1664 [3d Dept 2025]; *Matter of Lynn X. v Donald X.*, 162 AD3d at 1277).

The hearing evidence reflected that, although the mother lived close to the grandparents, she had visited the child only sporadically throughout the child's life until shortly before filing her modification petition, when her visits became more regular. The mother had visited her two older children even less often, leading to tension between those children and the subject child. Rather than providing an explanation for her inconsistent presence in the lives of her children, the mother claimed that they had been taken from her for no reason,

without acknowledging her role in that outcome. In support of her request for unsupervised parenting time, the mother focused on the fact that she had been sober for eight years. As Family Court noted, however, the mother's sobriety appeared to be based primarily upon her enrollment in a methadone treatment program. The mother's methadone dosage had steadily increased to a high level at the time of the hearing, with no indication of any plan to decrease it, and the mother was not utilizing other established tools such as a 12-step program or sponsor (*compare Matter of Beeken v Fredenburg*, 145 AD3d 1394, 1396 [3d Dept 2016]). Ultimately, the court determined that more time was needed for the mother to build trust with the child. Deferring to the court's credibility determinations as we must, and noting again our review of the transcripts of the fact-finding and *Lincoln* hearings, we conclude that the court correctly dismissed the mother's modification petition for unsupervised parenting time (*see Matter of Tina X. v Thomas Y.*, 233 AD3d 1272, 1276 [3d Dept 2024]; *see also Matter of Autumn B. v Jasmine A.*, 220 AD3d 1073, 1077 [3d Dept 2023], *lv denied* 41 NY3d 901 [2024]).

Finally, contrary to the mother's contention, Family Court did not improperly delegate its authority to determine the terms of her supervised parenting time to the father and the grandparents. A court "may order visitation as the parties may mutually agree so long as such an arrangement is not untenable under the circumstances" (*Matter of Sarah I. v Ian J.*, 233 AD3d 1334, 1337 [3d Dept 2024] [internal quotation marks and citations omitted], *lv denied* 43 NY3d 904 [2025]; *see Matter of Kelly SS. v Justin TT.*, 244 AD3d at 1348). Here, there was no indication that the court's order directing the mother's parenting time to be arranged with the father and the grandparents was untenable, insofar as it was merely a continuation of the parties' longstanding agreement, and both the father and the grandmother testified that they supported and encouraged the mother's visits with the child.

Aarons, J.P., McShan and Corcoran, JJ., concur. Ordered that the order is affirmed, without costs.

5 In the *Matter of City of Yonkers et al., Respondents, v New York State Department of Environmental Conservation et al., Respondents, and New York City Water Board, Appellant.* [— NYS3d —]

Municipal Corporations—Water and Sewer Rates—Challenges to Excess Water Rates

Ceresia, J. Appeal from a judgment of the Supreme Court

(David Gandin, J.), entered August 2, 2024, in Albany County, which, among other things, in a combined proceeding pursuant to CPLR article 78 and action for declaratory judgement, declared that respondent Department of Environmental Conservation should employ a fair and reasonable standard in adjudicating petitioners' challenges to excess water rates.

New York City (hereinafter the City) obtains its water from a system of City-owned reservoirs and lakes located north of its boundaries. Respondent New York City Water Board (hereinafter the Water Board) is tasked with setting rates for all withdrawals of water from this system. Certain upstate communities along the City's aqueduct route are statutorily entitled to purchase water for their own needs from the City's supply. This "entitlement water"—the same amount, per capita, as that consumed by City residents—must be sold by the Water Board to the upstate communities at a fair and reasonable rate, pursuant to a set formula,¹ that cannot exceed the rate paid by City residents (*see* Administrative Code of City of NY § 24-360 [b], [c]). Although nothing compels the Water Board to sell "excess water"—the amount that upstate communities may wish to consume over and above that to which they are entitled—it may choose to do so, but there is no formula governing the rate that it may charge.

In the event that a consumer of City water wishes to contest the Water Board's rate-setting, there are two avenues for such a challenge. In-city customers must file a CPLR article 78 proceeding in Supreme Court, while those customers outside the City must bring an administrative proceeding before respondent Department of Environmental Conservation (hereinafter DEC) (*see* Administrative Code of City of NY § 24-360 [b]; *Matter of Village of Scarsdale v Jorling*, 91 NY2d 507, 516 [1998]). DEC's determination can then be reviewed in Supreme Court (*see* Administrative Code of City of NY § 24-360 [c]).

Against that backdrop, in 2016, petitioners—municipalities and water districts located north of the City—filed petitions with DEC seeking to challenge the rates set by the Water Board for entitlement water and excess water in the fiscal years 2015-

1. "[F]air and reasonable" is defined as "the actual total cost of the water to the [C]ity after deducting from the total cost all construction costs and expenses of operation, maintenance and carrying charges incurred within the corporate limits of the [C]ity in connection with the distribution and delivery of the water within such limits" (Administrative Code of City of NY § 24-360 [c]).

2017.² During those years, the rate for excess water was approximately triple the rate for entitlement water. In a 2019 interim decision, an Administrative Law Judge (hereinafter ALJ) ruled, as relevant here, that the standard for reviewing the Water Board's excess water rates is not the fair and reasonable standard governing entitlement water. Rather, the ALJ found that the Water Board is entitled to more deference when it comes to excess water, and that, pursuant to controlling Court of Appeals case law (*see Matter of Prometheus Realty Corp. v New York City Water Bd.*, 30 NY3d 639, 646 [2017]; *Carey Transp. v Triborough Bridge & Tunnel Auth.*, 38 NY2d 545, 553 [1976], *cert denied* 429 US 830 [1976]), the standard of review is "whether the proposed excess water rates would serve the Water Board's economic and public policy goals." In 2023, the ALJ's decision in this regard was affirmed by DEC's Commissioner upon administrative appeal.

Thereafter, the Town of Carmel commenced a CPLR article 78 proceeding, and the remaining petitioners commenced a hybrid CPLR article 78 proceeding/declaratory judgment action, both seeking to vacate DEC's determination. The proceedings were eventually consolidated and, upon motion by DEC, petitioners agreed to convert their standard-of-review claims to causes of action for declaratory judgment. DEC also moved for summary judgment on these causes of action. Supreme Court denied that motion and declared that the fair and reasonable standard governs DEC's review of the Water Board's excess water rates, prompting this appeal by the Water Board.³

We are tasked with determining the proper standard to be utilized by DEC when reviewing the Water Board's rate for excess water. As indicated above, Administrative Code of the City of New York § 24-360 sets forth the fair and reasonable standard as it pertains to entitlement water, and makes no mention of excess water or the rate that can be charged for the same. Supreme Court nevertheless applied the fair and reasonable standard to excess water by looking outside of this statute for guidance. The court initially acknowledged the Court of Appeals' holding that "DEC's authority over excess consumption rates is derived from [its] power to control, regulate and preserve the water resources of the entire State" (*Matter of Village of Scarsdale v Jorling*, 91 NY2d at 517, citing ECL art 15). As such, the court turned to the Environmental Conserva-

2. Petitioner Town of Carmel was not initially among this group but was later granted full party status during the administrative proceedings.

3. DEC has filed a respondent's brief in which it joins the position of the Water Board.

tion Law and found various provisions of that law to be “instructive,” such as the provision in ECL 15-1521 indicating that certain water rates must be “fair and reasonable” and the provision in ECL 15-1503 (2) (c) stating that specified water projects must be “just and equitable to all affected municipalities.” The problem with this analysis, however, is that these statutes reference standards to be applied, in the context of a permit-granting function, when DEC is requiring one water system operator to supply water to another (*see Matter of Town of Watertown Water Dist. No. 2 v State of N.Y. Dept. of Env'tl. Conservation*, 176 AD2d 1166, 1167 [3d Dept 1991]), such that fairness is paramount. Hence, reliance on these statutes is misplaced inasmuch as they deal with one water system's *entitlement* to water from another, as opposed to the rate-setting circumstances at hand, where the City is *voluntarily* supplying excess water to petitioners.

Supreme Court also expressed concern that DEC should not be “overly deferential” to the Water Board when reviewing excess water rates, and should not abdicate its obligation to conserve the water resources of the entire state. However, the Water Board itself is “organized under our state's Public Authorities Law as a public benefit corporation, charged with acting ‘for the benefit of the people of the city *and the state*, [and] for the improvement of their health, welfare and prosperity’ ” (*Matter of Prometheus Realty Corp. v New York City Water Bd.*, 30 NY3d at 648 [Rivera, J., dissenting] [footnote omitted and emphasis supplied], quoting Public Authorities Law § 1045-f [9]). To be sure, the Water Board is concerned with conservation of its water supply (*see id.* at 643), which is a factor it has considered when setting higher rates for the consumption of water in excess of that deemed essential. Moreover, the Water Board must balance other economic and public policy concerns (*see* Public Authorities Law §§ 1045-g [4]; 1045-j [1]), and to require DEC to substitute its own judgment for that of the Water Board on those issues would obligate DEC to act outside the scope of its conservation mandate. In short, we do not share the apprehension expressed by Supreme Court.

We now turn to the standard that, in our view, is applicable. Recognizing the Water Board's role as a utility, it is noted that a typical challenge to a utility's rate-setting is brought before Supreme Court, not an administrative agency (*see e.g. Matter of New York Tel. Co. v Public Serv. Commn. of State of N.Y.*, 95 NY2d 40, 46 [2000]; *Sloane v Power Auth. of the State of N.Y.*, 214 AD3d 1150, 1151 [3d Dept 2023], *lv denied* 40 NY3d 902 [2023]; *Matter of Board of Trustees of Inc. Vil. of E. Williston v*

Board of Trustees of Inc. Vil. of Williston Park, 119 AD3d 679, 680 [2d Dept 2014]; *Matter of Home Depot U.S.A., Inc. v State of N.Y. Pub. Serv. Commn.*, 92 AD3d 1012, 1012 [3d Dept 2012], *lv denied* 19 NY3d 811 [2012]). In such a judicial context, it is well established “that a utility has ‘unfettered discretion to fix rates as it will so long as invidious illicit discriminations are not practiced and differentials are not utterly arbitrary and unsupported by economic or public policy goals, as it reasonably conceives them’ ” (*Matter of Prometheus Realty Corp. v New York City Water Bd.*, 30 NY3d at 646 [brackets and emphasis omitted], quoting *Carey Transp. v Triborough Bridge & Tunnel Auth.*, 38 NY2d at 553). In other words, rate-setting determinations are generally “entitled to deference and may not be set aside unless they are without rational basis or without reasonable support in the record” (*Matter of New York Tel. Co. v Public Serv. Commn. of State of N.Y.*, 95 NY2d at 48 [internal quotation marks and citation omitted]; see *Matter of Corning Natural Gas Corp. v Public Serv. Commn. of the State of N.Y.*, 221 AD3d 1075, 1078 [3d Dept 2023], *appeal dismissed* 41 NY3d 968 [2024], *lv denied* 42 NY3d 906 [2024]; *Matter of Home Depot U.S.A., Inc. v State of N.Y. Pub. Serv. Commn.*, 92 AD3d at 1014). Discerning no basis to deviate from this deferential approach, we hold that the standard articulated in *Matter of Prometheus Realty Corp.* and *Carey Transp.*, as cited above, governs the Water Board’s rate-setting for excess water.

As a final matter, to the extent that the Town of Carmel is seeking affirmative relief with respect to a portion of Supreme Court’s ruling below, it is barred from obtaining such relief as it did not appeal therefrom (see *Matter of 61 Crown St., LLC v City of Kingston Common Council*, 217 AD3d 1144, 1145 [3d Dept 2023]; *Finch v Erie Ins. Co.*, 211 AD3d 1152, 1155 [3d Dept 2022]).

Clark, J.P., Aarons and McShan, JJ., concur; Corcoran, J., not taking part.

Ordered that the judgment is modified, on the law, without costs, by reversing so much thereof as denied respondent Department of Environmental Conservation’s motion for summary judgment; motion granted, and it is declared that the standard for the Department of Environmental Conservation’s review of respondent New York City Water Board’s excess water rates is that set forth in *Prometheus Realty Corp.* and *Carey Transp.*; and, as so modified, affirmed. **[Prior Case History: 83 Misc 3d 1268(A), 2024 NY Slip Op 51056(U).]**

6 In the Matter of B. BB., Petitioner, v A.Z., Appellant, and A. AA., Respondent. [— NYS3d —]

**Parent, Child and Family—Custody—Extraordinary Circumstances—
Untreated Substance Abuse of Parents—Petitioner Maternal Grandmother**

Clark, J.P. Appeal from an order of the Family Court of Chemung County (Richard Rich Jr., J.), entered March 15, 2023, which granted petitioner's application, in a proceeding pursuant to Family Ct Act article 6, for custody of the subject child.

Respondents A.Z. (hereinafter the father) and A. AA. (hereinafter the mother) are the parents of the subject child (born in 2019). By the terms of an August 2023 custody order issued on consent, the parents agreed to share joint legal custody of the child, with the father retaining physical custody and the mother having a set schedule of parenting time. As both parents struggle with substance abuse issues, they also signed a safety plan regarding the child and the August 2023 order directed them to refrain from using illicit substances within 24 hours of their parenting time. The order also required the mother's parenting time to be "held in a public place" or at the home of petitioner, the child's maternal grandmother (hereinafter the grandmother). It further directed the father to remain in substance abuse counseling and to refrain from using alcohol within 24 hours of his parenting time.

In September 2023, following a Child Protective Services report, the grandmother obtained temporary custody of the child. The parents thereafter signed another safety plan under which they agreed that custody would remain with the grandmother pending the completion of services, including substance abuse treatment. A day later, the grandmother filed a petition for custody of the child based upon the parents' untreated substance abuse issues.

The grandmother appeared pro se at the ensuing fact-finding hearing on her petition. However, both parents, as well as the child, were represented by counsel. Following the hearing, Family Court granted the grandmother's petition and awarded her sole legal and physical custody of the child, finding that extraordinary circumstances existed to confer standing upon her to petition for custody and that the best interests of the child were served by granting the petition. The court also awarded the mother and the father parenting time with the child, with the father's parenting time to be supervised until he "engaged in and made substantial progress in substance abuse counseling." The father appeals.

The father does not challenge the merits of Family Court's

custody determination.¹ Rather, his sole argument on appeal is that the order must be reversed and the matter remitted for a new fact-finding hearing because the court did not maintain its judicial role and instead inappropriately assumed the role of advocate for the grandmother.² However, the father, who was represented by counsel during the hearing, did not raise this issue before Family Court, rendering it unpreserved for review (see *Matter of Samantha E. v Nicholas F.*, 233 AD3d 1295, 1300 [3d Dept 2024]; *Matter of Jehrica K. v Erin J.*, 223 AD3d 1079, 1083 [3d Dept 2024]). In any event, although a court may not abdicate its role as neutral arbiter, “the law will allow a certain degree of judicial intervention in the presentation of evidence . . . [and] a trial court may question witnesses or otherwise intervene in the proceedings on its own initiative in order to elicit relevant or important facts, clarify an issue or to facilitate the orderly and expeditious progress of the hearing” (*Matter of Samantha E. v Nicholas F.*, 233 AD3d at 1300 [internal quotation marks and citations omitted]).

Here, although Family Court played an active role during the hearing, we note that the grandmother appeared pro se and informed the court that she had “no idea how any of this works.” The court provided all parties, along with the attorney for the child, the opportunity to cross-examine the hearing witnesses and the court’s own questioning of witnesses was directed at eliciting information necessary to make an informed decision on the grandmother’s petition (see *Matter of Jeffrey SS. v Myah TT.*, 243 AD3d 1156, 1158 [3d Dept 2025]; *Matter of Carr v Stebbins*, 123 AD3d 1164, 1165 [3d Dept 2014]). Upon scrutinizing the hearing transcript, we are satisfied that the court’s active role during the hearing was for the purpose of “facilitat[ing] the orderly and expeditious progress of the hearing” and that it did not abdicate its role as neutral arbiter (*Matter of Denise L. v Michael L.*, 138 AD3d 1172, 1173-1174 [3d Dept 2016] [internal quotation marks and citation omitted]; see *Matter of Jeffrey SS. v Myah TT.*, 243 AD3d at 1158; *Matter of Samantha E. v Nicholas F.*, 233 AD3d at 1300; *Matter of Michelle L. v Steven M.*, 227 AD3d 1159, 1165 [3d Dept 2024]; *Matter of Carr v Stebbins*, 123 AD3d at 1165; *Matter of Borggreen v Borggreen*, 13 AD3d 756, 757 [3d Dept 2004]; compare *Matter of Zyion B. [Fredisha B.]*, 224 AD3d 1285, 1287

1. As such, we have no occasion to analyze the propriety of the extraordinary circumstances and best interests findings.

2. The mother and the attorney for the child both reject such contention, and additionally argue that the order has a sound and substantial basis in the record.

[4th Dept 2024]; *Matter of Nicole B. v Franklin A.*, 210 AD3d 1351, 1353 [3d Dept 2022], *lv dismissed* 39 NY3d 1092 [2023]). The father's related claim of judicial bias is also not supported by the record.

Aarons, Ceresia, McShan and Corcoran, JJ., concur. Ordered that the order is affirmed, without costs.

7 In the *Matter of Junarian Walker*, Appellant, v Daniel F. Martuscello III, as Commissioner of Corrections and Community Supervision, Respondent. [— NYS3d —]

Prisons and Incarcerated Individuals—Conditions of Confinement—Special Housing Unit
State—Equal Access to Justice Act—Counsel Fees—Prevailing Party

Clark, J.P. Appeal from an order of the Supreme Court (Meagan Galligan, J.), entered September 17, 2024, in Albany County, which, in a proceeding pursuant to CPLR article 78, denied petitioner's motion for counsel fees.

Petitioner is an incarcerated individual with serious mental illness (*see Matter of Walker v Commissioner, N.Y. State Dept. of Corr. & Community Supervision*, 241 AD3d 1, 4 [3d Dept 2025]). In September 2023, while petitioner was confined in a residential mental health unit (hereinafter RMHU) at Marcy Correctional Facility, he was charged in a misbehavior report with violent conduct and making threats. After a tier III disciplinary hearing, petitioner was found guilty as charged and, as relevant here, assessed a penalty of 120 days of confinement in the Special Housing Unit (hereinafter SHU).^{*} The determination and attendant penalties were upheld on administrative appeal. Petitioner thereafter commenced this CPLR article 78 proceeding to annul so much of the determination as imposed confinement in the SHU as violative of the Humane Alternatives to Long-Term Solitary Confinement Act (hereinafter the HALT Act) and the Special Housing Unit Exclusion Law (hereinafter the SHU Exclusion Law). In that regard, petitioner argued that his conduct did not satisfy the criteria necessary to impose a 120-day confinement sanction under Correction Law §§ 137 (6) (k) (ii) and 401 (5) (a), and that the Hearing Officer also failed to make required written findings to support such sanction.

^{*} In his brief on appeal, respondent reveals that, at the time the disciplinary sanction was imposed, SHU was being used as a general term "to denote disciplinary removal from [the] general population" and not necessarily "segregated confinement." Respondent further reveals that petitioner was not actually confined to any location other than the RMHU as a result of the disciplinary sanction.

Following joinder of issue, Supreme Court, as relevant here, partially granted the petition to the extent of annulling so much of the disciplinary determination as imposed more than three days of segregated confinement. In so doing, the court found that the 120-day confinement sanction was “not supported by the statutorily-required written findings that petitioner’s heinous and destructive words created a significant risk of imminent serious physical injury to staff or other incarcerated persons and created an unreasonable risk to the security of the facility,” and the record was otherwise devoid of facts that would permit a rational inference that such risk existed.

Based upon such determination, petitioner moved for \$8,550 in counsel fees pursuant to CPLR 8601, citing his status as the prevailing party in the proceeding. In opposition, respondent acknowledged that he had failed to strictly comply with the requirements of Correction Law § 137 (6) (k) (ii) necessary to impose the 120-day confinement sanction under the HALT Act. Nevertheless, he argued that “there existed a reasonable basis in law or fact to support the underlying determination” and, thus, his position in the proceeding was “substantially justified” within the meaning of CPLR 8601, rendering a fee award inappropriate.

Supreme Court denied petitioner’s application for counsel fees, finding that, while “[r]espondent committed procedural errors by not addressing the questions of imminence or unreasonable risk and making statutorily required written findings,” respondent’s determination was nevertheless “substantially justified” in light of the threats made by petitioner and his underlying disciplinary record. The court also found, on a sua sponte basis, that “special circumstances exist[ed] rendering a counsel fee award unjust” given the “serious threat levied by petitioner against respondent’s employees as well as an infant child” and respondent’s legal obligation to “protect its employees and the incarcerated persons in its custody.” Petitioner appeals, arguing that Supreme Court abused its discretion in denying his motion for counsel fees.

We agree. CPLR 8601 was enacted as part of the Equal Access to Justice Act (hereinafter EAJA) “to help litigants secure legal assistance to contest wrongful actions of state agencies” (*Matter of Wittlinger v Wing*, 99 NY2d 425, 431 [2003]; see CPLR 8600). “By allowing victorious [litigants] to gain [counsel] fees, the statute seeks to help those whose rights have been violated but whose potential damage awards may not have been enough to induce lawyers to fight [the state]” (*Matter of*

Wittlinger v Wing, 99 NY2d at 431). The statute provides that “a court shall award to a prevailing party, other than the state, fees and other expenses incurred by such party in any civil action brought against the state, unless the court finds that the position of the state was substantially justified or that special circumstances make an award unjust” (CPLR 8601 [a]). The “[p]osition of the state means the act, acts or failure to act from which judicial review is sought” (CPLR 8602 [e] [internal quotation marks omitted]). The term “substantially justified,” while not statutorily defined, “has been interpreted . . . as meaning justified to a degree that could satisfy a reasonable person, or having a reasonable basis both in law and fact” (*Matter of New York State Clinical Lab. Assn. v Kaladjian*, 85 NY2d 346, 356 [1995] [internal quotation marks and citation omitted]; see *Matter of Brown v City of Schenectady*, 209 AD3d 128, 133 [3d Dept 2022]).

“Whether the position of the state was substantially justified shall be determined solely on the basis of the record before the agency or official whose act, acts, or failure to act gave rise to the civil action” (CPLR 8601 [a]), and “the mere fact that [a respondent] lost on the merits in the underlying proceeding does not presumptively” mean that its position in the underlying litigation was not substantially justified (*Matter of Sutherland v Glennon*, 256 AD2d 984, 985 [3d Dept 1998]). The ultimate determination of whether the state’s position was substantially justified is “committed to the sound discretion of the court of first instance and is reviewable as an exercise of judicial discretion” (*Matter of Vapor Tech. Assn. v Cuomo*, 203 AD3d 1516, 1517 [3d Dept 2022] [internal quotation marks and citations omitted], *lv dismissed* 39 NY3d 960 [2022]).

Here, the imposition of the 120-day confinement sanction against petitioner was the state action that gave rise to the underlying CPLR article 78 proceeding and it is undisputed that petitioner prevailed in such proceeding by obtaining a court order annulling such determination as violative of the HALT Act and the SHU Exclusion Law. As such, whether respondent’s position was substantially justified within the meaning of CPLR 8601 distills to an analysis of whether there was “a reasonable basis both in law and fact” to impose the 120-day confinement sanction (*Matter of New York State Clinical Lab. Assn. v Kaladjian*, 85 NY2d at 356 [internal quotation marks and citation omitted]).

As relevant here, the HALT Act amended the SHU Exclusion Law to provide that incarcerated individuals housed in RMHUs “shall not be sanctioned with segregated confinement . . .

except in exceptional circumstances where such incarcerated individual's conduct poses a significant and unreasonable risk to the safety of incarcerated individuals or staff, or to the security of the facility and he or she has been found to have committed an act or acts defined in" Correction Law § 137 (6) (k) (ii) (Correction Law § 401 [5] [a]; see *Matter of Walker v Commissioner, N.Y. State Dept. of Corr. & Community Supervision*, 241 AD3d at 6). One of the qualifying acts enumerated in Correction Law § 137 (6) (k) (ii) is "making an *imminent threat* of . . . serious physical injury or death if the person has a history of causing such physical injury or death" (Correction Law § 137 [6] [k] [ii] [A] [emphasis added]). When the incarcerated individual "is or has been on the mental health caseload or appears to require psychiatric attention," the Commissioner of Mental Health or a designee must also "reasonably determine that there is a strong likelihood that the person will carry out such threat" (Correction Law § 137 [6] [k] [ii] [A]). Moreover, under the HALT Act, an incarcerated individual may not be placed in segregated confinement for more than three consecutive days (or over six days in any 30-day period) unless: (1) he or she has committed one of the acts set forth in Correction Law § 137 (6) (k) (ii) (A)-(G), and (2) respondent makes a written determination, "based on specific objective criteria," that the individual's acts "were so heinous or destructive that placement of the individual in general population housing creates a significant risk of imminent serious physical injury to staff or other incarcerated persons, and creates an unreasonable risk to the security of the facility" (Correction Law § 137 [6] [k] [ii]; see *Matter of Peterkin v New York State Dept. of Corr. & Community Supervision*, 242 AD3d 26, 32 [3d Dept 2025]; *Matter of Walker v Commissioner, N.Y. State Dept. of Corr. & Community Supervision*, 241 AD3d at 6).

As for the circumstances precipitating petitioner's threats, the record from the underlying disciplinary proceeding reveals that, while he was speaking to a staff member of Marcy Correctional Facility during a crisis call, petitioner verbally threatened to kill the First Deputy and the Unit Chief of the facility, as well as the First Deputy's infant child. During the ensuing tier III disciplinary hearing, petitioner called the author of the misbehavior report to testify, who affirmed that he believed petitioner's statements to be a threat. The record from the underlying disciplinary proceeding reveals that, at the time of petitioner's threats, he had numerous prior dispositions for engaging in violent conduct and making threats; however, the nature of petitioner's violent conduct history was not clearly delineated.

In his written disposition finding petitioner guilty of the charges and imposing a 120-day confinement sanction, the Hearing Officer articulated that “threats made by [incarcerated individuals] to cause harm to any person [are] unacceptable [and] will not be tolerated” and that petitioner’s “threats to harm . . . pose a serious risk to the safety of [the threatened individuals] and others.” The Hearing Officer’s written disposition also stated that “there may be a relationship between the [incarcerated individual’s] actions [and] his mental health diagnosis.” Upon petitioner’s administrative appeal, respondent affirmed the penalty imposed without further reasoning.

In justifying the confinement sanction imposed on petitioner, respondent notes that the contours of the HALT Act and the SHU Exclusion Law were still being litigated at the time of the Hearing Officer’s determination. However, the plain language of these statutes clearly required specific conduct and findings to impose a 120-day confinement sanction against an incarcerated individual housed in an RMHU. Even putting aside the lack of the required written findings, respondent did not have a reasonable basis to conclude that petitioner’s statements—made during a crisis call while he was confined in an RMHU without any indication that he had access to the individuals who were the subject of his threats or a history of causing serious physical injury or death to another person—constituted a qualifying threat under Correction Law § 137 (6) (k) (ii) (A). Although Supreme Court recognized as much in annulling the 120-day confinement sanction, expressly stating that “the administrative record . . . does not contain facts from which the court can discern a rational basis for respondent’s determination,” it nevertheless denied petitioner’s application for counsel fees on the ground that respondent’s position was substantially justified. Given the inherent conflict in Supreme Court’s determinations and our finding that respondent’s position was not “substantially justified” within the meaning of CPLR 8601, we find that Supreme Court abused its discretion in denying petitioner’s request for counsel fees on this basis (see *Matter of Brown v City of Schenectady*, 209 AD3d at 134; *Matter of Serio v New York State Dept. of Correctional Servs.*, 215 AD2d 835, 835 [3d Dept 1995]).

Supreme Court also erroneously concluded that “special circumstances” existed that would render an award of counsel fees “unjust” (CPLR 8601 [a]). Although there is a dearth of New York case law regarding the special circumstances exception of CPLR 8601, insofar as the state EAJA was modeled after its federal counterpart, New York courts have relied on

federal case law to provide guidance in this respect (see CPLR 8600; *Matter of Thomas v Coughlin*, 194 AD2d 281, 283 [3d Dept 1993]; see also *Albunio v City of New York*, 23 NY3d 65, 73 [2014]; *Matter of Markey v Tietz*, 244 AD3d 78, 86 [3d Dept 2025]). In support of applying CPLR 8601's "special circumstances" exception, Supreme Court emphasized that respondent was "under a legal duty to protect its employees and the incarcerated persons in its custody" and that "it would be unjust to award counsel fees to the perpetrator of [such] heinous threats."

Respondent argues that such finding was a provident exercise of discretion insofar as petitioner's own misconduct led to the unauthorized disciplinary sanction in this case. We reject that reasoning, as it runs counter to the purpose of the EAJA and risks foreclosing fee awards in any disciplinary proceeding where an incarcerated individual is found guilty of violating prison disciplinary rules but is later successful in challenging a violation of his or her rights (see *Matter of Thomas v Coughlin*, 194 AD2d at 283). The federal cases cited by respondent in advocating for an affirmance based upon petitioner's alleged "unclean hands" are distinguishable, as they primarily involved situations where a petitioner "took advantage of the very government misconduct he [or she] later challenged in court" (*id.* at 284; see *Sakhawati v Lynch*, 839 F3d 476, 478 [6th Cir 2016]; compare *Taylor v United States*, 815 F2d 249, 253 [3d Cir 1987]; *Oguachuba v Immigration & Naturalization Serv.*, 706 F2d 93, 99 [2d Cir 1983]). Such is not the case here and we discern no other special circumstances that would render a fee award unjust (see CPLR 8601 [a]). In light of our determination, the matter must be remitted to Supreme Court to determine the amount of the fee award owed to petitioner.

Aarons, Ceresia, McShan and Corcoran, JJ., concur. Ordered that the order is reversed, on the law and the facts, with costs, motion for counsel fees under CPLR 8601 granted, and matter remitted to the Supreme Court for further proceedings not inconsistent with this Court's decision.

8 In the Matter of April V., Respondent, v Jonathan U., Appellant. (And Another Related Proceeding.) [— NYS3d —]—

Parent, Child and Family—Order of Protection—Entered on Default—Deprivation of Due Process

Aarons, J. Appeal from a corrected order of the Family Court of Broome County (Mark Young, J.), entered February 18, 2025, which, among other things, in a proceeding pursuant to Family Ct Act article 8, denied respondent's motion to vacate an order of protection.

Petitioner commenced this proceeding in November 2023 seeking an order of protection against respondent. After an initial appearance and subsequent conferences at which the parties variously appeared virtually, in person or through counsel, respondent failed to appear for the April 2024 in-person hearing. Family Court directed respondent's counsel to leave the courtroom, at which point respondent's counsel offered to have respondent appear virtually, asserting that respondent was in "hiding" in light of criminal charges filed against petitioner in connection with her alleged stalking of, and firing a rifle at, respondent in August 2023. The court implicitly denied respondent's request by again directing respondent's counsel out of the courtroom. The hearing proceeded, during which petitioner testified and was subject to cross-examination by the attorney for petitioner's children. At the conclusion of the hearing, the court issued an order of protection on default against respondent in favor of petitioner and her children. Respondent thereafter moved to vacate the order of protection, which motion the court denied. From that denial, respondent appeals. We reverse.

Typically, "[a] party seeking to vacate a default judgment must establish both a reasonable excuse for the default and a meritorious defense to the underlying claim" (*Matter of Hohenforst v DeMagistris*, 44 AD3d 1114, 1116 [3d Dept 2007] [internal quotation marks and citations omitted]). "No such showing is required, however, where a party's fundamental due process rights have been denied" (*Matter of King v King*, 167 AD3d 1272, 1273 [3d Dept 2018] [internal quotation marks and citations omitted]). In this case, respondent's counsel attended in person evidently ready to proceed, offered an excuse for respondent's nonappearance and provided an alternate means to move forward in his absence (*compare Matter of Gabriel VV. [Joni TT.]*, 236 AD3d 1161, 1161-1162 [3d Dept 2025]; *Matter of Winter II. [Kerriann II.]*, 227 AD3d 1142, 1144 [3d Dept 2024], *lv denied* 42 NY3d 903 [2024]). Respondent's counsel made no application to withdraw, and Family Court did not relieve respondent's counsel, and thus respondent's attorneys remained counsel of record when they were dismissed from the courtroom without explanation (*see* CPLR 321 [b]; *see generally Matter of Richard TT. [Kara VV.]*, 223 AD3d 1070, 1071 [3d Dept 2024], *appeal dismissed* 41 NY3d 989 [2024]). The court's atypical conduct in that regard, coupled with the court's choice to decline available options to proceed in respondent's absence, deprived respondent of his opportunity to be heard (*see* CPLR 321 [a]; *see generally Matter of Thomson v Battle*, 99 AD3d 804, 806-807 [2d Dept 2012]; *Matter of Middlemiss v Pratt*, 86 AD3d 658, 659 [3d Dept 2011]).

Finally, we decline respondent's request to direct Family Court to permit respondent to appear virtually for any proceedings that may be required upon remittal, as we leave such a determination to Family Court's discretion. Respondent's remaining contentions are academic.

Clark, J.P., Pritzker, McShan and Corcoran, JJ., concur. Ordered that the corrected order is reversed, on the law, without costs; order of protection vacated; and matter remitted to the Family Court of Broome County for further proceedings not inconsistent with this Court's decision.

9 In the Matter of Nicholas Nunez, Appellant, v New York State Department of Motor Vehicles, Respondent. [— NYS3d —]—

Motor Vehicles—Revocation or Suspension of Operator's License—Denial of FOIL Request for Metadata and to Certify That Diligent Search Conducted

Powers, J. Appeal from a judgment of the Supreme Court (Kevin Bryant, J.), entered February 14, 2025, in Albany County, which partially dismissed petitioner's application, in a combined proceeding pursuant to CPLR article 78 and action for declaratory judgment, to review, among other things, a determination of respondent denying petitioner's Freedom of Information Law request.

Following his 2023 arrest for driving while intoxicated, petitioner's driver's license was suspended for refusal to submit to a chemical breath test. In September 2023, notice was sent that a hearing pursuant to Vehicle and Traffic Law § 1194 (2) (c) would be conducted to determine whether revocation of petitioner's driver's license was required. The October 2023 hearing was adjourned, despite petitioner's failure to appear, because notice was not provided to the law enforcement officers who were required to be present. A second notice of hearing was remitted to petitioner in December 2023 indicating that another hearing would be held in January 2024. Petitioner again failed to appear, resulting in a default finding against him and revocation of his driver's license. In April 2024, petitioner submitted a Freedom of Information Law (*see* Public Officers Law art 6 [hereinafter FOIL]) request to respondent seeking all records related to the case resulting in revocation of his driver's license. This request specifically sought, among other things, "all hearing notices" as well as "all records that the hearing notices were sent and not returned" and defined "records" to include "any information kept, held, filed, produced or reproduced . . . including, but not limited to, . . . meta[ldata]." Respondent replied by providing certain materials and

explained petitioner's right to administrative appeal if he determined these records were not responsive. Petitioner did appeal arguing, among other things, that respondent did not provide the requested metadata and, in line with this, failed to certify that the records disclosed were exhaustive of respondent's records. Respondent denied the administrative appeal, causing petitioner to commence this combined CPLR article 78 proceeding and action for declaratory judgment seeking to vacate the default determination against him, compel respondent's compliance with the FOIL request and award him counsel fees. Supreme Court partially granted the petition finding, among other things, that petitioner met his burden of demonstrating entitlement to vacatur of the default and, therefore, remanded to respondent for a new hearing. The court went on to find that the arguments addressed to petitioner's FOIL request had been rendered academic because he had made the request "to secure information to support" his vacatur motion. Petitioner appeals.

Respondent has advised this Court that it provided the requested records during the pendency of this appeal, a fact petitioner does not contest. As such, petitioner's challenge to the initial denial of his FOIL request has been rendered moot. Still, the provision of responsive records does not render moot petitioner's challenge to the denial of his request for counsel fees (*see Matter of Prisoners' Legal Servs. of N.Y. v New York State Dept. of Corr. & Community Supervision*, 209 AD3d 1208, 1213 [3d Dept 2022], *affd* 42 NY3d 936 [2024]; *Matter of Vertucci v New York State Dept. of Transp.*, 195 AD3d 1209, 1210 [3d Dept 2021], *lv denied* 37 NY3d 917 [2022]). In the context of a FOIL proceeding, an award of "reasonable [counsel] fees and other litigation costs" is mandated when a petitioner "has substantially prevailed and the court finds that the agency had no reasonable basis for denying access" to the requested records (Public Officers Law § 89 [4] [c] [ii]).

Although respondent provided certain records in response to petitioner's initial request, petitioner took issue with the failure to provide requested metadata and to certify that a diligent search was conducted before respondent concluded that it did not possess or maintain other requested records (*see* Public Officers Law § 89 [3] [a]; *see Matter of Rattley v New York City Police Dept.*, 96 NY2d 873, 875 [2001]; *compare Matter of Pak v NYS Dept. of Motor Vehs.*, 226 AD3d 1193, 1194 [3d Dept 2024], *lv denied* 42 NY3d 907 [2024]; *see generally Matter of Stone v Montgomery County Bd. of Elections*, 234 AD3d 1075, 1076-1077 [3d Dept 2025]). It is uncontested that respondent has

since affirmed that a diligent search has been conducted and has provided petitioner with the metadata it maintains. As a result, petitioner “receive[d] all the information that [he] requested and to which [he] was entitled” and has, therefore, substantially prevailed (*Matter of Gannett Satellite Info. Network, LLC v New York State Thruway Auth.*, 181 AD3d 1072, 1074 [3d Dept 2020] [internal quotation marks and citations omitted]; see *Matter of Morris v New York State Police*, 233 AD3d 1415, 1418 [3d Dept 2024], *lv denied* 44 NY3d 902 [2025]; *Matter of Aron Law PLLC v Town of Fallsburg*, 199 AD3d 1286, 1291 [3d Dept 2021]). However, respondent has not set forth the basis for the denial of petitioner’s request for metadata and, therefore, we are unable to determine whether such basis was reasonable (see generally Public Officers Law § 89 [4] [c] [ii]; *Matter of Beechwood Restorative Care Ctr. v Signor*, 5 NY3d 435, 441 [2005]; *Matter of New York State Defenders Assn. v New York State Police*, 87 AD3d 193, 195, 197 [3d Dept 2011]).* We remit to Supreme Court for such an inquiry and, if respondent fails to establish that there was a reasonable basis for denial, determination of the amount of an appropriate award (see *Matter of Standardbred Owners Assn., Inc. v New York State Gaming Commission*, 237 AD3d 1354, 1357-1358 [3d Dept 2025]; see also *Matter of Prisoners’ Legal Servs. of N.Y. v New York State Dept. of Corr. & Community Supervision*, 211 AD3d 1382, 1384 [3d Dept 2022]).

Petitioner’s additional request that we direct Supreme Court to impose sanctions is without merit (see *Matter of Roth & Roth, LLP v Long Is. R.R.*, 237 AD3d 506, 508 [1st Dept 2025]; 22 NYCRR 130-1.1 [c]).

Garry, P.J., Reynolds Fitzgerald, Mackey and Ryba, JJ., concur. Ordered that the judgment is modified, on the law, with costs to petitioner, by reversing so much thereof as denied petitioner’s request for counsel fees and costs; matter remitted to the Supreme Court for further proceedings not inconsistent with this Court’s decision; and, as so modified, affirmed.

10 Copeland Holdings, LLC, Respondent, v Gravity Ciders, Inc., Appellant. [— NYS3d —]

Torts—Conversion—Management Agent for Defendant Cidery Returned

* Respondent’s submissions in the context of the underlying proceeding concentrated on vacatur of petitioner’s default. Although respondent claimed that it responded promptly and properly to petitioner’s FOIL request, it did not provide a basis for the original denial to Supreme Court or, relatedly, explain to this Court why the requested metadata was not provided until this appeal was pending.

**Corporate Book Containing Blank Stock Certificates
Intoxicating Liquors—Licenses—Farm Cidery Manufactures and Distributes
Hard Cider as Well as Operates Tap Room
Intoxicating Liquors—Licenses—Manufacturer's Interest in Licensee
Prohibited**

Aarons, J. Appeal from an order of the Supreme Court (Joseph McBride, J.), entered March 6, 2025, in Chenango County, which denied defendant's motions for, among other things, summary judgment on its second, third and fourth counterclaims.

Defendant holds a farm cidery license issued by the State Liquor Authority (hereinafter SLA) and owns a cidery that manufactures and distributes hard cider as well as operates a tap room. The sole owners of defendant are Casey Vitti and Patricia Wilcox. Plaintiff is a company consisting of two members: Ian Rood and Bryan Birdsall. Rood, individually, also owns an interest in Sundown Golf & Country Club II, LLC (hereinafter Sundown); Sundown, in turn, holds a retail license to serve alcohol. By way of a management agreement effective September 2020, defendant temporarily appointed plaintiff as its exclusive management agent for the cidery. In exchange, plaintiff would be paid according to scheduled management fees and—as relevant here—additional compensation consisting of shares in defendant. Specifically, part 7 (c) of the agreement provides that, “[on] September 1, 2022 [plaintiff] shall be entitled to and shall receive, as additional compensation, a 5% ownership interest in [defendant], and another 5% ownership interest at the conclusion of the term on August 31, 2023.” The agreement terminated as scheduled in August 2023, upon the parties’ mutual consent, and defendant paid plaintiff the management fees but did not transfer the ownership interest promised in part 7 (c). Defendant also demanded that plaintiff return defendant’s corporate book, which allegedly contained, among other things, blank stock certificates. In July 2024, plaintiff commenced this action seeking, among other things, specific performance of part 7 (c). Defendant joined issue and asserted several affirmative defenses and four counterclaims: one for breach of contract (first counterclaim), two seeking declarations that part 7 (c) was unenforceable as illegal and against public policy (third and fourth counterclaims), and one alleging conversion/replevin based upon plaintiff’s alleged failure to return defendant’s corporate book (second counterclaim). Defendant thereafter filed successive pre-note of issue motions for summary judgment on its declaratory judgment and

conversion/replevin counterclaims.¹ Plaintiff opposed the motions and, while the motions were pending, returned the corporate book to defendant—albeit with some of the stock certificates missing. Supreme Court denied both motions, and this appeal ensued. We affirm.

“On a motion for summary judgment, the movant has the initial burden to establish its prima facie entitlement to summary judgment as a matter of law by submitting evidentiary proof in admissible form, demonstrating the absence of any material issues of fact” (*Reed v New York State Elec. & Gas Corp.*, 183 AD3d 1207, 1210 [3d Dept 2020] [internal quotation marks and citations omitted]; *accord Durr v Capital Dist. Transp. Auth.*, 198 AD3d 1238, 1239 [3d Dept 2021]). Only if the movant satisfies its initial burden does “the burden shift to the nonmovant to present evidence demonstrating the existence of a triable issue of fact” (*Aretakis v Cole’s Collision*, 165 AD3d 1458, 1459 [3d Dept 2018] [internal quotation marks and citations omitted]). In reviewing a summary judgment motion, “courts must view the evidence in a light most favorable to the nonmoving party and accord that party the benefit of every reasonable inference from the record proof, without making any credibility determinations” (*Sovocool v Cortland Regional Med. Ctr.*, 218 AD3d 947, 949 [3d Dept 2023] [internal quotation marks and citations omitted]; *see White Knight Constr. Contrs., LLC v Haugh*, 216 AD3d 1345, 1346-1347 [3d Dept 2023]).

“Illegal contracts are, as a general rule, unenforceable. However, where contracts which violate statutory provisions are merely *malum prohibitum*, the general rule does not always apply. If the statute does not provide expressly that its violation will deprive the parties of their right to sue on the contract, and the denial of relief is wholly out of proportion to the requirements of public policy the right to recover will not be denied” (*Lloyd Capital Corp. v Pat Henchar, Inc.*, 80 NY2d 124, 127 [1992] [internal quotation marks, brackets, ellipsis and citation omitted]).

Measured against the foregoing standard, defendant failed to establish entitlement to a declaration that part 7 (c) of the agreement is unenforceable, as a matter of law, under various provisions of the Alcoholic Beverage Control Law, described in more detail below. As we understand them, the statutory provisions upon which defendant relies would render part 7 (c) of the agreement “merely *malum prohibitum*,” and nothing in

1. Defendant did not seek summary judgment on the first counterclaim alleging breach of contract.

those statutory provisions expressly provides that violations “will deprive the parties of their right to sue on the contract” (*id.* [internal quotation marks and citation omitted]; see *Lizard O’s, Inc. v Baha Lounge Corp.*, 214 AD3d 597, 598 [1st Dept 2023]).²

As to defendant’s fourth counterclaim alleging that part 7 (c) is illegal because it requires an ownership change without an SLA-approved corporate change application, Alcoholic Beverage Control Law § 99-d (2) provides that “[b]efore any . . . corporate change . . . can be effectuated . . . there shall be filed with the [SLA] an application for permission to make such change.” As Supreme Court observed, Alcoholic Beverage Control Law § 99-d (2) does not require SLA approval of a corporate change before it can be effectuated, and the unambiguous terms of the agreement do not condition the transfer required by part 7 (c) on the SLA’s approval of the corporate change (*compare B&A Realty Mgt., LLC v Gloria*, 192 AD3d 851, 853 [2d Dept 2021]). Other cited provisions requiring prompt notification of changes to a license application, and prohibiting unauthorized transfer of a license, are inapposite and thus do not affect our conclusion that Supreme Court properly denied defendant’s motion with respect to its fourth counterclaim (see Alcoholic Beverage Control Law §§ 110 [4]; 111 [1]).

Defendant’s third counterclaim alleges that part 7 (c) is illegal and against public policy to the extent its enforcement would result in Rood having simultaneous interests in manufacturer and retail licensees. In that respect, it is unlawful under provisions of the Alcoholic Beverage Control Law commonly called the Tied House Rules for an SLA-licensed manufacturer to “[b]e interested directly or indirectly in any premises where any alcoholic beverage is sold at retail; or in any business devoted wholly or partially to the sale of any alcoholic beverage at retail by stock ownership, interlocking directors, mortgage or lien or any personal or real property, or by any other means” (Alcoholic Beverage Control Law § 101 [1] [a]; see generally *JRC Beverage, Inc. v K.P. Global, Inc.*, 223 AD3d 53, 65-66 [2d Dept 2024]). Moreover, “[n]o retail licensee for on-premises consumption shall be interested, directly or indirectly, in any premises where liquors, wines or beer are manufactured

2. A contract that is *malum prohibitum* is “unenforceable because the conduct thereunder was prohibited by statute”—as opposed to a contract that is “*malum in se*, i.e., unenforceable because the conduct thereunder was by its very nature prohibited” (*Specialty Rests. Corp. v Barry*, 262 AD2d 926, 927 [3d Dept 1999]).

or sold at wholesale, by stock ownership, interlocking directors, mortgage or lien on any personal or real property or by any other means” (Alcoholic Beverage Control Law § 106 [13] [a]).

Because authority indicates that the SLA may have no discretion to grant “exceptions” to the Tied House Rules (*Matter of RIHGA Intl. U.S.A. v New York State Liq. Auth.*, 84 NY2d 876, 879 [1994]), defendant asserts that Rood’s interest in Sundown would bar the SLA from approving any corporate change application. The record reflects that the parties submitted two corporate change applications to the SLA, which applications were rejected for paperwork defects—not based upon a violation of the Tied House Rules. In our view, defendant’s reliance on authority to predict the outcome of an administrative process that has not fully run its course does not constitute “sufficient evidence to demonstrate the absence of any material issues of fact” (*Ali-Hasan v St. Peter’s Health Partners Med. Assoc., P.C.*, 226 AD3d 1199, 1200 [3d Dept 2024] [internal quotation marks and citations omitted], *lv denied* 42 NY3d 906 [2024]; *see generally* Alcoholic Beverage Control Law § 2).³

Next, with respect to defendant’s second counterclaim alleging conversion/replevin, we note that while defendant’s motion was pending, plaintiff returned the corporate book.⁴ As such, replevin does not lie, as that cause of action requires proof, among other things, that plaintiff “is in possession of certain property of which [defendant] claims to have a superior right” (*Batsidis v Batsidis*, 9 AD3d 342, 343 [2d Dept 2004]). By contrast, “[c]onversion is an unauthorized exercise of dominion and control over property by someone other than the owner, where such control interferes with and is in defiance of the superior possessory right of the owner or another person” (*Cuprys v Volpicelli*, 170 AD3d 1477, 1478 [3d Dept 2019] [internal quotation marks and citations omitted]; *accord Van Amburgh v Boadle*, 231 AD3d 187, 193 [3d Dept 2024]). Moreover, “[i]f possession of the property is originally lawful, a conversion occurs when the [plaintiff] refuses to return the property after a demand” (*Cuprys v Volpicelli*, 170 AD3d at 1478 [internal quotation marks and citations omitted]).

Defendant’s proof shows that plaintiff, as defendant’s agent,

3. Plaintiff’s opposition papers included a waiver of Rood’s interest in defendant, which waiver defendant contends does not cure the alleged conflict with the Tied House Rules—an issue best left to the SLA in the first instance.

4. Although the corporate book was incomplete upon its return, defendant’s appellate contentions do not include a request for partial summary judgment based upon the missing parts of the corporate book (*see generally* CPLR 3212 [e]).

came into possession of the corporate book lawfully, but the management agreement specifies that all of defendant's records remain its property. Defendant's proof also reflects that it made several requests to plaintiff to return the corporate book, which requests were not honored. The burden thus shifted to plaintiff to come forward with evidence "demonstrating the existence of a triable issue of fact" (*Aretakis v Cole's Collision*, 165 AD3d at 1459 [internal quotation marks and citations omitted]). Plaintiff met this burden with Birdsall's affidavit explaining, in sum and substance, that plaintiff intended to comply with defendant's request to return the corporate book, but defendant failed to communicate to facilitate the transfer. The conflicting evidence creates a credibility issue that is not resolvable on summary judgment, and thus defendant's motion as to its second counterclaim was appropriately denied (*see Sovocool v Cortland Regional Med. Ctr.*, 218 AD3d at 949). Defendant's remaining contentions, to the extent not specifically addressed, have been reviewed and deemed meritless.

Clark, J.P., Pritzker, McShan and Corcoran, JJ., concur. Ordered that the order is affirmed, with costs.

11 In the Matter of Gionni LL., Alleged to be a Permanently Neglected Child. Ulster County Department of Social Services, Respondent; Beatriz LL., Appellant. [— NYS3d —]

Parent, Child and Family—Termination of Parental Rights—Permanent Neglect—Suspended Judgment Inappropriate—Length of Time Special Needs Child Placed in Foster Care and Mother's Repeated Failure to Remedy Substance Abuse Addictions

Reynolds Fitzgerald, J. Appeal from an order of the Family Court of Ulster County (Keri Savona, J.), entered March 12, 2025, which granted petitioner's application, in a proceeding pursuant to Social Services Law § 384-b, to adjudicate the subject child to be permanently neglected, and terminated respondent's parental rights.

Respondent (hereinafter the mother) is the mother of the subject child (born in 2019) who has special needs, having been diagnosed with autism and other developmental delays.¹ In April 2023, the mother was arrested for driving while intoxicated and endangering the welfare of a child after being found asleep on the side of the road with the child in the car. The child was removed from the mother's care after the mother tested positive for alcohol and cocaine, and was placed in foster

1. The child's birth father's rights were terminated for abandonment of the child by Family Court on November 11, 2024, and he is not a party to this appeal.

care in May 2023. Thereafter, the mother consented to a finding of neglect by reason of impairment by alcohol, rendering her unable to care for the child. As she was not in any type of substance abuse treatment at the time, the risk to the child remained and the child's placement in foster care was continued.

In August 2024, petitioner commenced the instant proceeding alleging that the mother had permanently neglected the child. Following a fact-finding hearing, Family Court determined that, despite diligent efforts made by petitioner and its contract foster care agency Kidspeace, the mother never successfully completed or even meaningfully engaged in substance abuse treatment and thus had permanently neglected the child.² A dispositional hearing was held in February 2025, wherein Family Court rendered a bench decision specifically finding that the best interests of the child would not be served by a suspended judgment but, rather, by terminating the mother's parental rights and freeing the child for adoption. A conforming dispositional order was thereafter entered on March 12, 2025, and the mother appeals from said order.

On appeal, the mother's sole contention is that Family Court should have granted her a suspended judgment rather than terminating her parental rights. "Following an adjudication of permanent neglect, the sole concern at a dispositional hearing is the best interests of the child, and there is no presumption that any particular disposition, including the return of a child to a parent, promotes such interests" (*Matter of Y. SS. [E. SS.]*, 243 AD3d 1131, 1133-1134 [3d Dept 2025] [internal quotation marks, brackets and citations omitted]; see *Matter of Edrick PP. [Alexis QQ.]*, 221 AD3d 1307, 1308 [3d Dept 2023]). "While the court may decide to issue a suspended judgment rather than terminating parental rights, a suspended judgment is only appropriate where a parent has made significant progress such that a brief grace period would allow him or her to demonstrate the ability to be a fit parent, and such delay is consistent with the child's best interests" (*Matter of Carmela D. [Shameeka G.]*, 232 AD3d 1126, 1131 [3d Dept 2024] [internal quotation marks, brackets and citation omitted], *lvs denied* 43 NY3d 903 [2025], 43 NY3d 903 [2025]; see *Matter of Issac Q. [Kimberly R.]*, 212 AD3d 1049, 1054 [3d Dept 2023], *lv denied* 39 NY3d 913 [2023]).

2. The mother failed to appear at the September 10, 2024 fact-finding hearing, appeared by telephone for the November 11, 2024 continuation of the fact-finding hearing and failed to appear at the December 11, 2024 continuation of the fact-finding hearing.

At the dispositional hearing, the program manager overseeing the child's foster care placement testified that the child has been in foster care with the same parents since June 2023, and that they provide a highly structured environment, including a set routine and sensory toys.³ She stated that the foster parents work well with the child's school providers, his neurologist, developmental doctor, and that they work with the autism population. The manager also stated that the foster parents are very nurturing, supportive and are well bonded with the child, he is much calmer when he is with the foster parents, they are a source of comfort to him and the child is involved in all aspects of their lives including extended family activities, trips and vacations. She further stated that when the child arrived at the foster parents' residence he could not speak, but he has made progress and is now speaking some words. The program manager repeatedly testified that the foster parents are very much willing to be the adoptive parents of the child.⁴

The mother testified that she has not successfully participated in drug treatment programs. To her credit, she was candid in her admissions that she enrolled in outpatient drug treatment and was discharged for failing to attend consistently and for having positive drug test results and that she terminated her inpatient drug treatment against advice. Although she stated that within a few weeks prior to the dispositional hearing she engaged in telephone screening for a drug treatment program, at the time of the dispositional hearing she was not enrolled in any drug treatment program. The mother further testified that she loves her child, yet conceded that she had been inconsistent with visitations, had not seen the child since December 2024 and had not made any significant progress toward reunification.⁵ Considering the record in its entirety, the length of time the child has been in foster care and the mother's repeated failure to remedy her substance abuse addictions, we conclude that Family Court's determination that the best interests of the child would be served by termination of the mother's parental rights, rather than a suspended judgment, is supported by a sound and substantial basis in the record (*see Matter of Carmela D. [Shameeka G.]*, 232 AD3d at

3. The program manager testified that there was a two-month period in spring 2024 when the child was placed in a different foster home.

4. The manager testified at both the permanent neglect fact-finding hearing and the dispositional hearing that the foster parents are an adoptive resource for the child.

5. In fact, the mother's visitations were suspended because the child was upset, aggressive and harmful to himself and others after visiting with the mother.

1131; *Matter of Gabriel J. [Christina I.]*, 232 AD3d 1093, 1097-1098 [3d Dept 2024], *lv denied* 43 NY3d 901 [2025]; *Matter of Daimeon MM. [Laurie MM.]*, 230 AD3d 1416, 1419-1420 [3d Dept 2024], *lv denied* 42 NY3d 910 [2025]).⁶

Aarons, J.P., Pritzker, Fisher and McShan, JJ., concur. Ordered that the order is affirmed, without costs.

12 Richard C. Adams, Appellant, v Bassett Healthcare Network, Respondent. [— NYS3d —]

Disclosure—Medical Records and Reports—Incident Reports of Psychiatric Hospital—Quality of Care—Defendant Failed to Demonstrate That Reports at Issue Constituted Privileged Patient Safety Work Product

Disclosure—Medical Records and Reports—Privilege for Records Relating to Medical or Quality Assurance Review Function

Corcoran, J. Appeal from an order of the Supreme Court (John Lambert, J.), entered April 29, 2025, in Otsego County, which, among other things, denied plaintiff's motion to compel disclosure of certain documents.

Plaintiff was employed as a nursing assistant and technician within defendant's secure unit for patients with behavioral health and psychiatric conditions. He commenced this action for wrongful termination and retaliation under Labor Law §§ 740 and 741, claiming that defendant unlawfully fired him after he reported unsafe workplace practices and conditions. During discovery, plaintiff demanded copies of his statements to defendant, including his June 2022 report of safety concerns submitted to defendant's electronic reporting system. Plaintiff also requested the parties' communications about the secure unit and defendant's responses to prior related complaints or concerns. The parties agreed to terms of a confidentiality stipulation. Defendant objected, served a privilege log identifying two "RL6" reports, and asserted that both reports were immune from disclosure pursuant to statutory privileges under Education Law § 6527 (3) and the Patient Safety and Quality Improvement Act of 2005 (42 USC § 299b-21 *et seq.* [hereinafter PSQIA]). One of the reports was authored by plaintiff in June 2022; the other was written by a hospital security staff member in July 2022 after the incident that led to plaintiff's termination. Plaintiff moved pursuant to CPLR 3124 to compel production of the reports and defendant cross-moved for a protective order. Supreme Court inspected the reports in camera, then denied plaintiff's motion to compel and granted defendant's cross-motion for a protective order. Plaintiff appeals.

6. We note that the attorney for the child supports termination of the mother's parental rights as being in the child's best interests.

Supreme Court erred in concluding that both RL6 reports were exempt from discovery pursuant to Education Law § 6527 (3). Under certain conditions, this statute exempts from disclosure records related to medical review and quality assurance functions, records of participation in a medical malpractice prevention program and certain reports required by the Department of Health (see *Katherine F. v State of New York*, 94 NY2d 200, 204 [1999]). The statutory privilege is designed to “encourage a candid peer review of physicians, and thereby improve the quality of medical care and prevent malpractice, but such protections are not automatically available and do not prevent full disclosure where it should otherwise be provided” (*Estate of Savage v Kredentser*, 150 AD3d 1452, 1455 [3d Dept 2017] [citations omitted]). “The exemption from discovery conferred by that statute pertains only to medical review functions” (*Carter v County of Erie*, 255 AD2d 984, 985 [4th Dept 1998] [citation omitted]). As the party seeking to invoke the privilege, defendant bore the burden of establishing that a review procedure was in place and that the requested documents were prepared in accordance with the relevant statute (see *Bellamy v State of New York*, 154 AD3d 1239, 1240 [3d Dept 2017]; *Estate of Savage v Kredentser*, 150 AD3d at 1454). Absent proof that a document was reviewed as contemplated by the statute, a conclusory statement that it was prepared for a protected purpose will not trigger the statutory privilege (see *Estate of Savage v Kredentser*, 150 AD3d at 1455; *Matter of Coniber v United Mem. Med. Ctr.*, 81 AD3d 1329, 1330 [4th Dept 2011]).

Defendant’s vice president, Paula Moshier, averred that hospital staff use RL6 reports to register a variety of incidents, such as accounts about medical procedures, “all near miss events,” falls, medication reactions, employee injuries and certain other events not normally subject to the privilege. Moshier’s description of the breadth of incidents reported through this electronic system demonstrated that it constitutes a tool to document an assortment of issues or events in the hospital, some of which relate to the medical review process. Contrary to defendant’s argument, the mere fact that a report was created through the hospital’s reporting system does not establish that it was made to promote quality assurance or for another purpose specified by Education Law § 6527 (3). Moshier described the policies and forms used to implement defendant’s “Patient Safety Evaluation System” in general terms but she did not aver that the reports at issue were created for or submitted to any medical review process; her affidavit failed to even mention the specific reports at issue (*compare*

Bamberg-Taylor v Strauch, 181 AD3d 432, 433 [1st Dept 2020]; *Drum v Collure*, 161 AD3d 1509, 1510 [4th Dept 2018]; *Belamy v State of New York*, 154 AD3d at 1241). Nor do the generic statements on the RL6 forms establish that they were composed for a protected purpose. Although Moshier explained that all RL6 forms contain boilerplate language indicating that they are “[c]onfidential quality assurance material pursuant to Education Law § 6527, Public Health Law § 2805, and Mental Hygiene Law § 29.29,” nothing in the record suggests that these particular reports were ever reviewed for any privileged purpose. “[A] party does not obtain the protection of Education Law § 6527 (3) merely because the information sought *could* have been obtained during the course of a hospital review proceeding[.] . . . The exemption applies only where the information was in fact so obtained” (*DiPasquale v Lim*, 218 AD3d 1182, 1183-1184 [4th Dept 2023] [internal quotation marks, brackets, ellipsis and citation omitted]). In short, the administrator’s conclusory affidavit is insufficient to satisfy defendant’s burden under Education Law § 6527 (3) (see *Estate of Savage v Kredentser*, 150 AD3d at 1454; *Slayton v Kolli*, 111 AD3d 1314, 1315 [4th Dept 2013]; *Matter of Coniber v United Mem. Med. Ctr.*, 81 AD3d at 1330). Moreover, defendant conceded, both in its brief and at oral argument, that the RL6 reports were *not* submitted to a quality assurance or peer review committee.

Next, we address defendant’s claim that the reports at issue are protected from disclosure by PSQIA. While defendant submits that the reports constitute privileged “patient safety work product,” that term of art applies, as relevant here, to statements that are (1) assembled or developed by a provider for the purpose of reporting to a patient safety organization (hereinafter PSO) and (2) reported to a PSO (42 USC § 299b-21 [7] [A] [i] [internal quotation marks omitted]). Assuming, without deciding, the doubtful proposition that PSQIA applies to this state law claim, defendant failed to demonstrate that the RL6 reports at issue constitute privileged patient safety work product. Neither Moshier’s affidavit, nor anything else in the record, establishes that these particular reports were actually provided to and reviewed by a PSO (see *Brown v St. Mary’s Hosp.*, 2015 US Dist LEXIS 179597, *11-12 [D Conn, Aug. 26, 2015, No. 3:14CV228 (DJS)]; *Francis v United States*, 2011 WL 2224509, *6, 2011 US Dist LEXIS 59762, *21 [SD NY, May 31, 2011, No. 09 Civ. 4004(GBD)(KNF)]; *Pal v New York Univ.*, 2007 WL 4358463, *7, 2007 US Dist LEXIS 91051, *21-22 [SD NY, Dec. 5, 2007, No. 06 Civ. 5892(PAC)(FM)]). Accordingly, defendant failed to show in the first instance that the reports were privileged under the cited state or federal statutes.

In light of this determination, we need not consider plaintiff's alternative arguments that the reports fell within the narrow party-statement exception to the Education Law privilege (*see Siegel v Snyder*, 202 AD3d 125, 127 [2d Dept 2021]; *Nowelle B. v Hamilton Med., Inc.*, 174 AD3d 1345, 1347 [4th Dept 2019]), and that public policy disfavors applying PSQIA and/or Education Law § 6527 (3) to healthcare whistleblower actions.

Clark, J.P., Ceresia, Fisher and Powers, JJ., concur. Ordered that the order is modified, on the law, without costs, by reversing so much thereof as denied plaintiff's motion to compel production of the RL6 reports and granted defendant's cross-motion for a protective order; motion granted to that extent and cross-motion denied to that extent; and, as so modified, affirmed.

13 In the Matter of James Shara, Respondent, v Jason R. Van Fossen, as Superintendent of the Maine-Endwell Central School District, et al., Appellants, et al., Respondent. [— NYS3d —]—

**Labor—Improper Labor Practices—Retaliatory Discharge of School Bus Driver after Raising Various Safety Concerns on Behalf of Union
Civil Service—Public Employment Relations Board—Collateral Estoppel Related to Findings in Context of Reinstatement Order
Civil Service—Termination of Employment—Retaliation Claim**

Ryba, J. Appeal from an order of the Supreme Court (Joseph McBride, J.), entered February 12, 2025, in Broome County, which, in a combined proceeding pursuant to CPLR article 78 and plenary action, denied certain respondents' motion to dismiss the petition/complaint.

As alleged in the petition/complaint, petitioner was formerly employed as a school bus driver for respondent Maine-Endwell Central School District (hereinafter the School District) while also serving as vice president of the employee organization representing its bus drivers (hereinafter the Union). In 2019, the School District placed petitioner on administrative leave and terminated his employment after he raised various safety concerns on behalf of the Union. The Union thereafter filed an improper practice charge with the Public Employment Relations Board (hereinafter PERB) alleging that the School District's conduct was retaliation for petitioner's participation in protected union activities. Although the Union ultimately prevailed in the PERB proceeding and petitioner was reinstated to his employment effective December 11, 2023, the School District immediately filed disciplinary charges against petitioner upon his return to work. Disciplinary proceedings pursuant to Civil Service Law § 75 ensued, concluding with re-

spondent Board of Education of Maine-Endwell Central School District (hereinafter the School Board) issuing a determination terminating petitioner's employment effective June 14, 2024.

In October 2024, petitioner commenced this combined CPLR article 78 proceeding and plenary action against, as is relevant here, the School District and respondents superintendent, president, vice president and individual members of the School Board (hereinafter collectively referred to as respondents) seeking to annul the determination terminating his employment and alleging retaliatory discharge in violation of Civil Service Law § 75-b as well as due process violations under 42 USC § 1983.¹ Respondents moved to dismiss the petition/complaint, arguing that petitioner's claims failed to state a cause of action, were improperly asserted against the individual respondents, and were barred by the doctrine of collateral estoppel due to determinations made in the PERB proceeding. Supreme Court denied the motion to dismiss, finding that petitioner sufficiently stated claims for relief pursuant to CPLR article 78, Civil Service Law § 75-b and 42 USC § 1983. With respect to respondents' collateral estoppel argument, Supreme Court found that respondents' failure to offer the record of the PERB proceeding precluded dismissal on this ground. Accordingly, Supreme Court directed respondents to file and serve an answer with the certified record.² Respondents appeal, challenging only the denial of their motion to dismiss petitioner's causes of action asserted pursuant to Civil Service Law § 75-b and 42 USC § 1983.

First, we reject respondents' contention that Supreme Court erred in denying their motion to dismiss the petition/complaint on collateral estoppel grounds. Collateral estoppel, also known as "issue preclusion, precludes a party from relitigating in a subsequent action or proceeding an issue clearly raised in a prior action or proceeding and decided against that party," regardless of the legal context in which the issue was raised (*Parker v Blauvelt Volunteer Fire Co.*, 93 NY2d 343, 349 [1999] [internal quotation marks and citation omitted]; see *Bryant v Gulnick*, 212 AD3d 78, 82 [3d Dept 2022]; *Rockwell v Despart*, 205 AD3d 1165, 1167 [3d Dept 2022]). The doctrine is, as a result, "applicable to give conclusive effect to the quasi-judicial

1. Petitioner also named counsel for the School District and School Board as a party, but he was not involved in the motion practice at issue here.

2. We note that the portion of the petition/complaint challenging the disciplinary determination pursuant to CPLR article 78 was transferred to this Court after the appealed-from order was issued, where it remains pending (2026 NY Slip Op 62008[U] [3d Dept 2026]; 2025 NY Slip Op 77895[U] [3d Dept 2025]).

determinations of administrative agencies” (*Ryan v New York Tel. Co.*, 62 NY2d 494, 499 [1984]; see *Matter of Kibler v New York State Dept. of Correctional Servs.*, 91 AD3d 1218, 1220 [3d Dept 2012], *lv denied* 19 NY3d 803 [2012]). The preclusive effect of collateral estoppel applies only to identical “issues that were actually litigated, squarely addressed and specifically decided” in the prior matter (*Church v New York State Thruway Auth.*, 16 AD3d 808, 810 [3d Dept 2005] [internal quotation marks and citation omitted]; see *Matter of Theophiles v County of Rensselaer*, 229 AD3d 1026, 1029 [3d Dept 2024]). On a motion to dismiss, “[t]he burden rests upon the proponent of collateral estoppel to demonstrate the identity and decisiveness of the issue” (*Parker v Blauvelt Volunteer Fire Co.*, 93 NY2d at 349 [internal quotation marks and citation omitted]; see *Matter of Nesconset Ctr. for Nursing & Rehabilitation v Commissioner of Health of the State of N.Y.*, 225 AD3d 956, 958 [3d Dept 2024], *lv denied* 42 NY3d 904 [2024]; *Abele v City of Albany, N.Y.*, 214 AD3d 1107, 1109 [3d Dept 2023]).

Here, inasmuch as respondents failed to include the underlying record from the PERB proceeding in support of their motion to dismiss, Supreme Court was unable to evaluate whether and to what extent the issues raised in this matter were identical to those decided in the PERB proceeding. To the extent that respondents seek application of the doctrine of collateral estoppel related to findings made by PERB in the context of petitioner’s proceeding to enforce its reinstatement order, the record was also insufficient to render a determination. In view of the above, Supreme Court properly found that respondents failed to demonstrate that dismissal on collateral estoppel grounds was warranted (see e.g. *Capitaland United Soccer Club v Capital Dist. Sports & Entertainment*, 238 AD2d 777, 780 [3d Dept 1997]).

We likewise reject respondents’ argument that the allegations in the petition/complaint were insufficient to state a cause of action for retaliatory discharge pursuant to Civil Service Law § 75-b. That statute prohibits a public employer from, among other things, taking adverse employment actions against an employee in retaliation for reporting what the employee reasonably believes to be improper governmental action (see Civil Service Law § 75-b [2] [a]; *Matter of Hardy v Kraham*, 224 AD3d 946, 949-950 [3d Dept 2024]). Here, petitioner alleges that he was first terminated after reporting bus safety issues and that, after the Union successfully challenged that termination and PERB directed his reinstatement, the School Board passed a resolution to proceed with new disciplinary

charges minutes after reinstating his employment. Liberally construing these allegations in petitioner's favor, affording petitioner the benefit of every favorable inference and accepting the facts alleged as true, we find that they sufficiently state a claim for retaliation in violation of Civil Service Law § 75-b (*see Lilley v Greene Cent. Sch. Dist.*, 168 AD3d 1180, 1182 [3d Dept 2019]). Applying the same liberal pleading standard to the 42 USC § 1983 cause of action, petitioner's allegations that respondents infringed upon his constitutional freedom of association and his property interest in continued employment set forth a cognizable cause of action predicated upon alleged due process violations (*see State Emp. Bargaining Agent Coalition v Rowland*, 718 F3d 126, 132 [2d Cir 2013], *cert dismissed* 571 US 1116 [2014], *cert denied* 571 US 1170 [2014]; *Ciambriello v County of Nassau*, 292 F3d 307, 313 [2d Cir 2002]). Accordingly, Supreme Court properly found that a 42 USC § 1983 claim was sufficiently stated.

However, we reach a different conclusion with respect to that portion of respondent's motion which sought dismissal of petitioner's claims against the individual respondents. To the extent that petitioner's Civil Service Law § 75-b cause of action is asserted against certain of the individual respondents, such a claim cannot be maintained against individual public employees (*see Frank v State of N.Y., Off. of Mental Retardation & Dev. Disabilities*, 86 AD3d 183, 188 [3d Dept 2011]; *Moore v County of Rockland*, 192 AD2d 1021, 1024 [3d Dept 1993]). As for the 42 USC § 1983 claim, it is well settled that liability will not attach to a government employee in his or her official capacity (*see Corvetti v Town of Lake Pleasant*, 146 AD3d 1118, 1124-1125 [3d Dept 2017]; *Shelton v New York State Liq. Auth.*, 61 AD3d 1145, 1148 [3d Dept 2009]), and only attaches to such an employee in their individual capacity if they were "personally involved" in the alleged constitutional violation (*Lewis v Annucci*, 154 AD3d 1025, 1026 [3d Dept 2017] [internal quotation marks and citations omitted]; *see Johnson v Collyer*, 191 AD3d 1192, 1194 [3d Dept 2021]). To that end, petitioner was required to "allege particular facts indicating that each of the individual [respondents] was personally involved in the deprivation of [his] constitutional rights; mere bald assertions and conclusions of law do not suffice" (*Johnson v Collyer*, 191 AD3d at 1194 [internal quotation marks and citations omitted]; *see Corvetti v Town of Lake Pleasant*, 146 AD3d at 1126; *Shelton v New York State Liq. Auth.*, 61 AD3d at 1148). The mere assumption that the individual respondents were personally involved simply by virtue of their official positions is insufficient (*see Shelton v New York State Liq. Auth.*, 61 AD3d at

1148-1149). In the present case, petitioner did not articulate specific facts to identify the manner in which each of the individual respondents personally engaged in conduct that violated his constitutional rights. Under these circumstances, Supreme Court should have granted the motion to dismiss with respect to the individual respondents.

We have examined the remaining contentions of the parties and have found them to be without merit or otherwise unnecessary to address.

Garry, P.J., Reynolds Fitzgerald, Powers and Mackey, JJ., concur. Ordered that the order is modified, on the law, without costs, by reversing so much thereof as denied the portion of the motion seeking dismissal of the claims against respondents Jason R. Van Fossen, Melinda Spooner, Lynn Ross, Gregg Armezzani, Lindsey Stanton, Michael Chudacik, Megan Gorski, Kathy Baker and Brady Lindsey; motion granted to that extent; and, as so modified, affirmed.

14 In the Matter of Sierra KK., Appellant, v Brett LL., Respondent. [253 NYS3d 826]—

Parent, Child and Family—Custody—Modification—Unsupervised Parenting Time—Mother’s Partner Prohibited from Having Contact with Child

McShan, J. Appeal from an order of the Family Court of Chenango County (John Hubbard, J.), entered July 14, 2025, which partially dismissed petitioner’s application, in a proceeding pursuant to Family Ct Act article 6, to modify a prior order of visitation.

Petitioner (hereinafter the mother) and respondent (hereinafter the father) are the parents of the subject child (born in 2014). Pursuant to an April 2024 order, the parties shared joint legal custody of the child, while the father had primary physical custody. That order granted the mother supervised parenting time every other weekend, every Wednesday evening and on certain holidays. As relevant here, the order required that the mother not permit her partner to be in the presence of the child.¹

In July 2024, the mother commenced this modification proceeding, seeking unsupervised parenting time with the child and removal of the provision prohibiting the partner from being in the presence of the child. In November 2024, Family

1. As set forth in the April 2024 order, the parties consented to the custody and supervised visitation arrangement and left the decision as to whether the partner could have contact with the child and the scope of such contact to Family Court’s discretion upon conducting a *Lincoln* hearing with the child.

Court issued a temporary order on consent, allowing unsupervised parenting time with the mother, but retaining the provision restricting the partner from having contact with the child. Following a three-day fact-finding hearing and a *Lincoln* hearing, the court partially granted the mother's petition by providing her with unsupervised parenting time. However, as relevant to this appeal, the court denied the request to remove the prohibition on contact between the child and the partner. The mother appeals.

Dispensing with the threshold issue on a custody modification petition, the father contends that the mother failed to demonstrate the requisite change in circumstances to permit modification of the custody arrangement with respect to the ongoing prohibition on contact between the child and the partner, which is the sole issue on appeal. We disagree, as the mother's sobriety clearly constitutes a change in circumstances permitting Family Court to engage in a best interests analysis with respect to modification of the entirety of custody provisions contained in the prior order (*see Matter of Carrie ZZ. v Aaron YY.*, 178 AD3d 1291, 1292 [3d Dept 2019]; *see also Matter of Christine X. v James Y.*, 244 AD3d 1545, 1546 [3d Dept 2025]; *Matter of Christine TT. v Gary VV.*, 143 AD3d 1085, 1085 [3d Dept 2016]).

We thus turn to the question of whether the aforementioned prohibition is in the best interests of the child. In doing so, we note that "Family Court is in a superior position to evaluate witness credibility, [and we therefore] defer to its factual findings and only assess whether its determination is supported by a sound and substantial basis in the record" (*Matter of David JJ. v Verna-Lee KK.*, 207 AD3d 841, 843 [3d Dept 2022] [internal quotation marks and citations omitted]; *see Matter of Nicole J. v Joshua J.*, 206 AD3d 1186, 1187 [3d Dept 2022]). Further, "although not determinative, the expressed wishes of the child are some indication of what is in his or her best interests, considering his or her age, maturity and potential to be influenced" (*Matter of Chad KK. v Jennifer LL.*, 219 AD3d 1581, 1584 [3d Dept 2023] [internal quotation marks, brackets and citations omitted]; *accord Matter of David JJ. v Tara KK.*, 240 AD3d 984, 986 [3d Dept 2025]). In that vein, we note that the attorney for the child, in line with the position taken before Family Court, supports leaving the prohibition in place at this time in accord with the child's preference (*see Matter of Alex Y. v Mindy X.*, 245 AD3d 1114, 1118 n 1 [3d Dept 2026]; *Matter of Misty PP. v Charles PP.*, 206 AD3d 1532, 1533-1534 [3d Dept 2022]).

Family Court determined that the partner did not pose any danger or threat to the child, and we agree with the court's assessment. Nevertheless, there are numerous factors that support Family Court's determination to leave the no-contact provision in place; chief among them is the ongoing rehabilitation of the child's relationship with the mother. As reflected by the record, the mother's newfound sobriety was hard-earned, and she has taken numerous steps to conquer her addiction, which has improved her home life and conflict management with her partner. Her accomplishments are laudable and, as credited by Family Court, her ongoing sobriety warranted removing the supervised parenting time provisions in the prior order. The record reflects that the child, however, was still affected by the mother's past alcohol abuse, as he expressed to the maternal grandmother and others that he had concerns about his safety. In particular, the record reflects that past altercations between the mother and her partner stemming from their use of alcohol had made the child uncomfortable. The child's feelings were further explained by other witnesses who credibly recounted the child's steadfast reluctance to visit with the partner as of the time of the hearing. To that end, the mother also acknowledged that the child had expressed concerns to her about her relationship with the partner, her time in inpatient treatment and her prior relocations in and out of the partner's house. These issues prompted the therapeutic intervention between the child and the mother that was ongoing as of the time of the hearing. In our view, the continued development of the relationship between the child and the mother is paramount to the best interests analysis with respect to the limitation on contact with the partner. Family Court also properly considered that, although the provision might present some challenges for the mother, the child would still be permitted substantial contact with his half siblings through the current custodial arrangement and parenting time schedule (see *Matter of Terry PP. v Domiyon PP.*, 184 AD3d 914, 916-917 [3d Dept 2020]; *Matter of Brent O. v Lisa P.*, 161 AD3d 1242, 1246 [3d Dept 2018]; see generally *Matter of Celinda JJ. v Adrian JJ.*, 198 AD3d 1203, 1205 [3d Dept 2021], *lv denied* 37 NY3d 918 [2022]). Accordingly, we find that a sound and substantial basis supports leaving the provision preventing contact between the child and the partner in place at this time (see *Matter of Eliza JJ. v Felipe KK.*, 173 AD3d 1285, 1286-1287 [3d Dept 2019]; see also *Matter of Christopher TT. v Lisa UU.*, 211 AD3d 1371, 1373 [3d Dept 2022]).

However, we are mindful of the concern raised by the mother at the onset of the hearing reflecting the potential difficulty of

revisiting this provision in the future based upon the need to demonstrate a new change in circumstances. In order to account for that uncertainty, we exercise our broad discretion and modify the order only to the extent that the passage of six months from the date of this Court's order shall constitute a per se change in circumstances, allowing the mother to seek modification of the prohibition, leaving Family Court to consider whether modifying same is in the child's best interests.² Doing so allows time for the mother and the child to continue engaging in counseling for a substantial period before revisiting the child's potential contact with the partner.

Aarons, J.P., Pritzker, Reynolds Fitzgerald and Fisher, JJ., concur. Ordered that the order is modified, on the law, without costs, by adding thereto a provision permitting petitioner to seek modification of that part of the order prohibiting contact between the child and the partner after six months from the date of entry of this Court's order without demonstrating a change in circumstances, and, as so modified, affirmed.

15 Riley Rohauer, Appellant, v Guilderland Central School District et al., Respondents. [— NYS3d —]—

Pleading—Amendment—Complaint—Addition of Negligence Claim—Proposed Amendment Not Palpably Insufficient or Patently Meritless

Reynolds Fitzgerald, J.P. Appeal from an order of the Supreme Court (Kimberly O'Connor, J.), entered September 4, 2025, in Albany County, which partially denied plaintiff's motion to amend the complaint.

In November 2019, plaintiff was a student at defendant Guilderland Central School District and was attending defendant Jon Kauffmann's history class when she was struck in the back of the head by Kauffmann. In August 2022, plaintiff commenced this action and moved to serve a late notice of claim, which was granted by Supreme Court in January 2023.* The complaint contained causes of action against Kauffmann for battery and intentional infliction of emotional distress, and asserted negligent hiring, training and supervision and negligent infliction of emotional distress against Guilderland.

A General Municipal Law § 50-h hearing was held in April

2. To be clear, our modification to the order on appeal does not preclude either party from seeking a modification upon a proper showing of a change in circumstances prior to the expiration of the six-month period.

* As plaintiff was an infant at the time of the commencement of the action, the action was brought by her parents on her behalf. Plaintiff achieved majority during the pendency of the action, and the caption was amended. For purposes of clarity, this decision uses the term plaintiff in all instances.

2023 and discovery ensued. Immediately upon conclusion of depositions, and prior to the filing of the note of issue, Guilderland moved for summary judgment seeking to dismiss the complaint against it. Thereafter, plaintiff moved to amend the pleadings to, among other things, include a cause of action in negligence, and Supreme Court denied this request, concluding both that plaintiff failed to offer a reasonable explanation for her delay and that the amendment would prejudice Guilderland. Plaintiff appeals.

Plaintiff contends that Supreme Court erred in denying her motion to amend the complaint to add a claim in negligence. “Pursuant to CPLR 3025 (b), a party may amend its pleadings at any time by leave of the court, which shall be freely given upon such terms as may be just” (*Passeri v Brody*, 199 AD3d 1260, 1261 [3d Dept 2021] [internal quotation marks and citations omitted]; *accord Mohammed v New York State Professional Fire Fighters Assn., Inc.*, 209 AD3d 1151, 1152 [3d Dept 2022]). Permission to amend may be granted “before or after judgment to conform [the pleadings] to the evidence” (CPLR 3025 [c]). “The rule on a motion for leave to amend a pleading is that, in the absence of prejudice or surprise resulting directly from the delay in seeking leave, such applications are to be freely granted unless the proposed amendment is palpably insufficient or patently devoid of merit” (*Walden v Varricchio*, 195 AD3d 1111, 1113 [3d Dept 2021] [internal quotation marks and citations omitted]; *see Passeri v Brody*, 199 AD3d at 1261). “Supreme Court, which has considerable latitude in exercising its discretion, may consider how long the party seeking the amendment was aware of the facts upon which the motion was predicated and whether a reasonable excuse for the delay was offered, particularly where the delay is on the eve of trial” (*NYAHSA Servs., Inc., Self-Ins. Trust v People Care Inc.*, 156 AD3d 99, 103 [3d Dept 2017] [internal quotation marks, brackets and citations omitted]; *see Place v Preferred Mut. Ins. Co.*, 190 AD3d 1208, 1212 [3d Dept 2021]). “The decision to grant leave to amend a complaint is within the trial court’s sound discretion and will not be disturbed absent a clear abuse of that discretion” (*Walden v Varricchio*, 195 AD3d at 1112-1113 [internal quotation marks and citations omitted]; *see NYAHSA Servs., Inc., Self-Ins. Trust v People Care Inc.*, 156 AD3d at 101).

In this instance, we find that Supreme Court abused its discretion in denying plaintiff’s motion to amend the complaint to add a negligence cause of action (*see Mohammed v New York State Professional Fire Fighters Assn., Inc.*, 209 AD3d at 1152;

Passeri v Brody, 199 AD3d at 1262). Initially, we note that this pre-note of issue motion was not brought on the eve of trial. The parties had just completed depositions, and, in fact, plaintiff asserts that certain testimony given at Kauffmann's deposition prompted her motion. As to Supreme Court's finding that a negligence cause of action is inconsistent with plaintiff's assertion that defendants acted intentionally, plaintiff need not establish the merits of the proposed amendments at this stage (see *Matter of Falck*, 232 AD3d 1150, 1154 [3d Dept 2024]; *Matter of Perkins v Town of Dryden Planning Bd.*, 172 AD3d 1695, 1697 [3d Dept 2019]), but is only required to demonstrate that the proposed amendment is not palpably insufficient or patently meritless. Here, especially in light of Kauffmann's deposition testimony wherein he testified that he did not intentionally strike plaintiff, it is not. Additionally, Guilderland cannot allege surprise, since shortly after the incident was reported to school officials, it investigated the incident and learned that Kauffmann contended his contact with plaintiff's head was accidental. Furthermore, Guilderland's argument that it would be prejudiced because it would be subject to increased liability is unavailing as prejudice is more than the mere exposure of an opposing party to greater liability (see *NYAHS Servs., Inc., Self-Ins. Trust v People Care Inc.*, 156 AD3d at 103; *Rutz v Kellum*, 144 AD2d 1017, 1018 [4th Dept 1988]; *Perkins v New York State Elec. & Gas Corp.*, 91 AD2d 1121, 1122 [3d Dept 1983]).

Powers, Mackey and Ryba, JJ., concur. Ordered that the order is modified, on the law, without costs, by reversing so much thereof as denied the portion of plaintiff's motion seeking to amend her complaint to add a negligence cause of action; motion granted to that extent; and, as so modified, affirmed, and plaintiff is directed to serve the amended complaint within 20 days of the date of this Court's decision.

16 In the Matter of Jacob Timothy English, an Attorney. (Attorney Registration No. 5765276.) [253 NYS3d 837]—

Attorney and Client—Resignation—Nondisciplinary Reasons

Per Curiam. Jacob Timothy English was admitted to practice by this Court in 2020 and lists a business address in Arlington Heights, Illinois with the Office of Court Administration. English now seeks leave to resign from the New York bar for nondisciplinary reasons (see Rules for Atty Disciplinary Matters [22 NYCRR] § 1240.22 [a]). The Attorney Grievance Committee for the Third Judicial Department (hereinafter AGC) advises that it does not oppose English's application.

Upon reading English's affidavit sworn to March 5, 2026, and filed March 10, 2026, and upon reading the April 23, 2026 correspondence in response by the Deputy Chief Attorney for AGC, and having determined that English is eligible to resign for nondisciplinary reasons, we grant his application and accept his resignation.

Pritzker, J.P., Ceresia, Fisher, McShan and Corcoran, JJ., concur. Ordered that Jacob Timothy English's application for permission to resign is granted and his nondisciplinary resignation is accepted; and it is further ordered that Jacob Timothy English's name is hereby stricken from the roll of attorneys and counselors-at-law of the State of New York, effective immediately, and until further order of this Court (*see generally* Rules for Atty Disciplinary Matters [22 NYCRR] § 1240.22 [b]); and it is further ordered that Jacob Timothy English is commanded to desist and refrain from the practice of law in any form in the State of New York, either as principal or as agent, clerk or employee of another; and English is hereby forbidden to appear as an attorney or counselor-at-law before any court, judge, justice, board, commission or other public authority, or to give to another an opinion as to the law or its application, or any advice in relation thereto, or to hold himself out in any way as an attorney and counselor-at-law in this state; and it is further ordered that Jacob Timothy English shall, within 30 days of the date of this decision, surrender to the Office of Court Administration any Attorney Secure Pass issued to him.

17 In the Matter of Robin Plummer Keller, an Attorney. (Attorney Registration No. 4027678.) [253 NYS3d 832]—

Attorney and Client—Resignation—Nondisciplinary Reasons

Per Curiam. Robin Plummer Keller was admitted to practice by this Court in 2002 and lists a business address in Norwalk, Connecticut with the Office of Court Administration. Keller now seeks leave to resign from the New York bar for nondisciplinary reasons (*see* Rules for Atty Disciplinary Matters [22 NYCRR] § 1240.22 [a]). The Attorney Grievance Committee for the Third Judicial Department (hereinafter AGC) advises that it does not oppose Keller's application.

Upon reading Keller's affidavit sworn to March 3, 2026, and filed March 5, 2026, and upon reading the April 23, 2026 correspondence in response by the Deputy Chief Attorney for AGC, and having determined that Keller is eligible to resign for nondisciplinary reasons, we grant his application and accept his resignation.

Pritzker, J.P., Ceresia, Fisher, McShan and Corcoran, JJ.,

concur. Ordered that Robin Plummer Keller's application for permission to resign is granted and his nondisciplinary resignation is accepted; and it is further ordered that Robin Plummer Keller's name is hereby stricken from the roll of attorneys and counselors-at-law of the State of New York, effective immediately, and until further order of this Court (*see generally* Rules for Atty Disciplinary Matters [22 NYCRR] § 1240.22 [b]); and it is further ordered that Robin Plummer Keller is commanded to desist and refrain from the practice of law in any form in the State of New York, either as principal or as agent, clerk or employee of another; and Keller is hereby forbidden to appear as an attorney or counselor-at-law before any court, judge, justice, board, commission or other public authority, or to give to another an opinion as to the law or its application, or any advice in relation thereto, or to hold himself out in any way as an attorney and counselor-at-law in this state; and it is further ordered that Robin Plummer Keller shall, within 30 days of the date of this decision, surrender to the Office of Court Administration any Attorney Secure Pass issued to him.

18 In the Matter of Jennifer T. Conti-Bediner, an Attorney. (Attorney Registration No. 4164000.) [253 NYS3d 834]—

Attorney and Client—Resignation—Nondisciplinary Reasons

Per Curiam. Jennifer T. Conti-Bediner was admitted to practice by this Court in 2003 and lists a business address in Livingston, New Jersey with the Office of Court Administration. Conti-Bediner now seeks leave to resign from the New York bar for nondisciplinary reasons (*see* Rules for Atty Disciplinary Matters [22 NYCRR] § 1240.22 [a]). The Attorney Grievance Committee for the Third Judicial Department (hereinafter AGC) advises that it does not oppose Conti-Bediner's application.

Upon reading Conti-Bediner's affidavit sworn to February 19, 2026, and filed March 9, 2026, and upon reading the April 23, 2026 correspondence in response by the Deputy Chief Attorney for AGC, and having determined that Conti-Bediner is eligible to resign for nondisciplinary reasons, we grant her application and accept her resignation.

Pritzker, J.P., Ceresia, McShan, Powers and Ryba, JJ., concur. Ordered that Jennifer T. Conti-Bediner's application for permission to resign is granted and her nondisciplinary resignation is accepted; and it is further ordered that Jennifer T. Conti-Bediner's name is hereby stricken from the roll of attorneys and counselors-at-law of the State of New York, effective immediately, and until further order of this Court (*see gen-*

erally Rules for Atty Disciplinary Matters [22 NYCRR] § 1240.22 [b]); and it is further ordered that Jennifer T. Conti-Bediner is commanded to desist and refrain from the practice of law in any form in the State of New York, either as principal or as agent, clerk or employee of another; and Conti-Bediner is hereby forbidden to appear as an attorney or counselor-at-law before any court, judge, justice, board, commission or other public authority, or to give to another an opinion as to the law or its application, or any advice in relation thereto, or to hold herself out in any way as an attorney and counselor-at-law in this state; and it is further ordered that Jennifer T. Conti-Bediner shall, within 30 days of the date of this decision, surrender to the Office of Court Administration any Attorney Secure Pass issued to her.

19 In the Matter of Alan E. Davis, an Attorney. (Attorney Registration No. 1883743.) [253 NYS3d 835]—

Attorney and Client—Resignation—Nondisciplinary Reasons

Per Curiam. Alan E. Davis was admitted to practice by this Court in 1983 and lists a business address in Woodbridge, New Jersey with the Office of Court Administration. Davis now seeks leave to resign from the New York bar for nondisciplinary reasons (*see* Rules for Atty Disciplinary Matters [22 NYCRR] § 1240.22 [a]). The Attorney Grievance Committee for the Third Judicial Department (hereinafter AGC) advises that it does not oppose Davis' application.

Upon reading Davis' affidavit sworn to February 25, 2026, and filed March 5, 2026, and upon reading the April 23, 2026 correspondence in response by the Deputy Chief Attorney for AGC, and having determined that Davis is eligible to resign for nondisciplinary reasons, we grant his application and accept his resignation.

Pritzker, J.P., Ceresia, McShan, Powers and Ryba, JJ., concur. Ordered that Alan E. Davis' application for permission to resign is granted and his nondisciplinary resignation is accepted; and it is further ordered that Alan E. Davis' name is hereby stricken from the roll of attorneys and counselors-at-law of the State of New York, effective immediately, and until further order of this Court (*see generally* Rules for Atty Disciplinary Matters [22 NYCRR] § 1240.22 [b]); and it is further ordered that Alan E. Davis is commanded to desist and refrain from the practice of law in any form in the State of New York, either as principal or as agent, clerk or employee of another; and Davis is hereby forbidden to appear as an attorney or counselor-at-law before any court, judge, justice,

board, commission or other public authority, or to give to another an opinion as to the law or its application, or any advice in relation thereto, or to hold himself out in any way as an attorney and counselor-at-law in this state; and it is further ordered that Alan E. Davis shall, within 30 days of the date of this decision, surrender to the Office of Court Administration any Attorney Secure Pass issued to him.

20 In the Matter of Jonathan R. Flora, an Attorney. (Attorney Registration No. 5471230.) [253 NYS3d 830]—

Attorney and Client—Resignation—Nondisciplinary Reasons

Per Curiam. Jonathan R. Flora was admitted to practice by this Court in 2016 and lists a business address in Philadelphia, Pennsylvania with the Office of Court Administration. Flora now seeks leave to resign from the New York bar for nondisciplinary reasons (*see* Rules for Atty Disciplinary Matters [22 NYCRR] § 1240.22 [a]). The Attorney Grievance Committee for the Third Judicial Department (hereinafter AGC) advises that it does not oppose Flora's application.

Upon reading Flora's affidavit sworn to March 5, 2026, and filed March 16, 2026, and upon reading the April 24, 2026 correspondence in response by the Deputy Chief Attorney for AGC, and having determined that Flora is eligible to resign for nondisciplinary reasons, we grant his application and accept his resignation.

Pritzker, J.P., Ceresia, McShan, Powers and Ryba, JJ., concur. Ordered that Jonathan R. Flora's application for permission to resign is granted and his nondisciplinary resignation is accepted; and it is further ordered that Jonathan R. Flora's name is hereby stricken from the roll of attorneys and counselors-at-law of the State of New York, effective immediately, and until further order of this Court (*see generally* Rules for Atty Disciplinary Matters [22 NYCRR] § 1240.22 [b]); and it is further ordered that Jonathan R. Flora is commanded to desist and refrain from the practice of law in any form in the State of New York, either as principal or as agent, clerk or employee of another; and Flora is hereby forbidden to appear as an attorney or counselor-at-law before any court, judge, justice, board, commission or other public authority, or to give to another an opinion as to the law or its application, or any advice in relation thereto, or to hold himself out in any way as an attorney and counselor-at-law in this state; and it is further ordered that Jonathan R. Flora shall, within 30 days of the date of this decision, surrender to the Office of Court Administration any Attorney Secure Pass issued to him.

21 In the Matter of John R. Gowell Jr., an Attorney. (Attorney Registration No. 5453857.) [253 NYS3d 831]—

Attorney and Client—Resignation—Nondisciplinary Reasons

Per Curiam. John R. Gowell Jr. was admitted to practice by this Court in 2016 and lists a business address in Jamestown, Rhode Island with the Office of Court Administration. Gowell now seeks leave to resign from the New York bar for nondisciplinary reasons (*see* Rules for Atty Disciplinary Matters [22 NYCRR] § 1240.22 [a]). The Attorney Grievance Committee for the Third Judicial Department (hereinafter AGC) advises that it does not oppose Gowell's application.

Upon reading Gowell's affidavit sworn to March 11, 2026, and filed March 16, 2026, and upon reading the April 24, 2026 correspondence in response by the Deputy Chief Attorney for AGC, and having determined that Gowell is eligible to resign for nondisciplinary reasons, we grant his application and accept his resignation.

Pritzker, J.P., Ceresia, McShan, Powers and Ryba, JJ., concur. Ordered that John R. Gowell Jr.'s application for permission to resign is granted and his nondisciplinary resignation is accepted; and it is further ordered that John R. Gowell Jr.'s name is hereby stricken from the roll of attorneys and counselors-at-law of the State of New York, effective immediately, and until further order of this Court (*see generally* Rules for Atty Disciplinary Matters [22 NYCRR] § 1240.22 [b]); and it is further ordered that John R. Gowell Jr. is commanded to desist and refrain from the practice of law in any form in the State of New York, either as principal or as agent, clerk or employee of another; and Gowell is hereby forbidden to appear as an attorney or counselor-at-law before any court, judge, justice, board, commission or other public authority, or to give to another an opinion as to the law or its application, or any advice in relation thereto, or to hold himself out in any way as an attorney and counselor-at-law in this state; and it is further ordered that John R. Gowell Jr. shall, within 30 days of the date of this decision, surrender to the Office of Court Administration any Attorney Secure Pass issued to him.

22 In the Matter of Jeremy David Mishkin, an Attorney. (Attorney Registration No. 5028626.) [253 NYS3d 829]—

Attorney and Client—Resignation—Nondisciplinary Reasons

Per Curiam. Jeremy David Mishkin was admitted to practice by this Court in 2012 and lists a business address in Philadelphia, Pennsylvania with the Office of Court Administration.

Mishkin now seeks leave to resign from the New York bar for nondisciplinary reasons (*see* Rules for Atty Disciplinary Matters [22 NYCRR] § 1240.22 [a]). The Attorney Grievance Committee for the Third Judicial Department (hereinafter AGC) advises that it does not oppose Mishkin's application.

Upon reading Mishkin's affidavit sworn to March 16, 2026, and filed April 2, 2026, and upon reading the April 24, 2026 correspondence in response by the Deputy Chief Attorney for AGC, and having determined that Mishkin is eligible to resign for nondisciplinary reasons, we grant his application and accept his resignation.

Pritzker, J.P., Ceresia, McShan, Powers and Ryba, JJ., concur. Ordered that Jeremy David Mishkin's application for permission to resign is granted and his nondisciplinary resignation is accepted; and it is further ordered that Jeremy David Mishkin's name is hereby stricken from the roll of attorneys and counselors-at-law of the State of New York, effective immediately, and until further order of this Court (*see generally* Rules for Atty Disciplinary Matters [22 NYCRR] § 1240.22 [b]); and it is further ordered that Jeremy David Mishkin is commanded to desist and refrain from the practice of law in any form in the State of New York, either as principal or as agent, clerk or employee of another; and Mishkin is hereby forbidden to appear as an attorney or counselor-at-law before any court, judge, justice, board, commission or other public authority, or to give to another an opinion as to the law or its application, or any advice in relation thereto, or to hold himself out in any way as an attorney and counselor-at-law in this state; and it is further ordered that Jeremy David Mishkin shall, within 30 days of the date of this decision, surrender to the Office of Court Administration any Attorney Secure Pass issued to him.

23 In the Matter of Daniel Isaac Papermaster, an Attorney. (Attorney Registration No. 5068747.) [253 NYS3d 833]—

Attorney and Client—Resignation—Nondisciplinary Reasons

Per Curiam. Daniel Isaac Papermaster was admitted to practice by this Court in 2012 and lists a business address in Hartford, Connecticut with the Office of Court Administration. Papermaster now seeks leave to resign from the New York bar for nondisciplinary reasons (*see* Rules for Atty Disciplinary Matters [22 NYCRR] § 1240.22 [a]). The Attorney Grievance Committee for the Third Judicial Department (hereinafter AGC) advises that it does not oppose Papermaster's application.

Upon reading Papermaster's affidavit sworn to March 24,

2026, and filed March 25, 2026, and upon reading the April 24, 2026 correspondence in response by the Deputy Chief Attorney for AGC, and having determined that Papermaster is eligible to resign for nondisciplinary reasons, we grant his application and accept his resignation.

Pritzker, J.P., Ceresia, McShan, Powers and Ryba, JJ., concur. Ordered that Daniel Isaac Papermaster's application for permission to resign is granted and his nondisciplinary resignation is accepted; and it is further ordered that Daniel Isaac Papermaster's name is hereby stricken from the roll of attorneys and counselors-at-law of the State of New York, effective immediately, and until further order of this Court (*see generally* Rules for Atty Disciplinary Matters [22 NYCRR] § 1240.22 [b]); and it is further ordered that Daniel Isaac Papermaster is commanded to desist and refrain from the practice of law in any form in the State of New York, either as principal or as agent, clerk or employee of another; and Papermaster is hereby forbidden to appear as an attorney or counselor-at-law before any court, judge, justice, board, commission or other public authority, or to give to another an opinion as to the law or its application, or any advice in relation thereto, or to hold himself out in any way as an attorney and counselor-at-law in this state; and it is further ordered that Daniel Isaac Papermaster shall, within 30 days of the date of this decision, surrender to the Office of Court Administration any Attorney Secure Pass issued to him.

24 In the Matter of Michael R. Pichowicz, an Attorney. (Attorney Registration No. 5787643.) [253 NYSd 836]—

Attorney and Client—Resignation—Nondisciplinary Reasons

Per Curiam. Michael R. Pichowicz was admitted to practice by this Court in 2020 and lists a business address in East Hanover, New Jersey with the Office of Court Administration. Pichowicz now seeks leave to resign from the New York bar for nondisciplinary reasons (*see* Rules for Atty Disciplinary Matters [22 NYCRR] § 1240.22 [a]). The Attorney Grievance Committee for the Third Judicial Department (hereinafter AGC) advises that it does not oppose Pichowicz's application.

Upon reading Pichowicz's affidavit sworn to March 16, 2026, and filed March 18, 2026, and upon reading the April 24, 2026 correspondence in response by the Deputy Chief Attorney for AGC, and having determined that Pichowicz is eligible to resign for nondisciplinary reasons, we grant his application and accept his resignation.

Pritzker, J.P., Ceresia, McShan, Powers and Ryba, JJ.,

concur. Ordered that Michael R. Pichowicz's application for permission to resign is granted and his nondisciplinary resignation is accepted; and it is further ordered that Michael R. Pichowicz's name is hereby stricken from the roll of attorneys and counselors-at-law of the State of New York, effective immediately, and until further order of this Court (*see generally* Rules for Atty Disciplinary Matters [22 NYCRR] § 1240.22 [b]); and it is further ordered that Michael R. Pichowicz is commanded to desist and refrain from the practice of law in any form in the State of New York, either as principal or as agent, clerk or employee of another; and Pichowicz is hereby forbidden to appear as an attorney or counselor-at-law before any court, judge, justice, board, commission or other public authority, or to give to another an opinion as to the law or its application, or any advice in relation thereto, or to hold himself out in any way as an attorney and counselor-at-law in this state; and it is further ordered that Michael R. Pichowicz shall, within 30 days of the date of this decision, surrender to the Office of Court Administration any Attorney Secure Pass issued to him.

25 In the Matter of Mary Elizabeth Rain, a Suspended Attorney. Attorney Grievance Committee for the Third Judicial Department, Petitioner; Mary Elizabeth Rain, Respondent. (Attorney Registration No. 2720183.) (Proceeding No. 1.) In the Matter of Mary Elizabeth Rain, a Suspended Attorney. Attorney Grievance Committee for the Third Judicial Department, Petitioner; Mary Elizabeth Rain, Respondent. (Attorney Registration No. 2720183.) (Proceeding No. 2.) [— NYS3d —]

Attorney and Client—Reinstatement—Failure to Demonstrate Requisite Character and Fitness to Practice Law, That Reinstatement Would Benefit Public Interest and to Meaningfully Address Factors That Led to Suspension

Per Curiam. Respondent was admitted to practice by the Fourth Department in 1996 and previously served as District Attorney of St. Lawrence County from 2013 to 2017. Following a hearing before a Court-appointed referee, we concluded that respondent, in her capacity as District Attorney, had violated 12 separate Rules of Professional Conduct (*see* 162 AD3d 1458 [3d Dept 2018]). Specifically, based on prosecutorial misconduct found by this Court in *People v Wright* (133 AD3d 1097 [3d Dept 2015]), we concluded that respondent had engaged in conduct prejudicial to the administration of justice and adversely reflecting on her fitness as a lawyer. Similarly, we found that respondent had violated various Rules of Professional Conduct through her improper use of grand jury subpoenas, her unlawful use of student interns in her office and her failure to disclose *Brady* material during a homicide

trial. Accordingly, we suspended respondent for two years by June 2018 order. Respondent now moves for her reinstatement, and petitioner opposes her motion.

In addition to various procedural requirements, an attorney seeking reinstatement from a suspension must satisfy, by clear and convincing evidence, a three-part substantive test in order to establish his or her entitlement to relief (*see Matter of Del Boccio*, 241 AD3d 1615, 1616 [3d Dept 2025]; Rules for Atty Disciplinary Matters [22 NYCRR] § 1240.16 [a]). First, the attorney must demonstrate that he or she has complied with the order of suspension and all of the applicable Court rules (*see Matter of Shmulsky*, 219 AD3d 1045, 1045 [3d Dept 2023]). Second, the attorney must demonstrate that he or she possesses the requisite character and fitness to practice law (*see Matter of Njogu*, 175 AD3d 800, 800 [3d Dept 2019]). Third, the attorney must demonstrate that it would be in the public interest to reinstate him or her to the practice of law, providing “assurances that no detriment would inure to the public by reason of the attorney’s return to practice, and that his or her reinstatement would be of some tangible benefit to the public” (*Matter of Sullivan*, 153 AD3d 1484, 1484 [3d Dept 2017]).

Based on the record before us, we conclude that respondent has failed to demonstrate, by clear and convincing evidence, that she possesses the requisite character and fitness to practice law, and that her reinstatement would benefit the public interest. While respondent has provided information concerning advocacy work that she has engaged in since her suspension, we conclude that she has not demonstrated that, in the intervening years since her suspension, she has meaningfully addressed the factors that led to her suspension in this state (*see Matter of Becker*, 202 AD3d 1430, 1431 [3d Dept 2022]). Similarly, respondent’s application materials failed to include any tangible details concerning her intentions were she to be reinstated (*see Matter of Cammarano*, 169 AD3d 1251, 1252 [3d Dept 2019]), and likewise do not provide assurances that her reinstatement would cause no detriment to the institutions and individuals whom the legal profession is intended to serve (*see Matter of Paragano*, 213 AD3d 1023, 1026 [3d Dept 2023]). Accordingly, we deny her motion (*see e.g. Matter of Del Boccio*, 241 AD3d at 1616; *Matter of Daigle*, 223 AD3d 1083, 1084 [3d Dept 2024]; *Matter of Cammarano*, 169 AD3d at 1252).

Garry, P.J., Aarons, Ceresia, McShan and Mackey, J.J., concur. Ordered that respondent’s motion for reinstatement is denied.

FOURTH DEPARTMENT, APRIL, 2026

(April 24, 2026)

1 Anthony M. Mock, Plaintiff, v New York Athletic Club of City of New York, Appellant/Third-Party Plaintiff-Appellant, et al., Defendant. Next Level Construction & Maintenance, Inc., et al., Third-Party Defendants-Respondents. [— NYS3d —]

Indemnity—Contractual Indemnification—Fall from Scaffold

Appeal from an order of the Supreme Court, Erie County (Amy C. Martoche, J.), entered January 14, 2025. The order, inter alia, granted the cross-motion of third-party defendant Anderson Courts and Sports Surfaces, Inc. for summary judgment dismissing the amended third-party complaint against it.

It is hereby ordered that the order so appealed from is unanimously affirmed without costs.

Memorandum: Plaintiff commenced this Labor Law and common-law negligence action seeking damages for injuries he sustained when he fell from a scaffold at defendant-third-party plaintiff New York Athletic Club of City of New York (NYAC). NYAC appeals from an order that, inter alia, granted the motion of defendant-third-party defendant Next Level Construction & Maintenance, Inc. (Next Level) insofar as it sought summary judgment dismissing NYAC's cross-claim against it for contractual indemnification, granted the cross-motion of third-party defendant Anderson Courts and Sports Surfaces, Inc. (Anderson) insofar as it sought summary judgment dismissing the amended third-party complaint against it, and denied NYAC's motion for summary judgment on its contractual indemnification cause of action against Anderson. We affirm.

Initially, we conclude that Supreme Court properly granted Next Level's motion insofar as it sought summary judgment dismissing NYAC's contractual indemnification cross-claim against it. "[I]t is elementary that the right to contractual indemnification depends upon the specific language of the contract" (*Gillmore v Duke/Fluor Daniel*, 221 AD2d 938, 939 [4th Dept 1995]; see *Miller v Rerob, LLC*, 197 AD3d 979, 981 [4th Dept 2021]). Thus, "[t]he language of an indemnity provision should be construed so as to encompass only that . . . which reasonably appear[s] to have been within the intent of the parties" (*Niagara Frontier Transp. Auth. v Tri-Delta Constr. Corp.*, 107 AD2d 450, 453 [4th Dept 1985], *aff'd* 65 NY2d 1038 [1985]). Here, the indemnification agreement between NYAC and Next Level, by its terms, pertained to "claims . . . actually or allegedly arising out of or relating to [Next Level's] work or

the work of any subcontractor retained by [Next Level].” Next Level established on its motion that Anderson, plaintiff’s employer, did not work for Next Level, and that plaintiff’s injuries did not arise out of and were not related to Next Level’s work (*cf. Olivieri v Barnes & Noble, Inc.*, 208 AD3d 1001, 1005 [4th Dept 2022]; *see generally Orellana v 5541-1274 Fifth Ave. Manhattan LLC*, 234 AD3d 527, 528 [1st Dept 2025]). In opposition, NYAC failed to raise a triable issue of fact (*see generally Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]).

Contrary to NYAC’s further contentions, we conclude that the court properly granted Anderson’s cross-motion insofar as it sought summary judgment dismissing NYAC’s contractual indemnification and breach of contract causes of action against it. There is no dispute that the indemnification agreement between NYAC and Anderson was executed after plaintiff’s accident. “An indemnification agreement that is executed after a plaintiff’s accident . . . may only be applied retroactively where it is established that (1) the agreement was made as of a date prior to the accident and (2) the parties intended the agreement to apply as of that prior date” (*Freas v John W. Danforth Co.*, 236 AD3d 1371, 1372 [4th Dept 2025] [internal quotation marks omitted]; *see Carpentieri v 1438 S. Park Ave. Co., LLC*, 215 AD3d 1236, 1238 [4th Dept 2023]; *Tanksley v LCO Bldg. LLC*, 196 AD3d 1037, 1039 [4th Dept 2021]). With respect to the contractual indemnification cause of action, Anderson met its initial burden on its cross-motion by establishing that it did not sign the agreement before the accident (*see generally Tanksley*, 196 AD3d at 1039), and that the agreement was not made “as of” a date prior to the accident (*Manns v Norstar Bldg. Corp.*, 4 AD3d 799, 800 [4th Dept 2004]), thus establishing that the agreement was not intended to be applied retroactively. In opposition, NYAC failed to raise a triable issue of fact. Indeed, NYAC submitted no evidence that Anderson and NYAC made the agreement as of a prior date, or that “the parties intended the agreement to apply as of [a] prior date” (*Freas*, 236 AD3d at 1372 [emphasis added and internal quotation marks omitted]; *see Meabon v Town of Poland*, 108 AD3d 1183, 1185 [4th Dept 2013]). For the same reasons, the court properly determined that Anderson is entitled to summary judgment dismissing NYAC’s cause of action for breach of contract for failure to procure insurance (*see Contreras v Mall 1-Bay Plaza, LLC*, 213 AD3d 601, 601 [1st Dept 2023]; *cf. Freas*, 236 AD3d at 1373).

Finally, we have considered NYAC’s remaining contentions and conclude that they do not warrant reversal or modification

of the order. Present—Curran, J.P., Bannister, Smith, Ogden and DelConte, JJ.

2 Cor Veterans Memorial Drive Company, LLC, Appellant, v Michaels Stores, Inc., Respondent. [— NYS3d —]

Landlord and Tenant—Lease—Amendments to Commercial Lease—Cotenancy Requirement

Appeal from an order of the Supreme Court, Onondaga County (Robert E. Antonacci, II, J.), entered September 23, 2024. The order granted plaintiff's motion for leave to reargue and, upon reargument, adhered to a prior order granting defendant's motion to dismiss certain causes of action.

It is hereby ordered that the order so appealed from is unanimously affirmed without costs.

Memorandum: Defendant rented a commercial property from plaintiff in a shopping center. The parties executed a lease that, inter alia, subjected plaintiff to an ongoing cotenancy requirement. Under the terms of the lease, if the ongoing cotenancy requirement was not satisfied for a period of six months, the minimum rent would be abated until such time as the ongoing cotenancy requirement was satisfied, and, in lieu thereof, defendant would pay "[a]lternative [r]ent."

The parties thereafter executed several amendments to the lease. In November 2018, after the parties executed the first amendment, but before the lease term under that amendment took effect, one cotenant (cotenant) closed its store. In June 2021, more than two years after the cotenant closed its store, defendant executed an estoppel certificate in which it declared that plaintiff was not in default on any provision of the lease.

Nevertheless, defendant thereafter informed plaintiff that plaintiff had not complied with the ongoing cotenancy requirement because the lease required the premises in question to be occupied by one anchor tenant, but, after the cotenant closed its store and vacated the premises, plaintiff filled the premises with two tenants. Defendant then advised that it was entitled to pay the alternative rent under the terms of the original lease upon the conclusion of the third amendment term. Plaintiff thereafter sent defendant a notice of default, terminated defendant's right of possession to the premises and commenced this action seeking, inter alia, back rent and continuing damages for defendant's alleged failure to make payments under the lease.

Subsequently, defendant moved to dismiss certain causes of action in the amended complaint and Supreme Court, upon converting defendant's motion to one for summary judgment,

granted the motion and ordered defendant to pay to plaintiff all unpaid alternative rent due. Plaintiff now appeals from an order that, *inter alia*, granted plaintiff's motion for leave to reargue its opposition to the converted motion and, upon reargument, adhered to the court's prior determination. We affirm.

Plaintiff contends that the estoppel certificate bars defendant from claiming a rent offset under the relevant terms of the lease. We reject that contention. Assuming, *arguendo*, that plaintiff's failure to abide by the cotenancy requirement could be considered a default in the performance of a duty under the lease, we conclude that defendant's rights pursuant to the cotenancy requirement were not in effect at the time of the execution of the estoppel certificate (*see generally* *W.W.W. Assoc. v Giancontieri*, 77 NY2d 157, 162 [1990]; *Linzy v Christa Constr.*, 238 AD2d 936, 936 [4th Dept 1997]). Instead, the parties were operating during the relevant time period under the second amendment to the lease wherein they agreed to a separate rental scheme (*see generally* *W.W.W. Assoc.*, 77 NY2d at 162). We further conclude that the lease did not provide plaintiff with any entitlement to rely upon the estoppel certificate (*cf.* *JRK Franklin, LLC v 164 E. 87th St. LLC*, 27 AD3d 392, 393 [1st Dept 2006], *lv denied* 7 NY3d 705 [2006]). Moreover, contrary to plaintiff's further contention, it failed to satisfy the ongoing cotenancy requirement inasmuch as it filled the premises in question with two tenants instead of one as unambiguously required by the terms of the lease.

We have considered plaintiff's remaining contentions and conclude that they lack merit. Present—Curran, J.P., Banister, Smith, Ogden and DelConte, JJ.

3 The People of the State of New York, Respondent, v Joseph D. Ayer, Also Known as Joseph David Ayer, Also Known as Joseph Ayer, Appellant. [— NYS3d —]—

Crimes—Unlawful Search and Seizure—Detention in Patrol Vehicle

Crimes—Burglary—Sufficiency and Weight of Evidence

Crimes—Right to Counsel—Effective Representation—Waiver of Conflict of Interest—Representation of Codefendant

Appeal from a judgment of the Genesee County Court (Melissa Lightcap Cianfrini, J.), rendered August 9, 2022. The judgment convicted defendant upon a jury verdict of burglary in the second degree and petit larceny.

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

Memorandum: Defendant appeals from a judgment convict-

ing him upon a jury verdict of burglary in the second degree (Penal Law § 140.25 [2]), and petit larceny (§ 155.25). We affirm.

Contrary to defendant's contention, we conclude that County Court properly refused to suppress tangible evidence and statements he made to the police (*see generally People v De Bour*, 40 NY2d 210, 222-223 [1976]; *People v Harvey*, 170 AD3d 1675, 1677 [4th Dept 2019], *lv denied* 33 NY3d 1031 [2019]). Indeed, we conclude that the police conduct was justified in its inception and at every subsequent stage of the encounter leading to defendant's arrest (*see People v Pettiford*, 173 AD3d 1716, 1716 [4th Dept 2019], *lv denied* 34 NY3d 936 [2019]; *People v Bradley*, 137 AD3d 1611, 1611 [4th Dept 2016], *lv denied* 27 NY3d 1128 [2016]).

Specifically, inasmuch as defendant was found at the start of the encounter in close physical and temporal proximity to the scene of the reported incident and defendant's physical characteristics and clothing matched the description of one of the individuals involved in the incident, we conclude that the officers had a founded suspicion that criminal activity was afoot, thereby justifying their initial common-law inquiry of defendant (*see People v Gayden*, 126 AD3d 1518, 1518 [4th Dept 2015], *affd* 28 NY3d 1035 [2016]; *People v Atkinson*, 185 AD3d 1438, 1439 [4th Dept 2020], *lv denied* 35 NY3d 1092 [2020]; *see generally De Bour*, 40 NY2d at 223), which included asking defendant if he had any weapons (*see People v Stevenson*, 7 AD3d 820, 821 [2d Dept 2004]; *People v Park*, 294 AD2d 887, 888 [4th Dept 2002], *lv denied* 98 NY2d 679 [2002]). In response, defendant told the police that he possessed a knife, providing the police with reasonable suspicion that he was armed, and therefore the police were, at the start of the encounter, permitted to conduct a brief pat-down frisk to ensure officer safety (*see People v Batista*, 88 NY2d 650, 654 [1996]; *People v Ginty*, 204 AD3d 1487, 1488-1489 [4th Dept 2022]; *see also People v Muhammed*, 196 AD3d 1151, 1152-1153 [4th Dept 2021], *lv denied* 37 NY3d 1061 [2021]).

Furthermore, we conclude that, during the course of their conversation with defendant and the codefendant, the police had reasonable suspicion that defendant had committed a crime sufficient to detain him in their patrol vehicle (*see People v Henry*, 207 AD3d 1062, 1063 [4th Dept 2022], *lv denied* 39 NY3d 940 [2022]; *Pettiford*, 173 AD3d at 1717; *People v Santiago*, 142 AD3d 1390, 1391 [4th Dept 2016], *lv denied* 28 NY3d 1127 [2016]). In addition to defendant having been found near the scene of the reported incident and matching the description

of one of the suspects, defendant admitted to the police that he had trespassed on someone's property, and the codefendant told the police that she and defendant had broken into a home and stolen property from inside. Thus, under the totality of the circumstances, the police clearly had a reasonable suspicion of a crime to justify detention of defendant while they investigated further (see *Henry*, 207 AD3d at 1063; *Santiago*, 142 AD3d at 1391; see generally *People v Hicks*, 68 NY2d 234, 238-242 [1986]).

We reject defendant's contention that, during the police encounter, the police unlawfully searched a lunch box that was in his possession inasmuch as the totality of the circumstances establishes that he expressly and voluntarily consented to the police search (see *People v Fioretti*, 155 AD3d 1662, 1663 [4th Dept 2017], *lv denied* 30 NY3d 1104 [2018]). To the extent that defendant also contends that the court erred in refusing to suppress statements made by the codefendant, we reject that contention and note that he lacks standing to seek suppression of her statements (see *People v Davis*, 103 AD3d 810, 812 [2d Dept 2013], *lv denied* 21 NY3d 1003 [2013]; *People v Hamilton*, 232 AD2d 899, 900-901 [3d Dept 1996], *lv denied* 89 NY2d 942 [1997]; see generally *People v Henley*, 53 NY2d 403, 407-408 [1981]).

We reject defendant's contention that the conviction is not supported by legally sufficient evidence. Viewing the evidence in the light most favorable to the People (see *People v Contes*, 60 NY2d 620, 621 [1983]), we conclude that the evidence provides a "valid line of reasoning and permissible inferences" that could lead a rational person to conclude, beyond a reasonable doubt (*People v Delamota*, 18 NY3d 107, 113 [2011]), that defendant committed the offense of burglary in the second degree. Specifically, there was evidence at trial—i.e., body-worn camera footage from immediately after the incident—that contained statements from the codefendant admitting that she and defendant had just broken into a residence and stolen property from inside. Moreover, the evidence at trial established that defendant was found in the vicinity of the broken-in home shortly after the burglary allegedly occurred, and was found in possession of property that came from the house. We further conclude that, viewing the evidence in light of the elements of all the crimes as charged to the jury (see *People v Danielson*, 9 NY3d 342, 349 [2007]), the verdict is not against the weight of the evidence (see generally *People v Bleakley*, 69 NY2d 490, 495 [1987]). Even assuming, arguendo, that a different verdict would not have been unreasonable, we

conclude that “the jury was in the best position to assess the credibility of the witnesses and, on this record, it cannot be said that the jury failed to give the evidence the weight it should be accorded” (*People v Dillard*, 227 AD3d 1501, 1502 [4th Dept 2024], *lv denied* 42 NY3d 926 [2024] [internal quotation marks omitted]; *see People v Wilcox*, 192 AD3d 1540, 1541 [4th Dept 2021], *lv denied* 37 NY3d 961 [2021]; *People v Elmore*, 175 AD3d 1003, 1005 [4th Dept 2019], *lv denied* 34 NY3d 1158 [2020]).

We reject defendant’s contention that the court erred in accepting his waiver of a conflict of interest stemming from defense counsel’s representation of both defendant and the co-defendant. Specifically, we conclude that the record establishes that the court, upon learning of the potential conflict of interest, conducted an inquiry “to ascertain, on the record, [that defendant] had an awareness of the potential risks involved in his continued representation by the attorney and had knowingly chosen to continue such representation” (*People v Lombardo*, 61 NY2d 97, 102 [1984]; *see People v Magee*, 182 AD3d 996, 997 [4th Dept 2020], *lv denied* 35 NY3d 1028 [2020]; *see generally People v Gomberg*, 38 NY2d 307, 313 [1975]). To the extent that defendant contends that defense counsel was ineffective in continuing to represent defendant despite the potential conflict of interest, we reject that contention inasmuch as defendant validly waived the conflict and “knowingly chose to have defense counsel represent him after being fully apprised of the potential conflict” (*People v Kopp*, 33 AD3d 153, 158 [4th Dept 2006], *lv denied* 7 NY3d 849 [2006], *cert denied* 549 US 1227 [2007]; *see Magee*, 182 AD3d at 997).

Defendant’s contention that he was deprived of a fair trial by prosecutorial misconduct is, for the most part, unpreserved for our review inasmuch as defendant failed to object to all but one of the statements he now challenges on appeal (*see People v Kellam*, 237 AD3d 1518, 1519 [4th Dept 2025]; *People v Watts*, 218 AD3d 1171, 1174 [4th Dept 2023], *lv denied* 40 NY3d 1013 [2023]; *People v Torres*, 125 AD3d 1481, 1484 [4th Dept 2015], *lv denied* 25 NY3d 1172 [2015]), and we decline to exercise our power to review that contention as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]). With respect to the preserved challenge, the prosecutor’s comment on summation regarding inferences one would have to make to conclude that defendant had no involvement in the burglary did not constitute improper burden shifting inasmuch as the comment did not suggest to the jury that defendant had to prove anything to avoid conviction (*cf. People v Griffin*, 125 AD3d 1509, 1510 [4th

Dept 2015]). Regardless, even assuming that the aforementioned comment was improper (*see People v Derby*, 242 AD3d 1627, 1628 [4th Dept 2025], *lv denied* 45 NY3d 936 [2026]), that one isolated comment was not so egregious that it deprived defendant of a fair trial and warrants reversal (*see People v Soto*, 242 AD3d 1613, 1615 [4th Dept 2025], *lv denied* 44 NY3d 1068 [2026]; *People v Hills*, 234 AD3d 1311, 1314 [4th Dept 2025], *lv denied* 43 NY3d 963 [2025]; *see generally People v Wright*, 25 NY3d 769, 780 [2015]).

Defendant also contends that the court erred in denying his request to instruct the jury, in connection with the burglary charge, on the lesser included offense of trespass. We reject that contention. We note that defense counsel did not actually request that the court instruct the jury on trespass as a lesser included offense of *burglary in the second degree* in connection with defendant's alleged entry into a home. Rather, defense counsel requested the instruction in connection with defendant's trespass on another person's land—an offense that was not related to the alleged burglary, was uncharged, and was not before the jury. Further, we reject defendant's contention that defense counsel was ineffective in failing to request any additional instructions on lesser included offenses. With respect to a claim of ineffective assistance of counsel, "it is incumbent on defendant to demonstrate the absence of strategic or other legitimate explanations" for defense counsel's allegedly deficient conduct (*People v Rivera*, 71 NY2d 705, 709 [1988]; *see People v Benevento*, 91 NY2d 708, 712 [1998]). The determination whether to seek a jury charge on a lesser included offense is a quintessentially tactical determination (*see People v McGee*, 20 NY3d 513, 519 [2013]; *People v Baez*, 175 AD3d 982, 985 [4th Dept 2019], *lv denied* 34 NY3d 1015 [2019]), and defendant failed to show the absence of a strategic basis for defense counsel's choice not to demand additional instructions regarding the lesser charges (*see People v Collins*, 167 AD3d 1493, 1498 [4th Dept 2018], *lv denied* 32 NY3d 1202 [2019]; *see generally People v Trotman*, 154 AD3d 1332, 1333 [4th Dept 2017], *lv denied* 30 NY3d 1109 [2018]). Indeed, defense counsel's strategy not to request additional lesser included offense charges was reasonable inasmuch as, without a request for a charge on lesser included offenses of attempted burglary in the second degree or burglary in the third degree, "the chances of defendant being acquitted outright with respect to [burglary in the second degree] were increased" (*People v Wright*, 235 AD3d 1248, 1249 [4th Dept 2025], *lv denied* 43 NY3d 947 [2025]).

Finally, we conclude that the sentence is not unduly harsh or

severe. Present—Lindley, J.P., Curran, Ogden, Greenwood and Hannah, JJ.

4 The People of the State of New York, Respondent, v Bounleang Thanthima, Appellant. [— NYS3d —]—

Crimes—Predatory Sexual Assault against Child—Oral Sexual Conduct—Sufficiency of Indictment

Appeal from a judgment of the Onondaga County Court (Theodore H. Limpert, J.), rendered May 14, 2024. The judgment convicted defendant upon a jury verdict of predatory sexual assault against a child and endangering the welfare of a child.

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

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of predatory sexual assault against a child (Penal Law former § 130.96) and endangering the welfare of a child (§ 260.10 [1]). Defendant contends that reversal is required because at trial the People introduced evidence of two acts of oral sexual conduct that the grand jury did not consider, which created the possibility that he was convicted of a crime upon a different theory from the one charged in the indictment. Defendant's contention is not preserved for our review (*see generally People v Hursh*, 191 AD3d 1453, 1454 [4th Dept 2021], *lv denied* 37 NY3d 957 [2021]), and is without merit in any event. The indictment, as limited by the bill of particulars, charged defendant with committing predatory sexual assault against a child by engaging in two or more acts of sexual conduct, including at least one act of oral sexual conduct. Thus, “[t]he language in the indictment and bill of particulars was . . . broad enough to encompass all the [oral] sexual [conduct] as testified to by the victim” (*People v Hymes*, 174 AD3d 1295, 1297 [4th Dept 2019], *affd* 34 NY3d 1178 [2020]; *see People v Myers*, 194 AD3d 1426, 1427 [4th Dept 2021], *lv denied* 37 NY3d 967 [2021]; *People v Colstrud*, 144 AD3d 1639, 1640 [4th Dept 2016], *lv denied* 29 NY3d 1030 [2017]), and there was no possibility that defendant was convicted of a crime based on an uncharged theory.

Defendant next contends that he was deprived of a fair trial based on alleged prosecutorial misconduct and ineffective assistance of counsel. Defendant failed to preserve for our review his contention with respect to the alleged instances of prosecutorial misconduct (*see CPL 470.05 [2]; People v Smith*, 224 AD3d 1221, 1222 [4th Dept 2024], *lv denied* 41 NY3d 985 [2024]; *People v Crumpler*, 163 AD3d 1457, 1460 [4th Dept

2018], *lv denied* 32 NY3d 1003 [2018], *denied reconsideration* 32 NY3d 1125 [2018]). In any event, his contention is without merit. The prosecutor's remarks in the opening statement and during summation were primarily fair response to defense counsel's summation and fair comment on the evidence (*see Smith*, 224 AD3d at 1222; *Crumpler*, 163 AD3d at 1460). We agree with defendant that it was improper for the prosecutor to ask an investigator whether he believed that defendant was being truthful with him during his interview with the investigator (*see People v Pabon*, 28 NY3d 147, 157 [2016]), but we conclude that it did not deprive defendant of a fair trial. The investigator's testimony was cumulative inasmuch as the jury also listened to the recording of defendant's interview with the investigators, during which the investigators repeatedly expressed their disbelief in defendant's statements (*see generally Crumpler*, 163 AD3d at 1458-1459). We have considered the remaining instances of alleged prosecutorial misconduct and conclude that "[a]ny improprieties were not so pervasive or egregious as to deprive defendant of a fair trial" (*People v Bubis*, 204 AD3d 1492, 1495 [4th Dept 2022], *lv denied* 38 NY3d 1149 [2022] [internal quotation marks omitted]).

With respect to defendant's contention that defense counsel was ineffective, it was proper for the prosecutor to elicit testimony and comment on all the instances of oral sexual conduct, and therefore defense counsels' failure to object to that testimony does not constitute ineffective assistance of counsel (*see generally People v Stultz*, 2 NY3d 277, 287 [2004], *rearg denied* 3 NY3d 702 [2004]). Defense counsels' cross-examination of the investigator and comments about the victim were matters of strategy and insufficient to establish ineffective assistance (*see People v Flores*, 84 NY2d 184, 187 [1994]). We have examined defendant's remaining allegations of ineffective assistance and conclude that "the evidence, the law, and the circumstances of [this] particular case, viewed in totality and as of the time of the representation, reveal that the attorney[s] provided meaningful representation" (*People v Baldi*, 54 NY2d 137, 147 [1981]).

The sentence is not unduly harsh or severe. We have considered defendant's remaining contention and conclude that it does not warrant modification or reversal of the judgment. Present—Lindley, J.P., Curran, Ogden, Greenwood and Hannah, JJ.

5 In the Matter of Anthony Flowers, Appellant, v Daniel F. Martuscello, III, Commissioner, New York State Department of Corrections and Community Supervision, Respondent. [253

NYS3d 454]—Appeal from a judgment of the Supreme Court, Wyoming County (Melissa Lightcap Cianfrini, A.J.), entered January 7, 2025, in a proceeding pursuant to CPLR article 78. The judgment dismissed the petition.

It is hereby ordered that said appeal is unanimously dismissed without costs.

Memorandum: Petitioner appeals from a judgment dismissing his petition pursuant to CPLR article 78 seeking to annul the determination of the Parole Board denying him parole release. We conclude that “‘[t]his appeal must be dismissed as moot because the determination expired during the pendency of this appeal, and the Parole Board denied petitioner’s subsequent request for parole release’” (*Matter of Porter v Annucci*, 148 AD3d 1779, 1779 [4th Dept 2017]). The exception to the mootness doctrine does not apply here (*see Matter of Bethea v Annucci*, 151 AD3d 1674, 1675 [4th Dept 2017]; *Matter of Brunner v Speckard*, 214 AD2d 1040, 1040 [4th Dept 1995], *lv denied* 86 NY2d 707 [1995]; *see generally Matter of Hearst Corp. v Clyne*, 50 NY2d 707, 714-715 [1980]). Present—Curran, J.P., Ogden, Greenwood and Hannah, JJ.

6 In the Matter of New York State Assembly, Appellant, v New York State Division of Human Rights et al., Respondents, et al., Respondent. [— NYS3d —]—

Civil Rights—State Division of Human Rights—Error in Exercise of Jurisdiction

Appeal from a judgment (denominated order) of the Supreme Court, Erie County (Donna M. Siwek, J.), entered August 23, 2024, in a proceeding pursuant to CPLR article 78. The judgment, insofar as appealed from, denied the petition.

It is hereby ordered that the judgment so appealed from is unanimously affirmed without costs.

Memorandum: Respondent Nicole Golias, an employee of petitioner, New York State Assembly, filed a complaint with respondent New York State Division of Human Rights (DHR) alleging that a state assembly member discriminated against her based on her sex and sexually harassed her during her employment. DHR found probable cause to proceed and amended the discrimination complaint to add petitioner as a respondent in the DHR proceeding. Petitioner subsequently commenced this CPLR article 78 proceeding seeking to prohibit DHR from proceeding with the discrimination claim to the extent such complaint is directed at petitioner. Supreme Court, *inter alia*, denied the petition, and we affirm.

“The extraordinary writ of prohibition is available to address

‘whether [a] body or officer proceeded, is proceeding or is about to proceed without or in excess of jurisdiction’” (*Matter of Town of Huntington v New York State Div. of Human Rights*, 82 NY2d 783, 786 [1993], quoting CPLR 7803 [2]; see *Matter of Niagara Frontier Transp. Auth. v Nevins*, 295 AD2d 887, 887 [4th Dept 2002]). Prohibition will not lie where the party has access to another adequate legal remedy (see *Town of Huntington*, 82 NY2d at 786; *Niagara Frontier Transp. Auth.*, 295 AD2d at 887). “[E]rrors of law, which of course may be verbalized, but incorrectly, as excesses of jurisdiction or power, are not to be confused with a proper basis for using the extraordinary writ” (*Matter of State of New York v King*, 36 NY2d 59, 62 [1975]).

Petitioner contends that DHR did not give petitioner constitutional due process notice of the charges against it because there are no specific allegations of wrongdoing on its part. It therefore contends that DHR is acting in excess of its jurisdiction and thus petitioner does not need to exhaust its administrative remedies. We reject that contention, however, because the “[r]emedy for asserted error of law in the exercise of [DHR’s] jurisdiction or authority lies first in administrative review and following exhaustion of that remedy in subsequent judicial review pursuant to section 298 of the Executive Law” (*Matter of Tessy Plastics Corp. v State Div. of Human Rights*, 47 NY2d 789, 791 [1979]; see *Matter of Diocese of Rochester v New York State Div. of Human Rights*, 305 AD2d 1000, 1001 [4th Dept 2003]). Petitioner “will suffer no irreparable harm . . . by waiting to challenge [DHR’s] findings, if necessary, on the merits after [DHR] investigates [Golias’s] complaint” (*Town of Huntington*, 82 NY2d at 786; see *Diocese of Rochester*, 305 AD2d at 1001; *Niagara Frontier Transp. Auth.*, 295 AD2d at 888). Present—Lindley, J.P., Curran, Ogden, Greenwood and Hannah, JJ.

7 The People of the State of New York, Respondent, v Kenneth Nixon, Appellant. [— NYS3d —]

Crimes—Appeal—Waiver as Condition of Court-Initiated Plea Agreement That Does Not Require Consent of People

Crimes—Sentence—Probation—Violation of Conditions—Sufficiency of Inquiry

Appeal from a judgment of the Monroe County Court (Michael L. Dollinger, J.), rendered August 24, 2022. The judgment convicted defendant, upon his plea of guilty, of criminal possession of a weapon in the second degree (two counts) and menacing a police officer or peace officer (two counts).

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

Memorandum: Defendant appeals from a judgment convicting him, upon his plea of guilty, of two counts of criminal possession of a weapon in the second degree (Penal Law § 265.03 [1] [b]; [3]) and two counts of menacing a police officer or peace officer (§ 120.18). County Court initially imposed a term of interim probation supervision (*see* CPL 390.30 [6]), but the court subsequently revoked the interim probation and sentenced defendant to concurrent terms of incarceration. We affirm.

Preliminarily, we agree with defendant that, under “the totality of the circumstances” presented here, his waiver of the right to appeal is invalid (*People v Thomas*, 34 NY3d 545, 559 [2019], *cert denied* 589 US 1302 [2020]; *see People v Magee*, 191 AD3d 1323, 1323-1324 [4th Dept 2021]). Consistent with our “responsibility to oversee the [plea] process and to review the record to ensure that the defendant’s waiver of the right to appeal reflects a knowing and voluntary choice” (*People v Callahan*, 80 NY2d 273, 280 [1992]; *see Thomas*, 34 NY3d at 559), we must look at “all the relevant facts and circumstances surrounding the waiver, including the nature and terms of the agreement” (*Thomas*, 34 NY3d at 559-560 [internal quotation marks omitted]).

Here, the court stated on the record, after refusing to suppress certain statements made by defendant, that, although the People opposed a youthful offender adjudication and were unwilling to make a plea offer, it would extend a plea offer. The court then set forth the details of its proposed plea agreement and sentencing commitment, advising defendant that if he pleaded guilty to the indictment, in exchange the court would commit to imposing a one-year term of interim probation. Additionally, if defendant was successful, the court would further commit to grant him youthful offender status and sentence him to four years of probation; however, if defendant failed to abide by the terms and conditions of interim probation, the court would impose a sentence of up to five years of incarceration, followed by five years of postrelease supervision. Notably, the court’s plea offer did not require defendant to waive his right to appeal in exchange for the court’s sentencing commitment. Defendant stated that he understood the terms of the court’s offer, and the court set a deadline of two weeks for defendant to accept the offer or proceed to trial.

Two weeks later, defendant appeared for a plea proceeding, at the outset of which defense counsel notified the court that defendant wanted to accept the court’s offer. In response, the court once again stated the terms of its plea offer and sentenc-

ing commitment. At no time did the court state in its reiteration that its plea offer was conditioned on defendant's waiver of his right to appeal. Defendant responded that he accepted the court's offer, and the court immediately began conducting the plea colloquy, closely following the model language. During the plea colloquy, after having advised defendant of his *Boykin* rights (see *Boykin v Alabama*, 395 US 238, 243 [1969]), the court stated, without explanation, that the waiver of defendant's right to appeal was a condition of the court's plea agreement. The court then conducted the waiver of the right to appeal colloquy, closely following the model language, and, at one point, asked defendant if he was willing to waive his right to appeal "in exchange for the plea and sentence agreement," to which the defendant responded affirmatively. The court thereafter continued with the remainder of the plea colloquy, at the conclusion of which defendant was placed on interim probation and released on his own recognizance.

While "a defendant has a fundamental right to appellate review of a criminal conviction" (*People v Yavru-Sakuk*, 98 NY2d 56, 59 [2002]), including one rendered upon a plea of guilty (see NY Const, art VI, § 4 [k]; CPL 450.10 [1]; *Callahan*, 80 NY2d at 284), there is generally "no public policy precluding defendants from waiving their rights to appeal as a condition of the plea and sentence bargains" (*People v Seaberg*, 74 NY2d 1, 10 [1989]). A public policy concern arises, however, where, as here, a court proposes a plea agreement predicated upon the defendant's plea of guilty to unreduced charges on the basis of the defendant's understanding as to the court's anticipated sentence. In that circumstance, the consent of the People is not required because the charges remain as presented (see CPL 220.10 [2]) and the sentencing responsibility remains exclusively with the court, which has the obligation and discretion to impose sentence in light of the information obtained from the presentence report or other sources (see *People v Farrar*, 52 NY2d 302, 306 [1981]). Therefore, the People are not in a position to demand a waiver of the defendant's right to appeal, nor is such a waiver—or any other plea condition—necessary to secure the People's consent.

It follows, then, that a court's demand of an appeal waiver as a condition of such a plea agreement gives rise to the appearance that the court is seeking to shield its decisions from appellate review or otherwise act as an advocate for the People (see *United States v Gonzalez-Melchor*, 648 F3d 959, 964 [9th Cir 2011]) and has thereby "assum[ed] the function of an interested party and deviat[ed] from its own role as a neutral

arbitrator” (*People v Towns*, 33 NY3d 326, 333 [2019]; see *People v Sutton*, 184 AD3d 236, 242-244 [2d Dept 2020], *lv denied* 35 NY3d 1070 [2020]). Thus, pursuant to the long-standing principle that “[n]ot only must judges actually be neutral, they must appear so as well” (*People v Novak*, 30 NY3d 222, 226 [2017]), and consistent with our “responsibility to oversee the [plea] process and to review the record” (*Callahan*, 80 NY2d at 280; see *Thomas*, 34 NY3d at 559), where a waiver of the defendant’s right to appeal is a condition of a court-initiated plea agreement that does not require the People’s consent, the waiver is invalid and unenforceable unless it is apparent from the record that the court had a distinct and proper reason to demand the waiver and foreclose judicial review at the time the demand was made (see *Sutton*, 184 AD3d at 244-245). In applying that principle, we note that we have not adopted, and we do not now adopt, the requirement of *Sutton* that courts must “articulate a reason for requiring a[n appeal] waiver in a . . . plea proceeding” (*People v Figueroa*, 230 AD3d 1581, 1583 [4th Dept 2024], *lv denied* 42 NY3d 1079 [2025]; see *People v Williams*, 246 AD3d 1370, 1370 [4th Dept 2026]). Instead, we must look to the record as a whole to determine whether there is a distinct and proper reason for the court’s demand that a defendant waive their right to appeal. In our view, that review of the record is necessary to address our concern “that trial judges may encourage the use of appeal waivers in order to insulate their decisions from appellate review and thus avoid reversals” (*Sutton*, 184 AD3d at 242-243; see *Thomas*, 34 NY3d at 559).

Upon our review of the record here, including the court’s recitation of its plea offer after denying suppression and its subsequent reiteration of the offer at the outset of the plea proceeding, we conclude that it is not apparent that the court had a distinct and proper reason to demand the waiver of defendant’s right to appeal as a condition of the plea agreement when the demand was made here during the plea colloquy. Therefore, the waiver of the right to appeal is invalid.

With respect to the merits, defendant contends that the court failed to conduct a sufficient inquiry before determining that he violated the conditions of his interim probation and thereby abused its discretion and violated his statutory and due process rights in revoking his interim probation. While that contention would survive even a valid waiver of the right to appeal (see *People v Butler*, 151 AD3d 1959, 1959-1960 [4th Dept 2017], *lv denied* 30 NY3d 948 [2017]; *People v Rodas*, 131 AD3d 1181, 1181-1182 [2d Dept 2015], *lv denied* 26 NY3d 1111

[2016]; *People v Streeter*, 71 AD3d 1463, 1464 [4th Dept 2010], *lv denied* 14 NY3d 893 [2010]), we conclude that, even assuming, arguendo, that the contention is preserved for our review (see CPL 470.05 [2]; see generally *People v Albergotti*, 17 NY3d 748, 750 [2011]), it lacks merit.

The record establishes that, in accordance with the procedure set forth in CPL 400.10 (3), the court confirmed that defendant had been advised of “the factual contents of any report or memorandum [the court] ha[d] received” regarding the alleged violations of interim probation (*id.*), allowed defendant to respond to those allegations, and conducted a summary hearing that “was of sufficient depth to enable the court to determine that defendant failed to comply with the terms and conditions of his interim probation supervision” (*People v Rollins*, 50 AD3d 1535, 1536 [4th Dept 2008], *lv denied* 10 NY3d 939 [2008] [internal quotation marks omitted]; see *People v Wheeler*, 242 AD3d 1630, 1631-1632 [4th Dept 2025]; *People v Alsaaidi*, 173 AD3d 1836, 1837 [4th Dept 2019], *lv denied* 35 NY3d 940 [2020]). The summary hearing “was sufficient pursuant to CPL 400.10 (3) to enable the court to ‘assure itself that the information upon which it bas[ed] the sentence [was] reliable and accurate’” (*Rollins*, 50 AD3d at 1536, quoting *People v Outley*, 80 NY2d 702, 712 [1993]; see *People v McIntosh*, 213 AD3d 1266, 1267 [4th Dept 2023]; *People v Boje*, 194 AD3d 1367, 1368 [4th Dept 2021], *lv denied* 37 NY3d 970 [2021]). Indeed, upon conducting the summary hearing, the court possessed sufficient reliable and accurate information to support its conclusion that defendant violated the conditions of his interim probation by failing to adhere to his curfew and by failing to report to his probation officer as directed (see *People v Bolster*, 210 AD3d 1205, 1206-1207 [3d Dept 2022]; *People v Waite*, 119 AD3d 1086, 1087-1088 [3d Dept 2014]; see generally *McIntosh*, 213 AD3d at 1267; *People v Lynn*, 144 AD3d 1491, 1492-1493 [4th Dept 2016], *lv denied* 28 NY3d 1186 [2017]). Moreover, defendant did not dispute that he was aware of the conditions of his interim probation; rather, defendant acknowledged that he violated those conditions by failing to adhere to his curfew and failing to report to his probation officer as directed (see *People v Butler*, 151 AD3d 1959, 1960 [4th Dept 2017], *lv denied* 30 NY3d 948 [2017]; *Waite*, 119 AD3d at 1087-1088; see also *Wheeler*, 242 AD3d at 1632).

We reject defendant’s contention that the court, having resolved the threshold issue of youthful offender status eligibility in defendant’s favor (see CPL 720.10 [2], [3]), abused its discretion in refusing to grant him youthful offender status,

and we decline to grant his request that we exercise our interest of justice jurisdiction to adjudicate him a youthful offender (see *People v Lewis*, 128 AD3d 1400, 1400-1401 [4th Dept 2015], *lv denied* 25 NY3d 1203 [2015]).

Finally, defendant's sentence is not unduly harsh or severe. Present—Bannister, J.P., Montour, Smith, Nowak and Del-Conte, JJ.

8 The People of the State of New York, Respondent, v George Everson, Appellant. [— NYS3d —]—Appeal from a judgment of the Onondaga County Court (Matthew J. Doran, J.), rendered July 15, 2022. The judgment convicted defendant, upon his plea of guilty, of attempted murder in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting him, upon his plea of guilty, of attempted murder in the second degree (Penal Law §§ 110.00, 125.25 [1]). Defendant pleaded guilty mid-trial, after the People had presented the testimony of several witnesses.

Contrary to defendant's contention, we conclude that he validly waived his right to appeal (see *People v Johnson*, 229 AD3d 1300, 1301 [4th Dept 2024], *lv denied* 42 NY3d 1020 [2024]). Defendant's valid waiver of the right to appeal precludes our review of his contention that he was denied his statutory right to a speedy trial (see *People v Rouse*, 244 AD3d 1783, 1783 [4th Dept 2025]; *People v Kelly*, 231 AD3d 1515, 1516 [4th Dept 2024], *lv denied* 43 NY3d 931 [2025]; cf. *People v Banks*, 240 AD3d 1307, 1308 [4th Dept 2025]) as well as his challenge to the severity of the sentence (see *People v Lopez*, 6 NY3d 248, 255-256 [2006]).

Defendant contends that his guilty plea was not knowingly, intelligently, and voluntarily entered. Although defendant's challenge to the voluntariness of the plea survives the valid waiver of the right to appeal, it is not preserved for our review because defendant "did not move to withdraw the plea or to vacate the judgment of conviction" (*People v Lacey*, 225 AD3d 1276, 1276 [4th Dept 2024], *lv denied* 41 NY3d 1003 [2024]). Defendant's challenge does not fall within the narrow exception to the preservation requirement (see *People v Lopez*, 71 NY2d 662, 666 [1988]).

To the extent that defendant contends that he received inadequate notice of the grand jury proceedings, that contention was forfeited by his guilty plea (see *People v Vanvleet*, 126 AD3d 1359, 1360 [4th Dept 2015], *lv denied* 26 NY3d 1012 [2015]).

Further, defendant waived that contention inasmuch as he “did not move to dismiss the indictment on that ground within five days after he was arraigned” (*People v Crosby*, 215 AD3d 1225, 1226 [4th Dept 2023], *lv denied* 40 NY3d 933 [2023] [internal quotation marks omitted]; see CPL 190.50 [5] [c]; *People v Linder*, 170 AD3d 1555, 1557 [4th Dept 2019], *lv denied* 33 NY3d 1071 [2019]).

By pleading guilty, defendant forfeited his contention that County Court erred in denying his motion for a mistrial (see *People v Adams*, 201 AD3d 1311, 1312 [4th Dept 2022], *lv denied* 38 NY3d 1007 [2022]). To the extent that defendant’s contention that he was denied effective assistance of counsel survives his plea and valid waiver of the right to appeal, that contention involves matters outside the record on appeal and therefore must be raised by way of a motion pursuant to CPL article 440 (see *People v Rausch*, 126 AD3d 1535, 1535-1536 [4th Dept 2015], *lv denied* 26 NY3d 1149 [2016]). Defendant also contends that the court erred in failing to provide substitute counsel at sentencing. To the extent that defendant’s contention survives the plea and valid waiver of the right to appeal (see *People v Morris*, 94 AD3d 1450, 1451 [4th Dept 2012], *lv denied* 19 NY3d 976 [2012]), we conclude that it lacks merit inasmuch as defendant’s “nonspecific complaint [about] defense counsel [at sentencing] did not constitute a request for substitution of counsel and thus did not trigger the need for an inquiry into whether good cause existed for substitution” (*People v Matthews*, 142 AD3d 1354, 1355 [4th Dept 2016] [internal quotation marks omitted], *lv denied* 28 NY3d 1125 [2016]). Present—Bannister, J.P., Montour, Smith, Nowak and DelConte, JJ.

9 The People of the State of New York, Respondent, v James A. Moore, Appellant. (Appeal No. 1.) [— NYS3d —]

Crimes—Unlawful Search and Seizure—Incident to Arrest—Firearm in Vehicle

Crimes—Right to Counsel—Effective Representation—Adjournment of Trial for New Counsel to Prepare

Crimes—Right to Counsel—Effective Representation—Untimely Request to Dismiss Indictment—Prejudice

Appeal from a judgment of the Supreme Court, Monroe County (Alex R. Renzi, J.), rendered February 8, 2023. The judgment convicted defendant, upon his plea of guilty, of criminal possession of a weapon in the second degree.

It is hereby ordered that the judgment so appealed from is unanimously reversed on the law, the plea is vacated, that part of the motion dated February 7, 2022, seeking to suppress

physical evidence is granted, and count 4 of the indictment is dismissed.

Memorandum: Defendant appeals in appeal No. 1 from a judgment convicting him, upon a guilty plea, of criminal possession of a weapon in the second degree (§ 265.03 [3]). In appeal No. 2, he appeals from a judgment convicting him upon a jury verdict of three counts of sexual abuse in the first degree (Penal Law § 130.65 [4]) and one count of escape in the second degree (§ 205.10 [2]).

Initially, in appeal No. 1, we agree with defendant that Supreme Court (Renzi, J.) erred in refusing to suppress the handgun underlying his conviction and that the judgment must be reversed. Testimony at a suppression hearing reflected that, after receiving the allegations of sexual abuse underlying defendant's conviction in appeal No. 2, an investigator with the Rochester Police Department attended defendant's scheduled probation meeting in order to question defendant regarding the allegations. The investigator testified that defendant was not under arrest at the outset of the interview. At the conclusion of the interview, the investigator called a second officer into the room to assist him in transporting defendant to the Public Safety Building (PSB) for further questioning, to which defendant had agreed. When the second officer entered the room, he asked defendant to stand and immediately searched defendant's person, revealing, among other things, a key fob. Probation officers, who were present in the room and were aware that defendant did not have a valid driver's license, then took the key fob, exited the building, and began activating the fob while they walked around the surrounding area. Probation officers ultimately found a vehicle that was activated by the fob parked in a nearby parking garage. Upon searching the vehicle, a probation officer discovered a firearm.

At the suppression hearing, although the police investigator testified that he believed defendant was under arrest at the time of the search of his person, the investigator testified that he did not inform defendant that he was under arrest, nor was he the officer who actually arrested defendant. Instead, the investigator testified that the officer who had performed the search had arrested defendant. Although that officer was unavailable to testify at the hearing, his body camera footage was introduced. That footage reflected that, at the time of the search of his person, defendant asked the searching officer whether he was under arrest, and the searching officer responded that he was not under arrest and was merely being detained and brought to the PSB for a continued investigation.

Even assuming, arguendo, that either the investigator or the searching officer *could have* arrested defendant prior to or contemporaneously with the search of his person, we note that “[a] search must be incident to an actual arrest, not just to probable cause that might have led to an arrest, but did not” (*People v Reid*, 24 NY3d 615, 619 [2014]). A lawful search incident to arrest “requires proof that, at the time of the search, an arrest has already occurred or is about to occur” (*id.* at 620). The search must be “substantially contemporaneous” to an actual arrest “so as to constitute one event” (*People v White*, 228 AD3d 1317, 1318 [4th Dept 2024], *lv denied* 42 NY3d 972 [2024] [internal quotation marks omitted]; see *People v Lamberty*, 233 AD3d 627, 627 [1st Dept 2024]). Under the circumstances of this case, we conclude that there was no actual arrest of defendant justifying the search, inasmuch as the only officer who was purported to have actually placed defendant under arrest prior to or contemporaneously with the search explicitly informed defendant that he was not under arrest at that time (see *People v Huggins*, 187 AD3d 484, 484 [1st Dept 2020], *lv denied* 36 NY3d 973 [2020]). The court upheld the search as a lawful search incident to an arrest, and thus we are precluded from affirming on any alternative basis (see *White*, 228 AD3d at 1318, citing, inter alia, *People v Concepcion*, 17 NY3d 192, 197-198 [2011]).

We further conclude that the “discovery of the [weapon] in the vehicle was the direct result of, and not entirely free and distinct from, the . . . unlawful search of defendant and seizure of the key[fob],” and thus that the court erred in refusing to suppress the handgun (*People v Smith*, 202 AD3d 1492, 1495 [4th Dept 2022]). Inasmuch as our determination results in the suppression of all evidence supporting the crime charged in count 4 of the indictment, that count must be dismissed (see *id.* at 1497; *People v Lopez*, 149 AD3d 1545, 1548 [4th Dept 2017]).

In light of our determination, we do not address defendant’s remaining contentions with respect to appeal No. 1.

In appeal No. 2, defendant contends that the court (Renzi, J.) denied him his right to hire counsel of his choosing and denied him a reasonable opportunity to find new counsel prior to trial. Contrary to defendant’s contention, however, the record reflects that the court did not deny defendant the opportunity to find new counsel; rather, the court invited defendant to retain a new attorney but, the following week, defendant indicated that he had opted not to seek new counsel because, in his view, any newly retained attorney would not have had

sufficient time to prepare for the upcoming trial. To the extent defendant contends that the court should have granted an adjournment of trial to have permitted sufficient time for a new attorney to become familiar with his case, we conclude, even assuming, arguendo, that defendant preserved that contention, that he failed to demonstrate that any requested adjournment was necessitated by factors outside of his control, and that the court did not abuse its discretion in refusing to adjourn the trial (*see People v DeValle*, 194 AD3d 1411, 1412 [4th Dept 2021], *lv denied* 37 NY3d 964 [2021]; *see generally People v Burney*, 204 AD3d 1473, 1476 [4th Dept 2022]).

Contrary to defendant's further contention in appeal No. 2, he was not deprived of a fair trial due to certain allegedly improper remarks made by the prosecutor during opening statements and on summation. Initially, we note that defendant preserved his contention for our review only with respect to one of the allegedly improper remarks (*see* CPL 470.05 [2]). In any event, we conclude with respect to both the preserved and unpreserved challenges that the remarks were either fair comment on the evidence and the reasonable inferences to be drawn therefrom or responsive to defense counsel's summation, or otherwise did not deprive defendant of a fair trial (*see People v Hawley*, 112 AD3d 968, 969 [2d Dept 2013], *lv denied* 23 NY3d 963 [2014]; *see generally People v King*, 224 AD3d 1313, 1314 [4th Dept 2024], *lv denied* 41 NY3d 1019 [2024]).

Defendant further contends in appeal No. 2 that he received ineffective assistance of counsel because defense counsel filed a motion in which he made an untimely request to dismiss the indictment pursuant to CPL 30.30. We reject that contention. Although defendant contends that defense counsel's error rendered the motion insofar as it concerned that request subject to dismissal, the court (Walsh, Jr., J.) heard argument on the merits of the motion from both defense counsel and the People and denied the motion with respect to the CPL 30.30 request on the merits without regard to its timeliness. Thus, insofar as defendant asserts that defense counsel's error in filing an untimely motion precluded the trial court's review of the motion, under the circumstances here, "defendant has not shown prejudice under the state or federal standards" (*People v McCray*, 165 AD3d 595, 596 [1st Dept 2018], *lv denied* 32 NY3d 1175 [2019]; *see generally People v Jackson*, 140 AD3d 1771, 1771-1772 [4th Dept 2016], *lv denied* 28 NY3d 931 [2016]). We note that, under the New York standard, prejudice is "a significant but not indispensable element in assessing meaningful representation" (*People v Caban*, 5 NY3d 143, 155-156 [2005]).

[internal quotation marks omitted]) and our focus is instead upon “the fairness of the proceedings as a whole” (*People v Stultz*, 2 NY3d 277, 284 [2004], *rearg denied* 3 NY3d 702 [2004]; *see People v Watkins*, 42 NY3d 635, 639-640 [2024]). Here, however, defendant obtained the very review on the merits that he claimed was foreclosed by defense counsel’s allegedly ineffective performance, and thus defendant has failed to show either prejudice or that he “was deprived of fair process” under the New York standard (*Watkins*, 42 NY3d at 640). In any event, had defendant shown some other basis for prejudice, defendant’s claim of ineffective assistance would nevertheless rely, in part, on matters outside of the record insofar as the record does not establish the motion’s likelihood of success (*see generally People v Heverly*, 230 AD3d 1534, 1534-1535 [4th Dept 2024], *lv denied* 42 NY3d 1053 [2024]), and such claim would thus have to be raised by motion pursuant to CPL 440.10 (*see generally People v Wilson* [appeal No. 2], 162 AD3d 1591, 1592 [4th Dept 2018]). Although defendant in his post-argument submission notes that this Court previously denied his motion seeking leave to appeal from the denial of his prior CPL 440.10 motion, that motion suffered from the same defect as the ineffective assistance of counsel contention articulated on the present appeal, i.e., the lack of a showing of prejudice or that he was “deprived of fair process” under the New York standard (*Watkins*, 42 NY3d at 640). Nothing in this memorandum would preclude defendant, however, from filing a successive CPL article 440 motion (*see generally* CPL 440.10 [3] [c]).

Contrary to defendant’s related contention in appeal No. 2, we conclude that defendant did not receive ineffective assistance of counsel at trial based on other alleged deficiencies. As discussed above, defendant was not deprived of a fair trial by the prosecutor’s allegedly improper remarks during opening statements and summation, and we therefore conclude that “defense counsel’s failure to object to the alleged instances of prosecutorial misconduct did not constitute ineffective assistance of counsel” (*People v Fick*, 167 AD3d 1484, 1486 [4th Dept 2018], *lv denied* 33 NY3d 948 [2019] [internal quotation marks omitted]). Additionally, defense counsel was not ineffective for failing to prevent the jury from hearing that defendant invoked his right to counsel inasmuch as the record reflects that defendant, in fact, did not do so. Although defendant contends that defense counsel was ineffective for failing to request a limiting instruction with respect to certain testimony at trial, for delivering his closing argument prior to a conference regarding the jury charge, and for failing to challenge a prospective juror during jury selection, defendant failed to

“demonstrate the absence of strategic or other legitimate explanations” for defense counsel’s decisions (*People v Maffei*, 35 NY3d 264, 269 [2020]; *see generally People v Piasta*, 207 AD3d 1054, 1055 [4th Dept 2022], *lv denied* 38 NY3d 1190 [2022]). Lastly, although defendant contends that defense counsel was ineffective for failing to call an expert to address the victim’s medical records at trial, defendant failed to establish that “opposing expert testimony was available, that it would have assisted [the factfinder] in its determination or that he was prejudiced by its absence” (*People v McKnight*, 236 AD3d 1483, 1483 [4th Dept 2025], *lv denied* 43 NY3d 1010 [2025]). Present—Bannister, J.P., Montour, Smith, Nowak and DelConte, JJ.

10 The People of the State of New York, Respondent, v James A. Moore, Appellant. (Appeal No. 2.) [253 NYS3d 454]—Appeal from a judgment of the Supreme Court, Monroe County (James E. Walsh, Jr., J.), rendered June 3, 2022. The judgment convicted defendant, upon a jury verdict, of sexual abuse in the first degree (three counts) and escape in the second degree.

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

Same memorandum as in *People v Moore* ([appeal No. 1] 248 AD3d 1675 [4th Dept 2026]). Present—Bannister, J.P., Montour, Smith, Nowak and DelConte, JJ.

11 In the Matter of New York State Police, Appellant, v Mathew J. Galliher, Respondent. [— NYS3d —]—

Mental Health—Extreme Risk Protection Orders—Substantial Risk of Physical Harm

Appeal from an order of the Supreme Court, Oneida County (Peter M. Rayhill, J.), entered February 25, 2025, in a proceeding pursuant to CPLR article 63-A. The order denied the petition for an extreme risk protection order.

It is hereby ordered that the order so appealed from is unanimously reversed on the law without costs, the application is reinstated, the application insofar as it seeks the issuance of a final extreme risk protection order is granted, and the matter is remitted to Supreme Court, Oneida County, for further proceedings in accordance with the following memorandum: In this proceeding pursuant to the Extreme Risk Protection Act (*see* CPLR art 63-A), petitioner appeals from an order that, after a hearing, denied a final extreme risk protection order (ERPO) against respondent. We reverse.

Respondent and several other Department of Corrections

and Community Supervision (DOCCS) correction officers participated in the gang assault of a restrained incarcerated individual (victim). Respondent and the other correction officers failed to activate their body-worn cameras during the assault in violation of DOCCS policy, but the Office of Special Investigations was able to retrieve “recall video” that depicted the assault without audio. The victim ultimately died as a result of the injuries he sustained.

Shortly thereafter, petitioner filed the instant application seeking a temporary and final ERPO based upon respondent’s involvement in the victim’s death. On the same day that the application was filed, Supreme Court denied the temporary ERPO and scheduled a final ERPO hearing. At the hearing, the court heard testimony from a DOCCS investigator tasked with investigating misconduct within correctional facilities across the State and received the recall body-worn camera footage as exhibits. Respondent invoked his Fifth Amendment right against self-incrimination beginning with the first question, and continued to invoke that right on each question thereafter.

Following the hearing, the court issued a written decision and order in which it concluded that, “[a]s troubling as the evidence provided is, it does not demonstrate that [r]espondent is *likely* to engage in conduct that would result in serious harm to himself or others.” The court thus denied the final ERPO.

At the outset, we note that respondent was criminally charged for his role in the victim’s death, but was ultimately acquitted of all charges against him. Inasmuch as respondent was acquitted and is thus not prohibited as a result of that prosecution from possessing any firearms, rifles, or shotguns (*see* Penal Law § 400.00 [1] [c]), this appeal is not moot (*cf. Matter of New York State Police v Kingsley*, 247 AD3d 1520, 1520 [4th Dept 2026]).

On the merits, we agree with petitioner that the court erred as a matter of law in refusing to issue a final ERPO. At a hearing to determine whether a final ERPO should be issued, “the petitioner shall have the burden of proving, by clear and convincing evidence, that the respondent is likely to engage in conduct that would result in serious harm to himself . . . or others, as defined in paragraph one or two of subdivision (a) of section 9.39 of the mental hygiene law” (CPLR 6343 [2]). Pursuant to Mental Hygiene Law § 9.39 (a), “[l]ikelihood to result in serious harm’ . . . shall mean,” as relevant here, “a substantial risk of physical harm to other persons as manifested by homicidal or other violent behavior by which others are placed in reasonable fear of serious physical harm” (§ 9.39 [a] [2]).

In determining whether the petitioner has met their burden, “[t]he court may consider,” *inter alia*, “any evidence submitted by the petitioner, any evidence submitted by the respondent, [and] any testimony presented” (CPLR 6343 [2]), and “*shall* also consider the [eight] factors set forth in [CPLR 6342 (2) with respect to whether to issue a temporary ERPO]” (*id.* [emphasis added]). While those factors are non-exhaustive, the first factor is a prior “threat or act of violence or use of physical force directed toward self, the petitioner, or another person” (CPLR 6342 [2] [a]).

Here, at the outset of the hearing, the court recited the appropriate standard set forth in CPLR 6343 (2) and Mental Hygiene Law § 9.39 (a) (2), and expressly concluded following the hearing that the evidence established that respondent “participated with others in an act of violence against a New York State DOCCS inmate in restraints that caused serious physical harm and, ultimately, death to that individual.” Nonetheless, the court held that respondent was not “likely” to engage in conduct that would result in serious harm to himself or others, relying upon the Merriam-Webster Dictionary’s definition of “likely,” rather than the express statutory definition in Mental Hygiene Law § 9.39 (a) (2) as incorporated into the statutory scheme. That was error.

As set forth above, the burden was on petitioner under the circumstances here to establish, by clear and convincing evidence, that respondent posed “a substantial risk of physical harm to other persons as manifested by homicidal or other violent behavior by which others are placed in reasonable fear of serious physical harm” (Mental Hygiene Law § 9.39 [a] [2]; *see* CPLR 6343 [2]). Petitioner met that burden by establishing that respondent actively participated in the assault of a restrained incarcerated individual by grabbing the victim by the chest and holding him down while other officers kicked the victim in the abdomen and groin (*see* CPLR 6342 [2] [a]). Indeed, that conduct is particularly egregious in this case because “DOCCS regulations require correction officers to exercise ‘[t]he greatest caution and conservative judgment’ in determining whether physical force against an inmate is necessary” (*Rivera v State of New York*, 34 NY3d 383, 391 [2019], quoting 7 NYCRR 251-1.2 [a]), inasmuch as “[c]orrection officers are tasked with the formidable and critical responsibility of protecting the safety of inmates and coworkers while maintaining order in correctional facilities” (*id.* at 385). Respondent adduced no evidence to the contrary at the hearing.

To the extent that the court appears to have implicitly

concluded that it is inappropriate to issue an ERPO based upon past acts of violence as opposed to threats of future violence, we note that CPLR article 63-A does not require either an explicit threat or expert testimony to predict a respondent's future conduct (*see* CPLR 6342 [2]; *Matter of R.M. v C.M.*, 226 AD3d 153, 162 [2d Dept 2024]). To the contrary, each of the eight factors that the court "shall" consider in determining whether to issue a final ERPO (CPLR 6343 [2]) is based upon past conduct (*see* CPLR 6342 [2]). Likewise, the court's tacit conclusion that an ERPO should not be issued where the parties have other civil or criminal remedies is similarly without merit. Although a respondent may ultimately face criminal charges for their conduct, the mere prospect of criminal charges does not preclude the issuance of an ERPO. If that were the case, no ERPO could ever be issued against a perpetrator of domestic abuse who owned firearms, because the perpetrator could be prosecuted criminally. That is simply not the law in New York (*see Matter of Orangetown Police Dept. v Cashell*, 238 AD3d 1152, 1154-1155 [2d Dept 2025]; *see generally R.M.*, 226 AD3d at 163).

We therefore reverse the order, reinstate the application, grant the application insofar as it seeks the issuance of a final ERPO, and remit the matter to Supreme Court for further proceedings pursuant to CPLR 6343 (3). Present—Bannister, J.P., Montour, Smith, Nowak and DelConte, JJ.

12 The People of the State of New York, Respondent, v Tahnisha Joyner-Pounds, Appellant. [— NYS3d —]

Motor Vehicles—Operating Vehicle while Under Influence of Alcohol or Drugs—Children in Vehicle—Sufficiency and Weight of Evidence

Appeal from a judgment of the Supreme Court, Monroe County (Alex R. Renzi, J.), rendered February 15, 2023. The judgment convicted defendant upon a jury verdict of aggravated driving while intoxicated (three counts) and driving while intoxicated.

It is hereby ordered that the case is held, decision is reserved, and the matter is remitted to Supreme Court, Monroe County, for further proceedings in accordance with the following memorandum: Defendant appeals from a judgment convicting her upon a jury verdict of three counts of aggravated driving while intoxicated (Vehicle and Traffic Law § 1192 [2-a] [b]) and one count of driving while intoxicated (§ 1192 [3]), arising from an incident that took place while she was driving with three children present in the vehicle.

Defendant failed to preserve for our review her contention

that the indictment was facially duplicitous (*see People v Be-coats*, 17 NY3d 643, 650 [2011], *cert denied* 566 US 964 [2012]), and we decline to exercise our power to review that contention as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]).

Defendant further contends that the evidence is legally insufficient to establish that the children in her vehicle were 15 years of age or less, as required for the charges of aggravated driving while intoxicated (*see* Vehicle and Traffic Law § 1192 [2-a] [b]). Following the close of the People's proof, defendant did not challenge the sufficiency of the evidence as it related to the ages of the two eldest children, whose birth certificates were admitted in evidence. As a result, defendant's contention is preserved for our review only with respect to the age of the youngest child, who was an infant (*see People v Tomion*, 174 AD3d 1495, 1496 [4th Dept 2019], *lv denied* 34 NY3d 1019 [2019]; *see generally People v Gray*, 86 NY2d 10, 19 [1995]). In any event, "[v]iewing the evidence in the light most favorable to the People, and giving them the benefit of every reasonable inference" (*People v Bay*, 67 NY2d 787, 788 [1986]), we conclude that there is a valid line of reasoning and permissible inferences that could lead rational persons to conclude that all three children in defendant's vehicle were 15 years of age or younger (*see People v Bleakley*, 69 NY2d 490, 495 [1987]).

Defendant next contends that the verdict is against the weight of the evidence because the People failed to prove beyond a reasonable doubt that she operated her vehicle in an intoxicated condition. The evidence at trial established that a police officer stopped defendant's vehicle after determining that it matched the description of a vehicle that had been reported for reckless driving. Upon observing defendant's vehicle, the officer noticed that, consistent with the vehicle in the reckless driving report, the vehicle's front bumper was partially detached and was scraping the road. After stopping the vehicle, the officer observed that defendant, its driver, had slurred speech and bloodshot eyes. The officer also noticed a strong odor of alcohol emanating from the vehicle. When a second responding officer asked defendant if she had had anything to drink, defendant answered, "Not enough."

Defendant refused the officers' requests to exit the vehicle and also refused to perform any field sobriety tests. According to the officers, defendant could barely stand and had to be supported while she walked to the police car. While detained in the back of the police car, defendant alternated between crying and yelling hysterically. Due to the level of her perceived

intoxication, defendant was taken to the hospital, and she later refused to submit to a chemical test. Defendant did not testify at trial and offered no evidence.

Viewing the evidence in light of the elements of the crimes as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349 [2007]), we reject defendant's contention that the verdict is against the weight of the evidence with respect to the issue of intoxication (*see generally Bleakley*, 69 NY2d at 495). Even assuming, arguendo, that a different verdict would not have been unreasonable, we cannot conclude that the jury "failed to give the evidence the weight it should be accorded" (*id.*; *see People v McPherson*, 213 AD3d 1261, 1263 [4th Dept 2023], *lv denied* 39 NY3d 1112 [2023]).

Finally, defendant contends that Supreme Court erred in denying her motion seeking to dismiss the indictment pursuant to CPL 30.30 on the ground that the People failed to comply with their discovery obligations under CPL 245.20, thereby rendering any certificate of compliance invalid and any statement of readiness illusory. The court improperly denied the speedy trial motion on the ground that defendant would not be prejudiced by the belated discovery of the evidence in question (*see People v Bay*, 41 NY3d 200, 213 [2023]; *People v Young*, 243 AD3d 1303, 1307 [4th Dept 2025]). Moreover, the court rendered its decision before the People had an opportunity to respond to the motion, which was filed on the eve of trial, telling the prosecutor that it did not want to hear from him in opposition to the motion.

We therefore hold the case, reserve decision, and remit the matter to Supreme Court to afford the People an opportunity to file a response to the motion and then to determine the motion (*see People v Rojas-Aponte*, 224 AD3d 1264, 1266 [4th Dept 2024]; *see generally People v Brinson*, 246 AD3d 1435, 1436-1437 [4th Dept 2026]). Present—Whalen, P.J., Lindley, Curran, Smith and DelConte, JJ.

13 The People of the State of New York, Respondent, v Gary N. Maull, Appellant. [— NYS3d —]

Crimes—Right to Counsel—Right to Private Communication

Crimes—Vacatur of Judgment of Conviction—Eavesdropping by Law Enforcement on Defendant's Phone Calls with Attorney

Appeal, by permission of a Justice of the Appellate Division of the Supreme Court in the Fourth Judicial Department, from an order of the Cattaraugus County Court (Ronald D. Ploetz, J.), dated May 24, 2024. The order denied the motion of defendant to vacate a judgment of conviction pursuant to CPL 440.10.

It is hereby ordered that the order so appealed from is unanimously affirmed.

Memorandum: Defendant appeals by permission of this Court from an order denying, after a hearing, his motion pursuant to CPL 440.10 seeking to vacate a judgment convicting him upon a jury verdict of, *inter alia*, murder in the second degree (Penal Law § 125.25 [1]), arising from an incident in which the victim was killed by a single gunshot to the head (murder case). We affirm.

The shooting took place in August 2014. DNA evidence recovered from the crime scene was linked to defendant and the codefendant, Thomas Hall (Turtle). The People's theory of the victim's death was that defendant shot and killed the victim in retribution for the victim having purportedly informed on defendant. At the time of the killing, defendant already faced charges in connection with a June 2013 burglary and assault (2013 case). After the victim's death, but before defendant was indicted for killing the victim, he was arrested for bail jumping in connection with the 2013 case.

While defendant was being held at the Cattaraugus County Jail on the bail jumping charges, he spoke by phone with the attorney representing him in the 2013 case. Pursuant to a jail policy that recorded all outgoing phone conversations, several phone conversations between defendant and the attorney were recorded and were subsequently listened to by the Cattaraugus County Sheriff's Office, including by the detective who was the lead investigator in the murder case and who later testified at defendant's trial. As relevant here, the detective prepared notes memorializing the contents of three calls between defendant and the attorney, which occurred on September 29, October 7, and October 16, 2014. The detective's written notes of the three calls listed the phone number of the person to whom the calls were made and identified that person as defendant's attorney. During those phone calls, defendant and his attorney seemingly discussed the murder case. Relevantly, there were instances during the calls in which defendant and the attorney discussed Turtle and his involvement in the murder case. By the time the first call occurred, Turtle and another individual had already provided law enforcement with statements implicating defendant in the murder case. Both Turtle and the other individual testified at trial.

Defendant was indicted in the murder case some time after law enforcement listened to the phone calls. At sentencing following his conviction, defendant informed County Court that law enforcement had listened to the recorded phone calls with

his attorney in the 2013 case. Defendant's trial counsel in the murder case had received the detective's notes memorializing the phone calls as *Rosario* material. Trial counsel stated at sentencing that, because of the homicide investigation, "[t]here may have been a reason [for law enforcement] to listen to those calls," and explained that he chose not to use the issue of law enforcement's actions in listening to phone calls as part of the defense because he "didn't think it was relevant" to the murder case. In response, the prosecutor stated that law enforcement is "not even able to access legal phone calls, none of us are . . . We can't [access those calls] under the software." The court took no action with respect to defendant's allegations.

On direct appeal, we modified the judgment with respect to the sentence imposed and otherwise affirmed the judgment. As relevant here, we concluded that "[t]he record [was] insufficient to establish that defendant's trial was affected by an alleged violation of defendant's right to counsel on the ground that law enforcement officers listened to at least three phone calls between defendant and [his attorney], or that [trial] counsel was ineffective for failing to seek a hearing on that matter" (*People v Maull*, 167 AD3d 1465, 1468 [4th Dept 2018], *lv denied* 33 NY3d 951 [2019]). We characterized the allegations that law enforcement had listened to defendant's phone calls with the attorney as "alarming" but nonetheless noted that "the appropriate vehicle for challenging that conduct is a CPL 440.10 motion inasmuch as defendant's contention[s] concern[] matters outside the record on appeal" (*id.*).

Defendant thereafter moved—both pro se and, subsequently, through counsel—to vacate the judgment pursuant to CPL 440.10 on the grounds that, inter alia, he was deprived of his right to counsel by law enforcement's actions in listening to the recorded conversations with the attorney and that trial counsel was ineffective in failing to take action after learning about law enforcement's conduct. The court summarily denied defendant's motion, and on appeal we reversed that order and remitted the matter for a fact-finding hearing pursuant to CPL 440.30 (5), concluding that the court abused its discretion in summarily denying the motion inasmuch as "ample evidence establish[ed] that a factfinding hearing [was] necessary to determine whether law enforcement's [conduct in listening to the three phone calls] violated defendant's right to counsel" (*People v Maull*, 218 AD3d 1236, 1240 [4th Dept 2023]), and "whether trial counsel was ineffective in failing to take any steps in response to learning about" law enforcement's conduct (*id.* at 1242). Pursuant to our remittal directive, the court

conducted a full fact-finding hearing on the CPL 440.10 motion, and it thereafter denied the motion, prompting this appeal.

Defendant contends that the court erred in denying his motion insofar as it sought to vacate the judgment on the ground that law enforcement's conduct in listening to his phone conversations violated his right to counsel. We reject that contention. "[T]he fundamental right to counsel in a criminal case includes 'the right to consult counsel in private, without fear or danger that the People, in a criminal prosecution, will have access to what has been said'" (*People v Gamble*, 18 NY3d 386, 396 [2012], *rearg denied* 19 NY3d 833 [2012], quoting *People v Cooper*, 307 NY 253, 259 [1954]; see *Maull*, 218 AD3d at 1240). To that end, the courts "have often condemned, without reservation, any intrusion into private communications between counsel and client" (*People v Poblner*, 32 NY2d 356, 369 n 2 [1973], *rearg denied* 33 NY2d 657 [1973], *cert denied* 416 US 905 [1974]; see *Glasser v United States*, 315 US 60, 76 [1942]; *Matter of Fusco v Moses*, 304 NY 424, 433 [1952]). The right to counsel, "based as it is on a fundamental principle of justice, must be protected by the trial judge" (*People v McLaughlin*, 291 NY 480, 482 [1944]; see *People v Hollmond*, 191 AD3d 120, 138 [2d Dept 2020]). Nonetheless, a court is not automatically required to grant a CPL article 440 motion and vacate the judgment of conviction where the court concludes that there has been an intrusion on a defendant's right to private consultation with defense counsel. To warrant vacatur of the judgment, the court must determine "whether the People's evidence on defendant's trial was 'tainted' " by the improper intrusion (*People v Morhouse*, 21 NY2d 66, 77 [1967]; see also *Poblner*, 32 NY2d at 369; see generally *Weatherford v Bursey*, 429 US 545, 552 [1977]).

Here, there is no dispute that law enforcement listened to recordings of three of defendant's phone calls with the attorney who represented him in the 2013 case. There also is no dispute that, during those phone conversations, defendant and the attorney discussed certain aspects of the murder case at a time when defendant was already a suspect in that investigation. That conduct clearly constituted an intrusion on defendant's right to private communication with counsel. Indeed, having listened to the recordings of the phone calls, we note that, contrary to the testimony of the lead investigator at the fact-finding hearing, it is readily apparent from the beginning of the first phone call that defendant was speaking to an attorney. We adhere to our prior characterization of law enforcement's

conduct in listening to defendant's conversations with the attorney as "alarming" (*Maull*, 218 AD3d at 1241; *see Maull*, 167 AD3d at 1468). We also note that, at oral argument, the People correctly conceded that it was improper for law enforcement to listen to those conversations.

Nevertheless, as we previously stated, "the operative question for purposes of defendant's entitlement to vacatur of the judgment of conviction is whether [law enforcement's listening to the recordings of] defendant's conversations with his attorney 'tainted' the People's evidence at trial" (*Maull*, 218 AD3d at 1241; *see Poblner*, 32 NY2d at 369; *Morhouse* 21 NY2d at 77). Despite the impropriety of law enforcements' behavior here, we conclude that the evidence at the fact-finding hearing supports the conclusion that the intrusion on defendant's right to private communication with the attorney did not taint the murder investigation or prosecution in this case (*see Weatherford*, 429 US at 558). The evidence established that, by the time of the recorded phone calls, law enforcement had already identified defendant as a prime suspect in the victim's death; indeed, two separate individuals (one of whom was Turtle) had already accused defendant of the killing. The evidence at the hearing thus established that the phone calls were not a significant factor causing law enforcement to focus on defendant as a suspect. Moreover, there was no evidence that, as a result of listening to the phone calls, law enforcement developed a new theory of the murder case or obtained any new leads or avenues of investigation. Further, to the extent defendant suggests that Turtle agreed to testify on the People's behalf only *after* he was provided with a copy of the lead investigator's notes summarizing the phone calls, we note that Turtle's testimony at trial somewhat contradicted his prior statements to law enforcement implicating defendant; indeed, his trial testimony cast doubt on whether defendant was the only person who could have killed the victim. Based on the record developed at the fact-finding hearing, we conclude that defendant's right to counsel was not violated by law enforcement's actions here and that the court thus did not err in denying defendant's motion insofar as it sought to vacate the judgment on that ground (*see generally Poblner*, 32 NY2d at 369; *Morhouse*, 21 NY2d at 77).

In light of our conclusion that defendant's right to counsel was not violated when law enforcement listened to the recorded phone calls between him and the attorney, we further conclude that trial counsel was not ineffective in failing to take action when he learned about the recorded calls inasmuch as "[t]here can be no denial of effective assistance of trial counsel

arising from counsel's failure to make a motion or argument that has little or no chance of success" (*People v Caban*, 5 NY3d 143, 152 [2005] [internal quotation marks omitted]; see *People v Perkins*, 160 AD3d 1455, 1457 [4th Dept 2018], *lv denied* 31 NY3d 1151 [2018]). In addition, to the extent that the record establishes that trial counsel did not diligently review the materials that revealed law enforcement's improper conduct and to the extent that trial counsel arguably took a position adverse to defendant at sentencing, those isolated errors were not "sufficiently egregious and prejudicial as to deprive . . . defendant of [the] constitutional right to effective legal representation" (*People v Hayward*, 42 NY3d 753, 755 [2024] [internal quotation marks omitted]). Thus, we reject defendant's contention that the court erred in denying his motion insofar as it sought vacatur of the judgment on the ground that he was denied effective assistance of counsel.

We have considered defendant's remaining contention and conclude that it does not warrant reversal or modification of the order. Present—Whalen, P.J., Lindley, Curran, Smith and DelConte, JJ.

14 The People of the State of New York, Respondent, v Philip Owens, Appellant. (Appeal No. 1.) [— NYS3d —]

Crimes—Right to Representation Pro Se—Pro Se Motions
Crimes—Sentence—Right to be Present at Resentencing

Appeal from a judgment of the Supreme Court, Monroe County (Alex R. Renzi, J.), rendered February 8, 2023. The judgment convicted defendant upon a plea of guilty of criminal possession of a weapon in the second degree.

It is hereby ordered that said appeal from the judgment insofar as it imposed sentence is unanimously dismissed, the judgment is modified as a matter of discretion in the interest of justice and on the law by vacating the order of protection, and as modified the judgment is affirmed.

Memorandum: In appeal No. 1, defendant appeals from a judgment convicting him upon his plea of guilty of criminal possession of a weapon in the second degree (Penal Law § 265.03 [3]) and, in appeal No. 2, defendant appeals from a resentence on that conviction.

We note at the outset that, inasmuch as the sentence in appeal No. 1 was superseded by the resentence in appeal No. 2, the appeal from the judgment in appeal No. 1 insofar as it imposed sentence must be dismissed (see *People v Weathington* [appeal No. 2], 141 AD3d 1173, 1173 [4th Dept 2016], *lv denied* 28 NY3d 975 [2016]; *People v Primm*, 57 AD3d 1525, 1525 [4th Dept 2008], *lv denied* 12 NY3d 820 [2009]).

Defendant contends in appeal No. 1 that Supreme Court had no authority to issue an order of protection in favor of an individual who was neither a victim of nor a witness to the crime to which defendant pleaded guilty (*see* CPL 530.13 [4] [a]; *People v Campbell*, 231 AD3d 1168, 1169 [2d Dept 2024], *lv denied* 42 NY3d 1052 [2024]; *People v Farrell*, 201 AD3d 1367, 1368 [4th Dept 2022]). Although defendant failed to preserve that contention for our review inasmuch as he did not object to the order of protection on that ground when it was issued (*see People v Shampine*, 31 AD3d 1163, 1164 [4th Dept 2006]), we nevertheless exercise our power to review it as a matter of discretion in the interest of justice (*see* CPL 470.15 [3] [c]; *People v Raduns*, 70 AD3d 1355, 1355 [4th Dept 2010], *lv denied* 14 NY3d 891 [2010], *denied reconsideration* 15 NY3d 808 [2010]). We agree with defendant that the order of protection is invalid (*see Raduns*, 70 AD3d at 1355; *People v Creighton*, 298 AD2d 774, 776 [3d Dept 2002], *lv denied* 99 NY2d 613 [2003]), and we therefore modify the judgment in appeal No. 1 by vacating the order of protection (*see Raduns*, 70 AD3d at 1355).

We reject defendant's further contention that the court erred in refusing to entertain his pro se motion to withdraw his plea. Where, as here, a defendant is represented by defense counsel in a proceeding, "the decision to entertain [pro se] motions [filed by a represented defendant] lies within the sound discretion of the trial court" inasmuch as "a criminal defendant is not entitled to hybrid representation" (*People v Johnson*, 195 AD3d 1420, 1420-1421 [4th Dept 2021], *lv denied* 37 NY3d 1146 [2021] [internal quotation marks omitted]; *see People v Rodriguez*, 95 NY2d 497, 500 [2000]; *People v Fowler*, 136 AD3d 1395, 1395 [4th Dept 2016], *lv denied* 27 NY3d 996 [2016], *denied reconsideration* 27 NY3d 1132 [2016]). Here, we conclude that the court did not abuse its discretion in declining to hear defendant's pro se motion to withdraw his plea (*see Johnson*, 195 AD3d at 1421; *Fowler*, 136 AD3d at 1395).

In appeal No. 2, defendant contends, and the People correctly concede, that the court erred in resentencing defendant in absentia. A defendant has a right to be personally present at the time sentence is pronounced, including at resentencing (*see* CPL 380.40; *People v Estremera*, 30 NY3d 268, 271-273 [2017]; *People v Diefenbacher*, 21 AD3d 1293, 1295 [4th Dept 2005], *lv denied* 6 NY3d 775 [2006]). We therefore reverse the sentence, and we remit the matter to Supreme Court for further resentencing, at which time defendant must be afforded the opportunity to appear with counsel (*see Diefenbacher*, 21 AD3d at 1295).

We have considered defendant's remaining contentions in each appeal and conclude that they are without merit. Present—Whalen, P.J., Lindley, Curran, Smith and DelConte, JJ.

15 The People of the State of New York, Respondent, v Philip Owens, Appellant. (Appeal No.) [253 NYS3d 458]—Appeal from a resentence of the Supreme Court, Monroe County (Alex R. Renzi, J.), rendered June 14, 2023. Defendant was resentenced upon his conviction of criminal possession of a weapon in the second degree.

It is hereby ordered that the resentence so appealed from is unanimously reversed on the law and the matter is remitted to Supreme Court, Monroe County, for resentencing.

Same memorandum as in *People v Owens* ([appeal No. 1] 248 AD3d 1690 [4th Dept 2026]). Present—Whalen, P.J., Lindley, Curran, Smith and DelConte, JJ.

16 The People of the State of New York, Respondent, v Carol Steinagle, Appellant. [253 NYS3d 457]—Appeal from a judgment of the Supreme Court, Erie County (Deborah A. Haendiges, J.), rendered June 25, 2024. The judgment convicted defendant upon her plea of guilty of kidnapping in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting her upon her plea of guilty of kidnapping in the second degree (Penal Law § 135.20). We affirm.

Defendant failed to preserve for our review her contention that her plea was not knowingly and voluntarily entered inasmuch as she did not move to withdraw the plea or to vacate the judgment of conviction (*see People v Council*, 234 AD3d 1361, 1362 [4th Dept 2025]; *People v Cunningham*, 213 AD3d 1270, 1271 [4th Dept 2023], *lv denied* 39 NY3d 1110 [2023]), and we decline to exercise our power to review the contention as a matter of discretion in the interest of justice (*see* CPL 470.15 [3] [c]; *Council*, 234 AD3d at 1363).

Contrary to defendant's contention, her sentence is not unduly harsh or severe. Present—Whalen, P.J., Lindley, Curran, Smith and DelConte, JJ.

17 The People of the State of New York, Respondent, v Brian Baxter, Jr., Appellant. [— NYS3d —]—

Crimes—Murder—Weight of Evidence

Crimes—Evidence—Photographs of Homicide Victim—Booking Photograph

Appeal from a judgment of the Supreme Court, Monroe

County (Alex R. Renzi, J.), rendered January 27, 2016. The judgment convicted defendant upon a jury verdict of murder in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of murder in the second degree (Penal Law § 125.25 [1]).

We reject defendant's contention that the verdict is against the weight of the evidence. An eyewitness identified defendant as the shooter, and a person matching defendant's description was seen on video surveillance riding a bike to and from the scene of the shooting between 5:30 a.m. and 6:30 a.m.—i.e., right before and after the shooting—on a route that matched the likely route to and from defendant's residence. Moreover, around the time of the shooting, another witness observed defendant riding his bicycle in the area of the shooting, and that witness's description of defendant's clothing matched the description of the shooter's clothing given by witnesses to the shooting. Similarly, the witnesses' description of the physical appearance and clothing of the shooter matched the description and clothing of defendant given by those who observed him on his bicycle. In addition, the evidence at trial established that defendant had issues with the victim regarding a defective gun that the victim allegedly sold to defendant within weeks of the shooting. Viewing the evidence in light of the elements of the crime as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349 [2007]), we conclude that the verdict is not against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495 [1987]). Although an acquittal would not have been unreasonable (*see Danielson*, 9 NY3d at 348-349; *Bleakley*, 69 NY2d at 495), we conclude, based on the weight of the credible evidence, that "the jury was justified in finding the defendant guilty beyond a reasonable doubt" (*Danielson*, 9 NY3d at 348).

Defendant further contends that evidentiary errors at trial warrant reversal. We reject that contention. Generally, "all relevant evidence is admissible unless its admission violates some exclusionary rule" (*People v Scarola*, 71 NY2d 769, 777 [1988]). Nevertheless, evidence "may still be excluded by the trial court in the exercise of its discretion if its probative value is substantially outweighed by the danger that it will unfairly prejudice the other side or mislead the jury" (*id.*). Here, Supreme Court did not err in admitting in evidence photographs of the homicide victim inasmuch as that evidence was

not admitted for the sole purpose of arousing emotions in the jury (see *People v Poblner*, 32 NY2d 356, 369 [1973], *rearg denied* 33 NY2d 657 [1973], *cert denied* 416 US 905 [1974]; see also *People v Brooks*, 214 AD3d 1425, 1426-1427 [4th Dept 2023], *lv denied* 39 NY3d 1153 [2023]). Nor did the court err in admitting in evidence defendant's booking photograph, which depicted him sticking out his tongue. Defendant's appearance at the time of his arrest was relevant to the jury's determination of whether he was the person depicted in a surveillance video of the alleged shooter (see *People v Jones*, 228 AD3d 1359, 1361 [4th Dept 2024], *lv denied* 42 NY3d 1053 [2024]). Although the photograph shows defendant sticking out his tongue, we cannot say that the probative value of the evidence was outweighed by any potential unfair prejudice.

Defendant failed to preserve for our review his contention that the admission in evidence of a medical witness's "gruesome and gratuitous" testimony regarding the victim's death was improper given that the defense was not challenging the manner of death (see *People v Lee*, 214 AD3d 457, 458 [1st Dept 2023], *lv denied* 40 NY3d 929 [2023]; see generally CPL 470.05 [2]). He likewise failed to preserve for our review his contention that minor witnesses should have been precluded from testifying inasmuch as their testimony was offered solely to garner sympathy from the jury (see *People v Lindsay*, 213 AD3d 867, 868 [2d Dept 2023], *lv denied* 40 NY3d 929 [2023]; see generally CPL 470.05 [2]). Although defendant contends that testimony from one witness about defendant's flight from the scene should have been stricken and a curative instruction given, he requested no such relief from the court and, as a result, he failed to preserve that contention for our review (see *People v Kaufman*, 288 AD2d 895, 896 [4th Dept 2001], *lv denied* 97 NY2d 684 [2001]; see generally CPL 470.05 [2]). We decline to exercise our power to review those contentions as a matter of discretion in the interest of justice (see CPL 470.15 [6] [a]).

Defendant further contends that he was denied effective assistance of counsel based on defense counsel's failure to file an alibi notice, his handling of video surveillance evidence, his failure to appropriately challenge the prosecution's use of child witnesses, his failure to request a curative instruction regarding a particular statement of a witness, and his failure to make a sufficient motion for a trial order of dismissal. We reject that contention.

"To prevail on a claim of ineffective assistance, defendants must demonstrate that they were deprived of a fair trial by

less than meaningful representation; a simple disagreement with strategies, tactics or the scope of possible cross-examination, weighed long after the trial, does not suffice” (*People v Flores*, 84 NY2d 184, 187 [1994]). It is defendant’s burden “to demonstrate the absence of strategic or other legitimate explanations’ for counsel’s alleged shortcomings” (*People v Benevento*, 91 NY2d 708, 712 [1998], quoting *People v Rivera*, 71 NY2d 705, 709 [1988]). Absent such a showing, it is presumed that counsel acted competently (*see Rivera*, 71 NY2d at 709; *People v Harvey*, 170 AD3d 1675, 1676-1677 [4th Dept 2019], *lv denied* 33 NY3d 1031 [2019]). Here, defendant failed to meet his burden. Moreover, we conclude that the evidence, the law, and the circumstances of this case, when “viewed in totality and as of the time of the representation,” establish that defendant received meaningful representation (*People v Baldi*, 54 NY2d 137, 147 [1981]).

Finally, the sentence is not unduly harsh or severe. Present—Whalen, P.J., Lindley, Curran, Smith and DelConte, JJ.

18 In the Matter of Anthony Crespo, Respondent, v Sheridan D. Wynn, Appellant. [— NYS3d —]

Parent, Child and Family—Custody—Right to Counsel—Waiver

Appeal from an order of the Family Court, Monroe County (Nicole E. Bayly, R.), entered October 15, 2024, in a proceeding pursuant to Family Court Act article 6. The order, among other things, granted the parties joint custody of the subject children.

It is hereby ordered that said appeal is unanimously dismissed except insofar as respondent-petitioner challenges the validity of her waiver of the right to counsel, the order is reversed on the law without costs, the petition of respondent-petitioner is reinstated, and the matter is remitted to Family Court, Monroe County, for further proceedings in accordance with the following memorandum: Petitioner-respondent father commenced this proceeding pursuant to Family Court Act article 6 seeking sole custody of the parties’ two children, and respondent-petitioner mother subsequently filed a petition seeking, among other things, sole custody of the children. At the mother’s initial appearance, Family Court advised the mother that she had the right to counsel, and the mother indicated that she planned to represent herself. The court scheduled a hearing on the petitions and warned the parties that, if a party failed to appear, the court would dismiss that party’s petition and proceed without the party. The mother failed to appear at the hearing, and the court noted her default

and proceeded on the father's petition. The mother now appeals from an order that, inter alia, dismissed her petition and awarded the parties joint custody of the children.

The mother contends that the court erred in failing to ensure that her waiver of the right to counsel was knowing, voluntary, and intelligent. Initially, we note that the mother's contention is reviewable despite her default. In general, "[n]o appeal lies from an order [or judgment] entered upon an aggrieved party's default" (*Matter of DiNunzio v Zylinski*, 175 AD3d 1079, 1080 [4th Dept 2019] [internal quotation marks omitted]; see CPLR 5511). Nevertheless, an appeal from an order or judgment entered upon the default of the appealing party "brings up for review those matters which were the subject of contest before the [court]" (*DiNunzio*, 175 AD3d at 1080 [internal quotation marks omitted]; see *Tun v Aw*, 10 AD3d 651, 652 [2d Dept 2004]). The "request by a party to waive the right to counsel and proceed pro se . . . places in issue whether the court fulfilled its obligation to ensure a valid waiver" and may be reviewed by this Court on an appeal by the subsequently defaulting pro se party (*DiNunzio*, 175 AD3d at 1081; see *Matter of Graham v Rawley*, 140 AD3d 765, 766-767 [2d Dept 2016], *lv dismissed in part & denied in part* 28 NY3d 955 [2016]).

With respect to the merits of the mother's contention, respondents in proceedings pursuant to Family Court Act article 6 "may face the infringements of fundamental interests and rights, including the loss of a child's society . . . , and therefore have a constitutional right to counsel in such proceedings" (*DiNunzio*, 175 AD3d at 1081 [internal quotation marks omitted]; see Family Ct Act § 262 [a] [iii]). "The deprivation of a party's fundamental right to counsel is a denial of due process and [therefore] requires reversal, without regard to the merits of the unrepresented party's position" (*Matter of Deon M. [Vernon B.]*, 68 AD3d 1740, 1741 [4th Dept 2009] [internal quotation marks omitted]; see *Matter of Evan F.*, 29 AD3d 905, 906 [2d Dept 2006]).

"[A] court's decision to permit a party who is entitled to counsel to proceed pro se must be supported by a showing on the record of a knowing, voluntary and intelligent waiver of [the right to counsel]" (*Deon M.*, 68 AD3d at 1741 [internal quotation marks omitted]; see *Matter of David VV.*, 25 AD3d 882, 884 [3d Dept 2006]). "If a timely and unequivocal request [to proceed pro se] has been asserted, then the trial court is obligated to conduct a 'searching inquiry' to ensure that the [party's] waiver is knowing, intelligent, and voluntary" (*Matter of Kathleen K. [Steven K.]*, 17 NY3d 380, 385 [2011]; see *DiNun-*

zio, 175 AD3d at 1081; *Matter of Girard v Neville*, 137 AD3d 1589, 1590 [4th Dept 2016]). Although “[a] ‘searching inquiry’ does not have to be made in a formulaic manner” (*Kathleen K.*, 17 NY3d at 386), “the record must demonstrate that the party was aware of the dangers and disadvantages of proceeding without counsel” (*DiNunzio*, 175 AD3d at 1083 [internal quotation marks omitted]; see *Matter of Pitkanen v Huscher*, 167 AD3d 901, 902 [2d Dept 2018]).

Here, the record reflects that the court failed to conduct a searching inquiry to ensure that the mother’s waiver of the right to counsel was a knowing, voluntary, and intelligent choice (see *Girard*, 137 AD3d at 1590; *Matter of Storelli v Storelli*, 101 AD3d 1787, 1788 [4th Dept 2012]). We therefore reverse the order, reinstate the mother’s petition, and remit the matter to Family Court for a new hearing on the petitions. Present—Whalen, P.J., Lindley, Curran, Smith and DelConte, JJ.

19 Julie Morse, Respondent, v Bradford Morse, Appellant. Catherine M. Sullivan, Esq., Attorney for the Children, Respondent. [253 NYS3d 455]—Appeal from an order of the Supreme Court, Onondaga County (Danielle M. Fogel, J.), entered June 21, 2024. The order, among other things, approved compensation for the Attorney for the Children.

It is hereby ordered that said appeal is unanimously dismissed without costs.

Memorandum: Defendant in this matrimonial action appeals from an order approving compensation for the Attorney for the Children. The appeal must be dismissed because no appeal lies as of right from an order that does not decide a motion made on notice (see CPLR 5701 [a]; *Sholes v Meagher*, 100 NY2d 333, 334 [2003]; *Deutsche Bank Natl. Trust Co. v Miller*, 172 AD3d 1890, 1890 [4th Dept 2019]). Although we have the power to treat the notice of appeal as an application for permission to appeal, we decline to do so here (see *Matter of Cor Van Rensselaer St. Co., III, Inc. v New York State Urban Dev. Corp.*, 197 AD3d 976, 977 [4th Dept 2021]). Present—Whalen, P.J., Lindley, Curran, Smith and DelConte, JJ.

20 Floyd Van Hooser, Appellant, v Bernard Arthur Fine et al., Respondents. [— NYS3d —]—

Limitation of Actions—Revival of Time-Barred Claims—Adult Survivors Act—
Conduct Constituting Sexual Offense

Appeal from an order of the Supreme Court, Onondaga County (Joseph E. Lamendola, J.), entered September 27, 2024.

The order granted the motions of defendants to dismiss the amended complaint.

It is hereby ordered that the order so appealed from is unanimously reversed on the law without costs, the amended complaint is reinstated, and the matter is remitted to Supreme Court, Onondaga County, for further proceedings in accordance with the following memorandum: Plaintiff commenced this personal injury action pursuant to the Adult Survivors Act (ASA) (*see* CPLR 214-j), alleging that he was sexually abused by an employee of defendant Syracuse University while plaintiff was employed at a fraternity house associated with the university. Defendants filed pre-answer motions to dismiss the amended complaint against them. Supreme Court granted the motions insofar as they sought dismissal of the amended complaint as untimely, and plaintiff appeals.

We agree with plaintiff that the court erred in granting the motions insofar as they sought dismissal of the amended complaint as untimely based on plaintiff's failure to sufficiently allege conduct constituting a sexual offense as defined in Penal Law article 130, as necessary to revive the claims under the ASA (*see generally* CPLR 3211 [a] [5], [7]). Although plaintiff was required to plead factual allegations related to his lack of consent in order to allege "conduct which would constitute a sexual offense as defined in article one hundred thirty of the penal law" (CPLR 214-j) and thereby "revive" the claims in the amended complaint for statute of limitations purposes, we conclude that the factual allegations in the amended complaint sufficiently assert plaintiff's lack of consent within the meaning of Penal Law § 130.05 (*see Shapiro v Syracuse Univ.*, 208 AD3d 958, 959 [4th Dept 2022]; *Druger v Syracuse Univ.*, 207 AD3d 1153, 1153 [4th Dept 2022]). "Whether a plaintiff can ultimately establish its allegations is not part of the calculus in determining a motion to dismiss" (*EBC I, Inc. v Goldman, Sachs & Co.*, 5 NY3d 11, 19 [2005]; *see Druger*, 207 AD3d at 1154).

Inasmuch as the court did not address the alternative grounds for dismissal raised in the motions, we remit the matter to Supreme Court to consider those contentions in the first instance (*see Lundy Dev. & Prop. Mgt., LLC v Cor Real Prop. Co., LLC*, 181 AD3d 1180, 1181 [4th Dept 2020]). Present—Whalen, P.J., Lindley, Curran and Smith, JJ.

21 Taruna Varma, Appellant, v Allstate Insurance Company et al., Respondents. [— NYS3d —]

Judgments—Res Judicata—Termination of Agreement

Appeal from an order of the Supreme Court, Erie County (Emilio Colaiacovo, J.), entered October 22, 2024. The order granted the motions of defendants insofar as they sought to dismiss the complaint.

It is hereby ordered that the order so appealed from is unanimously affirmed without costs.

Memorandum: In this action to recover damages for, inter alia, breach of contract, plaintiff appeals from an order granting those parts of defendants' respective motions seeking dismissal of the complaint against them, pursuant to CPLR 3211, on res judicata grounds. We affirm.

This action and a prior action between the same parties relate to plaintiff's purchase of an insurance agency from defendant Wayne LeVan and her execution of an exclusive agency agreement (Agency Agreement) with defendant Allstate Insurance Company (Allstate). Less than two years after plaintiff purchased the agency and executed the Agency Agreement, Allstate notified plaintiff that it was terminating the Agency Agreement pursuant to section XVII.B.2, which permitted either plaintiff or Allstate to terminate the Agency Agreement "with or without cause" on 90 days' written notice.

Plaintiff commenced the prior action to challenge the termination, asserting a cause of action for breach of contract, among other claims. Following the denial after a hearing of plaintiff's motion for a preliminary injunction, defendants moved to dismiss the amended complaint, and plaintiff cross-moved for leave to amend the amended complaint to add causes of action for discrimination, tortious interference with contract, and tortious interference with prospective business. Supreme Court granted defendants' motions and denied plaintiff's cross-motion (2023 order).

Before the time to appeal the 2023 order had expired, plaintiff commenced this action against defendants, asserting causes of action for breach of contract, discrimination, tortious interference with contract, and tortious interference with prospective business. Defendants each moved to, inter alia, dismiss the complaint pursuant to CPLR 3211, contending that the complaint in this action was barred by res judicata.

"Res judicata, i.e., claim preclusion, bars the parties or their privies from relitigating issues that were or could have been raised in [a prior] action" (*Matter of City of Buffalo v Carr*, 242 AD3d 1581, 1581 [4th Dept 2025] [internal quotation marks omitted]). "[U]nder New York's transactional analysis approach to res judicata, once a claim is brought to a final conclusion, all other claims arising out of the same transaction or series of

transactions are barred, *even if based upon different theories or if seeking a different remedy*” (*Matter of Hunter*, 4 NY3d 260, 269 [2005] [emphasis added]; see *Carr*, 242 AD3d at 1581-1582; see generally *Paramount Pictures Corp. v Allianz Risk Transfer AG*, 31 NY3d 64, 72 [2018]). What matters is not whether the claims were actually decided in the prior litigation but, rather, whether “‘they could have been decided in that action’” (*Knapp v Finger Lakes NY, Inc.*, 217 AD3d 1401, 1403 [4th Dept 2023], *lv denied* 41 NY3d 905 [2024]; see *Hunter*, 4 NY3d at 269).

Nevertheless, “where a claim could not have been raised in the prior litigation because it had not yet matured, res judicata does not apply” (*UBS Sec. LLC v Highland Capital Mgt., L.P.*, 159 AD3d 512, 513 [1st Dept 2018], *lv dismissed* 32 NY3d 1080 [2018]; see *Pawling Lake Prop. Owners Assn., Inc. v Greiner*, 72 AD3d 665, 668 [2d Dept 2010]; see also *1050 Tenants Corp. v Lapidus*, 118 AD3d 560, 560 [1st Dept 2014]).

Here, we conclude that plaintiff’s claim for breach of contract in the instant action could have been raised in the prior litigation. In the amended complaint in the prior action, plaintiff alleged that defendants breached the Agency Agreement by terminating it. In the instant complaint, plaintiff alleges that defendants breached the Agency Agreement by attempting to enforce the Termination Payment Provision (TPP) of the Agency Agreement. The TPP was contained in the “Supplement for the R3001 Agreement” (Supplement), which was incorporated by reference into the Agency Agreement. In both the prior and instant actions, plaintiff has consistently contended that the Supplement was not a valid part of the Agency Agreement. Although plaintiff did not specifically challenge the enforcement of the TPP in the prior litigation, the TPP was a part of the Agency Agreement and, as a result, her current challenge to its enforceability could have been raised in the prior litigation (see *Hunter*, 4 NY3d at 269; *Knapp*, 217 AD3d at 1403).

Plaintiff further contends that the dismissal in the prior action under CPLR 3211 has no res judicata effect. We reject that contention. Although there are situations in which “a dismissal under CPLR 3211 (a) (7) for failure to state a claim is not a dismissal on the merits with res judicata effect” (*Wilder v Fresenius Med. Care Holdings, Inc.*, 215 AD3d 511, 513 [1st Dept 2023]; see *Hock v Cohen*, 125 AD3d 722, 723 [2d Dept 2015]), the Court of Appeals has stated that the dismissal of a complaint on that ground has preclusive effect with respect to a new complaint “for the same cause of action which fails to correct the defect or supply the omission determined to exist in

the earlier complaint” (175 *E. 74th Corp. v Hartford Acc. & Indem. Co.*, 51 NY2d 585, 590 n 1 [1980], citing *Linton v Perry Knitting Co.*, 295 NY 14, 17 [1945]; see also *Rosa v Triborough Bridge & Tunnel Auth.*, 218 AD3d 810, 812 [2d Dept 2023]). Moreover, a dismissal may be deemed on the merits where “the order [is] sufficiently clear that it included a dismissal on the merits, and it was not issued purely on account of technical pleading deficiencies” (*SC Prop. Dev., LLC v MW Capital LLC*, 238 AD3d 470, 470 [1st Dept 2025]). Here, the court made it clear that its dismissal of the amended complaint in the prior action was a dismissal on the merits, and we therefore conclude that the dismissal precludes plaintiff’s attempt to relitigate the breach of contract cause of action.

Contrary to plaintiff’s further contention, the court properly determined that its denial of plaintiff’s cross-motion for leave to amend the amended complaint in the prior action precluded plaintiff’s attempt to assert those causes of action in the instant complaint inasmuch as the instant complaint is “essentially identical to the proposed amended complaint [plaintiff] submitted in support of [her] motion for leave to amend the [amended] complaint in the [prior] action” (*Pieroni v Phillips Lytle LLP*, 140 AD3d 1707, 1708 [4th Dept 2016], *lv denied* 28 NY3d 901 [2016]). Here, “[t]he proposed amended complaint in the [prior] action and the complaint in the present action raise identical issues, and the court decided those issues when it denied the motion for leave to amend” (*id.* at 1709; *cf.* *Condor Capital Corp. v CALS Invs., LLC*, 213 AD3d 433, 433 [1st Dept 2023]), having determined that the causes of action sought to be asserted were “palpably insufficient or patently devoid of merit” (*Pieroni*, 140 AD3d at 1709).

In light of our determination, we do not reach plaintiff’s remaining contentions. Present—Whalen, P.J., Lindley, Curran, Smith and DelConte, JJ.

22 In the Matter of Jeffrey Kotary, Petitioner, v Town of Floyd Zoning Board of Appeals et al., Respondents. [— NYS3d —]—

Municipal Corporations—Zoning—Variance—Construction of Vehicle Maintenance and Storage Unit Facility

Proceeding pursuant to CPLR article 78 (transferred to the Appellate Division of the Supreme Court in the Fourth Judicial Department by order of the Supreme Court, Oneida County [William F. Ramseier, J.], entered Aug. 7, 2025) to review a determination of respondent Town of Floyd Zoning Board of Appeals. The determination denied the application of petitioner for three variances.

It is hereby ordered that the determination is unanimously confirmed without costs and the petition is dismissed.

Memorandum: Petitioner, the owner of real property in the Town of Floyd (Town), commenced this CPLR article 78 proceeding seeking to annul the determination of respondent Town of Floyd Zoning Board of Appeals (ZBA) denying his application for three variances in connection with his proposed construction of a vehicle maintenance and storage unit facility on his property. We confirm the determination and dismiss the petition.

In 2019, petitioner sought and received a special use permit to construct storage units and a vehicle service garage on the property, a .95-acre parcel located in the Town. Petitioner thereafter received zoning approval to place a shipping container on the property to serve as a storage unit. Subsequently, he purchased a second shipping container to install on the property. Petitioner did not request or receive any zoning approval before installing the second container on the site.

Between the approval of the first shipping container and petitioner's installation of the second one, the Town passed a shipping container law, which, as relevant here, permits the use of shipping containers on a property only as an accessory use and limits the density of shipping containers to one container per acre, with no containers permitted on property of less than one acre. Thus, after petitioner installed the second container, the zoning code enforcement officer informed him that *only* the first shipping container was lawfully present on the property.

In an attempt to avoid the limitations imposed by the Town's shipping container law, petitioner applied for a building permit to erect a wooden storage building (barn) that would incorporate both shipping containers in its structure. Petitioner began construction of the barn without having received a building permit, and there is no indication that a building permit was ever issued. Petitioner subsequently applied for a zoning permit to approve construction of the barn. That application was denied by the zoning code enforcement officer, who directed petitioner to seek variances from the ZBA with respect to the second shipping container. Based on the presence of two shipping containers on the property, in violation of the shipping container law, petitioner was issued a notice of violation by the zoning code enforcement officer.

Following additional discussions with the ZBA, among others, petitioner again applied for a zoning permit with respect to the construction of the barn. As relevant here, petitioner

sought four variances from the ZBA with respect to his construction of the barn and the incorporation into its structure of the two shipping containers. Specifically, he requested variances (1) allowing the proposed structure to exceed the maximum allowable height by five feet, (2) allowing a reduction of the required setback from an adjacent state highway from 100 feet to 70 feet, (3) allowing the second shipping container to function as a proper accessory structure, and (4) allowing a second shipping container to be used on a property of less than one acre. Meanwhile, pursuant to General Municipal Law § 239-m, petitioner's project was referred to the Oneida County Planning Department, which ultimately disapproved the project, noting, among other things, that petitioner was seeking substantial variances that were the result of what appeared to be "self-created hardships" and that there were alternative available solutions that would not require variances. The Planning Board of the Town of Floyd also reviewed petitioner's application and similarly recommended that it be denied.

Following a public hearing, the ZBA applied the balancing test provided for in Town Law § 267-b (3) (b) and thereafter granted petitioner's request for a height variance and denied his application for the remaining variances. Petitioner commenced this proceeding seeking to annul the ZBA's determination with respect to the denied variances. Supreme Court transferred the matter to this Court. As a preliminary matter, we agree with respondents that this proceeding was improperly transferred to this Court inasmuch as petitioner does not challenge a determination made as a result of an evidentiary hearing directed by law (*see* CPLR 7803 [4]; 7804 [g]; *Matter of Erie County Sheriff's Police Benevolent Assn., Inc. v County of Erie*, 159 AD3d 1561, 1561 [4th Dept 2018]; *Matter of Little v Town of Fabius Zoning Bd. of Appeals*, 87 AD3d 1363, 1364 [4th Dept 2011]). Nevertheless, we review petitioner's contentions in the interest of judicial economy (*see Little*, 87 AD3d at 1364; *Matter of W.K.J. Young Group v Zoning Bd. of Appeals of Vil. of Lancaster*, 16 AD3d 1021, 1021 [4th Dept 2005]).

We conclude that petitioner's challenge to the ZBA's determination to deny three of the variances is without merit. A ZBA is afforded broad discretion in determining whether to grant or deny variances, and our review is limited to whether its determination was illegal, arbitrary, or an abuse of discretion (*see Matter of Conway v Town of Irondequoit Zoning Bd. of Appeals*, 38 AD3d 1279, 1280 [4th Dept 2007]). Where there is substantial evidence in the record to support the rationality of

the ZBA's determination, the determination should be affirmed upon judicial review (see *Matter of Ifrah v Utschig*, 98 NY2d 304, 308 [2002]; *Matter of Sasso v Osgood*, 86 NY2d 374, 384 n 2 [1995]; *Matter of Expressview Dev., Inc. v Town of Gates Zoning Bd. of Appeals*, 147 AD3d 1427, 1428-1429 [4th Dept 2017]).

Pursuant to Town Law § 267-b (3), when determining whether to grant a variance, the ZBA must weigh “the benefit of the grant to the applicant against the detriment to the health, safety and welfare of the neighborhood or community if the variance is granted” (*Matter of Pecoraro v Board of Appeals of Town of Hempstead*, 2 NY3d 608, 612 [2004]; see *Matter of Freck v Town of Porter*, 158 AD3d 1163, 1165 [4th Dept 2018], *lv denied* 32 NY3d 903 [2018]; *Matter of Mimassi v Town of Whitestown Zoning Bd. of Appeals*, 124 AD3d 1329, 1330 [4th Dept 2015]) and must consider “(1) whether an undesirable change will be produced in the character of the neighborhood or a detriment to nearby properties will be created by the granting of the area variance; (2) whether the benefit sought by the applicant can be achieved by some method, feasible for the applicant to pursue, other than an area variance; (3) whether the requested area variance is substantial; (4) whether the proposed variance will have an adverse effect or impact on the physical or environmental conditions in the neighborhood or district; and (5) whether the alleged difficulty was self-created” (§ 267-b [3] [b]; see *Matter of Qing Dong v Mammina*, 84 AD3d 820, 821 [2d Dept 2011]). Although the fifth factor “shall be relevant to the decision of the [zoning] board of appeals, [it] shall not necessarily preclude the granting of the area variance” (§ 267-b [3] [b]). A zoning board of appeals is “not required to justify its determination with supporting evidence with respect to each of the five factors, so long as its ultimate determination balancing the relevant considerations [is] rational” (*Matter of Merlotto v Town of Patterson Zoning Bd. of Appeals*, 43 AD3d 926, 929 [2d Dept 2007]; see *Matter of Feinberg-Smith Assoc., Inc. v Town of Vestal Zoning Bd. of Appeals*, 167 AD3d 1350, 1352 [3d Dept 2018]).

Here, we conclude that the ZBA “rendered its determination after considering the appropriate factors and properly weighing the benefit to petitioner against the detriment to the health, safety and welfare of the neighborhood or community” if the variances were granted (*Matter of DeGroot v Town of Greece Bd. of Zoning Appeals*, 35 AD3d 1177, 1178 [4th Dept 2006]; see *Sasso*, 86 NY2d at 382). Further, although the ZBA did not articulate its findings, its determination to deny the variances was supported by a rational basis (see *Matter of Tall Trees*

Constr. Corp. v Zoning Bd. of Appeals of Town of Huntington, 97 NY2d 86, 93 [2001]; *Matter of Gasparino v Town of Brighton Zoning Bd. of Appeals*, 199 AD3d 1351, 1353 [4th Dept 2021]; see generally *Matter of Kaye v Zoning Bd. of Appeals of the Vil. of N. Haven*, 185 AD3d 820, 821 [2d Dept 2020]). The record demonstrates that the ZBA considered the five statutory factors, focusing particularly on safety considerations, the availability of feasible alternatives to the requested variances, and whether the alleged difficulty that gave rise to the need for variances was self-created (see *Gasparino*, 199 AD3d at 1353). Critically, we note that petitioner's need for variances with respect to the use of the second shipping container was almost entirely self-created and that feasible alternatives existed inasmuch as petitioner could have constructed a barn without incorporating the shipping containers into the structure, which would have obviated the need for some of the requested variances. Indeed, the record establishes that petitioner installed the second shipping container *after* the Town enacted the law prohibiting its installation and that petitioner began constructing the barn before he obtained the necessary approvals (see generally *Matter of Christian Airmen, Inc. v Town of Newstead Zoning Bd. of Appeals*, 115 AD3d 1319, 1321 [4th Dept 2014]; *Matter of Carrier v Town of Palmyra Zoning Bd. of Appeals*, 30 AD3d 1036, 1036-1038 [4th Dept 2006], *lv denied* 8 NY3d 807 [2007]). Thus, it was rational for the ZBA to conclude, in denying the variances, that petitioner sought to circumvent his violation of the shipping container law by building a barn that incorporated the two containers into its structure, which petitioner did not need to do. To the extent that there may be substantial evidence in the record to support the rationality of a contrary determination with respect to the requested variances, we note that we may not substitute our own judgment for that of the ZBA (see *Matter of Socha v Town of Starkey*, 239 AD3d 1298, 1302 [4th Dept 2025]). Present—Whalen, P.J., Lindley, Curran, Smith and DelConte, JJ.

23 City of Rome, Appellant, v GHD Consulting Services, Inc., et al., Respondents. [— NYS3d —]—

Negligence—Proximate Cause—Injuries Resulting from Chlorine Gas Leak at Ultraviolet Water Filtration Facility—Removal of Frosted Chlorine Tank by Chief Operator as Superseding Cause

Appeal from an order of the Supreme Court, Oneida County (William F. Ramseier, J.), entered August 19, 2024. The order granted the motions of defendants for summary judgment and dismissed the amended complaint.

It is hereby ordered that the order so appealed from is

unanimously reversed on the law without costs, the motions are denied, and the amended complaint is reinstated.

Memorandum: Plaintiff commenced this action seeking, among other things, damages for injuries resulting from a chlorine gas leak at its newly constructed ultraviolet water filtration facility. The leak occurred during the transition from the old water filtration facility to the new water filtration facility, at which time the water supply was being treated by an emergency chlorination system in the new facility. That system, which used two chlorine gas tanks in alternation, was housed in a room that was deliberately separated from the rest of the facility and, pursuant to the construction plan for the new facility, was designed to be sealed in a manner that would prevent the escape of chlorine gas in the event of a leak. Hours after the emergency chlorination system was put into use, a worker discovered that the temperature of the room was lower than required for operation of the system and that one of the system's two chlorine gas tanks had frost forming on it. The chief operator for the water filtration plant, an employee of plaintiff, switched the chlorine gas feed from the frosted tank to the second tank. The chief operator then sought to replace the frosted tank, which was partially depleted, with a new one. The chief operator used a wrench to close the valve on the top of the tank and, believing that valve to be closed, started to disconnect the frosted tank from a regulator that connected the tank to the emergency chlorination system. Chlorine gas leaked into the room from the frosted tank, necessitating the evacuation of the chief operator and the other persons present. Inasmuch as the room had not been completely sealed before the emergency chlorination system was put into use, the chlorine gas leaked into the larger facility, resulting in property damage to the new facility.

In its amended complaint against defendants, who were involved in the design and construction of the new facility, plaintiff asserted causes of action for, among other things, negligence and breach of contract. Plaintiff now appeals from an order granting defendants' respective motions for summary judgment dismissing the amended complaint against them. In granting the motions, Supreme Court concluded that, even assuming, *arguendo*, that defendants' alleged negligence and breaches of contract were causative factors in plaintiff's damages, the conduct of the chief operator in removing the frosted chlorine tank "was an unforeseeable superseding event that absolved defendants of liability." We agree with plaintiff that this was error, and we therefore reverse.

Contrary to the court's conclusion, defendants failed to meet their initial burden on their respective motions to establish as a matter of law that the chief operator's act of disconnecting the frosted tank was a superseding cause that interrupted the link between defendants' alleged failures and the damages incurred by plaintiff (see *Hain v Jamison*, 28 NY3d 524, 529 [2016]; *Derdiarian v Felix Contr. Corp.*, 51 NY2d 308, 315-316 [1980], *rearg denied* 52 NY2d 784 [1980]; see generally *Bi-Economy Mkt., Inc. v Harleysville Ins. Co. of N.Y.*, 10 NY3d 187, 192-193 [2008], *rearg denied* 10 NY3d 890 [2008]). A superseding act of a third party will break the chain of causation only when the act is not a "normal or foreseeable consequence of the situation created by the defendant's [actions or inactions]," and "questions concerning what is foreseeable and what is normal . . . generally are for the fact finder to resolve" (*Derdiarian*, 51 NY2d at 315; see *Pomeroy v Buccina*, 289 AD2d 944, 945 [4th Dept 2001]). Here, plaintiff alleged that defendants were negligent and breached their respective contracts with plaintiff by, among other things, using the emergency chlorination system while the room was not at the appropriate temperature and failing to properly seal the room in order to contain corrosive chlorine gas in the event that a leak occurred. In his deposition testimony, which was submitted in support of each motion, the chief operator explained that he attempted to replace the frosted tank because he was concerned that the tank was damaged from the frost and would not work properly once the alternative, nonfrosted tank emptied, in which case untreated water might leave the facility. Although the chief operator admitted that, at the time he began to disconnect the frosted tank, a rotameter in the regulator indicated that chlorine gas was still flowing from it, he also explained that he believed that chlorine gas was no longer flowing from the frosted tank because he closed the valve with a wrench to the point where it would not move any further, he thought the rotameter might also be freezing over or damaged from the frost, and the indicator ball in the rotameter would occasionally "stick" and give a false reading. Under the circumstances, the chief operator's actions were not "extraordinary . . . , unforeseeable in the normal course of events, different in kind from the foreseeable risks associated with the original negligence, or independent or far removed from the defendant[s'] conduct" (*Rodriguez v Pro Cable Servs. Co. Ltd. Partnership*, 266 AD2d 894, 895 [4th Dept 1999]; see *Mazella v Beals*, 27 NY3d 694, 706 [2016]; *Derdiarian*, 51 NY2d at 315-316).

We have reviewed the contention raised by defendant GHD Consulting Services, Inc. (GHD) as an alternative ground for

partial affirmance and conclude that it is without merit inasmuch as GHD failed to meet its initial burden of establishing its entitlement to summary judgment on that issue (*see generally Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). Present—Whalen, P.J., Lindley, Curran and Smith, JJ.

24 The People of the State of New York, Respondent, v Terrell L. Walker, Appellant. [— NYS3d —]—

Crimes—Disclosure—Automatic Discovery—Good Faith and Due Diligence

Appeal from a judgment of the Monroe County Court (Douglas A. Randall, J.), rendered April 26, 2021. The appeal was held by this Court by order entered June 14, 2024, decision was reserved and the matter was remitted to Monroe County Court for further proceedings (228 AD3d 1318 [4th Dept 2024]). The proceedings were held and completed.

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

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of driving while ability impaired (Vehicle and Traffic Law § 1192 [1]). We previously held this case, reserved decision, and remitted the matter to County Court to determine defendant's motion to dismiss the indictment on statutory speedy trial grounds by ruling on the outstanding issues whether the People were required, pursuant to CPL 245.20 (2), to exercise due diligence to obtain transcripts or recordings from the refusal hearing of the Department of Motor Vehicles that were not in their possession and, if so, whether the People made reasonable efforts to comply with the statutory directives and made reasonable inquiries to ascertain the existence of material and information subject to discovery, as well as whether defendant's motion to dismiss was untimely (*People v Walker*, 228 AD3d 1318, 1320 [4th Dept 2024]). Upon remittal, the court denied the motion. We affirm.

We reject defendant's contention on resubmission that the court erred in denying his motion to dismiss the indictment. Here, the transcripts or recordings in question were not "in the possession, custody or control of the prosecution or persons under the prosecution's direction or control" (CPL 245.20 [1]; *see Walker*, 228 AD3d at 1320) and did not qualify as "items and information related to the prosecution of a charge in the possession of any New York state or local police or law enforcement agency" that must be "deemed to be in the possession of the prosecution" (CPL 245.20 [2]). Thus, they were not part of the "discovery required by [CPL 245.20 (1)]" to be provided by

the People as a predicate for filing a proper certificate of compliance (COC) (CPL 245.50 [1]), and the People were not required to “make a diligent, good faith effort to ascertain the existence” of the transcripts or recordings and cause them to be made available for discovery (CPL 245.20 [2]). Inasmuch as the People’s failure to provide the transcripts or recordings at the time they served and filed their COC or to exercise due diligence to obtain them did not render the COC improper, the People’s statement of trial readiness pursuant to CPL 30.30 was not illusory, and defendant’s statutory right to a speedy trial was not violated on that ground (*see People v Radford*, 237 AD3d 1511, 1512 [4th Dept 2025], *lv denied* 43 NY3d 1048 [2025]; *People v Walker*, 232 AD3d 1214, 1217 [4th Dept 2024], *lv denied* 42 NY3d 1082 [2025]).

In light of our determination, we do not reach defendant’s remaining contentions. Present—Bannister, J.P., Montour, Smith, Greenwood and Nowak, JJ.

25 The People of the State of New York, Respondent, v Kimberly J. Jones, Also Known as Kymberly Smith, Appellant. [— NY3d —]

Crimes—Murder—Sufficiency and Weight of Evidence

Appeal from a judgment of the Supreme Court, Monroe County (Alex R. Renzi, J.), rendered April 20, 2022. The judgment convicted defendant, upon a jury verdict, of murder in the second degree (two counts), kidnapping in the first degree, robbery in the first degree, robbery in the second degree (two counts) and criminal possession of stolen property in the fourth degree.

It is hereby ordered that the judgment so appealed from is unanimously modified on the law by directing that the concurrent sentences imposed on counts 5 and 6 of the indictment shall run concurrently with the concurrent sentences imposed on counts 1 and 4 of the indictment, and as modified the judgment is affirmed.

Memorandum: In this prosecution arising out of the disappearance and death of the victim, whose naked, decomposing body was located approximately one week after his disappearance in a vacant residential garage in Rochester and bound with restraints in various ways including to a post, defendant appeals from a judgment convicting her, following a joint trial with a codefendant before separate juries, of two counts of murder in the second degree (Penal Law §§ 20.20, 125.25 [2], [3] [depraved indifference and felony murder, respectively]), one count of kidnapping in the first degree (§§ 20.00, 135.25

[3]), one count of robbery in the first degree (§§ 20.00, 160.15 [1]), two counts of robbery in the second degree (§§ 20.00, 160.10 [1], [3]), and one count of criminal possession of stolen property in the fourth degree (§§ 20.00, 165.45 [5]).

Defendant contends that the evidence is legally insufficient to establish her guilt as either a principal or an accessory with respect to the counts of murder, kidnapping, and robbery. Even assuming, *arguendo*, that defendant's motion for a trial order of dismissal was sufficiently specific to preserve that contention for our review (*see People v Colon*, 192 AD3d 1567, 1569-1570 [4th Dept 2021], *lv denied* 37 NY3d 955 [2021]; *People v Kithcart*, 85 AD3d 1558, 1559 [4th Dept 2011], *lv denied* 17 NY3d 818 [2011]; *see generally People v Gray*, 86 NY2d 10, 19 [1995]), we conclude that it lacks merit. "[E]ven in circumstantial evidence cases, the standard for appellate review of legal sufficiency issues is 'whether any valid line of reasoning and permissible inferences could lead a rational person to the conclusion reached by the fact finder on the basis of the evidence at trial, viewed in the light most favorable to the People' " (*People v Hines*, 97 NY2d 56, 62 [2001], *rearg denied* 97 NY2d 678 [2001]; *see People v Hancock*, 229 AD3d 1229, 1230 [4th Dept 2024], *lv denied* 42 NY3d 1020 [2024]). Here, viewing the evidence in the light most favorable to the People (*see Hines*, 97 NY2d at 62; *People v Contes*, 60 NY2d 620, 621 [1983]), we conclude that there is a valid line of reasoning and permissible inferences from which the jury could find that defendant, either as a principal or an accomplice, kidnapped, robbed, and killed the victim (*see Hancock*, 229 AD3d at 1231).

Contrary to defendant's further contention, even assuming, *arguendo*, that a different verdict would not have been unreasonable, we conclude that, viewing the evidence "in light of the elements of the crime[s] as charged without objection" (*People v Noble*, 86 NY2d 814, 815 [1995]; *see People v Danielson*, 9 NY3d 342, 349 [2007]; *see generally People v Bailey*, 159 AD2d 1009, 1009 [4th Dept 1990]), the verdict is not against the weight of the evidence with respect to the counts of murder, kidnapping, and robbery (*see Hancock*, 229 AD3d at 1230-1231; *People v Isaac*, 195 AD3d 1410, 1410 [4th Dept 2021], *lv denied* 37 NY3d 992 [2021]; *see generally People v Bleakley*, 69 NY2d 490, 495 [1987]). The People presented, among other things, surveillance footage and testimony establishing that defendant, whose clothing and wig were distinctive, had been with the codefendant in the lobby of a bank two days before the victim's disappearance and was walking in tandem with the codefendant along streets in the early morning hours on the day of the

victim's disappearance. Surveillance footage then depicted defendant entering the victim's vehicle while the codefendant was nearby. The codefendant was shown less than an hour and a half later on video footage from an ATM, which was located close to where the victim's body was eventually found, driving the victim's vehicle, appearing to speak with someone in the back seat, and making a withdrawal from the victim's account. After further movements of the victim's vehicle around Rochester later on the morning of the victim's disappearance, the victim's vehicle was photographed traveling southwest on the Thruway in New York before eventually being depicted on surveillance footage pulling into a gas station in Pennsylvania. That surveillance footage showed defendant and the codefendant exiting the victim's vehicle and entering the gas station convenience store. The victim's vehicle was located in Florida two days later after being set on fire and, a few days after that, defendant and the codefendant appeared at a Florida pawn shop where they sold a gold chain and pendant that the victim had been wearing before his disappearance(see *People v Carter*, 96 AD3d 1520, 1521 [4th Dept 2012], *amended on rearg* 100 AD3d 1472 [4th Dept 2012], *affd* 21 NY3d 739 [2013]; *People v Crosby*, 158 AD3d 1300, 1302 [4th Dept 2018], *lv denied* 31 NY3d 1115 [2018]). Additionally, cell-site data and other evidence established that the codefendant's cell phone and the victim's cell phone had traveled together during the relevant time frame and consistent with the movements of the victim's vehicle, and defendant admitted to the police that she had destroyed her cell phone prior to leaving New York to avoid being tracked (see *Isaac*, 195 AD3d at 1410). Along with several other pieces of physical evidence located at the scene of the victim's death, investigators found a five-inch long, two-tone manufactured fiber that the examining forensic criminalist identified as a synthetic hair from a wig or hair extension product. Although the forensic pathologist who performed the autopsy could not determine the precise cause of death due to the decomposition of the victim's body, she was able to conclude to a reasonable degree of medical certainty upon her examination of the body and the various restraint materials on the hands, legs, and neck and jaw area that the victim died as a result of "homicidal violence," i.e., natural causes were ruled out (see *People v Carter*, 1 AD3d 1028, 1029 [4th Dept 2003], *lv denied* 2 NY3d 738 [2004]).

Based on the foregoing, we conclude that, contrary to defendant's assertion, "[t]his is not a case where the evidence established only defendant's mere presence at the scene of the crimes" (*Hancock*, 229 AD3d at 1230-1231). Moreover, even if

the jury discredited the testimony that defendant made incriminating statements following her arrest to her jail cellmate, who had significant credibility issues, we conclude that defendant's guilt was nevertheless proved beyond a reasonable doubt " 'by a compelling chain of circumstantial evidence' establishing all of the elements of the crimes" that she now challenges on appeal (*People v Collins*, 106 AD3d 1544, 1545-1546 [4th Dept 2013], *lv denied* 21 NY3d 1072 [2013]). Consequently, upon our review of the evidence, we are satisfied that " 'the inference of guilt is the only one that can fairly and reasonably be drawn from the facts, and that the evidence excludes beyond a reasonable doubt every reasonable hypothesis of innocence' " (*People v Bague*, 43 NY3d 26, 30 [2024], quoting *People v Sanchez*, 61 NY2d 1022, 1024 [1984]).

With respect to the sentence, we conclude that Supreme Court erred in directing that the concurrent sentences imposed on the counts of robbery in the second degree run consecutively to the sentence imposed on the count of felony murder inasmuch as the indictment "did not specify which of the [available felony] counts served as the predicate for the felony murder count" (*People v Davis*, 68 AD3d 1653, 1655 [4th Dept 2009], *lv denied* 14 NY3d 839 [2010]; see *People v Wilkins*, 175 AD3d 867, 869 [4th Dept 2019], *affd* 37 NY3d 371 [2021]; *People v Glover*, 117 AD3d 1477, 1478 [4th Dept 2014], *lv denied* 23 NY3d 1036 [2014], *denied reconsideration* 24 NY3d 961 [2014]; see generally *People v Parks*, 95 NY2d 811, 814-815 [2000]). We conclude that the court also erred in directing that the concurrent sentences imposed on the counts of robbery in the second degree run consecutively to the sentence on the count of robbery in the first degree because "it is impossible to ascertain from the record whether the [robbery in the first degree] conviction[was] based on defendant's conduct in relation to any particular [property], and concurrent sentences are required where, as here, 'it is impossible to determine whether the act that formed the basis for the jury's guilty verdict on [one] count . . . was also . . . the . . . act[] that formed the basis for its guilty verdict on [another] count' " (*People v Plume*, 145 AD3d 1469, 1472 [4th Dept 2016], quoting *People v Alford*, 14 NY3d 846, 848 [2010]; see *Parks*, 95 NY2d at 815). Although the legality of the sentence has not been raised by either party, we cannot allow an illegal sentence to stand (see *People v Considine*, 167 AD3d 1554, 1555 [4th Dept 2018]; *Carter*, 96 AD3d at 1522; see also *Plume*, 145 AD3d at 1473). We therefore modify the judgment by directing that the concurrent sentences imposed on counts 5 and 6 of the indictment for robbery in the second degree run concurrently with the concurrent sentences imposed

on counts 1 and 4 of the indictment for, respectively, felony murder and robbery in the first degree. Notwithstanding our modification of the judgment, the aggregate sentence of 40 years to life imprisonment is unaffected (*see People v Munford*, 174 AD3d 412, 413 [1st Dept 2019], *lv denied* 34 NY3d 1018 [2019]; *People v Thang Thanh Nguyen*, 2 AD3d 1485, 1485 [4th Dept 2003]; *People v Jeanty*, 268 AD2d 675, 680 [3d Dept 2000], *lv denied* 94 NY2d 949 [2000]), and we reject defendant's contention that the aggregate sentence is unduly harsh and severe. Present—Bannister, J.P., Montour, Greenwood, Nowak and Hannah, JJ.

26 The People of the State of New York, Respondent, v Theodore E. Coffie, Appellant. [253 NYS3d 459]—

Crimes—Reckless Endangerment—Sufficiency and Weight of Evidence—Gunshots

Appeal from a judgment of the Cattaraugus County Court (Ronald D. Ploetz, J.), rendered February 14, 2023. The judgment convicted defendant upon a jury verdict of reckless endangerment in the first degree.

It is hereby ordered that the appeal from the judgment insofar as it imposed sentence is unanimously dismissed and the judgment is affirmed.

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of reckless endangerment in the first degree (Penal Law § 120.25) stemming from an incident where nine gun shots were fired outside a house toward the street. Defendant contends that the evidence is legally insufficient to establish that he was the shooter or that anyone was in or near the line of fire. Defendant's contention is not preserved for our review, both because his trial order of dismissal motion did not raise the specific grounds he advances on appeal and because he did not renew the motion after presenting evidence (*see generally People v Hines*, 97 NY2d 56, 61 [2001], *rearg denied* 97 NY2d 678 [2001]; *People v Gray*, 86 NY2d 10, 19 [1995]). In any event, viewing the evidence in the light most favorable to the People (*see People v Contes*, 60 NY2d 620, 621 [1983]), we conclude that the evidence is legally sufficient (*see generally People v Bleakley*, 69 NY2d 490, 495 [1987]). The testimony of defendant's girlfriend established defendant's identity as the shooter, and we reject defendant's contention that her testimony was “‘so unworthy of belief as to be incredible as a matter of law’” (*People v Woods*, 26 AD3d 818, 819 [4th Dept 2006], *lv denied* 7 NY3d 765 [2006]; *see People v Toran*, 229 AD3d 1228, 1229 [4th Dept 2024], *lv denied* 42 NY3d 1022 [2024]).

The evidence also established that the vehicle defendant arrived in when he went to the house was parked in the street, with a passenger still inside the vehicle, when shots were fired near the vehicle. In addition, a bullet was recovered from a porch directly across the street from the shooting, and the jury could rationally infer that the bullet came from the gun used by defendant in the shooting. Under these circumstances, there is a valid line of reasoning and permissible inferences to enable the jury to find that defendant acted recklessly under circumstances evincing a depraved indifference to human life and created a grave risk of death to a bystander (*see People v Collins*, 70 AD3d 1366, 1367 [4th Dept 2010], *lv denied* 14 NY3d 839 [2010]).

Viewing the evidence in light of the elements of the crime as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349 [2007]), we further conclude that the verdict is not against the weight of the evidence (*see generally Bleakley*, 69 NY2d at 495). Although a different verdict would not have been unreasonable, it cannot be said that the jury “failed to give the evidence the weight it should be accorded” (*id.*).

Defendant’s contention that he was denied his right to be convicted only on charges determined by a grand jury is not preserved for our review (*see People v Hursh*, 191 AD3d 1453, 1454 [4th Dept 2021], *lv denied* 37 NY3d 957 [2021]), and we decline to exercise our power to review it as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]). Defendant further contends that County Court failed to comply with the procedure for disclosure of jury notes to counsel set forth in *People v O’Rama* (78 NY2d 270 [1991]). County Court read the jury note at issue into the record in open court in the presence of defendant, defense counsel, and the jury, and thus no mode of proceedings error occurred and defendant was required to object in order to preserve his present contention for review (*see People v Nealon*, 26 NY3d 152, 160-161 [2015]; *People v Kellam*, 237 AD3d 1518, 1519 [4th Dept 2025]; *People v Wilson*, 158 AD3d 1204, 1204-1205 [4th Dept 2018], *lv denied* 31 NY3d 1089 [2018]), which he failed to do. We decline to exercise our power to review defendant’s contention as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]).

Defendant further failed to preserve for our review his contention that prosecutorial misconduct on summation deprived him of a fair trial (*see People v Williams*, 233 AD3d 1463, 1465 [4th Dept 2024], *lv denied* 43 NY3d 1012 [2025]). In any event, to the extent that the prosecutor’s remarks were improper, they were “not so pervasive or egregious as to deprive

defendant of a fair trial” (*People v Elmore*, 175 AD3d 1003, 1005 [4th Dept 2019], *lv denied* 34 NY3d 1158 [2020] [internal quotation marks omitted]; *see People v Hills*, 234 AD3d 1311, 1314 [4th Dept 2025], *lv denied* 43 NY3d 963 [2025]). We reject defendant’s further contention that he was denied effective assistance of counsel (*see generally People v Baldi*, 54 NY2d 137, 146-147 [1981]). We conclude that the evidence, the law, and the circumstances of this case, viewed in totality and as of the time of the representation, reveal that defendant received meaningful representation (*see People v Benevento*, 91 NY2d 708, 712 [1998]; *Baldi*, 54 NY2d at 147).

Inasmuch as defendant has completed serving the sentence imposed, his contention that the sentence is unduly harsh and severe has been rendered moot (*see People v Castellano*, 232 AD3d 1305, 1305-1306 [4th Dept 2024]; *People v Ismael*, 210 AD3d 1528, 1529-1530 [4th Dept 2022]; *People v Boley*, 126 AD3d 1389, 1390 [4th Dept 2015], *lv denied* 25 NY3d 1159 [2015]). Even assuming, arguendo, that defendant’s contention is not moot, we would decline to reduce the sentence as a matter of discretion in the interest of justice (*see Ismael*, 210 AD3d at 1530). Present—Bannister, J.P., Montour, Greenwood, Nowak and Hannah, JJ.

27 The People of the State of New York, Respondent, v Christopher O’Neal, Jr., Appellant. [— NYS3d —]—

Crimes—Right to Counsel—Effective Representation—Plea of Guilty

Appeal from a judgment of the Supreme Court, Monroe County (Thomas E. Moran, J.), rendered April 29, 2024. The judgment convicted defendant, upon his plea of guilty, of criminal possession of a weapon in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting him, upon his guilty plea, of criminal possession of a weapon in the second degree (Penal Law § 265.03 [3]). Contrary to defendant’s contention, he validly waived his right to appeal (*see People v Moody*, 240 AD3d 1323, 1324 [4th Dept 2025], *lv denied* 44 NY3d 1012 [2025]; *People v Williams*, 237 AD3d 1581, 1582 [4th Dept 2025], *lv denied* 44 NY3d 985 [2025]; *see generally People v Thomas*, 34 NY3d 545, 564-566 [2019], *cert denied* 589 US 1302 [2020]). While defendant is correct that Supreme Court failed to ascertain defendant’s understanding of the contents of the written waiver of the right to appeal on the record, that “deficiency . . . is of no moment where, as here, the oral waiver was adequate” (*People v*

Brinson, 240 AD3d 1376, 1377 [4th Dept 2025], *lv denied* 44 NY3d 1064 [2026]). Defendant's valid waiver of the right to appeal encompasses his challenge to the severity of the sentence (see *People v Lopez*, 6 NY3d 248, 256 [2006]; *People v Hidalgo*, 91 NY2d 733, 737 [1998]).

Defendant further contends that the court abused its discretion in denying his motion to withdraw his guilty plea on the ground of ineffective assistance of counsel without holding a hearing. We reject that contention. As an initial matter, we note that defendant's contention survives his valid waiver of the right to appeal "only insofar as he contends that his plea was infected by the allegedly ineffective assistance and that he entered the plea because of his attorney's allegedly poor performance" (*People v Strickland*, 103 AD3d 1178, 1178 [4th Dept 2013]; see *People v Wong*, 151 AD3d 1853, 1854 [4th Dept 2017], *lv denied* 30 NY3d 954 [2017]). "When a defendant moves to withdraw a guilty plea, the nature and extent of the fact-finding inquiry rest[] largely in the discretion of the Judge to whom the motion is made and a hearing will be granted only in rare instances" (*People v Brown*, 14 NY3d 113, 116 [2010] [internal quotation marks omitted]; see *People v Ciskiewicz*, 219 AD3d 1696, 1696 [4th Dept 2023], *lv denied* 40 NY3d 1091 [2024]). Here, "nothing in the record casts doubt on the apparent effectiveness of counsel" (*People v Raghnael*, 185 AD3d 1411, 1413 [4th Dept 2020], *lv denied* 35 NY3d 1115 [2020] [internal quotation marks omitted]), "[d]efendant admitted each element of the offense[] during his plea allocution and did not claim either that he was innocent or that he had been coerced[,] . . . [and defendant's claims] presented credibility issues that the court could properly resolve without a hearing" (*People v Newsome*, 140 AD3d 1695, 1695-1696 [4th Dept 2016] [internal quotation marks omitted]). Present—Bannister, J.P., Montour, Greenwood, Nowak and Hannah, JJ.

28 The People of the State of New York, Respondent, v Curtez McLaurin, Appellant. [253 NYS3d 456]—Appeal from a judgment of the Onondaga County Court (Matthew J. Doran, J.), rendered October 21, 2022. The judgment convicted defendant, upon a jury verdict, of murder in the second degree, attempted robbery in the first degree and criminal possession of a weapon in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting him, upon a jury verdict, of murder in the second degree (Penal Law § 125.25 [3]), attempted robbery in the first degree

(§§ 110.00, 160.15 [2]), and criminal possession of a weapon in the second degree (§ 265.03 [3]). We affirm.

Defendant contends that County Court erred in refusing his request to charge manslaughter in the second degree as a lesser included offense of murder in the second degree. We reject that contention. While, as the People correctly concede, manslaughter in the second degree (*see* Penal Law § 125.15) is a lesser included offense of murder in the second degree under Penal Law § 125.25 (1) (intentional murder) (*see People v McIntosh*, 162 AD3d 1612, 1613 [4th Dept 2018], *affd* 33 NY3d 1064 [2019]), defendant was not prejudiced by the failure to charge the lesser offense because he was acquitted on the intentional murder count (*see People v Brown*, 53 NY2d 979, 981 [1981]; *People v Ashraf*, 186 AD2d 1057, 1058 [4th Dept 1992], *lv denied* 80 NY2d 1025 [1992]). Rather, defendant was convicted of felony murder (*see* § 125.25 [3]) and manslaughter in the second degree is not a lesser included offense of that crime (*see People v Langlois*, 17 AD3d 772, 774 [3d Dept 2005]).

Defendant's challenge to the court's second *Allen* charge is unpreserved for our review (*see generally People v Moore*, 213 AD3d 1213, 1214 [4th Dept 2023], *lv denied* 39 NY3d 1142 [2023]), and we decline to exercise our power to review that contention as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]).

Viewing the evidence in light of the elements of the crimes as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349 [2007]), we reject defendant's further contention that the verdict is against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495 [1987]).

Contrary to defendant's contention, his sentence is not unduly harsh or severe. Finally, we have considered defendant's remaining contention and conclude that it does not warrant reversal or modification of the judgment. Present—Bannister, J.P., Montour, Greenwood, Nowak and Hannah, JJ.

29 In the Matter of Leon Thomas, Petitioner, v Daniel F. Martuscello, III, Acting Commissioner, New York State Department of Corrections and Community Supervision, Respondent. [253 NYS3d 461]—Proceeding pursuant to CPLR article 78 (transferred to the Appellate Division of the Supreme Court in the Fourth Judicial Department by order of the Supreme Court, Wyoming County [Donald G. O'Geen, A.J.], entered August 27, 2025) to review a determination of respondent. The determination found after a tier III hearing that petitioner had violated various incarcerated individual rules.

It is hereby ordered that the determination is unanimously confirmed without costs and the petition is dismissed.

Memorandum: Petitioner commenced this CPLR article 78 proceeding seeking to annul a determination, following a tier III hearing, that he violated several incarcerated individual rules. To the extent that petitioner contends that the determination finding that he violated incarcerated individual rules 104.13 (7 NYCRR 270.2 [B] [5] [iv] [creating a disturbance]) and 106.10 (7 NYCRR 270.2 [B] [7] [i] [refusing a direct order]) is not supported by substantial evidence, we note that “his plea of guilty to those violations precludes our review of his contention” (*Matter of Caballero v Annucci*, 187 AD3d 1671, 1672 [4th Dept 2020]; see *Matter of Ingram v Annucci*, 151 AD3d 1778, 1778 [4th Dept 2017], *lv denied* 30 NY3d 904 [2017]; *Matter of Williams v Annucci*, 133 AD3d 1362, 1363 [4th Dept 2015]). We have reviewed petitioner’s remaining contention and conclude that it does not require a different result. Present—Bannister, J.P., Montour, Greenwood, Nowak and Hannah, JJ.

30 The People of the State of New York, Respondent, v Carlos A. Machado-Garcia, Appellant. [— NYS3d —]

Crimes—Right to Counsel—Effective Representation—Plea of Guilty

Appeal from a judgment of the Supreme Court, Monroe County (Victoria M. Argento, J.), rendered December 22, 2022. The judgment convicted defendant upon a plea of guilty of criminal possession of a weapon in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon a plea of guilty of criminal possession of a weapon in the second degree (Penal Law § 265.03 [3]). Defendant contends that the plea was not entered knowingly, intelligently, and voluntarily because Supreme Court failed to advise him of the sentencing consequences of Penal Law § 70.25 (2-b). By failing to move to withdraw the plea or to vacate the judgment of conviction on that ground, defendant failed to preserve his contention for our review (see *People v Laury*, 156 AD3d 1473, 1473 [4th Dept 2017], *lv denied* 32 NY3d 939 [2018]; see generally *People v Delorbe*, 35 NY3d 112, 119 [2020]), and we decline to exercise our power to review it as a matter of discretion in the interest of justice (see CPL 470.15 [3] [c]).

Inasmuch as defendant’s contentions regarding the effective assistance of counsel would survive even a valid waiver of the right to appeal to the same extent that they would survive his plea, we need not address the validity of the waiver of the

right to appeal (*see People v Burgess*, 247 AD3d 1623, 1624 [4th Dept 2026]; *People v Shaw*, 222 AD3d 1401, 1401, 1403 [4th Dept 2023], *lv denied* 42 NY3d 930 [2024]). Defendant's contention that he was denied effective assistance of counsel prior to entering his plea does not survive his plea because defendant "failed to demonstrate that the plea bargaining process was infected by [the] allegedly ineffective assistance or that defendant entered the plea because of his attorney[s] allegedly poor performance" (*People v Dewiel*, 100 AD3d 1524, 1525 [4th Dept 2012], *lv denied* 20 NY3d 1010 [2013] [internal quotation marks omitted]; *see generally People v Richards*, 239 AD3d 1330, 1331 [4th Dept 2025], *lv denied* 44 NY3d 1013 [2025]). Defendant further contends that defense counsel failed to present sufficient mitigating circumstances at sentencing to warrant the imposition of a sentence that would run concurrently with a sentence imposed on an unrelated conviction (*see* Penal Law § 70.25 [2-b]). Even assuming, *arguendo*, that defendant's contention survives his guilty plea and waiver of the right to appeal (*see People v McFarley*, 144 AD3d 1521, 1522 [4th Dept 2016]), we conclude that, under the circumstances of this case, defense counsel's inability to persuade the sentencing court to impose concurrent sentences did not constitute ineffective assistance of counsel (*see generally People v Avent*, 178 AD3d 1403, 1405 [4th Dept 2019], *lv denied* 35 NY3d 940 [2020]; *see People v Smith*, 300 AD2d 745, 746 [3d Dept 2002], *lv denied* 99 NY2d 620 [2003]). Present—Curran, J.P., Montour, Smith, Ogden and DelConte, JJ.

31 The People of the State of New York, Respondent, v Trevor E. Clarke, Appellant. [— NYS3d —]—Appeal from a judgment of the Monroe County Court (Douglas A. Randall, J.), rendered May 28, 2020. The judgment convicted defendant, upon a jury verdict, of sexual abuse in the first degree (five counts), sexual abuse in the third degree, predatory sexual assault against a child (three counts), and endangering the welfare of a child (two counts).

It is hereby ordered that the judgment so appealed from is unanimously modified as a matter of discretion in the interest of justice by directing that the sentences of incarceration imposed on counts 2 and 6 of the indictment shall run concurrently with each other and as modified the judgment is affirmed.

Memorandum: Defendant appeals from a judgment convicting him, upon a jury verdict, of five counts of sexual abuse in the first degree (Penal Law § 130.65 [1], [4]), three counts of predatory sexual assault against a child (former § 130.96), one

count of sexual abuse in the third degree (§ 130.55), and two counts of endangering the welfare of a child (§ 260.10 [1]).

Defendant contends that the verdict is against the weight of the evidence. We reject that contention. Viewing the evidence in light of the elements of the crimes as charged to the jury (see *People v Danielson*, 9 NY3d 342, 349 [2007]), we conclude that the verdict is not against the weight of the evidence (see generally *People v Bleakley*, 69 NY2d 490, 495 [1987]). Where, as here, “witness credibility is of paramount importance to the determination of guilt or innocence, the appellate court must give ‘[g]reat deference . . . [to the] fact-finder’s opportunity to view the witnesses, hear the testimony and observe demeanor’ ” (*People v Harris*, 15 AD3d 966, 967 [4th Dept 2005], *lv denied* 4 NY3d 831 [2005], quoting *Bleakley*, 69 NY2d at 495; see *People v Streeter*, 118 AD3d 1287, 1288 [4th Dept 2014], *lv denied* 23 NY3d 1068 [2014], *denied reconsideration* 24 NY3d 1047 [2014]). Although a different verdict would not have been unreasonable, we cannot conclude that the jurors “ ‘failed to give the evidence the weight it should be accorded’ ” (*People v Bailey*, 239 AD3d 1375, 1376 [4th Dept 2025], *lv denied* 44 NY3d 1009 [2025]). Any inconsistencies in the testimony of the witnesses merely presented credibility issues for the jury to resolve (see *People v Cerroni*, 225 AD3d 1117, 1120 [4th Dept 2024], *lv denied* 41 NY3d 1017 [2024]; *People v Watts*, 218 AD3d 1171, 1173-1174 [4th Dept 2023], *lv denied* 40 NY3d 1013 [2023]; *People v Woolson*, 122 AD3d 1353, 1355 [4th Dept 2014], *lv denied* 25 NY3d 1078 [2015]).

Defendant further contends that County Court deprived him of his constitutional right to present a defense when it precluded him from questioning one of the victims about statements she attributed to defendant that she had previously attributed to a third party. We conclude that “defendant did not assert a constitutional right to introduce the excluded evidence at trial,” and that his constitutional claim is therefore unpreserved for our review (*People v Simmons*, 106 AD3d 1115, 1116 [2d Dept 2013], *lv denied* 22 NY3d 1043 [2013]; see *People v Garrow*, 126 AD3d 1362, 1363 [4th Dept 2015]), and we decline to exercise our power to review that contention as a matter of discretion in the interest of justice (see CPL 470.15 [6] [a]).

Finally, we agree with defendant that the sentence is unduly harsh and severe. “The determination of an appropriate sentence requires the exercise of discretion after due consideration given to, among other things, the crime[s] charged, the particular circumstances of the individual before the court and

the purpose of a penal sanction, i.e., societal protection, rehabilitation and deterrence” (*People v Farrar*, 52 NY2d 302, 305 [1981]). Here, although defendant’s conduct was heinous and despicable, we conclude that the aggregate prison sentence of 52 years to life is not justified under the circumstances of this case (see *People v Franklin*, 206 AD3d 1610, 1613 [4th Dept 2022], *lv denied* 38 NY3d 1150 [2022]). In contrast to the aggregate sentence imposed by the court, which effectively guarantees a life sentence without the possibility of parole, we conclude that a prison sentence aggregating to 37 years to life is an appropriate sanction for the crimes committed (see *id.*). We therefore modify the judgment, as a matter of discretion in the interest of justice, by directing that the sentences of incarceration imposed on counts 2 and 6 of the indictment shall run concurrently with each other (see CPL 470.15 [6] [b]). Present—Curran, J.P., Montour, Smith, Ogden and DelConte, JJ.

32 The People of the State of New York, Respondent, v Joseph Serrano, Appellant. [— NYS3d —]

Crimes—Confession—Statements to Police while at Hospital

Crimes—Jurors—Misconduct of Juror—Hearsay Allegations in Affirmation of Counsel

Crimes—Disclosure—Expert Disclosure—Enhancements to Video Evidence

Appeal from a judgment of the Supreme Court, Monroe County (Thomas E. Moran, J.), rendered August 21, 2023. The judgment convicted defendant upon a jury verdict of murder in the second degree and criminal possession of a weapon in the second degree (two counts).

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

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of murder in the second degree (Penal Law § 125.25 [1]) and two counts of criminal possession of a weapon in the second degree (§ 265.03 [1] [b]; [3]). We affirm.

Contrary to defendant’s contention, we conclude, after viewing the evidence in light of the elements of the crimes as charged to the jury (see *People v Danielson*, 9 NY3d 342, 349 [2007]), that the verdict is not against the weight of the evidence (see generally *People v Bleakley*, 69 NY2d 490, 495 [1987]). “Issues of credibility are primarily for the jury’s determination” (*People v Edwards*, 159 AD3d 1425, 1426 [4th Dept 2018], *lv denied* 31 NY3d 1116 [2018]; see *People v Witherspoon*, 66 AD3d 1456, 1457 [4th Dept 2009], *lv denied* 13 NY3d 942

[2010]) and, thus, we “must give ‘[g]reat deference . . . [to the] fact-finder’s opportunity to view the witnesses, hear the testimony and observe demeanor’ ” (*People v Harris*, 15 AD3d 966, 967 [4th Dept 2005], *lv denied* 4 NY3d 831 [2005], quoting *Bleakley*, 69 NY2d at 495). Here, the testimony of the two eye-witnesses, particularly when viewed in conjunction with the supporting ballistics evidence, “was not so inconsistent or unbelievable as to render it incredible as a matter of law” (*People v Black*, 38 AD3d 1283, 1285 [4th Dept 2007], *lv denied* 8 NY3d 982 [2007]; see *Edwards*, 159 AD3d at 1426), and we see no basis for disturbing the jury’s credibility determinations.

Defendant failed to preserve for our review his contention that his constitutional right to confront witnesses against him was violated when the victim’s autopsy report was admitted in evidence during the testimony of a medical examiner who did not prepare the report (see CPL 470.05 [2]; *People v Bacon*, 44 NY3d 1076, 1078 [2025]; *People v Flowers*, 166 AD3d 1492, 1496 [4th Dept 2018], *lv denied* 32 NY3d 1125 [2018]).

Contrary to defendant’s contention, Supreme Court did not err in refusing to suppress statements defendant made to police investigators while at a hospital. “[B]oth the elements of police ‘custody’ and police ‘interrogation’ must be present before law enforcement officials constitutionally are obligated to provide the procedural safeguards imposed upon them by *Miranda*” (*People v Huffman*, 41 NY2d 29, 33 [1976]; see *People v Hailey*, 153 AD3d 1639, 1640-1641 [4th Dept 2017], *lv denied* 30 NY3d 1060 [2017]). Although defendant was in custody at the time the statements he sought to suppress were made (*cf. People v Green*, 197 AD3d 993, 995 [4th Dept 2021], *lv denied* 37 NY3d 1161 [2022]), the statements were made in response to a threshold inquiry that was “intended to ascertain the nature of the situation during initial investigation of a crime, rather than to elicit evidence of a crime, and those statements thus were not subject to suppression” (*People v Mitchell*, 132 AD3d 1413, 1414 [4th Dept 2015], *lv denied* 27 NY3d 1072 [2016] [internal quotation marks omitted]; see *People v Spirles*, 136 AD3d 1315, 1316 [4th Dept 2016], *lv denied* 27 NY3d 1007 [2016], *cert denied* 580 US 920 [2016]).

Defendant failed to preserve for our review his contention that a photo array identification procedure was unduly suggestive on the grounds that it depicted him in a hospital gown and used a photograph of him that had been broadcast in the media because he did not raise those specific grounds at the suppression hearing (see CPL 470.05 [2]; *People v Pinet*, 201 AD3d

1370, 1370 [4th Dept 2022], *lv denied* 38 NY3d 953 [2022]; *People v Bell*, 19 AD3d 1074, 1075 [4th Dept 2005], *lv denied* 5 NY3d 803 [2005], *denied upon reconsideration* 5 NY3d 850 [2005]).

Defendant's contention that the prosecutor committed misconduct during the grand jury proceeding by failing to correct a witness's allegedly perjurious statement and not disclosing to the grand jury that the same witness did not identify defendant in the first of two photo array identification procedures administered to her is not preserved for our review. Defendant, while seeking dismissal of the indictment "on the general ground that the grand jury proceeding was defective, . . . failed to set forth the specific ground[s] for dismissal now set forth on appeal" (*People v Nesmith*, 242 AD3d 1564, 1565 [4th Dept 2025], *lv denied* 44 NY3d 1067 [2026]; see CPL 470.05 [2]; *People v Brown*, 81 NY2d 798, 798 [1993]).

Defendant failed to preserve for our review his present contention that the court erred in failing to preclude a police investigator's testimony as a sanction for the People's failure to disclose photographs and documentation related to a search of defendant's vehicle because, at trial, he did not request the sanction now sought on appeal (see CPL 470.05 [2]; *People v Elmore*, 211 AD3d 1536, 1538 [4th Dept 2022], *lv denied* 42 NY3d 938 [2024]; *People v Manigault*, 125 AD3d 1480, 1480 [4th Dept 2015], *lv denied* 25 NY3d 1074 [2015]). "[I]n the absence of further objection or a request for a mistrial, [the issuance of an adverse inference instruction] must be deemed to have corrected the error to the defendant's satisfaction" (*People v Contreras*, 154 AD3d 1320, 1322 [4th Dept 2017], *lv denied* 30 NY3d 1104 [2018] [internal quotation marks omitted]; see *People v Acosta*, 134 AD3d 1525, 1526 [4th Dept 2015], *lv denied* 27 NY3d 990 [2016]).

Defendant failed to preserve for our review his contention that he was denied a fair trial by prosecutorial misconduct during cross-examination and summation (see *People v Marra*, 96 AD3d 1623, 1626 [4th Dept 2012], *aff'd* 21 NY3d 979 [2013]; *People v King*, 224 AD3d 1313, 1314 [4th Dept 2024], *lv denied* 41 NY3d 1019 [2024]; *People v Brown*, 94 AD3d 1461, 1462 [4th Dept 2012], *lv denied* 19 NY3d 995 [2012]). In any event, "[r]eversal on grounds of prosecutorial misconduct 'is mandated only when the conduct has caused such substantial prejudice to the defendant that he has been denied due process of law'" (*People v Rubin*, 101 AD2d 71, 77 [4th Dept 1984], *lv denied* 63 NY2d 711 [1984]), and that cannot be said here (see *People v Alligood*, 115 AD3d 1346, 1347-1348 [4th Dept 2014], *lv denied*

23 NY3d 1017 [2014]; *People v Rivers*, 82 AD3d 1623, 1624 [4th Dept 2011], *lv denied* 17 NY3d 904 [2011]).

Contrary to defendant's contention, the court did not err in summarily denying his motion to set aside the verdict pursuant to CPL 330.30 insofar as it was based on alleged juror misconduct. A motion to set aside a verdict based on juror misconduct "must contain sworn allegations, whether by the defendant or by another person or persons, of the occurrence or existence of all facts essential to support the motion. Such sworn allegations may be based upon personal knowledge of the affiant or upon information and belief, provided that in the latter event the affiant must state the sources of such information and the grounds of such belief" (CPL 330.40 [2] [a]; *see* CPL 330.30 [2]). Here, defendant's motion insofar as it was based on juror misconduct "'was supported only by hearsay allegations contained in an [affirmation] of defense counsel'" (*People v Meredith*, 220 AD3d 1201, 1202 [4th Dept 2023], *lv denied* 41 NY3d 966 [2024]; *see People v Kerner*, 299 AD2d 913, 913 [4th Dept 2002], *lv denied* 99 NY2d 583 [2003]).

While we agree with defendant that the People failed to meet their obligation of disclosing impeachment material with respect to an evidence technician (*see generally Giglio v United States*, 405 US 150, 150-154 [1972]), the "failure by the People to comply with their continuing discovery obligations under CPL 245.60 . . . does not . . . implicate speedy trial considerations under CPL 30.30" (*People v Radford*, 237 AD3d 1511, 1513 [4th Dept 2025], *lv denied* 43 NY3d 1048 [2025]), and we conclude that, contrary to defendant's contention, the court did not abuse its discretion in denying that part of his motion to set aside the verdict pursuant to CPL 330.30 based on that alleged *Giglio* violation. "[I]n the context of this case, the value of the undisclosed information as admissible impeachment evidence would have been, at best, minimal" (*People v Garrett*, 23 NY3d 878, 892 [2014], *rearg denied* 25 NY3d 1215 [2015] [internal quotation marks omitted]).

We further conclude that the court did not abuse its discretion in denying defendant's motion to set aside the verdict pursuant to CPL 330.30 insofar as it was based on alleged late expert disclosure. Under the circumstances of this case, the limited enhancements to the subject video evidence, which consisted solely of zooming in and adjusting the brightness and contrast of the footage using video editing software, were "within the ken of the typical juror," and thus expert disclosure was not required with respect to the testimony and video evidence in question (*People v Cronin*, 60 NY2d 430, 433 [1983];

see *People v Lemery*, 107 AD3d 1593, 1594 [4th Dept 2013], *lv denied* 22 NY3d 956 [2013]; see generally *People v Ashe*, 208 AD3d 1500, 1507 [3d Dept 2022], *lv denied* 39 NY3d 961 [2022]).

Contrary to defendant's contention, we conclude that he received effective assistance of counsel. When analyzing a contention of ineffective assistance of counsel, the evidence, law, and circumstances of a particular case must be "viewed in totality and as of the time of the representation" and, if they reveal "that the attorney provided meaningful representation, the constitutional requirement will have been met" (*People v Baldi*, 54 NY2d 137, 147 [1981]). Here, defendant failed to demonstrate the absence of a legitimate or strategic basis for defense counsel's decision not to seek admission in evidence of body-worn camera footage from the officers responding to the shooting, the recording of the 911 call from the victim's girlfriend, or hearsay statements contained within the victim's autopsy report and, thus, "failed to establish that he was denied effective assistance of counsel" on those grounds (*People v Dombrowski*, 94 AD3d 1416, 1417 [4th Dept 2012], *lv denied* 19 NY3d 959 [2012]). Similarly, defense counsel was not ineffective for failing to seek admission in evidence of inadmissible hearsay statements contained in a recorded telephone conversation involving one of the prosecution's witnesses (see *People v McCullough*, 144 AD3d 1526, 1527 [4th Dept 2016], *lv denied* 29 NY3d 999 [2017]; *People v Geddes*, 49 AD3d 1255, 1256 [4th Dept 2008], *lv denied* 10 NY3d 863 [2008]), nor was defense counsel ineffective in failing to request that the court recuse itself or in failing to seek suppression of certain identification testimony. Such efforts would have been unlikely to succeed, and "defense counsel cannot be deemed ineffective for failing to make a motion [or argument] that would have had little to no chance of success" (*People v Weeks*, 221 AD3d 1469, 1471 [4th Dept 2023], *lv denied* 41 NY3d 944 [2024]; see generally *People v Caban*, 5 NY3d 143, 152 [2005]). Notably, defense counsel made appropriate pretrial motions, conducted a suppression hearing and other pretrial hearings, presented opening and closing arguments, raised appropriate objections throughout the trial, effectively cross-examined the prosecution witnesses, and presented a cogent defense in challenging his identification as the shooter (see *People v Singleton*, 203 AD3d 1671, 1673 [4th Dept 2022], *lv denied* 38 NY3d 1074 [2022]; *People v Goncalves*, 283 AD2d 1005, 1005 [4th Dept 2001], *lv denied* 96 NY2d 918 [2001]).

Finally, defendant contends that he was denied a fair trial

by the cumulative effect of the errors alleged herein. We reject defendant's contention with respect to the preserved alleged errors previously reviewed, and we decline to exercise our power to review his contention with respect to the unpreserved alleged errors as a matter of discretion in the interest of justice (see CPL 470.15 [6] [a]; *People v Lathrop*, 171 AD3d 1473, 1475 [4th Dept 2019], *lv denied* 33 NY3d 1106 [2019]). Present—Curran, J.P., Montour, Smith, Ogden and DelConte, JJ.

33 The People of the State of New York, Respondent, v Carlos Machado-Garcia, Appellant. [— NYS3d —]—

Crimes—Possession of Stolen Property—Vehicle—Weight of Evidence
Crimes—Consolidation and Severance—Separate Theft-Related Incidents

Appeal from a judgment of the Supreme Court, Monroe County (Victoria M. Argento, J.), rendered December 22, 2022. The judgment convicted defendant upon a jury verdict of criminal possession of stolen property in the third degree (two counts), burglary in the third degree (two counts), attempted grand larceny in the third degree and grand larceny in the fourth degree.

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

Memorandum: Defendant appeals from a judgment convicting him after a jury trial of two counts of criminal possession of stolen property in the third degree (Penal Law § 165.50), two counts of burglary in the third degree (§ 140.20), one count of attempted grand larceny in the third degree (§§ 110.00, 155.35 [2]), and one count of grand larceny in the fourth degree (§ 155.30 [1]). Viewing the evidence in light of the elements of the crime of criminal possession of stolen property in the third degree as charged to the jury (see *People v Danielson*, 9 NY3d 342, 349 [2007]), we reject defendant's contention that the verdict with respect to that crime as charged in the first count of the indictment is against the weight of the evidence (see generally *People v Bleakley*, 69 NY2d 490, 495 [1987]). "Knowledge that property is stolen can be established through circumstantial evidence such as by evidence of recent exclusive possession, defendant's conduct[,] or contradictory statements from which guilt may be inferred" (*People v Cintron*, 95 NY2d 329, 332 [2000] [internal quotation marks omitted]; see *People v Waterford*, 124 AD3d 1246, 1246-1247 [4th Dept 2015], *lv denied* 26 NY3d 972 [2015]; see also *People v Brown*, 174 AD3d 1329, 1332 [4th Dept 2019], *lv denied* 34 NY3d 979 [2019]). Here, the record establishes, inter alia, that defendant was found to be the sole occupant of the subject stolen vehicle

parked in front of a business after midnight. When confronted by police, defendant provided conflicting statements as to the vehicle's purported owner and was unable to provide contact information for that person. In light of the testimony at trial, we conclude that the jury was entitled to infer that defendant knowingly possessed a stolen vehicle (*see generally People v Ohse*, 114 AD3d 1285, 1286 [4th Dept 2014], *lv denied* 23 NY3d 1041 [2014]).

Contrary to defendant's further contention, Supreme Court properly denied his motion to sever the counts of the indictment based on the separate incidents to which they pertained because he failed to show "‘good cause for severance’" (*People v Rios*, 107 AD3d 1379, 1380 [4th Dept 2013], *lv denied* 22 NY3d 1158 [2014]; *see* CPL 200.20 [3]). The indictment charged defendant with counts arising from four separate theft-related incidents where defendant was alleged to be using a different stolen vehicle on each occasion. The offenses were each "‘the same or similar’ and thus were properly joinable [pursuant to CPL 200.20 (2) (c)]" (*People v Cabrera*, 188 AD2d 1062, 1063 [4th Dept 1992]; *see People v Brown*, 172 AD3d 437, 437-438 [1st Dept 2019], *lv denied* 33 NY3d 1067 [2019]; *People v Smart* [appeal No. 2], 224 AD2d 999, 999-1000 [4th Dept 1996], *lv denied* 88 NY2d 854 [1996]). The evidence concerning each incident "was presented separately and was readily capable of being segregated in the minds of the jury," and defendant failed to establish that there was "a substantial likelihood that the jury would be unable to [separately consider the evidence]" (*Rios*, 107 AD3d at 1380 [internal quotation marks omitted]). Indeed, "the fact that defendant was acquitted of [certain] charges ‘indicates that the jury was able to consider the proof concerning each count separately’" (*id.*; *see People v Smith*, 147 AD3d 1527, 1528 [4th Dept 2017], *lv denied* 29 NY3d 1087 [2017]; *People v Barber-Montemayor*, 138 AD3d 1455, 1457 [4th Dept 2016], *lv denied* 28 NY3d 926 [2016]). As defendant correctly concedes, he failed to preserve his alternative contention that the court provided the jury with an insufficient limiting instruction regarding the jury's duty to consider each of the counts of the indictment separately (*see generally People v Hymes*, 174 AD3d 1295, 1299 [4th Dept 2019], *affd* 34 NY3d 1178 [2020]).

We likewise reject defendant's contention that he received ineffective assistance of counsel. Initially, defendant's contention that he received ineffective assistance of counsel at sentencing is not properly before us on this appeal. Defendant was sentenced on two indictments, i.e., the instant indictment

and a subsequent indictment related to charges arising from conduct that occurred while the charges on the instant indictment were pending. These circumstances triggered the consecutive sentencing regime provided by Penal Law § 70.25 (2-b). Defendant contends that defense counsel was ineffective at sentencing by failing to provide sufficient mitigating circumstances in favor of concurrent sentences as contemplated by that statute. Defendant's contention, however, relates to his judgment of conviction on the second indictment, not the instant indictment (*see People v Dunbar*, 183 AD3d 1263, 1264 [4th Dept 2020], *lv denied* 35 NY3d 1044 [2020]). We conclude that defendant's remaining contentions regarding the alleged ineffectiveness of counsel represent "simple disagreement[s] with [trial] strategies, tactics or the scope of possible cross-examination" that do not constitute ineffective assistance (*People v Mastin*, 232 AD3d 1268, 1269 [4th Dept 2024], *lv denied* 42 NY3d 1053 [2024]; *see People v Austen*, 197 AD3d 861, 861-862 [4th Dept 2021], *lv denied* 37 NY3d 1095 [2021]; *People v Case*, 197 AD3d 985, 988 [4th Dept 2021], *lv denied* 37 NY3d 1160 [2022]; *People v Lozada*, 164 AD3d 1626, 1628 [4th Dept 2018], *lv denied* 32 NY3d 1174 [2019]).

Finally, we reject defendant's contention that his sentence is unduly harsh and severe. Present—Curran, J.P., Montour, Smith, Ogden and DelConte, JJ.

34 In the Matter of Akeem M. and Another. Onondaga County Department of Children and Family Services, Respondent; Thomas M., Appellant, et al., Respondent. (Appeal No. 1.) [— NYS3d —]

Parent, Child and Family—Abused or Neglected Child—Cocaine Use—Domestic Violence

Parent, Child and Family—Abused or Neglected Child—Diligent Efforts of Agency

Appeal from an order of the Family Court, Onondaga County (Christina F. DeJoseph, J.), entered September 19, 2024, in a proceeding pursuant to Family Court Act article 10. The order, inter alia, determined that respondent Thomas M. had neglected the subject children.

It is hereby ordered that the order so appealed from is unanimously affirmed without costs.

Memorandum: In these proceedings pursuant to Family Court Act article 10, respondent father appeals from three orders of fact-finding and disposition. In the orders in appeal Nos. 2 and 3, Family Court, inter alia, adjudged that he neglected the eldest and the youngest of the four subject children,

respectively, and in appeal No. 1, the court, *inter alia*, adjudged that he neglected the two middle children. We affirm in each appeal.

Initially, to the extent that the father purports to appeal from a June 2022 temporary order entered in a separate neglect proceeding, we note that his contention is not properly before us inasmuch as he “failed to take a timely appeal from that order” (*Matter of Arkadian S. [Crystal S.]*, 130 AD3d 1457, 1458 [4th Dept 2015], *lv dismissed* 26 NY3d 995 [2015]; *see* Family Ct Act § 1113).

We reject the father’s contention in appeal Nos. 1 and 2 that the court erred in determining that he neglected the three eldest children. Pursuant to Family Court Act § 1046 (a) (iii), “proof that a person repeatedly misuses a drug or drugs or alcoholic beverages, to the extent that it has or would ordinarily have the effect of producing in the user thereof a substantial state of stupor, unconsciousness, intoxication, hallucination, disorientation, or incompetence, or a substantial impairment of judgment, or a substantial manifestation of irrationality, shall be *prima facie* evidence that a child of or who is the legal responsibility of such person is a neglected child except that such drug, or alcoholic beverage misuse shall not be *prima facie* evidence of neglect when such person is voluntarily and regularly participating in a recognized rehabilitative program.” Thus, “neglect may in some circumstances be presumed if the parent chronically and persistently misuses alcohol and drugs which, in turn, substantially impairs [their] judgment while [the] child is entrusted to [their] care” (*Matter of Samaj B. [Towanda H.-B.—Wade B.]*, 98 AD3d 1312, 1313 [4th Dept 2012]; *see Matter of Chassidy CC. [Andrew CC.]*, 84 AD3d 1448, 1449 [3d Dept 2011]). “In other words, [t]he presumption contained in Family [Court] Act § 1046 (a) (iii) operates to eliminate a requirement of specific parental conduct vis-à-vis the child and neither actual impairment nor specific risk of impairment need be established” (*Samaj B.*, 98 AD3d at 1313 [internal quotation marks omitted]; *see Matter of Paolo W.*, 56 AD3d 966, 967 [3d Dept 2008], *lv dismissed* 12 NY3d 747 [2009]). Here, we conclude that petitioner met its burden of proof at the fact-finding hearing that was held with respect to the three eldest children (first hearing). Petitioner established that the father tested positive for cocaine while he had custody of the eldest child and that the police responded to two domestic violence calls while the mother—who is a respondent in the proceedings in appeal Nos. 1 and 3—was pregnant with the two middle children, twins, during which the father was found

to be severely intoxicated. Although the father denied using cocaine in his testimony, we “accord great deference to the findings of the court, which is in the best position to evaluate the character and credibility of the witnesses” (*Matter of Garland v Goodwin*, 13 AD3d 1059, 1059 [4th Dept 2004]).

Additionally, the evidence at the first hearing established that the father engaged in abusive behavior against the mother on at least two occasions while the eldest child was present, on at least one additional occasion while the mother was pregnant that resulted in the father having to be subdued by the police with a Taser, and on another occasion in the hospital immediately after the birth of the twins (*see Matter of Jacob W. [Jermaine W.]*, 170 AD3d 1513, 1513 [4th Dept 2019], *lv denied* 33 NY3d 906 [2019]; *Matter of Michael WW.*, 20 AD3d 609, 611-612 [3d Dept 2005]). Thus, petitioner established by a preponderance of the evidence that the three eldest children’s “physical, mental or emotional condition[s] [were] impaired or [were] in imminent danger of becoming impaired” by the father’s actions (*Jacob W.*, 170 AD3d at 1513 [internal quotation marks omitted]; *see* Family Ct Act § 1012 [f] [i] [B]; *Nicholson v Scopetta*, 3 NY3d 357, 368 [2004]).

Likewise, contrary to the father’s further contention with respect to appeal No. 3, we conclude that petitioner adduced sufficient evidence at the fact-finding portion of the relevant hearing concerning the youngest child to establish that he derivatively neglected that child. As relevant here, “[t]he focus of the inquiry to determine whether derivative neglect is present is whether the evidence of . . . neglect of [the three eldest] child[ren] indicates a fundamental defect in the [father’s] understanding of the duties of parenthood . . . or demonstrates such an impaired level of parental judgment as to create a substantial risk of harm for any child in [his] care” (*Matter of Eliora B. [Kennedy B.]*, 146 AD3d 772, 774 [2d Dept 2017] [internal quotation marks omitted]; *see Jacob W.*, 170 AD3d at 1513-1514). The evidence of the father’s repeated physical abuse of the mother, as well as his verbal abuse during supervised visitation with all four subject children, established that his neglect of the eldest children is “so closely connected with the care of [the youngest] child as to indicate that [the youngest] child is equally at risk” of being neglected (*Matter of Marino S.*, 100 NY2d 361, 374 [2003], *cert denied* 540 US 1059 [2003]; *see Matter of Ryanna H. [Monique H.]*, 214 AD3d 1308, 1309-1310 [4th Dept 2023], *lv dismissed* 40 NY3d 964 [2023]; *see also* Family Ct Act § 1046 [a] [i]).

We also reject the father’s contention in each appeal that

petitioner failed to establish that it exercised reasonable efforts to encourage and strengthen his relationship with the subject children, as required by Family Court Act § 1052 (b) (i) (A). Petitioner created a services plan for the father, informed him on a monthly basis of its requirements, attempted home visits frequently, offered drug tests on a regular basis, provided the father with a clinical visitation service, and offered the father access to anger management services, domestic violence classes, and counseling, all of which the father refused. On this record, we conclude that petitioner “‘made reasonable efforts to prevent or eliminate the need for removal of the children from [the father’s] home’” (*Matter of Ruth H. [Marie H.]*, 159 AD3d 1487, 1489 [4th Dept 2018]; *see Matter of Jack NN. [Sarah OO.]*, 173 AD3d 1499, 1503-1504 [3d Dept 2019], *lv denied* 34 NY3d 904 [2019]; *Matter of Cloey S. [Anthony T.]*, 99 AD3d 1080, 1081 [3d Dept 2012]). Present—Curran, J.P., Montour, Smith, Ogden and DelConte, JJ.

35 In the Matter of Ahmilia M. Onondaga County Department of Children and Family Services, Respondent; Thomas M., Appellant. (Appeal No. 2.) [253 NYS3d 457]—Appeal from an order of the Family Court, Onondaga County (Christina F. DeJoseph, J.), entered September 19, 2024, in a proceeding pursuant to Family Court Act article 10. The order, *inter alia*, determined that respondent had neglected the subject child.

It is hereby ordered that the order so appealed from is unanimously affirmed without costs.

Same memorandum as in *Matter of Akeem M. (Thomas M.)* ([appeal No. 1] 248 AD3d 1728 [4th Dept 2026]). Present—Curran, J.P., Montour, Smith, Ogden and DelConte, JJ.

36 In the Matter of Aleena M. Onondaga County Department of Children and Family Services, Respondent; Rose J., Respondent, and Thomas M., Appellant. (Appeal No. 3.) [253 NYS3d 458]—Appeal from an order of the Family Court, Onondaga County (Christina F. DeJoseph, J.), entered March 17, 2025, in a proceeding pursuant to Family Court Act article 10. The order, *inter alia*, determined that respondent Thomas M. had neglected the subject child.

It is hereby ordered that the order so appealed from is unanimously affirmed without costs.

Same memorandum as in *Matter of Akeem M. (Thomas M.)* ([appeal No. 1] 248 AD3d 1728 [4th Dept 2026]). Present—Curran, J.P., Montour, Smith, Ogden and DelConte, JJ.

37 Meg Bray et al., Respondents, v Saurin Popat, M.D., et al., Appellants, et al., Defendants. [253 NYS3d 851]—

Witnesses—Expert Witness—Qualifications—Medical Malpractice

Appeal from an order of the Supreme Court, Erie County (Emilio Colaiacovo, J.), entered January 24, 2025, in a medical malpractice action. The order denied the motion of defendants Saurin Popat, M.D., and Delaware Medical Group, P.C., for summary judgment.

It is hereby ordered that the order so appealed from is unanimously affirmed without costs.

Memorandum: In this medical malpractice action, Saurin Popat, M.D. and Delaware Medical Group, P.C. (defendants) appeal from an order that denied their motion for summary judgment dismissing the “Amended/Supplemental” complaint against them. We affirm.

Contrary to defendants’ contention, we conclude that, although they met their initial burden on their motion by establishing that they did not deviate from the accepted standard of care, plaintiffs raised triable issues of fact with respect to that element sufficient to defeat the motion (*see generally Thompson v Hall*, 191 AD3d 1265, 1267 [4th Dept 2021]). With respect to plaintiffs’ opposition papers, we initially reject defendants’ contention that plaintiffs’ expert was unqualified to render an opinion regarding the issues in this case. Plaintiffs’ anonymous expert averred in their expert affirmation that they are a physician, duly licensed to practice medicine, and that they are board certified by the American Board of Surgery with a clinical focus in endocrine surgery. The affirmation established that “[t]he specialized skills of [the] expert as demonstrated through [their] board certifications, taken together with the nature of the medical subject matter of th[e] action, are sufficient to support the inference that [their] opinion regarding [the] treatment [at issue] was reliable” (*Nowelle B. v Hamilton Med., Inc.*, 177 AD3d 1256, 1258 [4th Dept 2019] [internal quotation marks omitted]; *see Hilbrecht v Greco*, 189 AD3d 2073, 2074 [4th Dept 2020]). Plaintiffs’ expert opined in their affirmation, *inter alia*, that Popat’s assessment, diagnosis and treatment of plaintiff Meg Bray’s condition fell below the accepted standard of care, thus presenting a “classic battle of the experts” that precludes summary judgment (*Hilbrecht*, 189 AD3d at 2074 [internal quotation marks omitted]). Present—Curran, J.P., Montour, Smith, Ogden and DelConte, JJ.

38 Eric C. Burns et al., Appellants, v Voytek W. Sobieraj, M.D., et al., Respondents. [253 NYS3d 849]—

Physicians and Surgeons—Malpractice—Error in Judgment—Failure to Identify Abnormality as Potentially Cancerous on X-Ray

Appeal from a judgment of the Supreme Court, Steuben County (Jason L. Cook, J.), entered October 16, 2024, in a medical malpractice action. The judgment dismissed the complaint upon a jury verdict.

It is hereby ordered that the judgment so appealed from is unanimously reversed on the law without costs, the complaint is reinstated against defendants, and a new trial is granted.

Memorandum: Plaintiffs commenced this action seeking damages for injuries sustained by Eric C. Burns (plaintiff) as the result of the alleged malpractice of defendant Voytek W. Sobieraj, M.D. At trial, plaintiffs' expert testified that Sobieraj deviated from medically acceptable treatment standards when reviewing a series of X-rays taken of plaintiff's lungs by failing to identify an abnormality as potentially cancerous. The jury returned a verdict finding that Sobieraj was not negligent. We agree with plaintiffs that reversal is required because Supreme Court improperly gave an error in judgment charge (*see* PJI 2:150).

"[A]n error [in] judgment charge is appropriate in a case where a doctor is confronted with several alternatives and, in determining appropriate treatment to be rendered, exercises [their] judgment by following one course of action in lieu of another" (*Anderson v House of Good Samaritan Hosp.*, 44 AD3d 135, 139 [4th Dept 2007] [internal quotation marks omitted]; *see Spadaccini v Dolan*, 63 AD2d 110, 120 [1st Dept 1978]). However, such a charge should be given "only in a narrow category of medical malpractice cases in which there is evidence that [the] defendant physician considered and chose among several medically acceptable treatment alternatives" (*Mancuso v Kaleida Health*, 172 AD3d 1931, 1935 [4th Dept 2019], *aff'd* 34 NY3d 1020 [2019] [internal quotation marks omitted]; *see Nestorowich v Ricotta*, 97 NY2d 393, 399 [2002]; *Martin v Latimore Rd. Surgicenter*, 281 AD2d 866, 866 [4th Dept 2001]). An error in judgment charge is not warranted where, as here, there was no evidence introduced at trial that the defendant physician "made a choice between or among medically acceptable alternatives" (*Anderson*, 44 AD3d at 140), and the "plaintiffs' [sole] theory of [the] defendant's alleged malpractice ar[ose] from [the] defendant's alleged lack of due care in assessing [the] plaintiff's condition," inasmuch as "the [sole] issue before the jury was [then] whether [the] defendant's failure to diagnose [the] plaintiff's [condition] constituted a deviation from medically accepted standards of care" (*Vanderpool v*

Adirondack Neurosurgical Specialists, P.C., 45 AD3d 1477, 1478 [4th Dept 2007]; see *Lacqua v Silich*, 141 AD3d 690, 692 [2d Dept 2016]). Inasmuch as the error in judgment charge here “create[d] a risk that [the] jury w[ould] find that, because [Sobieraj] exercised his . . . best judgment, there can be no liability despite a failure to adhere to generally accepted standards of care,” we conclude that the court’s error in giving the charge cannot be deemed harmless (*Anderson*, 44 AD3d at 141; see *Rospierski v Haar*, 59 AD3d 1048, 1049-1050 [4th Dept 2009]; *Vanderpool*, 45 AD3d at 1478), and plaintiffs are thus entitled to a new trial. Present—Curran, J.P., Montour, Smith, Ogden and DelConte, JJ.

39 Acea M. Mosey, Respondent, v Office of Court Administration, Appellant. [— NYS3d —]

Courts—Nonjudicial Personnel—Chief Clerks and Deputy Chief Clerks in Surrogates’ Courts

Appeal from a judgment (denominated order and judgment) of the Supreme Court, Erie County (Catherine R. Nugent Panepinto, J.), entered September 10, 2024, in a proceeding pursuant to CPLR article 78 and declaratory judgment action. The judgment, inter alia, declared that the term nonjudicial personnel in Judiciary Law § 211 (1) (d) does not apply to Chief Clerks and Deputy Chief Clerks in Surrogates’ Courts.

It is hereby ordered that the judgment so appealed from is unanimously reversed on the law without costs, the decretal paragraphs are vacated, the petition-complaint insofar as it seeks relief pursuant to CPLR article 78 is denied, and judgment is granted in favor of respondent-defendant as follows:

It is adjudged and declared that: (1) the term “nonjudicial personnel” in Judiciary Law § 211 (1) (d) applies to and includes the Chief Clerks and Deputy Chief Clerks of the Surrogates’ Courts of the State of New York; (2) article VI, § 28 of the New York Constitution supersedes sections 2605 and 2606 of the Surrogate’s Court Procedure Act; and (3) Judiciary Law § 211 and 22 NYCRR 80.1, through the authority of article VI, § 28 of the New York Constitution, vest the Chief Administrator of the Courts with the power and authority to appoint the Chief Clerks and Deputy Chief Clerks of the Surrogates’ Courts of the State of New York to the exclusion of the Surrogates.

Memorandum: This hybrid CPLR article 78 proceeding and declaratory judgment action arises from a dispute between petitioner-plaintiff (plaintiff), who is the Erie County Surrogate, and respondent-defendant (defendant) over who has the authority to appoint the Chief Clerks and Deputy Chief

Clerks of the Surrogates' Courts—the respective local Surrogates or the Chief Administrator of the Courts (Chief Administrator). Plaintiff commenced this proceeding-action seeking, inter alia, a declaration that she held the authority to make appointments to the Chief Clerk and Deputy Chief Clerk positions in Erie County Surrogate's Court. Supreme Court agreed with plaintiff and, inter alia, granted declaratory relief effectively providing her with the relevant appointment authority to the exclusion of the Chief Administrator. We reverse inasmuch as we conclude that the Chief Administrator, to the exclusion of the respective Surrogates, possesses the power and authority to appoint the Chief Clerks and Deputy Chief Clerks of the Surrogates' Courts.

It is undisputed that the plain terms of Surrogate's Court Procedure Act article 26, enacted in 1966, placed the authority to appoint the Chief Clerks and Deputy Chief Clerks with the respective Surrogates (*see* SCPA 2605 [1], [2]). Notwithstanding that statutory provision, however, New York Constitution, article VI, § 28, effective in 1977, “expressly vests the Chief Administrator, on behalf of the Chief Judge, with the broad power to supervise the administration and operation of the Unified Court System” (*Matter of Met Council v Crosson*, 84 NY2d 328, 334-335 [1994]). The Unified Court System includes the Surrogates' Courts (*see* NY Const, art VI, § 1). “The powers of the Chief Judge are said to be ‘complete’ and may be exercised fully by the Chief Administrator on behalf of the Chief Judge” (*Met Council*, 84 NY2d at 335). On behalf of the Chief Judge, those powers include the power to appoint and remove “all nonjudicial officers and employees” with exceptions not presently relevant (22 NYCRR 80.1 [b] [3]; *see* Judiciary Law § 211 [1] [d]; *see also Met Council*, 84 NY2d at 335).

Although the Chief Clerks and Deputy Chief Clerks of the Surrogates' Courts possess significant authority, we agree with defendant that they are, nevertheless, nonjudicial officers. The Chief Clerks, for example, have the authority to sign papers or records of the courts, to adjourn matters, to administer oaths, to supervise disclosure and, in certain circumstances, to hear and report matters to the Surrogates (*see* SCPA 506 [6] [a]; 2609). Such responsibilities, however, are akin to those of referees (*see* SCPA 506; CPLR 4201), which are themselves “nonjudicial officers of the court appointed to assist it in the performance of its judicial functions” (*Met Council*, 84 NY2d at 332; *see generally* CPLR 4312 [5]; *People v Davis*, 13 NY3d 17, 25-26 [2009]). Thus, given the “nature of the position[s],” we agree with defendant that the Chief Clerks and Deputy Chief

Clerks of the Surrogates' Courts are nonjudicial positions and, "[a]s such, they are subject to the constitutional appointment power of the Chief Administrator, notwithstanding [article 26 of the Surrogate's Court Procedure Act]. Since the appointment powers of the Chief Administrator flow from the State Constitution, they cannot be abrogated by statute" (*Met Council*, 84 NY2d at 335). Present—Lindley, J.P., Smith, Greenwood and DelConte, JJ. [**Prior Case History: 84 Misc 3d 960.**]

40 Amber Well Drilling, LLC, Appellant, v Timothy A. Reed et al., Respondents, et al., Defendants. [— NYS3d —]

Contracts—Breach or Performance of Contract—Home Improvement Contract

Appeal from a judgment of the Supreme Court, Herkimer County (Mark R. Rose, J.), entered July 30, 2024, in an action for breach of contract. The judgment awarded plaintiff money damages.

It is hereby ordered that the judgment so appealed from is unanimously affirmed without costs.

Memorandum: Plaintiff, Amber Well Drilling, LLC, a company that provides well drilling and water supply system services, commenced this action alleging, inter alia, that Timothy A. Reed and Jennifer M. Reed (defendants), residential property owners, had breached a written contract with plaintiff for such services by failing to fully pay for their provision and that plaintiff was therefore entitled to recover the remaining balance as well as interest and attorneys' fees as provided in the contract. The matter proceeded to a jury trial, during which Supreme Court ruled and also instructed the jury that plaintiff could not enforce the contract against defendants because the contract failed to conform to the requirements of General Business Law § 771, but that plaintiff could recover for completed work under principles of quantum meruit if the jury found that plaintiff had established the elements of such a claim. The jury rendered a verdict in favor of plaintiff under the theory of quantum meruit.

Plaintiff subsequently moved for the issuance of a judgment in the amount awarded by the jury, plus interest and attorneys' fees as provided in the contract. Plaintiff contended in an attorney affidavit and a memorandum of law (NY St Cts Elec Filing [NYSCEF] Doc No. 114 at 1-4), the latter of which we take judicial notice for preservation purposes (*see Nosegbe v Charles*, 227 AD3d 1400, 1404 [4th Dept 2024]), that, although the court had ruled in accordance with Appellate Division precedent that the contract was unenforceable against defendants due to its failure to comply with General Business Law § 771,

the contract should be partially enforced by severing the provision allowing for plaintiff to recover interest and attorneys' fees in the event of a default in payment.

The court determined in a decision and order that plaintiff could not recover interest and attorneys' fees as provided in the contract because the contract was unenforceable, but the court nonetheless determined that plaintiff was entitled to prejudgment interest for a certain period, albeit at a lower rate than that provided in the contract. Plaintiff now appeals from a final judgment awarding damages together with interest and statutory costs and disbursements, which appeal brings up for review the prior order denying plaintiff's posttrial motion insofar as it sought an award of interest and attorneys' fees as provided in the contract (*see* CPLR 5501 [a] [1]). We affirm.

We note at the outset that, although defendants initially took a cross-appeal, their cross-appeal was deemed dismissed for failure to timely perfect (*see* 22 NYCRR 1250.10 [a]). In addition, we granted plaintiff's motion to strike that part of defendants' answering brief that was in support of their cross-appeal, and we denied defendants' subsequent motion to vacate the dismissal of their cross-appeal (*see* 22 NYCRR 1250.10 [c]). Consequently, any requests by defendants for affirmative relief on appeal are not before us (*see Edgett v North Fork Bank*, 72 AD3d 1635, 1635 [4th Dept 2010]).

On its appeal, plaintiff contends that we should revisit our precedent in this area of law by adopting a rule that would allow plaintiff to fully enforce the home improvement contract, including the provision for interest and attorneys' fees in the event of a default in payment, via a breach of contract cause of action against defendants, notwithstanding the failure of the contract to strictly comply with General Business Law § 771 or, alternatively, that the contract should be partially enforced by severing from the remainder of the unenforceable contract the provision allowing for plaintiff to recover interest and attorneys' fees.

By way of background, the legislature enacted article 36-A of the General Business Law, which governs home improvement contracts, in order to provide a meaningful measure of protection for residential owners and tenants against fraudulent activities by unscrupulous home improvement contractors while imposing only a minimal burden on legitimate contractors (L 1987, ch 421; *see* Letter from Senator Kehoe to Governor's Counsel, Bill Jacket, L 1987, ch 421 at 6; Letter from Assembly Member Tocci to Governor, Bill Jacket, L 1987, ch 421 at 8; Attorney General's Legislative Program, Bill

Jacket, L 1987, ch 421 at 21-22; *see also White Knight Constr. Contrs., LLC v Haugh*, 216 AD3d 1345, 1347 [3d Dept 2023] [*White Knight*]). Every home improvement contract subject to the provisions of the article must be in writing and signed by all parties thereto, and must contain numerous terms and notices to the party purchasing the home improvement (*see* General Business Law § 771 [1]; *White Knight*, 216 AD3d at 1347). Before any work is done, the party purchasing the home improvement must be furnished with a signed copy of the written agreement, which must be legible, in plain English, and in such a form to describe clearly any other document incorporated into the contract (*see* § 771 [2]).

Under our precedent, “the failure ‘to enter into a signed written home improvement contract in conformity with General Business Law § 771 bars recovery [by the contractor] based upon breach of contract’ ” (*Weiss v Zellar Homes, Ltd.*, 169 AD3d 1491, 1493 [4th Dept 2019]; *see Frank v Feiss*, 266 AD2d 825, 826 [4th Dept 1999]). Thus, when a home improvement contract fails to comply with the statutory requirements, the contract is unenforceable by the contractor against the property owner (*see Weiss*, 169 AD3d at 1492-1493). The Third Department agrees that “ ‘a contractor cannot enforce a contract that fails to comply with General Business Law § 771’ ” (*Grey’s Woodworks, Inc. v Witte*, 173 AD3d 1322, 1323 [3d Dept 2019]; *see e.g. Schott v Lucatelli*, 239 AD3d 1125, 1126 [3d Dept 2025]; *White Knight*, 216 AD3d at 1347; *LaPenna Contr., Ltd. v Mullen*, 187 AD3d 1451, 1453 [3d Dept 2020]), whereas the Second Department primarily holds that “the failure to strictly comply with all of the requirements of General Business Law § 771 does not render a home improvement contract per se unenforceable in all cases” (*Big C Contr. Corp. v Fishman*, 237 AD3d 1022, 1024 [2d Dept 2025]; *see Wowaka & Sons v Pardell*, 242 AD2d 1, 6 [2d Dept 1998]; *but see Home Constr. Corp. v Beaury*, 149 AD3d 699, 702 [2d Dept 2017]; *see generally Chapman v Davis*, 75 Misc 3d 360, 368 [Pleasant Valley Just Ct 2022]). Nevertheless, under our precedent, “although ‘the failure to strictly comply with the statute bars recovery under an oral or insufficiently detailed written home improvement contract, such failure does not preclude recovery for completed work under principles of quantum meruit’ ” (*Weiss*, 169 AD3d at 1493; *see Frank*, 266 AD2d at 826; *see also Harter v Krause*, 250 AD2d 984, 986-987 [3d Dept 1998]).

Here, as the court properly ruled at trial, the contract indisputably failed to comply with General Business Law § 771 because, *inter alia*, it did not contain plaintiff’s license number;

state the approximate date of commencement and substantial completion of the work; specify whether the parties had determined a definite completion date to be of the essence; provide a description of the work to be performed and the materials to be provided to defendants, including make, model number or any other identifying information; or include certain requisite notices to defendants (*see* § 771 [1]; *LaPenna Contr., Ltd.*, 187 AD3d at 1452-1453; *Grey's Woodworks, Inc.*, 173 AD3d at 1323; *Weiss*, 169 AD3d at 1492-1493). Thus, in accordance with binding precedent, the court properly determined that “the failure ‘to enter into a signed written home improvement contract in conformity with General Business Law § 771 bar[red] recovery [by plaintiff against defendants] based upon breach of contract’ ” (*Weiss*, 169 AD3d at 1493; *see Frank*, 266 AD2d at 826; *see also LaPenna Contr., Ltd.*, 187 AD3d at 1452-1453; *Grey's Woodworks, Inc.*, 173 AD3d at 1323). Plaintiff’s “‘failure to strictly comply with the statute bar[red] recovery under . . . [the] insufficiently detailed written home improvement contract,’ ” even though “‘such failure d[id] not preclude recovery for completed work under principles of quantum meruit’ ” (*Weiss*, 169 AD3d at 1493; *see Frank*, 266 AD2d at 826).

Inasmuch as plaintiff did not raise the specific argument in the trial court, plaintiff failed to preserve for appellate review its contention that, notwithstanding the failure of the contract to strictly comply with General Business Law § 771, it should be allowed to fully enforce the contract, including the provision for interest and attorneys’ fees in the event of a default in payment, via a breach of contract cause of action against defendants (*see Sabine v State of New York*, 43 NY3d 1015, 1016-1018 [2024]). Even “‘in the face of adverse Appellate Division precedent, litigants are expected to preserve’ their challenges” for appellate review (*id.* at 1017 n 2). Contrary to plaintiff’s assertion, “the rarely used exception to the preservation rule” for a new issue, even one of pure law, “which applies only where the unpreserved argument could not have been avoided through ‘factual showings or legal countersteps’ in the trial court . . . , does not apply here” (*id.* at 1018, quoting *Bingham v New York City Tr. Auth.*, 99 NY2d 355, 359 [2003]). Indeed, the Court of Appeals has expressly disapproved of the application of that exception to preservation in these circumstances (*see id.*). We decline to address plaintiff’s contention in the interest of justice (*see generally id.* at 1017; *Bingham*, 99 NY2d at 359).

Furthermore, we reject plaintiff’s more narrow, preserved contention that the interest and attorneys’ fees provision of the contract may be severed from the otherwise unenforceable

contract and then enforced against defendants. “[A] contractor cannot enforce a contract that fails to comply with General Business Law § 771’” (*Grey’s Woodworks, Inc.*, 173 AD3d at 1323; see *LaPenna Contr., Ltd.*, 187 AD3d at 1453; *Weiss*, 169 AD3d at 1492-1493), and that includes a provision for interest and attorneys’ fees (see *J.B. Sterling Co. v Verhelle*, 397 F Supp 3d 286, 296 [WD NY 2019], *denied reconsideration* 470 F Supp 3d 298 [WD NY 2020]; see generally *Sage Sys., Inc. v Liss*, 39 NY3d 27, 30-31 [2022]; *NML Capital v Republic of Argentina*, 17 NY3d 250, 258 [2011]). In that regard, we agree with defendants that “[t]o allow a contractor to draft a noncompliant contract” and yet still recover attorneys’ fees and interest at the contractor’s chosen rate as provided in the contract would only “incentivize contractors to disregard the statute, thereby thwarting the intent of the statute,” which is “designed to protect the homeowner” (*White Knight*, 216 AD3d at 1347). Present—Curran, J.P., Montour, Smith, Ogden and DelConte, JJ.

41 James Penn, Appellant, v Rochester Rev Holdings, LLC, Respondent. [— NYS3d —]—

Quieting Title—Determination of Claim to Real Property

Appeal from an order of the Supreme Court, Monroe County (Vincent M. Dinolfo, J.), entered April 17, 2025, in an action pursuant to RPAPL articles 6 and 15. The order granted the motion of defendant for summary judgment dismissing the complaint and on its counterclaims.

It is hereby ordered that the order so appealed from is unanimously reversed on the law without costs, the motion is denied, and the complaint is reinstated.

Memorandum: In this action involving the parties’ competing claims to ownership of real property pursuant to RPAPL article 15, plaintiff appeals from an order that granted defendant’s motion seeking, inter alia, summary judgment dismissing the complaint and on its counterclaims. We reverse.

“To obtain summary judgment in an action to quiet title pursuant to RPAPL article 15, the movant must establish, prima facie, that it holds title, or that the nonmovant’s title claim is without merit” (*Corriette v Mele*, 244 AD3d 679, 682 [2d Dept 2025] [internal quotation marks omitted]). “[A] purchaser is charged with knowledge of the exact rights claimed by all persons in possession” (*Raines v Moran*, 57 NYS2d 800, 807 [Sup Ct, Ontario County 1945], *affd* 270 App Div 979 [4th Dept 1946]; see *Phelan v Brady*, 119 NY 587, 591 [1890]). Indeed, a purchaser is charged with “constructive notice of *all the inter-*

ests, rights and equities which [a tenant] may have in the property in question by reason of the fact that [such tenant] was in actual possession of the property at the time that conveyances thereof were accepted by [the purchaser]” (*Raines*, 57 NYS2d at 807 [emphasis added]; see *Ward v Ward*, 52 AD3d 919, 920 [3d Dept 2008]).

Here, defendant, which asserts that it acquired title to the property in question pursuant to a warranty deed, failed to meet its initial burden on its motion. Defendant submitted, inter alia, a lease agreement between plaintiff and a prior owner of the property—which contains a purported purchase option—as well as the affirmation of defendant’s managing member, in which he made averments indicating that he knew plaintiff was a tenant prior to recording the warranty deed. Because defendant’s own submissions raise triable issues of fact regarding each of plaintiff’s causes of action and each of defendant’s counterclaims, we conclude that Supreme Court erred in granting defendant’s motion (see generally *Ulrich v Estate of Zdunkiewicz*, 8 AD3d 1014, 1015 [4th Dept 2004]). “Failure to make such prima facie showing requires a denial of the motion, regardless of the sufficiency of the opposing papers” (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). Present—Curran, J.P., Montour, Smith, Ogden and DelConte, JJ.

42 The People of the State of New York, Respondent, v Jonathan Sanchez, Appellant. [— NYS3d —]

Crimes—Disclosure—Protective Order—Identity of Witness

Crimes—Harmless and Prejudicial Error—Confirmatory Identification

Crimes—Jurors—Selection of Jury—Exclusion on Basis of Race

Appeal from a judgment of the Onondaga County Court (Thomas J. Miller, J.), rendered July 15, 2022. The judgment convicted defendant upon a jury verdict of murder in the second degree, attempted murder in the second degree and criminal possession of a weapon in the second degree (three counts).

It is hereby ordered that the judgment so appealed from is unanimously modified as a matter of discretion in the interest of justice by reducing the sentence of imprisonment imposed for attempted murder in the second degree under count 2 of the indictment to a determinate term of 15 years and as modified the judgment is affirmed.

Memorandum: Defendant appeals from a judgment convicting him following a jury trial of murder in the second degree (Penal Law § 125.25 [1]), attempted murder in the second degree (§§ 110.00, 125.25 [1]), and three counts of criminal possession of a weapon in the second degree (§ 265.03 [3]). The

charges arose from an incident during which numerous men drove two vehicles to a memorial service where several of the men exited the vehicles and opened fire on the crowd as part of an alleged gang war dispute. Two people were shot, and one died. Four men were indicted on the same five charges under a theory that they were acting in concert with each other.

In his main brief, defendant contends that County Court abused its discretion in issuing a protective order under CPL 245.70 regarding one witness. We reject that contention. “ ‘[T]he legislature, when enacting CPL 245.70, created an exception for disclosure relating to confidential informants’ that ‘permits the People to withhold and redact from discovery materials the name and contact information of a confidential informant’ ” (*People v Taylor*, 237 AD3d 1543, 1544 [4th Dept 2025]). It is well settled that the issuance of a protective order under CPL 245.70 “involves balancing the defendant’s interest in obtaining information for defense purposes against concerns for witness safety and protection” (*People v Beaton*, 179 AD3d 871, 874 [2d Dept 2020]; see *People v Jeanty*, 187 AD3d 828, 828-829 [2d Dept 2020]). Contrary to the contention of defendant, the People established that there was a “ ‘danger to . . . the safety of [the] witness’ or ‘risk of intimidation’ ” (*Taylor*, 237 AD3d at 1544, quoting CPL 245.70 [4]). The witness, who was in a vehicle with defendant and his codefendants before the shooting and told the police that he had observed defendant take part in the shooting, faced significant risk of harm or intimidation should his identity be revealed to defendant and his codefendants.

To balance defendant’s interest in obtaining information for defense purposes against concerns for the witness’s safety and risk of intimidation, the court appropriately permitted disclosure of the witness’s identity to defense counsel but not to defendant until one month before trial (see *People v Morales-Aguilar*, 186 AD3d 786, 787-788 [2d Dept 2020]; *People v Artis*, 179 AD3d 1440, 1442-1443 [3d Dept 2020]). Thus, although the witness’s identity was not disclosed to defendant at the suppression hearing, his identity was “ ‘turned over early enough’ to permit defendant to prepare for effective cross-examination of the witness[] at trial” (*People v Eaves*, 152 AD3d 1226, 1227 [4th Dept 2017], *lv denied* 30 NY3d 949 [2017]), and we conclude, based on the relevant statutory factors, i.e., “witness safety, risk of witness intimidation, and risk of an adverse effect upon the legitimate needs of law enforcement” (*People v Griggs*, 180 AD3d 853, 855 [2d Dept 2020]; see CPL 245.70 [4]), that the court appropriately balanced defendant’s interests and the witness’s safety and protection.

Defendant further contends in his main brief that the court erred in refusing to suppress identification evidence. We likewise reject that contention. As noted above, the protective order was appropriately issued and, as a result, we conclude that defense counsel had the necessary information at the suppression hearing regarding that witness's identification of defendant in a photo array. Defendant concedes that the photo array shown to the witness was not unduly suggestive, but he contends that some other ground for suggestiveness may have been uncovered at the hearing had he been able to cross-examine the witness or to cross-examine the officer who conducted the photo array about the witness. We note, however, that the Court of Appeals has recognized that "a defendant's opportunity to participate in suppression proceedings must yield in some cases to the need for confidentiality" (*People v Castillo*, 80 NY2d 578, 587 [1992]). Here, inasmuch as defendant has not specified any particular information that could have been obtained regarding the circumstances of the witness's identification of defendant (*cf. People v Ocasio*, 134 AD2d 293, 294 [2d Dept 1987]), we conclude that the court did not abuse its discretion in that regard.

Three officers testified at the suppression hearing regarding their confirmatory identifications of defendant. Even assuming, *arguendo*, that defendant's challenge to their identifications is preserved, we conclude that reversal is not warranted. One of the officers did not testify at trial (*see People v Crowley*, 188 AD3d 1665, 1666-1667 [4th Dept 2020], *lv denied* 36 NY3d 1056 [2021]). Another officer, familiar with defendant from defendant's neighborhood, did not independently identify defendant at trial (*see id.*). Although the third officer did identify defendant at trial and may not have had sufficient contacts with defendant to make a confirmatory identification (*see generally People v Mosley*, 41 NY3d 640, 648-649 [2024]), we conclude that any error in that regard is harmless (*see generally People v Crimmins*, 36 NY2d 230, 240-241 [1975]). Surveillance video evidence showed the two vehicles driving to the scene just before the shooting and leaving the scene just after the shooting. Eyewitnesses established that the shooters were some of the occupants of those vehicles. Defendant's fingerprint was found on one of the vehicles. Another passenger of that vehicle, who remained in the vehicle during the shooting, testified that defendant was in possession of a gun. Finally, inasmuch as surveillance videos showed the occupants of the vehicles, the jury was able to compare the videos to defendant's appearance in the courtroom.

In his *pro se* supplemental brief, defendant contends that

the court erred in rejecting his *Batson* challenge. That contention lacks merit. *Batson* set forth a three-step test for trial courts to apply in determining whether peremptory challenges have been used by a party to exclude prospective jurors on the basis of race (*see Batson v Kentucky*, 476 US 79, 94-98 [1986]). First, the party raising a *Batson* challenge must make a prima facie showing that the opposing party exercised a peremptory strike to remove a juror on the basis of race (*see id.* at 96). Second, the nonmoving party must come forward with race-neutral reasons for striking the juror (*see id.* at 97). Finally, the moving party must establish that the reasons proffered were “‘a pretext for intentional discrimination’” (*People v Wright*, 42 NY3d 708, 715 [2024], quoting *People v Smocum*, 99 NY2d 418, 422 [2003]; *see People v Bullock*, 213 AD3d 1351, 1352-1353 [4th Dept 2023], *lv denied* 40 NY3d 933 [2023]).

When defense counsel questioned the prosecutor’s use of a peremptory challenge to strike the sole Latino prospective juror, the prosecutor provided several reasons for striking the prospective juror, e.g., he had no hobbies, he “[did] not like to do anything,” and he had “no stake in the community.” Where the prosecutor provides a race-neutral reason for striking the juror, “‘the inference of discrimination is overcome’” (*People v Hecker*, 15 NY3d 625, 656 [2010], *cert denied* 563 US 947 [2011]; *see People v Allen*, 86 NY2d 101, 109 [1995]), and “the sufficiency of the prima facie case showing becomes moot” (*Hecker*, 15 NY3d at 660; *see People v Tucker*, 181 AD3d 103, 111 [4th Dept 2020], *cert denied* 592 US —, 141 S Ct 566 [2020]). Here, we conclude that the prosecutor offered facially neutral reasons supporting the challenge and, as a result, the inference of discrimination is overcome. The question then becomes whether the allegedly race-neutral reasons proffered by the People were pretextual (*see Wright*, 42 NY3d at 715). We conclude that the court did not abuse its discretion in determining that the prosecutor’s explanation of the peremptory challenge was not pretextual (*see People v Herrod*, 174 AD3d 1322, 1323 [4th Dept 2019], *lv denied* 34 NY3d 951 [2019]; *People v Jiles*, 158 AD3d 75, 78 [4th Dept 2017], *lv denied* 31 NY3d 1149 [2018]).

Defendant failed to preserve for our review his contention, raised in his pro se supplemental brief, that he was denied a fair trial by prosecutorial misconduct on summation, inasmuch as he made no objection to the allegedly improper comments of the prosecutor (*see People v Romero*, 7 NY3d 911, 912 [2006]; *People v Williams*, 233 AD3d 1463, 1465 [4th Dept 2024], *lv denied* 43 NY3d 1012 [2025]). We decline to exercise our power

to review that contention as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]).

Contrary to the contention of defendant in his main brief, we conclude that the evidence, viewed in the light most favorable to the People (*see People v Contes*, 60 NY2d 620, 621 [1983]), is legally sufficient to support the conviction with respect to each count (*see People v Bleakley*, 69 NY2d 490, 495 [1987]) and, viewing the evidence in light of the elements of the crimes as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349 [2007]), we conclude that the verdict is not against the weight of the evidence (*see generally id.*).

Contrary to defendant's contention in his main brief, the sentences imposed on the counts of murder in the second degree and attempted murder in the second degree could legally be imposed consecutively as the conduct underlying those offenses constituted separate and distinct acts (*see* Penal Law § 70.25 [2]; *People v Laureano*, 87 NY2d 640, 643 [1996]; *see also People v McKnight*, 16 NY3d 43, 48 [2010]; *People v Brown*, 204 AD3d 1390, 1394 [4th Dept 2022], *lv denied* 39 NY3d 985 [2022]). We agree with defendant, however, that his aggregate sentence is unduly harsh and severe. Defendant's aggregate sentence amounted to 50 years to life. The sentence imposed on defendant, who was 19 years old at the time of the offense, is decades longer than those imposed on his codefendants, even though all defendants were charged with acting in concert with each other to commit the same offenses. Although there is some evidence that defendant may have fired the shot that killed the murder victim, "that was due only to happenstance" and does not render any one of the multiple shooters "more or less culpable than the other" (*People v Reed*, 237 AD3d 1490, 1492 [4th Dept 2025], *lv denied* 43 NY3d 1058 [2025]).

We therefore modify the judgment as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [b]; *People v Delgado*, 80 NY2d 780, 783 [1992]) by reducing the sentence of imprisonment imposed for attempted murder in the second degree under count 2 of the indictment to a determinate term of incarceration of 15 years, which results in an aggregate term of imprisonment of 40 years to life. Present—Lindley, J.P., Bannister, Greenwood, Nowak and Hannah, JJ.

43 David A. Cass, Respondent, v Richard G. Newell et al., Appellants. [— NYS3d —]

Contracts—Breach or Performance of Contract—Option to Purchase Ownership Interest
 Contracts—Ambiguous Contracts—Option to Purchase Ownership Interest

Appeal from an order of the Supreme Court, Chautauqua County (Emilio Colaiacono, J.), entered February 24, 2025. The order, insofar as appealed from, denied in part the motion of defendants to dismiss the complaint.

It is hereby ordered that the order insofar as appealed from is unanimously reversed on the law without costs, the motion is granted in its entirety, and the complaint is dismissed.

Memorandum: Plaintiff commenced this action alleging, inter alia, the breach of an option agreement between him and Richard G. Newell (defendant). Defendants moved pursuant to CPLR 3211 (a) (1), (5), and (7) to dismiss the complaint and pursuant to CPLR 3212 for summary judgment dismissing the complaint. Supreme Court denied the motion to the extent that it sought dismissal of the first, second, and fourth causes of action. Defendants appeal from the order to the extent that it denied their motion, and we reverse the order insofar as appealed from.

Plaintiff and defendant each held a 50% interest in defendants Chautauqua Lakeview, LLC and Lakeview Hotel, LLC (collectively, LLCs), which owned and operated a hotel. In January 2015, plaintiff assigned his interests in the LLCs to defendant. In February 2015, plaintiff and defendant entered into an option agreement. Pursuant to the agreement, plaintiff had “the exclusive right and option to purchase the” 50% interests in the LLCs that he had transferred to defendant. The agreement provided that the “option shall expire at midnight on December 31, 2020, or so long as [defendant] shall continue to own 100% of the interests in” the LLCs. The agreement further provided that, at the termination of the option, plaintiff “shall have the right to extend the option period for an additional period of five . . . years.” In November 2023, plaintiff notified defendant of his intent to exercise the option, and defendant responded through his counsel that the agreement was not enforceable.

We agree with defendants that the fourth cause of action, alleging breach of contract, as well as the first and second causes of action, which the parties agree depend on the breach of contract cause of action, must be dismissed pursuant to CPLR 3211 (a) (1). “The elements of a cause of action for breach of contract are the existence of a contract, the plaintiff’s performance under the contract, the defendant’s breach of that contract, and resulting damages” (*Pearl St. Parking Assoc. LLC v County of Erie*, 207 AD3d 1029, 1031 [4th Dept 2022] [internal quotation marks omitted]). It is well settled that “a written agreement that is complete, clear and unambiguous on

its face must be enforced according to the plain meaning of its terms” (*MHR Capital Partners LP v Presstek, Inc.*, 12 NY3d 640, 645 [2009] [internal quotation marks omitted]; see *Brad H. v City of New York*, 17 NY3d 180, 185 [2011]; *W.W.W. Assoc. v Giancontieri*, 77 NY2d 157, 162-163 [1990]). A contract is unambiguous if the language it uses has “a definite and precise meaning, unattended by danger of misconception in the purport of the [agreement] itself, and concerning which there is no reasonable basis for a difference of opinion” (*Breed v Insurance Co. of N. Am.*, 46 NY2d 351, 355 [1978], *rearg denied* 46 NY2d 940 [1979]; see *Selective Ins. Co. of Am. v County of Rensselaer*, 26 NY3d 649, 655 [2016]). “Thus, if the agreement on its face is reasonably susceptible of only one meaning, a court is not free to alter the contract to reflect its personal notions of fairness and equity” (*Greenfield v Philles Records*, 98 NY2d 562, 569-570 [2002]; see *Selective Ins. Co. of Am.*, 26 NY3d at 655).

Here, the option agreement is not ambiguous, and we further conclude that defendants did not breach it. When plaintiff attempted to exercise the option in November 2023, it had already expired inasmuch as the December 31, 2020 deadline had passed, plaintiff never exercised his right to extend the option period, and defendant no longer owned 100% of the interests in the LLCs (see *Olden Group, LLC v 2890 Review Equity, LLC*, 209 AD3d 748, 751-752 [2d Dept 2022]). Contrary to the court’s determination, inasmuch as plaintiff never sought to exercise the option before it expired at the end of 2020, it is immaterial that defendant had already transferred the assets of the LLCs and dissolved the LLCs prior to that time (see *generally id.*). Moreover, the option agreement did not prohibit defendant from selling his interests in the LLCs and, in fact, it specifically contemplated that defendant would do so inasmuch as it provided that the option would expire at the end of 2020 “or so long as” defendant continued to own 100% of the interests in the LLCs.

We reject plaintiff’s contention—raised as an alternative ground for affirmance—that the option agreement was ambiguous and may be interpreted as giving him, in addition to the option, the “exclusive right” to purchase back his interests in the LLCs, i.e., that he was the only person who could buy those interests. Plaintiff’s interpretation “rests on an impermissibly strain[ed reading] to find an ambiguity which otherwise might not be thought to exist” (*Uribe v Merchants Bank of N.Y.*, 91 NY2d 336, 341 [1998] [internal quotation marks omitted]; see *Albert Frassetto Enters. v Hartford Fire Ins. Co.*, 144 AD3d 1556, 1558 [4th Dept 2016]). In addition, under plaintiff’s in-

terpretation, the option term and extension of term provisions would be meaningless (*see generally Two Guys from Harrison-N.Y. v S.F.R. Realty Assoc.*, 63 NY2d 396, 403 [1984]). Further, under plaintiff's interpretation, the option agreement never expires, which would be absurd and commercially unreasonable (*see NCCMI, Inc. v Bersin Props., LLC*, 226 AD3d 88, 96 [1st Dept 2024]; *Matter of El-Roh Realty Corp.*, 74 AD3d 1796, 1800 [4th Dept 2010]). Present—Lindley, J.P., Bannister, Greenwood, Nowak and Hannah, JJ.

44 In the Matter of Christopher P. Scanlon, as Mayor of City of Buffalo, et al., Respondents, v Barbara Miller-Williams, as Comptroller of City of Buffalo, Appellant. [— NYS3d —]

Municipal Corporations—Bond Issue—Authorization by Resolution—Ministerial Duty of Comptroller

Appeal from a judgment (denominated order and judgment) of the Supreme Court, Erie County (Emilio Colaiacovo, J.), entered September 25, 2025, in a proceeding pursuant to CPLR article 78. The judgment granted the petition to compel respondent to issue and sell certain bonds.

It is hereby ordered that the judgment so appealed from is unanimously affirmed without costs.

Memorandum: In this proceeding pursuant to CPLR article 78, respondent appeals from a judgment granting the petition seeking a writ of mandamus compelling respondent to issue and sell bonds pursuant to resolutions duly adopted by the City of Buffalo Common Council (Common Council). We affirm.

Mandamus to compel lies “only to enforce a clear legal right where the public official has failed to perform a duty enjoined by law . . . While [it] is an appropriate remedy to enforce the performance of a ministerial duty, . . . it will not be awarded to compel an act in respect to which [a public] officer may exercise judgment or discretion” (*Alliance to End Chickens as Kaporos v New York City Police Dept.*, 32 NY3d 1091, 1093 [2018], *cert denied* 587 US 1027 [2019], *reh denied* 588 US 934 [2019] [internal quotation marks omitted]; *see Klostermann v Cuomo*, 61 NY2d 525, 539-540 [1984]). “A discretionary act involve[s] the exercise of reasoned judgment which could typically produce different acceptable results whereas a ministerial act envisions direct adherence to a governing rule or standard with a compulsory result” (*Matter of COR Van Rensselaer St. Co. III, Inc. v New York State Urban Dev. Corp.*, 221 AD3d 1524, 1528 [4th Dept 2023], *lv denied* 41 NY3d 907 [2024] [internal quotation marks omitted]; *see New York Civ. Liberties Union v State of New York*, 4 NY3d 175, 184 [2005], *rearg*

denied 4 NY3d 882 [2005]). Mandamus is an appropriate remedy to enforce the performance of “those acts which are mandatory but are executed through means that are discretionary” (*Klostermann*, 61 NY2d at 539).

Contrary to respondent’s assertion, the comptroller possesses no discretion over *whether* to issue bonds (*see generally Matter of Cohalan v Caputo*, 94 AD2d 742, 742-743 [2d Dept 1983]). The Charter of the City of Buffalo (City Charter) grants the Common Council the power to “authorize the borrowing of funds by the city in accordance with article VIII of the constitution of the state of New York and applicable provisions of state law” (City Charter § 3-7 [f]). The City Charter provides that expenditures pursuant to the capital improvement budget “may not be made unless and until the council by appropriate action for the payment thereof provides funds or authorizes the issuance of serial bonds or other capital obligations” (City Charter § 20-27), and that “no debt shall be incurred for any capital improvement except as further authorized pursuant to” the Local Finance Law (City Charter § 20-30). The comptroller’s involvement in the capital improvement budget process consists primarily of preparing a report listing the city’s outstanding capital debt, “commenting in detail about the city’s financial condition,” and “advising as to the maximum amount of capital debt that the city may prudently incur” over the next five years “without impairing [its] credit rating and financial stability” (City Charter § 20-21). If the proposed capital budget exceeds the recommended cap, the comptroller must submit an additional report to the Common Council “advising as to the probable effect of such debt on the city’s financial condition” (City Charter § 20-25).

The Local Finance Law gives the Common Council, as a finance board (§ 2.00 [4] [b] [2]) “the power to authorize the issuance of bonds and notes” (Local Finance Law § 30.00 [a]). Although the Common Council may delegate certain powers to the comptroller, its chief fiscal officer (§ 2.00 [5] [b]; *see* City Charter § 7-4), by resolution (Local Finance Law § 30.00 [a], [c]; *see* § 56.00 [a], [b]), we reject respondent’s contention that the Common Council delegated all of its authority as a finance board to the comptroller in resolutions passed in 1945 and 1994. Those resolutions involved the delegation of powers relating to the issuance of specific types of bonds and notes, but neither resolution provided the comptroller with the power to authorize, or prevent the authorization of, the issuance of such bonds and notes. In other words, the Common Council delegated certain powers to the comptroller relating to *how* to is-

sue bonds but did not delegate the threshold power found in Local Finance Law § 30.00 regarding *whether* to issue them. Thus, the Common Council did not provide the comptroller with the power to, in effect, veto Common Council authorizations directing her to issue bonds or notes for specific projects.

Inasmuch as respondent's duty to issue bonds was ministerial (see *Klostermann*, 61 NY2d at 539; *Holroyd v Town of Indian Lake*, 180 NY 318, 324 [1905]; *Cohalan*, 94 AD2d at 742-743; see generally 1991 Ops St Comp No. 91-8), Supreme Court did not err in granting the petition. Present—Lindley, J.P., Bannister, Greenwood, Nowak and Hannah, JJ.

45 The People of the State of New York, Respondent, v Markeef Royal, Appellant. [— NYS3d —]

**Crimes—Double Jeopardy—Waiver—Implied Consent to Mistrial
Crimes—Jurors—Selection of Jury—Possession of Weapon Charges—Juror Discomfort with Guns**

Appeal from a judgment of the Supreme Court, Monroe County (Alex R. Renzi, J.), rendered May 24, 2023. The judgment convicted defendant upon a jury verdict of criminal possession of a weapon in the second degree and criminal possession of a weapon in the third degree.

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

Memorandum: Defendant appeals from a judgment convicting him following a jury trial of criminal possession of a weapon in the second degree (Penal Law § 265.03 [3]) and criminal possession of a weapon in the third degree (§ 265.02 [3]). The trial was the third on the indictment, the first two having ended in mistrials. Defendant contends that Supreme Court (Moran, J.) declared a mistrial in the first trial without his consent and in the absence of manifest necessity and therefore retrial was barred by the principles of double jeopardy. We reject that contention.

“Both the State and Federal Constitutions provide that the State may not put a defendant in jeopardy twice for the same offense” (*People v Baptiste*, 72 NY2d 356, 359 [1988]; see NY Const, art I, § 6; US Const, 5th Amend). “Unlike statutory double jeopardy, the State and Federal constitutional prohibitions against double jeopardy are deemed so fundamental that they are preserved despite the failure to raise them at the trial level” (*People v Michallow*, 201 AD2d 915, 916 [4th Dept 1994], *lv denied* 83 NY2d 874 [1994]; see *People v Michael*, 48 NY2d 1, 6-8 [1979]). “Where a mistrial is granted without the consent or over the objection of a defendant, retrial is barred by double

jeopardy protections unless there was ‘manifest necessity’ for the mistrial or ‘the ends of public justice would otherwise be defeated’ ” (*People v Ferguson*, 67 NY2d 383, 388 [1986], quoting *United States v Perez*, 22 US 579, 580 [1824]; see *Michallow*, 201 AD2d at 916). Consent may be either express or implied (see *Michallow*, 201 AD2d at 916).

Here, although we agree with defendant that there was no express consent and no manifest necessity for a mistrial inasmuch as the court could have stricken defendant’s offending testimony and issued a curative instruction (see *People v Ferguson*, 115 AD2d 215, 216 [4th Dept 1985], *affd* 67 NY2d 383 [1986]; see generally *Matter of Romero v Justices of Supreme Ct., Queens County*, 237 AD2d 292, 293 [2d Dept 1997], *lv denied* 89 NY2d 817 [1997]), we nevertheless conclude that defense counsel gave implied consent to the declaration of a mistrial.

During defendant’s testimony, he attempted to impart information concerning a codefendant’s admission that the gun that was found in a satchel in defendant’s vehicle belonged to the codefendant. The court sustained multiple objections by the prosecutor, but defendant continued trying to testify that the codefendant had admitted ownership of the gun. The court then interrupted defendant and *sua sponte* declared a mistrial. The jury was removed from the courtroom, and the court engaged in a colloquy with the attorneys, asking the prosecutor whether the prosecutor was moving for a mistrial. The prosecutor responded in the affirmative. The court then stated that the prosecutor’s motion for a mistrial was “granted because of the actions of the defendant.” Defense counsel did not object. The court subsequently stated: “We’ll schedule it for tomorrow morning. I will tell the jury what happened and I will dismiss them. Anybody have a problem with that?” Defense counsel responded “No.” The court dismissed the jury.

We note that “defendant raised no objection to the court’s *sua sponte* declaration of a mistrial, and ‘actively participate[d] in the various colloquies’ with the court” (*Michallow*, 201 AD2d at 916; see *People v Hawkins*, 228 AD2d 450, 451 [2d Dept 1996]). Inasmuch as “[a] ‘[d]efendant’s personal consent to the mistrial is not necessary’ and may be made by [their] attorney” (*Michallow*, 201 AD2d at 916, quoting *Ferguson*, 67 NY2d at 390-391), we conclude that defense counsel’s “conduct constituted implied consent, and an effective waiver of defendant’s constitutional rights against double jeopardy” (*id.*; see *Hawkins*, 228 AD2d at 451; *Ferguson*, 115 AD2d at 216).

Contrary to defendant’s further contention, with respect to

his third trial, Supreme Court (Renzi, J.) did not err in refusing to dismiss for cause a prospective juror who expressed a discomfort with guns due to a personal experience related to an individual who had been killed by a gun. Inasmuch as the defense struck the prospective juror and exhausted all peremptory challenges before the completion of jury selection, this issue is preserved for our review (*see* CPL 270.20 [2]; *People v Betances*, 147 AD3d 1352, 1354 [4th Dept 2017]; *People v Griffin*, 145 AD3d 1551, 1552 [4th Dept 2016]). The court asked the prospective juror whether he could put his personal experience out of his mind in this case, which the court noted was strictly a possession case. The prospective juror answered in the affirmative. Based upon a “review of the voir dire transcript ‘in totality and in context’ and giving due deference to the determination of the trial court,” we conclude that it was not an abuse of discretion for the court to deny defendant’s challenge for cause (*People v Turner*, 221 AD3d 1590, 1591 [4th Dept 2023], *lv denied* 41 NY3d 1004 [2024], quoting *People v Warrington*, 28 NY3d 1116, 1120 [2016]; *cf. People v Santiago*, 218 AD3d 1270, 1271-1272 [4th Dept 2023]).

Defendant further contends that he was denied effective assistance of counsel during the third trial based on defense counsel’s failure to poll the prospective jurors to determine whether they heard a particular sidebar discussion with a prospective juror and failure to raise any challenge when another prospective juror stated that a friend did not have a good relationship with defendant. We reject that contention. Viewing the evidence, the law, and the circumstances of this case as a whole and as of the time of the representation, we conclude that defendant was afforded meaningful representation (*see generally People v Baldi*, 54 NY2d 137, 147 [1981]).

With respect to defendant’s contention that Penal Law § 265.03 (3) is unconstitutional in light of *New York State Rifle & Pistol Assn., Inc. v Bruen* (597 US 1 [2022]), we have rejected identical contentions in prior cases (*see People v Richardson*, 246 AD3d 1396, 1396-1397 [4th Dept 2026]; *People v Davis*, 234 AD3d 1356, 1356-1357 [4th Dept 2025], *lv granted* 44 NY3d 1051 [2025]; *see also People v Johnson*, — NY3d —, —, 2025 NY Slip Op 06528, *3 [2025]), and we perceive no reason to reach a different conclusion here.

Finally, we conclude that the sentence is not unduly harsh or severe. Present—Lindley, J.P., Curran, Ogden, DelConte and Hannah, JJ.

46 The People of the State of New York, Respondent, v Austin R. Deal, Appellant. (Appeal No. 1.) [253 NYS3d 462]—

Appeal from a judgment of the Cayuga County Court (Thomas G. Leone, J.), rendered April 18, 2024. The judgment convicted defendant upon a plea of guilty of aggravated family offense.

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

Memorandum: In these consolidated appeals, defendant appeals, in appeal No. 1, from a judgment convicting him upon a plea of guilty of aggravated family offense (Penal Law § 240.75) and, in appeal No. 2, from a judgment convicting him upon a plea of guilty of aggravated criminal contempt (§ 215.52 [3]).

Contrary to defendant's contention in both appeals, County Court did not abuse its discretion in issuing the order of protection. The court was not required to obtain the consent of the person for whose benefit the order of protection was issued (*see People v Monacelli*, 299 AD2d 916, 916 [4th Dept 2002], *lv denied* 99 NY2d 617 [2003]; *see generally* CPL 530.13 [4]). In any event, the order of protection is subject to modification upon a motion should the circumstances warrant (*see* CPL 530.12 [15]; *see generally* *People v Nieves*, 2 NY3d 310, 317 [2004]; *People v Blauvelt*, 211 AD3d 1175, 1176 [3d Dept 2022]).

Contrary to defendant's further contention in both appeals, we conclude that his sentence is not unduly harsh or severe. Present—Lindley, J.P., Curran, Ogden, DelConte and Hannah, JJ.

47 The People of the State of New York, Respondent, v Austin R. Deal, Appellant. (Appeal No. 2.) [253 NYS3d 462]—Appeal from a judgment of the Cayuga County Court (Thomas G. Leone, J.), rendered April 18, 2024. The judgment convicted defendant upon a plea of guilty of aggravated criminal contempt.

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

Same memorandum as in *People v Deal* ([appeal No. 1] 248 AD3d 1752 [4th Dept 2026]). Present—Lindley, J.P., Curran, Ogden, DelConte and Hannah, JJ.

48 The People of the State of New York, Respondent, v Anthony Colbert, Appellant. [253 NYS3d 471]—Appeal from an order of the Monroe County Court (Douglas A. Randall, J.), entered April 2, 2025. The order determined that defendant is a level three risk pursuant to the Sex Offender Registration Act.

It is hereby ordered that the order so appealed from is unanimously affirmed without costs.

Memorandum: Defendant appeals from an order determining, inter alia, that he is a level three risk pursuant to the Sex Offender Registration Act (Correction Law § 168 *et seq.*). We reject defendant's contention that County Court abused its discretion when it denied his request for a downward departure from his presumptive risk level. We conclude, after "weighing the aggravating and mitigating factors" at the third step of the downward departure analysis, that the totality of the circumstances does not warrant a downward departure (*People v Gillotti*, 23 NY3d 841, 861 [2014]; see *People v Allis*, 229 AD3d 1375, 1376 [4th Dept 2024]). Present—Lindley, J.P., Curran, Ogden, DelConte and Hannah, JJ.

49 In the Matter of Adelaide H. Wayne County Department of Social Services, Respondent; Heather H., Appellant. [253 NYS3d 464]—

Parent, Child and Family—Abused or Neglected Child—Mental Illness—Substance Abuse

Appeal from an order of the Family Court, Wayne County (John L. Grow, J.), dated August 15, 2024, in a proceeding pursuant to Family Court Act article 10. The order, among other things, adjudged that respondent had neglected the subject child.

It is hereby ordered that the order so appealed from is unanimously affirmed without costs.

Memorandum: In this proceeding pursuant to Family Court Act article 10, respondent mother appeals from an order of disposition that, inter alia, placed her under the supervision of petitioner. That order, although expired in part, brings up for review the underlying fact-finding order in which Family Court found that, as a result of the mother's mental illness and illicit drug use, she neglected the subject child (see *Matter of Clarissa F. [Carrie W.]*, 227 AD3d 1543, 1543 [4th Dept 2024], *lv denied* 42 NY3d 907 [2024]; *Matter of Jimmy D.*, 302 AD2d 892, 892 [4th Dept 2003], *lv denied* 100 NY2d 503 [2003]). We affirm.

Contrary to the mother's contention, we conclude that petitioner established by a preponderance of the evidence that the subject child was neglected as a result of the mother's mental illness and substance abuse (see *Matter of Zackery S. [Stephanie S.]*, 170 AD3d 1594, 1595 [4th Dept 2019]; *Matter of Thomas B. [Calla B.]*, 139 AD3d 1402, 1403-1404 [4th Dept 2016]; see generally Family Ct Act §§ 1012 [f] [i] [B]; 1046 [b] [i]; *Nicholson v Scoppetta*, 3 NY3d 357, 368-369 [2004]). The evidence at the fact-finding hearing established that, as a result of the mother's mental illness and substance abuse, the

mother suffered from delusions and engaged in paranoid behavior that placed the subject child's physical, mental, or emotional condition in imminent danger of becoming impaired (see *Matter of Jahkai S. [Shirley S.]*, 216 AD3d 1432, 1432 [4th Dept 2023]; *Zackery S.*, 170 AD3d at 1595; see generally *Matter of Alexis H. [Jennifer T.]*, 90 AD3d 1679, 1680 [4th Dept 2011], *lv denied* 18 NY3d 810 [2012]). Present—Lindley, J.P., Curran, Ogden, DelConte and Hannah, JJ.

50 In the Matter of Krista H. Hoover, Appellant, v Patrick W. Ester, Respondent. [— NYS3d —]—

Parent, Child and Family—Visitation—Modification—Indefinite Wait List for Supervised Visitation

Appeal from an order of the Family Court, Ontario County (Frederick G. Reed, A.J.), dated January 8, 2025, in a proceeding pursuant to Family Court Act article 6. The order dismissed the petition.

It is hereby ordered that the order so appealed from is unanimously reversed on the law without costs, the petition is reinstated, and the matter is remitted to Family Court, Ontario County, for further proceedings in accordance with the following memorandum: In this proceeding pursuant to Family Court Act article 6, petitioner mother filed a petition seeking to modify a visitation order entered upon the parties' consent that granted the parties joint custody of their two children, with primary placement of the children with respondent father. The consent order also provided the mother with supervised agency visitation, once per month, subject to agency availability and the wishes and schedules of the children. Additionally, the mother would have "further supervised visitation as agreed and arranged between the parties." The mother appeals from an order, following an evidentiary hearing, that dismissed the mother's petition.

"Where an order of custody and visitation is entered on stipulation, a court cannot modify that order unless a sufficient change in circumstances—since the time of the stipulation—has been established, and then only where a modification would be in the best interests of the child[ren]" (*Matter of McKenzie v Polk*, 166 AD3d 1529, 1529 [4th Dept 2018] [internal quotation marks omitted]; see *Matter of Berg v Stoufer-Quinn*, 179 AD3d 1544, 1544-1545 [4th Dept 2020]). To warrant an inquiry into whether a change in custody is in the child's best interests, the change in circumstances must be significant (see *Matter of Aronica v Aronica*, 151 AD3d 1605, 1605 [4th Dept 2017]). "Upon determining that there has been a change in circum-

stances, [Family Court] must consider whether the requested modification is in the best interests of the child[ren]" (*Matter of Luce v Buehlman*, 218 AD3d 1243, 1243 [4th Dept 2023], *lv denied* 40 NY3d 908 [2023] [internal quotation marks omitted]).

Here, notwithstanding Family Court's failure to make an express finding relative to the change in circumstances alleged by the mother in her petition, "we have the authority to review the record to ascertain whether the requisite change in circumstances existed" (*Matter of William F.G. v Lisa M.B.*, 169 AD3d 1428, 1429 [4th Dept 2019] [internal quotation marks omitted]; *see Matter of Dickes v Johnston*, 213 AD3d 1247, 1248 [4th Dept 2023], *lv denied* 39 NY3d 913 [2023]).

We conclude, contrary to the mother's contention, that evidence of her sustained sobriety is not adequate to establish a change in circumstances inasmuch as that circumstance existed at the time of the parties' consent order (*see William F.G.*, 169 AD3d at 1429). We nonetheless agree with the mother that the court erred in dismissing the petition inasmuch as the mother established a change in circumstances by testifying that, almost immediately after the parties entered into the consent order, the agency indicated that there was an indefinite wait list for supervised visitation, which made such visitation improbable, and the father indicated that the mother would not be granted any visitation pursuant to the "as agreed and arranged" provision of the consent order (*see Matter of Gelling v McNabb*, 126 AD3d 1487, 1487-1488 [4th Dept 2015]; *Matter of Stilson v Stilson*, 93 AD3d 1222, 1223 [4th Dept 2012]; *see generally Matter of Kelley v Fifield*, 159 AD3d 1612, 1613-1614 [4th Dept 2018]).

Where the record is sufficient to make a best interests determination, this Court "will do so 'in the interests of judicial economy and the well-being of the child[ren]'" (*Matter of Cole v Nofri*, 107 AD3d 1510, 1512 [4th Dept 2013], *appeal dismissed* 22 NY3d 1083 [2014]). Here, however, the court dismissed the petition before the father testified or offered any evidence and before the court could conduct a *Lincoln* hearing, if necessary, and, thus, we do not have an adequate record upon which to make our own determination in the interest of judicial economy (*see Matter of Heinsler v Sero*, 177 AD3d 1316, 1317 [4th Dept 2019]; *Matter of McClinton v Kirkman*, 132 AD3d 1245, 1246 [4th Dept 2015]; *see generally Matter of Austin v Austin*, 254 AD2d 703, 703-704 [4th Dept 1998]). We therefore reverse the order, reinstate the petition, and remit the matter to Family Court for a new hearing to determine whether the modifica-

tions sought by the mother in her petition are in the children's best interests.

Finally, the mother failed to preserve her contention that the court was biased against her inasmuch as she failed to make a motion for the court to recuse itself (*see Matter of Melish v Rinne*, 221 AD3d 1560, 1561 [4th Dept 2023]; *Matter of Tartaglia v Tartaglia*, 188 AD3d 1754, 1756 [4th Dept 2020]), and, in any event, our review of the record does not indicate the existence of any such bias that would warrant remittal before a different judge (*see Melish*, 221 AD3d at 1561). Present—Lindley, J.P., Curran, Ogden, DelConte and Hannah, JJ.

51 Florence Louise Harms, Individually and as Executor of the Estate of Robert L. Harms, Deceased, Respondent, v Clementina Lewis, M.D., et al., Defendants, and TLC Health Network et al., Appellants. [253 NYS3d 472]—

Disclosure—Discovery and Inspection—Medical Malpractice—Audit Trails

Appeal from an order of the Supreme Court, Erie County (John B. Licata, J.), entered May 8, 2025, in a medical malpractice and wrongful death action. The order, among other things, granted the motion of plaintiff to the extent that it seeks to compel defendants TLC Health Network and Lake Shore Health Care Center to comply with certain discovery demands.

It is hereby ordered that the order so appealed from is unanimously affirmed without costs.

Memorandum: In this medical malpractice and wrongful death action, defendants TLC Health Network and Lake Shore Health Care Center (collectively, defendants) appeal from an order that, inter alia, granted plaintiff's motion to the extent that it seeks to compel defendants to comply with certain discovery demands relative to the disclosure of electronic medical record audit trails (audit trails) arising out of defendants' care and treatment of plaintiff's decedent. We affirm.

This appeal is not the first instance where we have been called to adjudicate a discovery dispute between plaintiff and defendants concerning the audit trails. Previously, we affirmed an order dismissing as moot plaintiff's motion (first motion) to strike defendants' answer or, alternatively, to compel defendants to comply with her fourth notice to produce, which sought, inter alia, the aforementioned audit trails (*Harms v TLC Health Network*, 215 AD3d 1295, 1295-1296 [4th Dept 2023]). In affirming the order, we noted that, in support of the first motion, "[p]laintiff did not establish that defendants engaged in any willful, contumacious, or . . . bad faith noncompliance

with the notice to produce” (*id.* at 1296 [internal quotation marks omitted]). Indeed, based on the record before us at that time, we noted that the first motion “contain[ed] no showing, beyond mere conjecture, that there is relevant information to be gleaned from . . . audit trails which cannot be obtained from other sources of information that were already supplied by defendants” (*id.* [internal quotation marks omitted]). We concluded that Supreme Court (Marshall, J.) did not err “in dismissing the [first] motion on the ground that defendants substantially complied with the notice to produce” with respect to the audit trails inasmuch as “defendants disclosed decedent’s electronic medical records, which already displayed much of the information sought from the audit trails” and “defendants otherwise provided reasonable explanations for why some of the requested information was no longer available” (*id.*).

During the pendency of the prior appeal, however, plaintiff took depositions of several representatives of defendants during which those individuals were questioned about the creation, modification, and retention of the audit trails. Some of those representatives had previously provided affidavits in connection with the first motion that, in essence, stated that the audit trails were no longer available. Information obtained during the ensuing depositions of those representatives, however, contradicted some of the central assertions in their affidavits with respect to the audit trails and, indeed, suggested that some of the information sought by plaintiff in relation to the electronic medical records and audit trails may, in fact, still exist and was not disclosed to plaintiff. The depositions also revealed that the representatives were not entirely knowledgeable about defendants’ policies and procedures in retaining the audit trails. Thus, as a consequence of the information obtained during the depositions, plaintiff moved to compel defendants to produce, *inter alia*, knowledgeable representatives for depositions, defendants’ policies on the preservation and maintenance of records and audit trails, information on how the audit trails were produced, and audit trails from defendants’ data storage system. Supreme Court (Licata, J.) granted plaintiff’s second motion, and defendants appeal.

Defendants contend that the court erred in granting plaintiff’s motion for the requested discovery concerning the audit trails inasmuch as that decision impermissibly conflicted with this Court’s prior determination that plaintiff was not entitled to disclosure of similar material. We reject that contention. At the outset, we note again that “[t]rial courts have broad discretion in supervising disclosure and, absent a clear abuse of that

discretion, a trial court's exercise of such authority should not be disturbed" (*Prattico v City of Rochester*, 197 AD3d 882, 883 [4th Dept 2021] [internal quotation marks omitted]; see *Castro v Admar Supply Co., Inc.* [appeal No. 2], 159 AD3d 1616, 1617 [4th Dept 2018]; *Allen v Wal-Mart Stores, Inc.*, 121 AD3d 1512, 1513 [4th Dept 2014]). The CPLR provides that "[t]here shall be full disclosure of all matter material and necessary in the prosecution or defense of an action" (CPLR 3101 [a]; see *Crysler v Erk* [appeal No. 2], 227 AD3d 1410, 1412 [4th Dept 2024]).

Further, audit trails, such as the ones sought by plaintiff here, are subject to discovery where a plaintiff establishes legitimate questions regarding whether portions of the medical records provided by a defendant have been withheld or altered (see *Wright v Stephens*, 239 AD3d 1271, 1274-1275 [4th Dept 2025]; *Vargas v Lee*, 170 AD3d 1073, 1077 [2d Dept 2019]).

Here, we conclude that the court's decision to grant the second motion and compel disclosure pertaining to the audit trails—based on the record provided by plaintiff in support of that motion—was not an abuse of the court's discretion and does not conflict with our prior determination (*cf. Harms*, 215 AD3d at 1295-1296). As noted above, plaintiff's second motion was based on new information that came to light *after* Supreme Court (Marshall, J.) decided the first motion and while the prior appeal was pending. Indeed, in concluding that the court had not abused its discretion in denying the first motion, we noted, among other things, that "[t]he *record* [before us] contain[ed] no showing, beyond mere conjecture, that there is relevant information to be gleaned from . . . [the] audit trails" and that, in opposition to the first motion, "defendants otherwise provided reasonable explanations for why some of the requested information was no longer available" (*id.* at 1296 [emphasis added and internal quotation marks omitted]). In other words, our conclusion on the prior appeal was based on the record before the court *at the time it denied the first motion*, which included the affidavits of defendants' representatives suggesting that the audit trail information was no longer available. Inasmuch as there were subsequent developments to the contrary—i.e., new evidence that the requested audit trail information may be available, that some of the requested material had been withheld, and that defendants' representatives lacked critical knowledge about defendants' audit trails and their retention—we perceive no conflict between our holding in the prior appeal and the order granting the second motion based on that new information.

We reject defendants' further contention that Supreme Court

(Licata, J.) was bound by the law of the case to follow our prior decision affirming the order dismissing the first motion. We note that the first motion “preceded [the] deposition [of defendants’ representatives on the audit trails], which introduced additional evidence and raised further issues, thereby precluding application of the law of the case doctrine” (*Milligan v Bifulco*, 153 AD3d 1624, 1625 [4th Dept 2017] [internal quotation marks omitted]; see *M&T Bank Corp. v Moody’s Invs. Servs., Inc.*, 191 AD3d 1288, 1292 [4th Dept 2021]; *Ziolkowski v Han-Tek, Inc.*, 126 AD3d 1431, 1432 [4th Dept 2015]). In any event, even assuming, arguendo, that the law of the case doctrine applied to the motion court, we note that the doctrine “is not binding upon this Court’s review of the order” (*Ziolkowski*, 126 AD3d at 1432; see *Martin v City of Cohoes*, 37 NY2d 162, 165 [1975], *rearg denied* 37 NY2d 817 [1975]; *Micro-Link, LLC v Town of Amherst*, 155 AD3d 1638, 1642 [4th Dept 2017]).

We have reviewed defendants’ remaining contentions and conclude that none warrants reversal or modification of the order. Present—Lindley, J.P., Curran, Ogden, DelConte and Hannah, JJ.

52 Sandra Verbridge, Appellant, v Harpreet Deol, D.D.S., L.L.C., Doing Business as Progressive Endodontics of Pittsford/Canandaigua/Geneseo, et al., Respondents, et al., Defendant. [— NYS3d —]

Employment Relationships—Existence of Employer-Employee Relationship—Associate Dentist

Appeal from an order of the Supreme Court, Monroe County (James A. Vazzana, J.), entered November 14, 2024, in a dental malpractice action. The order granted the motion of defendants Harpreet Deol, D.D.S., L.L.C., doing business as Progressive Endodontics of Pittsford/Canandaigua/Geneseo, and Harpreet Deol, D.D.S., MMSc., for summary judgment and dismissed the complaint against said defendants.

It is hereby ordered that the order so appealed from is unanimously affirmed without costs.

Memorandum: Plaintiff commenced this dental malpractice action seeking damages for injuries sustained as a result of root canals and related treatment performed by defendant Tanjit S. Taggar, D.M.D., M.S., an endodontist practicing at a dental office in Canandaigua operated by defendant Harpreet Deol, D.D.S., L.L.C., doing business as Progressive Endodontics of Pittsford/Canandaigua/Geneseo, a professional limited liability company owned by defendant Harpreet Deol, D.D.S., MMSc. (collectively, Deol defendants). Following discovery, the

Deol defendants moved for summary judgment dismissing the complaint against them on the ground that Taggar was an independent contractor and, thus, they are not liable for his malpractice. Supreme Court granted the motion and dismissed the complaint against the Deol defendants. Plaintiff appeals, and we affirm.

“Generally, a party who retains an independent contractor, as distinguished from a mere employee or servant, is not [vicariously] liable for the independent contractor’s negligent acts” (*Dziedzic v Wirth*, 162 AD3d 1749, 1749 [4th Dept 2018] [internal quotation marks omitted]; see *Van Hook v Doak*, 227 AD3d 1537, 1538-1539 [4th Dept 2024]; *Chan v Toothsavers Dental Care, Inc.*, 125 AD3d 712, 713 [2d Dept 2015]; see also *Tereshchenko v Lynn*, 36 AD3d 684, 686 [2d Dept 2007]). The rationale underlying the rule is that “one who employs an independent contractor has no right to control the manner in which the work is to be done and, thus, the risk of loss is more sensibly placed on the contractor” (*Kleeman v Rheingold*, 81 NY2d 270, 274 [1993]; see *Begley v City of New York*, 111 AD3d 5, 28 [2d Dept 2013], *lv denied* 23 NY3d 903 [2014]). In keeping with that rationale, “[c]ontrol of the method and means by which the work is to be done . . . is the critical factor in determining whether one is an independent contractor or an employee for the purposes of [vicarious] tort liability” (*Gfeller v Russo*, 45 AD3d 1301, 1302 [4th Dept 2007]; see *Begley*, 111 AD3d at 28). Additionally, while a principal who retains an independent contractor may be held directly liable for, inter alia, the principal’s own negligence in “supervising the contractor” (*Kleeman*, 81 NY2d at 274), such a claim requires that the principal actually *exercised* supervision over the contractor inasmuch as “the mere retention of general supervisory powers over an independent contractor cannot form a basis for the imposition of [direct] liability against the principal” (*Wendt v Bent Pyramid Prods., LLC*, 108 AD3d 1032, 1033 [4th Dept 2013] [internal quotation marks omitted]; see *Chainani v Board of Educ. of City of N.Y.*, 87 NY2d 370, 380-381 [1995], *rearg denied* 87 NY2d 862 [1995]).

Here, in support of their motion, the Deol defendants submitted an Independent Contractor Associate Agreement executed by Harpreet Deol, D.D.S., L.L.C., and Taggar providing, inter alia, that Taggar was “an independent contractor . . . responsible for scheduling and maintaining office hours to treat [his] patients, as [he] deem[s] appropriate,” and that the Deol defendants “shall not exercise any control or direction over the professional aspects of [his] providing services, which shall be

[his] sole responsibility.” The agreement further provided that Taggar would retain 50% of his gross collections and was “solely responsible for payments of all federal income and self-employment taxes.” The Deol defendants also submitted transcripts from the depositions of Taggar and Deol, who testified that Taggar was the only individual working in the Canandaigua dental office, that he did not discuss his patients with the Deol defendants, and that the Deol defendants did not review his work. Contrary to plaintiff’s contentions, the Deol defendants thus met the initial burden on their motion with respect to both vicarious and direct liability (*see Wendt*, 108 AD3d at 1033; *Carlineo v Akins*, 71 AD3d 1535, 1535-1536 [4th Dept 2010]; *Gfeller*, 45 AD3d at 1302-1303). In opposition, plaintiff submitted only the affirmation of her attorney, who had no personal knowledge of the facts, and thus failed to raise a triable issue of fact in opposition (*see Zuckerman v City of New York*, 49 NY2d 557, 563 [1980]; *Contacare, Inc. v CIBA-Geigy Corp.*, 49 AD3d 1215, 1216 [4th Dept 2008], *lv denied* 10 NY3d 714 [2008]; *cf. Santiago v Spinuzza*, 48 AD3d 1257, 1258 [4th Dept 2008]). Present—Lindley, J.P., Curran, Ogden, DelConte and Hannah, JJ.

53 Kelly Sue McInnis, Executor of the Estate of Ronald McInnis, Deceased, Appellant, v A.O. Smith Water Products et al., Defendants, and The William Powell Company, Respondent. [— NYS3d —]

Courts—Jurisdiction—Long-Arm Jurisdiction—Sale of Asbestos-Containing Parts

Appeal from an order of the Supreme Court, Erie County (Raymond W. Walter, J.), entered November 15, 2024, in an action for damages for injuries caused by exposure to asbestos. The order, insofar as appealed from, granted the motion of defendant The William Powell Company to dismiss the complaint against it.

It is hereby ordered that the order insofar as appealed from is unanimously reversed on the law without costs, the motion is denied, and the complaint is reinstated against defendant The William Powell Company.

Memorandum: Plaintiff’s decedent commenced this action seeking damages for injuries he sustained as a result of his exposure to asbestos contained in, inter alia, products manufactured or supplied by, among others, defendant The William Powell Company (defendant), an out-of-state corporation. Following depositions, defendant moved for, inter alia, dismissal of the complaint against it pursuant to CPLR 3211 (a)

(8) or, in the alternative, summary judgment dismissing the complaint against it pursuant to CPLR 3212 based on an alleged lack of personal jurisdiction. Supreme Court treated the motion as one for summary judgment (*see* CPLR 3211 [c]), and, *inter alia*, granted the motion. Plaintiff appeals from the order to the extent that it granted the motion, and we now reverse the order insofar as appealed from.

At the outset, we conclude that the court did not err in treating the motion under the standard applicable to motions for summary judgment under CPLR 3212. Although the court did not “give the parties notice of its intent” to treat the motion as one for summary judgment (*Carcone v D’Angelo Ins. Agency*, 302 AD2d 963, 963 [4th Dept 2003]; *see* CPLR 3211 [c]), the failure to provide notice is not fatal where, as here, “the parties expressly [sought] summary judgment or [submitted] facts and arguments clearly indicating that they were deliberately charting a summary judgment course” (*Carcone*, 302 AD2d at 963 [internal quotation marks omitted]; *see Mihlovan v Grozavu*, 72 NY2d 506, 508 [1988]). Specifically, we note that defendant’s motion expressly—albeit, alternatively—sought summary judgment under CPLR 3212. In addition, by the time of the motion, both parties had been deposed and, in connection with the motion, they “laid bare their proof” (*Nowacki v Becker*, 71 AD3d 1496, 1497 [4th Dept 2010] [internal quotations omitted]; *see Mihlovan*, 72 NY2d at 508; *Tudisco v Mincer*, 126 AD3d 1501, 1501 [4th Dept 2015]).

On the merits, we agree with plaintiff that, by failing to mention defendant’s initial burden as movant and, indeed, by repeatedly reasoning in the first instance that decedent had not adduced sufficient evidence to establish long-arm jurisdiction over defendant pursuant to CPLR 302 (a) (3), the court “erred in placing the initial burden of proof on [decedent] with respect to [defendant’s] motion” (*Horning v J.B. Wise Professional Bldg. LLC*, 243 AD3d 1284, 1285 [4th Dept 2025]; *see generally Pelow v Tri-Main Dev.*, 303 AD2d 940, 940-941 [4th Dept 2003]; *Kasinski v Questel*, 99 AD2d 396, 398 [4th Dept 1984], *appeal dismissed* 62 NY2d 977 [1984]). “[W]hile the ultimate burden of proof at trial will fall upon the plaintiff[], a defendant seeking summary judgment bears the initial burden of demonstrating its entitlement to judgment as a matter of law by submitting evidentiary proof in admissible form” (*Can Man Carting, LLC v Spiezio*, 165 AD3d 1029, 1030 [2d Dept 2018] [internal quotation marks omitted]). If the moving defendant makes a *prima facie* showing, “the burden then shifts to the non-moving party to ‘establish the existence of material

issues of fact which require a trial of the action’ ” (*Jacobsen v New York City Health & Hosps. Corp.*, 22 NY3d 824, 833 [2014]). Critically, it is well settled that “the same burden-shifting framework applies where, as here, a defendant moves for summary judgment on the affirmative defense of lack of long-arm personal jurisdiction” (*Williams v Beemiller, Inc.*, 159 AD3d 148, 152 [4th Dept 2018], *affd* 33 NY3d 523 [2019]).

CPLR 302 (a) (3) provides, in relevant part, that a court may exercise personal jurisdiction over a non-domiciliary “who in person or through an agent . . . commits a tortious act without the state causing injury to [a] person or property within the state . . . if [the non-domiciliary] (i) . . . derives substantial revenue from goods used or consumed . . . in the state, or (ii) expects or should reasonably expect the act to have consequences in the state and derives substantial revenue from interstate or international commerce.” Here, we conclude that defendant did not meet its initial burden on the motion inasmuch as it merely pointed to gaps in decedent’s proof in asserting that decedent could not establish long-arm jurisdiction under CPLR 302 (a) (3) because decedent could not establish that defendant sold the asbestos-containing parts that allegedly caused injury to him or that decedent—a Canadian citizen and resident—was exposed to asbestos from defendant’s products in New York (*see generally Horning*, 243 AD3d at 1286). We conclude, after drawing “every available inference . . . in the [non-moving party’s] favor” (*Williams*, 159 AD3d at 152), that defendant’s submissions in support of the motion raise a question of fact whether decedent was exposed to defendant’s asbestos-containing products during the combined period of approximately six months that he worked in New York (*see generally Howard v A.O. Smith Water Prods.*, 212 AD3d 924, 924-925 [3d Dept 2023]; *Reid v Georgia-Pacific Corp.*, 212 AD2d 462, 463 [1st Dept 1995]). Because defendant failed to satisfy its initial burden on the motion, the burden never shifted to decedent, “requir[ing] denial of the motion, regardless of the sufficiency of the opposing papers” (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; *see End of the Hill, LLC v Brock Acres Realty, LLC*, 206 AD3d 1587, 1588 [4th Dept 2022]; *Scruton v Acro-Fab Ltd.*, 144 AD3d 1502, 1503 [4th Dept 2016]). Present—Lindley, J.P., Curran, Ogden and Hannah, JJ.

54 Akiyla Poindexter, as the Administrator of the Estate of Kaazim F. Freeman, Deceased, Respondent, v State of New York, Appellant. (Claim No. 137356.) [— NYS3d —]—

Limitation of Actions—Claim in Amended Pleading—Conform Claim to

Proof—Death of Incarcerated Individual in Correctional Facility

Appeal from an order of the Court of Claims (J. David Sampson, J.), entered May 5, 2025, in a negligence and wrongful death action. The order granted the motion of claimant seeking leave to amend her claim and denied the cross-motion of defendant to dismiss the claim.

It is hereby ordered that the order so appealed from is unanimously affirmed without costs.

Memorandum: Claimant commenced this action in the Court of Claims seeking damages related to the death of Kaazim F. Freeman, an incarcerated individual who died in a correctional facility. The claim alleges that, although defendant, the State of New York (State), had taken the position that Freeman's death was a suicide, upon information and belief Freeman had been violently attacked by other incarcerated individuals or correction officers. During discovery, the State produced records regarding its investigation into Freeman's death for the first time, indicating, inter alia, that Freeman's death was a suicide. Claimant moved for leave to amend her claim to conform to the proof, pursuant to CPLR 3025 and Court of Claims Act § 9 (8), by alleging, inter alia, that the State had prior notice that Freeman presented a risk of self-harm and following Freeman's death at least one correction officer attempted to cover up evidence relating to that notice. The court, inter alia, granted claimant's motion. The State appeals, as limited by its brief, from the order insofar as it granted claimant's motion, and we affirm.

It is well settled that, "[i]n the absence of prejudice or surprise, leave to amend a pleading should be freely granted" (*Boxhorn v Alliance Imaging, Inc.*, 74 AD3d 1735, 1735 [4th Dept 2010]; see CPLR 3025 [b]). However, even though "[a]pplications to amend pleadings [pursuant to CPLR 3025] are within the sound discretion of the court," . . . there is no sound basis in law to grant amendment pursuant to CPLR 3025 (c) to add an untimely claim" (34-06 73, *LLC v Seneca Ins. Co.*, 39 NY3d 44, 50 [2022]). It is undisputed here that when claimant sought to amend her claim the statute of limitations on the proposed amended claims had expired, and the proposed amendment would be "time-barred unless it related back to the original pleading" (*id.*). The relation back doctrine is codified in CPLR 203 (f), which provides that, where a plaintiff or claimant seeks leave to amend a pleading to assert new claims against an existing defendant or respondent, "[a] claim asserted in an amended pleading is deemed to have been interposed at the time the claims in the original pleading were interposed, un-

less the original pleading does not give notice of the transactions, occurrences, or series of transactions or occurrences, to be proved pursuant to the amended pleading.” “Section 203 (f) requires the court to determine solely whether [the] original pleading gives notice of the transactions or occurrences underlying the proposed amendment” and, thus, a court “should not . . . look[] beyond the four corners of the original pleading to determine whether defendant was on notice of transactions or occurrences underlying [the proposed amendment]” (34-06 73, *LLC*, 39 NY3d at 51).

Under the circumstances of this case, we conclude that claimant established that the relation back doctrine applied for statute of limitations purposes with respect to the claims in her proposed amendment inasmuch as they were based on the same occurrence as the claims in her original claim—namely, the unexplained death of Freeman while in State custody—and thus related back to the original claim (see *Wojtalewski v Central Sq. Cent. Sch. Dist.*, 161 AD3d 1560, 1561 [4th Dept 2018]; *Taylor v Deubell*, 153 AD3d 1662, 1662 [4th Dept 2017]; *Stokes v Komatsu Am. Corp.*, 117 AD3d 1152, 1154 [3d Dept 2014]; cf. *Raymond v Ryken*, 98 AD3d 1265, 1266 [4th Dept 2012]). In opposition to the motion, the State failed to establish that it would be prejudiced by claimant’s delay in seeking leave to amend the claim (see *Wojtalewski*, 161 AD3d at 1561; see *Boxhorn*, 74 AD3d at 1736). Present—Lindley, J.P., Curran, Ogden, DelConte and Hannah, JJ.

55 The People of the State of New York, Respondent, v Warren Love, Appellant. [— NYS3d —]

Crimes—Right to Representation Pro Se—Unequivocal Request

Appeal from a judgment of the Monroe County Court (Douglas A. Randall, J.), rendered September 19, 2023. The judgment convicted defendant upon his plea of guilty of grand larceny in the third degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of grand larceny in the third degree (Penal Law § 155.35 [1]). We affirm.

We reject defendant’s contention that County Court erred in denying his request to proceed pro se. “It is well settled that a criminal defendant’s constitutional right to counsel concomitantly includes the right to refuse appointed counsel” (*People v Davis*, 240 AD3d 1162, 1163 [4th Dept 2025], *lv denied* 44 NY3d 1051 [2025] [internal quotation marks omitted]; see *People v*

McIntyre, 36 NY2d 10, 15 [1974]; *see generally* US Const Amend VI; NY Const, art I, § 6). “In other words, there is a constitutional right ‘to self-representation . . . and [a] corresponding—and sometimes competing—requirement that the state provide [a] defendant competent counsel to conduct [their] defense’ ” (*Davis*, 240 AD3d at 1163, quoting *People v Stone*, 22 NY3d 520, 525 [2014]). “A defendant in a criminal case may invoke the right to defend pro se provided: (1) the request is unequivocal and timely asserted, (2) there has been a knowing and intelligent waiver of the right to counsel, and (3) the defendant has not engaged in conduct which would prevent the fair and orderly exposition of the issues” (*McIntyre*, 36 NY2d at 17).

Here, defendant informed the court that he had been having communication issues with defense counsel, particularly with respect to certain motions that he wished to file, and stated that, “if we can’t communicate I would rather represent myself.” Although defendant briefly inquired whether he could proceed pro se specifically to file the motions, he immediately explained that he wanted “a competent lawyer” who would “communicate with [him]” in regard to those motions. The court responded that it would not relieve defense counsel at that time; rather, it would consider the issues raised in the motions filed by defense counsel and, thereafter, if defendant felt that “there [was] something . . . to be argued beyond that,” the court would consider a new request to proceed pro se. No new request was made.

Under these facts, we conclude that defendant did not unequivocally request to proceed pro se inasmuch as he “ask[ed] to proceed pro se [only] as an alternative to receiving new counsel,” thereby seeking to “leverage his right of self-representation in an attempt to compel the court to appoint another lawyer” (*People v Lewis*, 44 NY3d 350, 359 [2025]; *see Davis*, 240 AD3d at 1164). “A request to proceed pro se is equivocal where, as here, it does not reflect an affirmative desire for self-representation and instead shows that self-representation was reserved as a final, conditional resort” (*Davis*, 240 AD3d at 1164 [internal quotation marks omitted]; *see People v Dixon*, 42 NY3d 609, 618 [2024], *cert denied* 604 US —, 145 S Ct 1460 [2025]). Defendant’s request consisted of “equivocal and hesitant statements about proceeding pro se” (*Lewis*, 44 NY3d at 360) and thus, the court’s duty to “make a searching inquiry . . . to determine whether that request was knowing, voluntary, and intelligent” was not triggered (*id.* at 352; *see generally McIntyre*, 36 NY2d at 17).

Defendant’s contention that his plea is invalid because the

court failed to inquire about the voluntariness of his plea after he expressed dissatisfaction with defense counsel is not preserved for our review inasmuch as defendant failed to move either to withdraw the plea or to vacate the judgment of conviction (see *People v Green*, 70 AD3d 1392, 1392 [4th Dept 2010]; *People v Richardson*, 295 AD2d 763, 764 [3d Dept 2002], *lv denied* 98 NY2d 771 [2002]), and this case does not fall within the narrow exception to the preservation requirement (see generally *People v Lopez*, 71 NY2d 662, 666-667 [1988]). Present—Whalen, P.J., Bannister, Smith, Nowak and DelConte, JJ.

56 The People of the State of New York, Respondent, v Kenneth T. Mountzouros, Appellant. [— NYS3d —]—

Crimes—Indictment—Duplicity—Proof of Prior Bad Acts

Crimes—Sexual Abuse—First-Degree Sexual Abuse—Sufficiency of Pleading—Age of Victim

Crimes—Witnesses—Expert Witness—Child Sexual Abuse Accommodation Syndrome

Appeal from a judgment of the Livingston County Court (Kevin Van Allen, J.), rendered April 18, 2023. The judgment convicted defendant, upon a jury verdict, of sexual abuse in the first degree, sexual abuse in the second degree, and forcible touching (two counts).

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

Memorandum: Defendant appeals from a judgment convicting him, upon a jury verdict, of one count each of sexual abuse in the first degree (Penal Law § 130.65 [4]) and sexual abuse in the second degree (§ 130.60 [2]) and two counts of forcible touching (§ 130.52 [1]). We affirm.

Defendant contends that the People’s pretrial motion seeking to introduce certain uncharged incidents of sexual abuse committed by defendant against the victim as *Molineux* evidence was an effective concession by the People that the indictment was facially duplicitous. We reject that contention. “An indictment is duplicitous when a single count *charges* more than one offense” (*People v Allen*, 24 NY3d 441, 448 [2014] [internal quotation marks omitted and emphasis added]). *Molineux* evidence, conversely, regards a defendant’s *uncharged* crimes or bad acts, admitted under an exception to the general rule prohibiting such proof (see *People v Telfair*, 41 NY3d 107, 114 [2023]). Thus, the People’s attempt to introduce uncharged acts of sexual abuse as *Molineux* evidence did not reflect—or, as defendant contends, effectively result in a concession—that the indictment was facially duplicitous. To the extent that defendant raises other contentions regarding the alleged dupli-

ity of the indictment, defendant failed to preserve those contentions for our review (*see generally Allen*, 24 NY3d at 449-450; *People v Woods*, 221 AD3d 1415, 1416 [4th Dept 2023], *lv denied* 40 NY3d 1095 [2024]).

To the extent that defendant contends that the time period alleged in count 1 of the indictment, which charged him with sexual abuse in the first degree, rendered that count defective and subject to dismissal because it included a time period after which the subject child turned 13 years old, we conclude that the contention lacks merit (*see People v Carter*, 147 AD3d 1514, 1515 [4th Dept 2017], *lv denied* 29 NY3d 1030 [2017]). Count 1 charged defendant with sexual abuse in the first degree by name, with reference to the relevant section of the Penal Law as well as the relevant subdivision containing the age element (*see id.*). In addition, count 1 specifically alleged that defendant committed the act against a child who was, at the time, less than 13 years old, and that allegation was not negated by inclusion of a period of time when the victim was 13 years of age or older (*see id.*).

We likewise reject defendant's contention that County Court erred in admitting in evidence the testimony of the victim regarding uncharged sexual abuse by defendant. Such evidence was admissible in this case "to complete the narrative of the events charged in the indictment . . . , and it also provided necessary background information" (*People v Workman*, 56 AD3d 1155, 1156 [4th Dept 2008], *lv denied* 12 NY3d 789 [2009] [internal quotation marks omitted]; *see People v Bailey*, 239 AD3d 1375, 1375-1376 [4th Dept 2025], *lv denied* 44 NY3d 1009 [2025]; *People v Caballero*, 199 AD3d 1468, 1470 [4th Dept 2021], *lv denied* 38 NY3d 926 [2022], *denied reconsideration* 38 NY3d 949 [2022]). To the extent that defendant contends that the court's instructions to the jury regarding the *Molineux* evidence were inadequate, defendant failed to preserve that contention for our review (*see generally People v Hildreth*, 199 AD3d 1366, 1368 [4th Dept 2021], *lv denied* 37 NY3d 1161 [2022]).

Defendant next contends that he was denied a fair trial when the court provided an allegedly insufficient instruction in response to a prospective juror's comments during voir dire that allegedly tainted certain seated jurors and the pool of prospective jurors. By failing to object to the content of the court's instruction, however, defendant failed to preserve that issue for our review (*see generally People v Gaiter*, 224 AD3d 1384, 1384 [4th Dept 2024], *lv denied* 41 NY3d 1018 [2024], *denied reconsideration* 42 NY3d 970 [2024]; *People v Hall*, 194 AD3d

1372, 1373 [4th Dept 2021], *lv denied* 37 NY3d 972 [2021]; *People v Standsblack*, 162 AD3d 1523, 1527 [4th Dept 2018], *lv denied* 32 NY3d 1008 [2018]).

Defendant further contends that the court erred in permitting the People to elicit testimony from an expert regarding child sexual abuse accommodation syndrome (CSAAS). Contrary to defendant's contention, however, such testimony is admissible to explain to a jury why a child victim might, as did the victim in this case, delay in disclosing sexual abuse (see *People v Nicholson*, 26 NY3d 813, 828 [2016]; *People v Williams*, 20 NY3d 579, 584 [2013]; *People v Young*, 206 AD3d 1631, 1632 [4th Dept 2022]). To the extent that defendant contends that answers given during voir dire established that this particular jury panel did not require CSAAS testimony, the record of jury voir dire does not support defendant's contention (see *Nicholson*, 26 NY3d at 828-829).

Defendant's contention regarding the legal sufficiency of the evidence is not preserved for our review inasmuch as defendant made only a general motion for a trial order of dismissal (see *People v Fowler*, 239 AD3d 1444, 1444 [4th Dept 2025], *lv denied* 44 NY3d 1011 [2025]; see generally *People v Gray*, 86 NY2d 10, 19 [1995]).

Finally, although we conclude that defendant has raised no issue warranting reversal or modification of the judgment, we note that the Livingston County District Attorney failed to file a brief in opposition to this appeal and therefore failed "to perform [her] duty to the people of [her] county" (*People v Maull*, 218 AD3d 1236, 1243 [4th Dept 2023] [internal quotation marks omitted]; see *People v Coger*, 2 AD3d 1279, 1280 [4th Dept 2003], *lv denied* 2 NY3d 738 [2004]). The District Attorney is obligated to file a brief in opposition "unless the appeal is from a judgment which [s]he concedes should be reversed" (*Coger*, 2 AD3d at 1280 [internal quotation marks omitted]). No such concession has been made in this case. Present—Whalen, P.J., Bannister, Smith, Nowak and DelConte, JJ.

57 The People of the State of New York, Respondent, v Dvontea Alexander, Appellant. [— NYS3d —]

Crimes—Appeal—Preservation of Issue for Review—Foundation for Admission of Software-Generated Video Files Showing Location of Defendant Based on GPS Coordinates from Ankle Monitor

Appeal from a judgment of the Monroe County Court (Douglas A. Randall, J.), rendered February 10, 2022. The judgment convicted defendant upon a jury verdict of murder in the second degree, attempted murder in the second degree (two

counts), assault in the first degree, assault in the second degree, and criminal possession of a weapon in the second degree (two counts).

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

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of, inter alia, murder in the second degree (Penal Law § 125.25 [1]). We affirm.

Contrary to defendant's contention, County Court did not err in denying defendant's for-cause challenge to a prospective juror. While the prospective juror's initial statements in response to questions from defense counsel raised a concern about his ability to render an impartial verdict, his responses to defense counsel's additional inquiries constituted "a personal, unequivocal assurance of impartiality [that] cure[d] his] prior indication that [he was] . . . predisposed against . . . defendant'" (*People v Clark*, 171 AD3d 1530, 1531 [4th Dept 2019], quoting *People v Arnold*, 96 NY2d 358, 364 [2001]; see *People v Warrington*, 28 NY3d 1116, 1120-1121 [2016]).

Defendant next contends that the court erred in admitting in evidence certain software-generated video files purporting to show defendant's location based upon GPS coordinates obtained from an ankle monitor that defendant wore while on parole. The video files, together with multiple other files, were admitted on a single disc identified as People's Exhibit 31. Defendant argues that the People did not lay an adequate foundation for admission of the video files because the People failed to explain how the video files were created and failed to establish that the locations identified on the video files accurately reflected the ankle monitor's location. However, defendant's general objection to a lack of foundation for admission of Exhibit 31 is insufficient to preserve the specific contention that defendant now advances on appeal with respect to the adequacy of the foundation for the video files at issue (see generally *People v Combs*, 243 AD3d 1259, 1260 [4th Dept 2025]).

Contrary to defendant's further contention, we conclude that the court did not err in permitting defendant's parole officer to identify him in two still images taken from surveillance video footage. The parole officer "had sufficient contact with . . . defendant to achieve a level of familiarity that render[ed] the lay opinion helpful" (*People v Mosley*, 41 NY3d 640, 648 [2024] [internal quotation marks omitted]), and while the images at issue are relatively clear, they are "not so crystal clear that the jury could identify a person as capably as any witness" (*id.* at 649). To the extent that defendant challenges the parole offi-

cer's identification of him in three other still images, that contention is unpreserved for our review (see *People v Rhynes*, 239 AD3d 1461, 1465 [4th Dept 2025], *lv denied* 44 NY3d 1029 [2025]; see generally *People v Montanez*, 135 AD3d 528, 528 [1st Dept 2016], *lv denied* 27 NY3d 1072 [2016]).

Defendant also failed to preserve his contention that the People engaged in prosecutorial misconduct during summation (see *People v McGuire*, 218 AD3d 1357, 1358 [4th Dept 2023]; *People v Reynolds*, 211 AD3d 1493, 1494 [4th Dept 2022], *lv denied* 39 NY3d 1079 [2023]), and we decline to exercise our power to review that contention as a matter of discretion in the interest of justice (see CPL 470.15 [3] [c]).

We have reviewed defendant's remaining contentions and conclude that they do not warrant modification or reversal of the judgment. Present—Whalen, P.J., Bannister, Smith, Nowak and DelConte, JJ.

58 The People of the State of New York, Respondent, v Robert Turner, Appellant. [— NYS3d —]

Crimes—Appeal—Waiver as Condition of Court-Initiated Plea Agreement That Does Not Require Consent of People

Crimes—Unlawful Search and Seizure—Consent

Appeal from a judgment of the Supreme Court, Erie County (Betty Calvo-Torres, A.J.), rendered April 3, 2023. The judgment convicted defendant upon a plea of guilty of criminal possession of a weapon in the second degree and criminal possession of a controlled substance in the fourth degree.

It is hereby ordered that the judgment so appealed from is unanimously reversed on the law, the plea is vacated, that part of the omnibus motion seeking to suppress physical evidence is granted, the indictment is dismissed, and the matter is remitted to Supreme Court, Erie County, for proceedings pursuant to CPL 470.45.

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of criminal possession of a weapon in the second degree (Penal Law § 265.03 [3]) and criminal possession of a controlled substance in the fourth degree (§ 220.09 [1]). We reverse.

Preliminarily, we agree with defendant that, under “the totality of the circumstances” presented here, his waiver of the right to appeal is invalid (*People v Thomas*, 34 NY3d 545, 559 [2019], *cert denied* 589 US 1302 [2020]; see *People v Nixon*, 248 AD3d —, —, 2026 NY Slip Op 02506 [4th Dept 2026] [decided herewith]). Consistent with our “responsibility to oversee the [plea] process and to review the record to ensure that the de-

defendant's waiver of the right to appeal reflects a knowing and voluntary choice" (*People v Callahan*, 80 NY2d 273, 280 [1992]; see *Thomas*, 34 NY3d at 559), we must look at "all the relevant facts and circumstances surrounding the waiver, including the nature and terms of the agreement" (*Thomas*, 34 NY3d at 559-560 [internal quotation marks omitted]), and, as necessary, "address our concern that trial judges may encourage the use of appeal waivers in order to insulate their decisions from appellate review and thus avoid reversals" (*Nixon*, 248 AD3d at —, 2026 NY Slip Op 02506, *2 [internal quotation marks omitted]). Thus, pursuant to the long-standing principle that "[n]ot only must judges actually be neutral, they must appear so as well" (*People v Novak*, 30 NY3d 222, 226 [2017]), "where a waiver of the defendant's right to appeal is a condition of a court-initiated plea agreement that does not require the People's consent, the waiver is invalid and unenforceable unless it is apparent from the record that the court had a distinct and proper reason to demand the waiver and foreclose judicial review at the time the demand was made" (*Nixon*, 248 AD3d at —, 2026 NY Slip Op 02506, *2).

Here, according to the testimony at the suppression hearing, two Buffalo Police Department officers received a dispatch report to respond to a residential address based on an anonymous 911 phone tip that an older Black man was knocking on the front door of that residence and arguing with a woman. The anonymous caller further reported overhearing the woman say to the man "why would you pull out a gun." The officers responded to the location and observed defendant, "an older [B]lack male on the [front] porch of [a neighboring house]." One of the officers approached defendant and asked if he could "pat him down." Although the officer testified that defendant unequivocally responded "yes" to his search request, the officer's body-worn camera (BWC) footage—which was admitted during the suppression hearing—instead records defendant responding, albeit faintly, to the officer's request with a question, namely, "For what?" The officer nonetheless proceeded to frisk defendant, and he recovered a handgun from defendant's jacket. A subsequent search of defendant incident to his arrest recovered narcotics. Following the hearing, Supreme Court denied suppression, concluding that "[t]he fact that the [BWC] failed to make an audible recording of defendant's response does not contradict or refute [the officer's] testimony" as to defendant's consent to a frisk.

Defendant thereafter pleaded guilty to the indictment upon his understanding that the court would impose the minimum

sentence, to run concurrently, on both counts. While plea discussions were conducted off the record, defense counsel appropriately made a record of the fact that, although defendant requested to preserve his right to appeal the adverse suppression ruling, “the [c]ourt will not accept that . . . [and] will require [defendant] to waive all suppression issues except for illegalities in sentencing and other illegalities that would survive a waiver of appeal.” Neither the court nor the prosecutor objected to, or otherwise qualified, defense counsel’s assertion that the court had demanded defendant waive his right to appeal as a condition of the plea agreement.

Here, the consent of the People to the plea agreement was not required because the charges remained as presented (*see* CPL 220.10 [2]) and, thus, the People were not in a position to demand a waiver of defendant’s right to appeal nor was such a waiver—or any other plea condition—necessary to secure the People’s consent (*see Nixon*, 248 AD3d at —, 2026 NY Slip Op 02506, *2). It follows, then, that the court’s demand of an appeal waiver, particularly as viewed in light of defendant’s expressed desire to seek appellate review of the court’s suppression ruling, “gives rise to the appearance that the court [was] seeking to shield its decisions from appellate review or otherwise act[ing] as an advocate for the People” and, therefore, “we must look to the record as a whole to determine whether there is a distinct and proper reason for the court’s demand” (*id.* at —, 2026 NY Slip Op 02506, *2).

Although the record establishes that defendant received consideration for his waiver of the right to appeal inasmuch as he “secure[d] the benefit of the sentencing limitation promised by the court” (*People v Figueroa*, 230 AD3d 1581, 1583 [4th Dept 2024], *lv denied* 42 NY3d 1079 [2025]; *see People v Allen*, 174 AD3d 1456, 1456 [4th Dept 2019], *lv denied* 34 NY3d 978 [2019]; *cf. People v Gramza*, 140 AD3d 1643, 1643-1644 [4th Dept 2016], *lv denied* 28 NY3d 930 [2016]), the sentencing limitation does not constitute a distinct and proper reason for the court’s demand of an appeal waiver because the court retains both the obligation and the discretion to impose sentence in light of the information subsequently obtained from the presentence report and other sources regardless of whether defendant waived his right to appeal (*see People v Farrar*, 52 NY2d 302, 306 [1981]; *Nixon*, 248 AD3d at —, 2026 NY Slip Op 02506, *2). Similarly, any perceived finality for the court derived from the appeal waiver following its denial of defendant’s suppression motion does not constitute a distinct and proper reason for the demand of the waiver because, “unlike

the People, the trial court does not participate in an appeal, and thus does not have the same interest in achieving finality to the case” (*People v Sutton*, 184 AD3d 236, 244 [2d Dept 2020], *lv denied* 35 NY3d 1070 [2020]).

Upon our review of the record here, including defense counsel’s unrefuted assertion that the court unilaterally demanded an appeal waiver that would foreclose appellate review of its determination of defendant’s suppression motion as a condition of the court-initiated plea agreement, we conclude that it is not apparent that the court had a distinct and proper reason to demand that waiver of defendant’s right to appeal. Therefore, the waiver of the right to appeal is invalid and does not preclude our review of defendant’s contentions.

We agree with defendant that the court erred in refusing to suppress physical evidence. “It is well established that, in evaluating the legality of police conduct, [a court] must determine whether the action taken was justified in its inception and at every subsequent stage of the encounter” (*People v Burnett*, 126 AD3d 1491, 1492 [4th Dept 2015] [internal quotation marks omitted]; see *People v De Bour*, 40 NY2d 210, 215 [1976]; *People v Nicodemus*, 247 AD2d 833, 835 [4th Dept 1998], *lv denied* 92 NY2d 858 [1998]). In *De Bour*, the Court of Appeals “set forth a graduated four-level test for evaluating street encounters initiated by the police: level one permits a police officer to request information from an individual and merely requires that the request be supported by an objective, credible reason, not necessarily indicative of criminality; level two, the common-law right of inquiry, permits a somewhat greater intrusion and requires a founded suspicion that criminal activity is afoot; level three authorizes an officer to forcibly stop and detain an individual, and requires a reasonable suspicion that the particular individual was involved in a felony or misdemeanor; [and] level four, arrest, requires probable cause to believe that the person to be arrested has committed a crime” (*People v Moore*, 6 NY3d 496, 498-499 [2006], citing *De Bour*, 40 NY2d at 223; see *Burnett*, 126 AD3d at 1492).

Here, as the People acknowledge, the anonymous 911 phone tip generated only a belief that criminal activity was afoot and, as such, limited the officers’ permissible action to a level two common-law right of inquiry (see *Moore*, 6 NY3d at 498-499). The officers thus were “entitled to interfere with [defendant] to the extent necessary to gain explanatory information, but short of a forcible seizure” (*De Bour*, 40 NY2d at 223), permitting them to engage defendant in “extended and accusatory”

questioning (*People v Hollman*, 79 NY2d 181, 191 [1992]) and to “ask[] defendant for permission to search his person” (*People v Dibble*, 43 AD3d 1363, 1364 [4th Dept 2007], *lv denied* 9 NY3d 1032 [2008]; see *People v Battaglia*, 86 NY2d 755, 756 [1995]).

“It is the People’s burden to establish the voluntariness of defendant’s consent [to such a search], and that burden is not easily carried, for a consent to search is not voluntary unless it is a true act of the will, an unequivocal product of an essentially free and unconstrained choice. Voluntariness is incompatible with official coercion, actual or implicit, overt or subtle” (*People v Packer*, 49 AD3d 184, 187 [1st Dept 2008], *affd* 10 NY3d 915 [2008] [internal quotation marks omitted]; see *People v Gonzalez*, 39 NY2d 122, 128 [1976]). Although “great deference should be given to the determination of the suppression court, which had the opportunity to observe the demeanor of the witnesses and to assess their credibility” (*People v Layou*, 134 AD3d 1510, 1511 [4th Dept 2015], *lv denied* 27 NY3d 1070 [2016], *denied reconsideration* 28 NY3d 932 [2016]), we conclude that the court’s determination that defendant consented to the search is “unsupported by the record” in light of the BWC footage and discernible audio (*People v Williams*, 244 AD3d 1785, 1788 [4th Dept 2025]; see generally *People v Savage*, 137 AD3d 1637, 1639 [4th Dept 2016]).

Inasmuch as the People failed to present evidence at the suppression hearing establishing defendant’s voluntary consent to the search of his person, all physical evidence seized as a result of that consent “should have been suppressed” (*People v Kendrick*, 147 AD3d 1419, 1421 [4th Dept 2017] [internal quotation marks omitted]; see *People v Purdy*, 106 AD3d 1521, 1523 [4th Dept 2013]). We therefore reverse the judgment, vacate the plea, and grant that part of the omnibus motion seeking to suppress physical evidence. Additionally, because our conclusion results in the suppression of all evidence in support of the crimes charged, the indictment must be dismissed (see *People v Ruise*, 242 AD3d 1587, 1588 [4th Dept 2025]), and we remit the matter to Supreme Court for proceedings pursuant to CPL 470.45 (see *People v Corey*, 209 AD3d 1306, 1306-1307 [4th Dept 2022]; *People v Holz*, 184 AD3d 1156, 1157 [4th Dept 2020]).

In light of our determination, we do not address defendant’s challenge to the severity of the sentence. Present—Whalen, P.J., Bannister, Smith, Nowak and DelConte, JJ.

59 The People of the State of New York, Respondent, v William Giambelluca, Appellant. [— NYS3d —]

Crimes—Murder—Felony Murder—Robbery—Sufficiency and Weight of Evidence
Crimes—Confession—Impaired Mental State

Appeal from a judgment of the Erie County Court (Kenneth F. Case, J.), rendered November 16, 2023. The judgment convicted defendant, upon a jury verdict, of murder in the second degree and robbery in the first degree.

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

Memorandum: Defendant appeals from a judgment convicting him, upon a jury verdict, of murder in the second degree (Penal Law § 125.25 [3] [felony murder]) and robbery in the first degree (§ 160.15 [1]). Defendant's conviction arises out of an incident in which defendant followed the victim out of a bar to the parking lot, inflicted blows to the victim's head with a wooden baluster, and stole the victim's wallet. The victim then drove from the bar to his apartment, where he was found unconscious. He was hospitalized and shortly thereafter succumbed to his injuries.

Defendant contends that the evidence with respect to his conviction of felony murder is legally insufficient because the People did not establish that his actions in robbing the victim caused the victim's death. Although defendant correctly concedes that his legal sufficiency contention is unpreserved (*see generally People v Gray*, 86 NY2d 10, 19 [1995]), he also challenges the weight of the evidence with respect to the causation element of felony murder, and we note that “‘we necessarily review the evidence adduced as to each of the elements of th[at] crime[] in the context of our review of defendant's challenge regarding the weight of the evidence’” (*People v Stepney*, 93 AD3d 1297, 1298 [4th Dept 2012], *lv denied* 19 NY3d 968 [2012]).

As relevant here, a conviction of felony murder requires evidence that defendant “commit[ted] or attempt[ed] to commit robbery . . . , and, in the course of and in furtherance of such crime or of immediate flight therefrom, he . . . cause[d] the death of” the victim (Penal Law § 125.25 [3]). To prove causation in this case, the People were required to demonstrate that defendant's conduct was “a sufficiently direct cause of death, and that there was not an obscure or merely probable connection between defendant's conduct and the death[]” (*People v Li*, 34 NY3d 357, 369 [2019] [internal quotation marks omitted]; *see People v Stewart*, 40 NY2d 692, 696-697 [1976]). Although defendant's conduct need not be the sole cause of the victim's death, his conduct is a “sufficiently direct cause” of it

where “(1) [his] actions were an actual contributory cause of [the] death, in the sense that they forged a link in the chain of causes which actually brought about the death; and (2) . . . the fatal result was reasonably foreseeable” (*Li*, 34 NY3d at 369 [internal quotation marks omitted]; see *People v Davis*, 28 NY3d 294, 300 [2016]).

Here, the trial evidence included surveillance video showing that the victim paid with cash and that defendant then closely followed him out of the bar. During the portion of defendant’s police interview that was played during the trial, defendant admitted that he hit the victim with a piece of wood. Moreover, a wooden baluster was found near the bar with the victim’s blood on it, along with tissue, hair, and a mixture of DNA from which defendant’s DNA could not be excluded. Additionally, there was a large spot of blood in the parking lot of the bar where the victim’s phone and glasses were found, and there was blood all over the victim’s car and apartment. The victim was found lying unconscious on the floor in his apartment, and he never regained consciousness at the hospital. An autopsy revealed that the victim died from blunt-impact head injuries, and the Medical Examiner who conducted the autopsy opined that those injuries were consistent with being hit by an item like the wooden baluster. Viewing the evidence in light of the elements of felony murder as charged to the jury (see *People v Danielson*, 9 NY3d 342, 349 [2007]), we conclude that the verdict is not against the weight of the evidence with respect to causation (see *People v Swift*, 160 AD3d 1341, 1342-1343 [4th Dept 2018], *lv denied* 31 NY3d 1122 [2018]; see generally *Davis*, 28 NY3d at 300-302; *People v Bleakley*, 69 NY2d 490, 495 [1987]). Indeed, inasmuch as the evidence supports the determination that “defendant’s conduct was an actual contributory cause of the victim’s death” (*Davis*, 28 NY3d at 301), it cannot be said that the jury “failed to give the evidence the weight it should be accorded” (*Bleakley*, 69 NY2d at 495).

Contrary to the further contention of defendant, we conclude that County Court did not err in refusing to suppress the statements that he made to the police while being interviewed at the police station. We reject defendant’s contention that he was incapable of making voluntary statements or knowingly waiving his *Miranda* rights as a result of his purported impaired mental state due to drug use and lack of sleep. The record of the suppression hearing, including the video recording of the interview, establishes that defendant was read and waived his *Miranda* rights before the interview began, and he “was alert and made coherent decisions about the topics of discussion

with the police” during the interview (*People v Ashline*, 124 AD3d 1258, 1259 [4th Dept 2015], *lv denied* 27 NY3d 1128 [2016]). We thus conclude that defendant’s cognitive ability was not so impaired by drugs or lack of sleep that he was incapable of making voluntary statements (*see People v Carbonaro*, 134 AD3d 1543, 1548 [4th Dept 2015], *lv denied* 27 NY3d 994 [2016], *denied reconsideration* 27 NY3d 1149 [2016]). Moreover, there is no basis to disturb the court’s credibility determinations, which are “entitled to great deference” (*People v Butler*, 170 AD3d 1496, 1497 [4th Dept 2019]; *see People v Morrow*, 167 AD3d 1516, 1517 [4th Dept 2018], *lv denied* 33 NY3d 951 [2019]).

We agree with defendant that the People were improperly permitted to use extrinsic evidence to impeach defendant’s expert on a collateral issue relevant only to the expert’s credibility (*cf. People v Snow*, 185 AD3d 1400, 1402 [4th Dept 2020], *lv denied* 35 NY3d 1115 [2020]; *see generally People v Alvino*, 71 NY2d 233, 247-248 [1987]). Here, the court erred in allowing the prosecutor to read from a court decision rejecting the expert’s testimony in an unrelated criminal prosecution of a different defendant. However, given that there is overwhelming evidence of defendant’s guilt and no significant probability that the error contributed to defendant’s conviction, we find the error harmless (*see People v Crimmins*, 36 NY2d 230, 241-242 [1975]).

Defendant’s contention that he was deprived of a fair trial by prosecutorial misconduct on summation is unpreserved for our review inasmuch as defendant failed to object to the statements he now challenges on appeal (*see People v Moorhead*, 224 AD3d 1225, 1227 [4th Dept 2024], *lv denied* 41 NY3d 1003 [2024]; *People v Coggins*, 198 AD3d 1297, 1301 [4th Dept 2021], *lv denied* 38 NY3d 1032 [2022]). In any event, we conclude that the contention is without merit inasmuch as the statements were either fair comment on the evidence or appropriate response to arguments made in defendant’s summation (*see People v Speaks*, 28 NY3d 990, 992 [2016]; *People v Cerroni*, 225 AD3d 1117, 1120 [4th Dept 2024], *lv denied* 41 NY3d 1017 [2024]).

We conclude that the sentence is not unduly harsh or severe. We have considered defendant’s remaining contention and conclude that it does not warrant reversal or modification of the judgment. Present—Whalen, P.J., Bannister, Smith, Nowak and DelConte, JJ.

60 In the Matter of Karen Anthone, Formerly Known as Karen Carlo, Appellant, v George Carlo et al., Respondents.
[— NYS3d —]

Trusts—Invasion of Principal—Self-Settled Trust—Creditor of Beneficiary

Appeal from an order of the Supreme Court, Chautauqua County (Grace Marie Hanlon, J.), entered January 31, 2025. The order denied petitioner's motion for summary judgment.

It is hereby ordered that the order so appealed from is unanimously affirmed without costs.

Memorandum: Petitioner commenced this special proceeding pursuant to CPLR 5236 seeking, inter alia, an order directing the sale of real property owned by respondent George Carlo (respondent) and the Carlo Family Trust (Trust), of which respondent is the grantor and lifetime beneficiary, in order to satisfy a judgment lien against respondent. Supreme Court denied petitioner's motion for summary judgment. We affirm.

Initially, we agree with petitioner that the court erred in concluding that she had the burden to establish a fraudulent conveyance in order to seek enforcement of her judgment lien against any of the assets held by the Trust. "A disposition in trust for the use of the creator is void as against the existing or subsequent creditors of the creator" (EPTL 7-3.1 [a]). "The statutory language is abundantly clear and unequivocal that self-settled trusts are void as against creditors" (*State of New York v Hawes*, 169 AD2d 919, 920 [3d Dept 1991]). Thus, the "settlor's creditors need not allege or prove [that a self-settled] trust is a fraudulent conveyance before they are permitted to reach the full amount of the beneficial interest retained by the settlor" (*Vanderbilt Credit Corp. v Chase Manhattan Bank*, 100 AD2d 544, 546 [2d Dept 1984]; see *State of New York v Coyle*, 171 AD2d 288, 290 [3d Dept 1991], *appeal dismissed* 79 NY2d 805 [1991]).

Here, the Trust was funded with assets transferred either by respondent or a "person or entity who is acting under the authority granted to that person or entity by [respondent]"; the purpose of the Trust is to, inter alia, "receive and manage assets for the benefit of [respondent]"; during respondent's lifetime, the Trustee "shall pay all of the income of th[e] Trust, and also such sums from principal as [respondent] may request . . . to or for the benefit of [respondent], or as [respondent] may designate"; and respondent may revoke the Trust at any time. We conclude that the "trust then is totally owned by [respondent]" (*Hawes*, 169 AD2d at 921) and, therefore, "is available to satisfy [respondent's] obligation to [petitioner]" (*Coyle*, 171 AD2d at 290).

We further conclude, contrary to petitioner's contention, that although petitioner met her initial burden on the motion, re-

spondent's affidavit in opposition raises a triable issue of fact whether the homestead exemption is applicable to the sale of the subject real property (*see generally* CPLR 5206 [a]; *Matter of Halpern v White*, 247 AD3d 897, 898 [2d Dept 2026]). Present—Whalen, P.J., Smith, Nowak and DelConte, JJ.

61 Barbara Sciarrino, Appellant-Respondent, v Raymond P. Sciarrino, Respondent-Appellant. (Appeal No. 1.) [253 NYS3d 463]—Appeal and cross-appeal from an order of the Supreme Court, Livingston County (John B. Gallagher, Jr., J.), entered September 19, 2024, in a divorce action. The order, *inter alia*, equitably distributed the marital property of the parties.

It is hereby ordered that said appeal and cross-appeal are unanimously dismissed without costs.

Same memorandum as in *Sciarrino v Sciarrino* ([appeal No. 2] 248 AD3d 1781 [4th Dept 2026]). Present—Whalen, P.J., Bannister, Smith, Nowak and DelConte, JJ.

62 Barbara Sciarrino, Appellant-Respondent, v Raymond P. Sciarrino, Respondent-Appellant. (Appeal No. 2.) [— NYS3d —]—

Husband and Wife and Other Domestic Relationships—Equitable Distribution

Husband and Wife and Other Domestic Relationships—Support—Maintenance

Appeal and cross-appeal from a judgment of the Supreme Court, Livingston County (John B. Gallagher, Jr., J.), entered November 21, 2024, in a divorce action. The judgment, *inter alia*, equitably distributed the marital property of the parties.

It is hereby ordered that the judgment so appealed from is unanimously modified on the law by reducing the amount of life insurance that defendant is required to obtain from \$750,000 to the remaining unpaid amount of his maintenance obligation and by providing that defendant may obtain a declining term life insurance policy, and as modified the judgment is affirmed without costs in accordance with the following memorandum: In this contested matrimonial action, in appeal No. 1, plaintiff wife appeals and defendant husband cross-appeals from an order entered following a nonjury trial that, *inter alia*, equitably distributed the marital property. In appeal No. 2, the wife appeals and the husband cross-appeals from a subsequent judgment of divorce, which incorporated the order in appeal No. 1.

In appeal No. 2, the wife contends that Supreme Court erred in calculating the equitable distribution of the marital property. We reject that contention. Although the wife contends

that the equitable distribution award ignores the husband's dissipation of marital assets, her "claims [of dissipation] are conclusory and rely on the credibility of the parties, and in such circumstances[, this Court] shall afford the trial court great deference" (*Jonas v Jonas*, 225 AD3d 1229, 1229 [4th Dept 2024] [internal quotation marks omitted]; see *Fishman v Fishman*, 244 AD3d 526, 526 [1st Dept 2025]; *McPheeters v McPheeters*, 284 AD2d 968, 969 [4th Dept 2001]). We likewise reject the wife's further contention that the court erred in ordering the sale of the marital residence and neighboring properties instead of awarding them to her (see *Barrett v Barrett*, 175 AD3d 1067, 1068-1069 [4th Dept 2019]; see generally *Wojtowicz v Wojtowicz*, 171 AD2d 1073, 1073 [4th Dept 1991]). Inasmuch as we agree with the court that the husband did not wastefully dissipate marital assets, there is no basis to award the wife additional marital property on that ground (see generally *Barrett*, 175 AD3d at 1068-1069).

Contrary to the wife's further contention, the court did not err in declining to distribute certain personal property given that the parties presented insufficient evidence with respect to the value of that property (see *Iwasykiw v Starks*, 179 AD3d 1485, 1486 [4th Dept 2020]). Contrary to her related contention, the record does not reflect that the husband waived his right to that personal property.

We reject the contention of the parties on their respective appeal and cross-appeal in appeal No. 2 that the court abused its discretion in setting the amount and duration of maintenance awarded to the wife. "[A]s a general rule, the amount and duration of maintenance are matters committed to the sound discretion of the trial court" (*Mehlenbacher v Mehlenbacher*, 199 AD3d 1304, 1307 [4th Dept 2021] [internal quotation marks omitted]), and we conclude that the court did not abuse its discretion in light of, inter alia, its overall distribution of marital assets and debts. Furthermore, we conclude that the court did not err in applying the statutory income cap to the husband's income when determining the wife's award of maintenance (see Domestic Relations Law § 236 [B] [6] [b] [4]; [d] [1], [2]). The court appropriately set forth the relevant factors that it relied upon in declining to include income above the cap (see § 236 [B] [6] [d] [3]), and we perceive no abuse of discretion in the court's decision in that regard (see *Lisowski v Lisowski*, 218 AD3d 1214, 1216 [4th Dept 2023]).

We agree with the husband on his cross-appeal, however, that the amount of life insurance that he is required to carry in order to secure his maintenance obligations is excessive. Al-

though the judgment directed the husband to pay durational maintenance in the amount of approximately \$650,000, it required that the husband secure the maintenance obligation with a policy of life insurance in the amount of \$750,000, naming the wife as beneficiary. We conclude that he should instead be required to maintain a life insurance policy of at least, but not more than, the remaining amount of his total maintenance obligation. In other words, “the amount of life insurance [that the husband] is required to obtain to secure his . . . maintenance obligation[] may have a declining term that would permit [him] to reduce the amount of life insurance by the amount of . . . maintenance actually paid, provided that at all times the amount of life insurance is not less than the amount of . . . maintenance remaining unpaid” (*Syrett v Syrett*, 208 AD3d 1030, 1032 [4th Dept 2022]; see *Marfone v Marfone*, 118 AD3d 1488, 1489 [4th Dept 2014]). We therefore modify the judgment accordingly.

We reject the wife’s contention that the court abused its discretion in awarding her only a portion of the requested amount of attorney’s fees. “An award of an attorney’s fee pursuant to Domestic Relations Law § 237 (a) is a matter within the sound discretion of the trial court, and the issue is controlled by the equities and circumstances of each particular case” (*Vella v Vella*, 213 AD3d 1225, 1227 [4th Dept 2023] [internal quotation marks omitted]). Here, the court properly considered the circumstances of the case, the nature of the attorney’s fees sought, the wife’s previous award of interim attorney’s fees, and the allocation of marital debts, and we conclude that the award is reasonable (*see generally id.*).

With respect to appeal No. 1, because the issues raised on appeal from the order are brought up for review and have been considered on the appeal and cross-appeal from the final judgment in appeal No. 2, the appeal and cross-appeal from the order in appeal No. 1 are dismissed (*see generally* CPLR 5501 [a]). Present—Whalen, P.J., Bannister, Smith, Nowak and DelConte, JJ.

63 Peter A. Derkovitz et al., Appellants, v Up State Tower Co., LLC, Respondent. [— NYS3d —]—

Contracts—Ambiguous Contracts—Lease Agreement Permitting Placement of Cell Tower—Payment of Taxes

Appeal from an order of the Supreme Court, Erie County (Catherine R. Nugent Panepinto, J.), entered June 4, 2025. The order denied the motion of plaintiffs for summary judgment and granted the cross-motion of defendant for summary judgment.

It is hereby ordered that the order so appealed from is unanimously modified on the law by denying the cross-motion and reinstating the complaint, and as modified the order is affirmed without costs.

Memorandum: In this action sounding in breach of contract, plaintiffs appeal from an order that denied their motion for summary judgment on the complaint and granted defendant's cross-motion for, inter alia, summary judgment dismissing the complaint. Although Supreme Court properly denied plaintiffs' motion, it erred in granting defendant's cross-motion, and we therefore modify the order accordingly.

Plaintiffs entered into a lease agreement (lease) with defendant to permit defendant to place a cell tower (Communications Facility) on a designated portion of plaintiffs' property (Premises). As relevant here, the lease provides that plaintiffs would pay "all real estate taxes and assessments on the Property on time" and that defendant would pay "all personal property taxes on the Communications Facility on time." The "Property" is defined by the metes and bounds of the real property owned by plaintiffs, while "Communications Facility" is defined as "a pole or tower, and . . . related equipment, cables, antennas, equipment shelters or cabinets and fencing and any other items [defendant] need[s] to successfully and securely use the Premises." The lease provides that title to the Communications Facility would remain "personal to and be vested in [defendant]" and is described in the lease as defendant's "personal property." However, neither "real estate taxes and assessments" nor "personal property taxes" are defined in the lease, and New York State does not impose personal property taxes.

The central dispute here is whether, in agreeing to "pay all personal property taxes on the Communications Facility," defendant agreed to pay the additional tax attributable to the Communications Facility or whether, in agreeing to pay "all real estate taxes and assessments on the Property," plaintiffs agreed to pay that additional tax. "It is well settled that '[t]he fundamental, neutral precept of contract interpretation is that agreements are construed in accord with the parties' intent' " (*Colella v Colella*, 129 AD3d 1650, 1651 [4th Dept 2015], quoting *Greenfield v Philles Records*, 98 NY2d 562, 569 [2002]). Because the "best evidence of what [the parties intend] is what they say in their writing, . . . a written agreement that is complete, clear and unambiguous on its face must be enforced according to the plain meaning of its terms" (*Greenfield*, 98 NY2d at 569). If an "agreement on its face is reasonably susceptible of more than one interpretation," however, the

contract is ambiguous (*Kowalak v Keystone Med. Servs. of N.Y., P.C.*, 197 AD3d 893, 894 [4th Dept 2021] [internal quotation marks omitted]). Where a contract is ambiguous, to be entitled to summary judgment, “the moving party has the burden of establishing that its construction of the [contract] is the only construction [that] can fairly be placed thereon” (*id.* [internal quotation marks omitted]).

We conclude that the lease provisions regarding the parties’ respective tax obligations are ambiguous as to which party is responsible for paying the additional tax attributable to the Communications Facility. Defendant argues that the only reasonable interpretation of the lease is that it imposes upon plaintiffs the responsibility for paying the additional tax related to the Communications Facility inasmuch as the plain language requires plaintiffs to pay real estate taxes and assessments, that defendant is obligated to pay only personal property taxes, and that there are no personal property taxes imposed in New York State. Plaintiffs effectively contend that the only reasonable interpretation of the provision requiring defendant to pay personal property taxes is that defendant agreed to pay the additional tax attributable to the Communications Facility and that any other interpretation would render that requirement “‘meaningless or without force or effect’” (*Nomura Home Equity Loan, Inc., Series 2006-FM2 v Nomura Credit & Capital, Inc.*, 30 NY3d 572, 581 [2017]).

We conclude that neither party met the burden on their respective motion and cross-motion of establishing that their construction of the salient lease provisions is the only reasonable interpretation of those provisions, and thus no party is entitled to summary judgment (*see generally Corter-Longwell v Juliano*, 200 AD3d 1578, 1583-1584 [4th Dept 2021]; *Kowalak*, 197 AD3d at 894). Summary judgment is inappropriate “[w]here[, as here,] resolution of an ambiguous [provision] turns on questions of credibility and the choice between reasonable inferences to be drawn therefrom, [and thus] determination of the intent of the parties is a question of fact for the trier of fact” (*Show Car Speed Shop v United States Fid. & Guar. Co.*, 192 AD2d 1063, 1065 [4th Dept 1993]; *see State of New York v Home Indem. Co.*, 66 NY2d 669, 671 [1985]). Present—Whalen, P.J., Bannister, Smith and Nowak, JJ.

64 In the Matter of the Estate of Janet Hess, Also Known as Janet Elaine Hess, Deceased. Barrett Hess, Appellant; Jennifer Hess et al., Respondents. [253 NYS3d 465]—Appeal from an order of the Surrogate’s Court, Chautauqua County (Stephen W. Cass, S.), entered December 4, 2024. The order granted the

motion of respondents to dismiss the probate petition and dismissed the petition.

It is hereby ordered that the order so appealed from is unanimously affirmed with costs for reasons stated in the decision by the Surrogate. Present—Whalen, P.J., Bannister, Montour, Greenwood and Hannah, JJ.

65 The People of the State of New York, Respondent, v Craig E. Laird, Appellant. [253 NYS3d 466]—Appeal from a judgment of the Cayuga County Court (Thomas G. Leone, J.), rendered October 3, 2024. The judgment convicted defendant, upon a guilty plea, of aggravated family offense (four counts) and criminal contempt in the second degree.

It is hereby ordered that the judgment so appealed from is unanimously affirmed. Present—Lindley, J.P., Curran, Ogden, Nowak and DelConte, JJ.

66 In the Matter of Shaiyah H. Monroe County Department of Human Services, Respondent; Shai-Janae H., Appellant. [— NYS3d —]—

Parent, Child and Family—Abused or Neglected Child—Temporary Removal—Return of Child—Mental Health Conditions

Appeal from an order of the Family Court, Monroe County (Alecia J. Mazzo, J.), entered April 18, 2025, in a proceeding pursuant to Family Court Act article 10. The order continued the custody of the subject child with petitioner.

It is hereby ordered that the order so appealed from is unanimously affirmed without costs.

Memorandum: In this proceeding pursuant to Family Court Act article 10, respondent mother appeals from an order that denied her Family Court Act § 1028 application seeking the return of her child to her care and custody following her temporary removal pursuant to a prior order. We affirm.

A parent's application pursuant to Family Court Act § 1028 for the return of a child who has been temporarily removed shall be granted unless Family Court finds, upon a hearing, that "the return presents an imminent risk to the child's life or health" (Family Ct Act § 1028 [a]; *see Matter of Nyomi P. [Imeisha P.]*, 224 AD3d 906, 906 [2d Dept 2024], *lv dismissed* 41 NY3d 1008 [2024]; *Matter of Mikayla T. [Jyranda R.]*, 199 AD3d 1009, 1010 [2d Dept 2021]). "A credibility assessment of a hearing court is accorded considerable deference on appeal" (*Matter of Gavin G. [Carla G.]*, 165 AD3d 1258, 1259 [2d Dept 2018]), and the court's determination will not be disturbed if it is supported by a sound and substantial basis in the record (*see*

Matter of Junny B. [Homere B.], 200 AD3d 687, 688 [2d Dept 2021]; *Matter of Zaniyah R.-T. [Wanda R.]*, 196 AD3d 584, 585 [2d Dept 2021]). In making its determination, the court “must weigh, in the factual setting before it, whether the imminent risk to the child can be mitigated by reasonable efforts to avoid removal,” and “balance that risk against the harm removal might bring, and it must determine factually which course is in the child’s best interests” (*Nicholson v Scoppetta*, 3 NY3d 357, 378 [2004]; see *Nyomi P.*, 224 AD3d at 907). The child protective services agency bears the burden of establishing that the child would be at imminent risk and therefore should remain in its custody (see *Matter of Skkyy M.R. [Justin R.—Desanta C.]*, 206 AD3d 660, 661 [2d Dept 2022]; *Matter of Chase P. [Maureen Q.]*, 199 AD3d 807, 809 [2d Dept 2021]).

Here, there is a sound and substantial basis in the record for the court’s determination that the return of the child to the mother would present an imminent risk to the child, and that the risk could not be mitigated by reasonable efforts to avoid removal, in light of the testimony at the hearing as to the mother’s untreated, severe mental health conditions. Petitioner established that the mother suffered from frequent “visions” that predominantly focused on murder and also—at times—included the child; that the mother lacked insight into her mental health conditions; that the mother failed to take medication for her mental health conditions or to seek mental health therapy; and that the mother followed her “visions” and intrusive thoughts, thereby engaging in unsafe behaviors that placed the child at imminent risk of harm (see *Matter of Jurennny M.-J. [Kelley M.]*, 235 AD3d 980, 982 [2d Dept 2025]; *Gavin G.*, 165 AD3d at 1259; *Matter of Alex A.E. [Adel E.]*, 103 AD3d 721, 722 [2d Dept 2013]; see also *Matter of Ayanna O. [Amanda M.]*, 233 AD3d 1418, 1420-1421 [3d Dept 2024]). Present—Lindley, J.P., Curran, Ogden, Nowak and DelConte, JJ.

67 In the *Matter of Dana DiFlorio*, Respondent, v John Heisler, III, Appellant. [253 NYS3d 465]—Appeal from an order of the Family Court, Onondaga County (Diane E. Plumley, J.), entered November 27, 2024, in a proceeding pursuant to Family Court Act article 4. The order, among other things, granted petitioner’s written objection to an order of the support magistrate entered October 7, 2024.

It is hereby ordered that the order so appealed from is unanimously affirmed without costs. Present—Lindley, J.P., Curran, Ogden, Nowak and DelConte, JJ.

68 In the *Matter of Oscar Asencio*, Petitioner, v Daniel F. Martuscello, III, Commissioner, New York State Department of

Corrections and Community Supervision, Respondent. [253 NYS3d 467]—Proceeding pursuant to CPLR article 78 (transferred to the Appellate Division of the Supreme Court in the Fourth Judicial Department by order of the Supreme Court, Wyoming County [Donald G. O’Geen, A.J.], entered Oct. 2, 2025) to review a determination of respondent. The determination found after a tier III hearing that petitioner had violated various incarcerated individual rules.

It is hereby ordered that said proceeding is unanimously dismissed without costs as moot (*see Matter of Free v Coombe*, 234 AD2d 996, 996 [4th Dept 1996]). Present—Lindley, J.P., Bannister, Montour, Greenwood and Hannah, JJ.

69 Yoerkis Gamboa, Respondent, v TJM Syracuse, LLC, Appellant. [253 NYS3d 469]—Appeal from an order of the Supreme Court, Onondaga County (Gregory R. Gilbert, J.), entered October 31, 2024. The order, insofar as appealed from, granted in part the motion of plaintiff for summary judgment.

Now, upon reading and filing the stipulation of discontinuance signed by the attorneys for the parties on March 23, 2026,

It is hereby ordered that said appeal is unanimously dismissed without costs upon stipulation. Present—Lindley, J.P., Bannister, Montour, Greenwood and Hannah, JJ.

70 Sycamore Maple Family Limited Partnership, Appellant-Respondent, v James F. Jerge, Jr., Respondent-Appellant. [253 NYS3d 468]—Appeal and cross-appeal from an order of the Supreme Court, Erie County (Deborah A. Chimes, J.), entered April 15, 2025. The order granted in part and denied in part plaintiff’s motion for partial summary judgment and defendant’s cross-motion for summary judgment.

Now, upon reading and filing the stipulation of discontinuance signed by the attorneys for the parties on April 2, 2026,

It is hereby ordered that said appeal and cross-appeal are unanimously dismissed without costs upon stipulation. Present—Whalen, P.J., Curran, Ogden, Nowak and DelConte, JJ.

71 Colleen Pandey, Individually and as the Executor of the Estate of Cynthia Galvin, Deceased, Appellant, v Teachers Insurance and Annuity Association of America et al., Respondents. [253 NYS3d 466]—Appeal from an order of the Supreme Court, Erie County (Donna M. Siwek, J.), entered March 6, 2024. The order, inter alia, granted the motion of defendants for summary judgment.

It is hereby ordered that the order so appealed from is unanimously affirmed without costs. Present—Whalen, P.J., Curran, Ogden, Nowak and DelConte, JJ.

72 Jeremiah Smith, Appellant, v City of Buffalo et al., Respondents. [253 NYS3d 851]—Appeal from an order of the Supreme Court, Erie County (Edward Pace, J.), entered November 12, 2024. The order denied the motion of plaintiff for leave to amend the complaint.

It is hereby ordered that the order so appealed from is unanimously affirmed without costs. Present—Whalen, P.J., Curran, Ogden, Nowak and DelConte, JJ.

73 The People of the State of New York, Respondent, v Ryan S. Kelsey, Appellant. (Appeal No. 1.) [253 NYS3d 470]—Appeal from a judgment of the Cayuga County Court (Jon E. Budelmann, A.J.), rendered February 13, 2024. The judgment convicted defendant, upon his plea of guilty, of aggravated family offense.

It is hereby ordered that the judgment so appealed from is unanimously affirmed. Present—Lindley, J.P., Curran, Ogden, Greenwood and DelConte, JJ.

74 The People of the State of New York, Respondent, v Ryan S. Kelsey, Appellant. (Appeal No. 2.) [253 NYS3d 468]—Appeal from a judgment of the Cayuga County Court (Jon E. Budelmann, A.J.), rendered May 16, 2024. The judgment convicted defendant, upon his plea of guilty, of assault in the second degree.

It is hereby ordered that the judgment so appealed from is unanimously affirmed. Present—Lindley, J.P., Curran, Ogden, Greenwood and DelConte, JJ.

75 The People of the State of New York ex rel. Richard F. Mills, Appellant, v J. Wolcott, Superintendent, Attica Correctional Facility, Respondent. [253 NYS3d 474]—Appeal from a judgment of the Supreme Court, Wyoming County (Terrence M. Parker, A.J.), dated December 18, 2024, in a habeas corpus proceeding. The judgment denied the petition.

It is hereby ordered that the judgment so appealed from is unanimously affirmed without costs for reasons stated in the decision at Supreme Court. Present—Lindley, J.P., Curran, Ogden, Greenwood and DelConte, JJ.

76 Towd Point Mortgage Trust 2019-3, US Bank National Association, Indenture Trustee, Respondent, v Patrick Minogue, Also Known as Patrick J. Minogue, III, Appellant. [253 NYS3d 467]—Appeal from an order of the Supreme Court, Onondaga County (Joseph E. Lamendola, J.), entered October 7, 2024. The order denied defendant's motion to vacate a default judgment.

Now, upon reading and filing the stipulation of discontinuance signed by defendant and the attorney for the plaintiff on February 9 and 16, 2026,

It is hereby ordered that said appeal is unanimously dismissed without costs upon stipulation. Present—Lindley, J.P., Curran, Ogden, Greenwood and DelConte, JJ.

77 The People of the State of New York, Respondent, v Diane E. Clark, Appellant. [253 NYS3d 469]—Appeal from a judgment of the Steuben County Court (Philip J. Roche, J.), rendered June 20, 2023. The appeal was held by this Court by order entered March 14, 2025, decision was reserved and the matter was remitted to Steuben County Court for further proceedings (236 AD3d 1345 [4th Dept 2025]). The proceedings were held and completed.

It is hereby ordered that said appeal is unanimously dismissed (*see People v Odyssty D.R.*, 208 AD3d 1596, 1596-1597 [4th Dept 2022]). Present—Bannister, J.P., Ogden, Nowak and Hannah, JJ.

78 The People of the State of New York, Respondent, v David W. Free, Jr., Appellant. [253 NYS3d 471]—Appeal from an order of the Supreme Court, Niagara County (Mario A. Giacobbe, A.J.), entered April 11, 2024. The order determined that defendant is a level two risk pursuant to the Sex Offender Registration Act.

It is hereby ordered that the order so appealed from is unanimously affirmed without costs. Present—Whalen, P.J., Bannister, Montour, Nowak and Hannah, JJ.

79 The People of the State of New York, Respondent, v Alexander R. Watros, Appellant. [253 NYS3d 470]—Appeal from an order of the Oswego County Court (Armen J. Nazarian, J.), dated March 28, 2025. The order determined that defendant is a level two risk pursuant to the Sex Offender Registration Act.

It is hereby ordered that the order so appealed from is unanimously affirmed without costs. Present—Whalen, P.J., Bannister, Montour, Nowak and Hannah, JJ.

80 Maura Bianco, Appellant, v Jacqueline S. Johnson, Respondent. [253 NYS3d 475]—Appeal from an order of the Supreme Court, Steuben County (Jason L. Cook, J.), entered December 27, 2024. The order, *inter alia*, denied the motion of plaintiff for summary judgment.

It is hereby ordered that the order so appealed from is unanimously affirmed without costs. Present—Whalen, P.J., Bannister, Montour, Nowak and Hannah, JJ.

81 The People of the State of New York, Respondent, v Frank Bredt, Appellant. [— NYS3d —]

Crimes—Right to Counsel—Opportunity to State Grounds for Substitute Counsel

Crimes—Witnesses—Opinion Testimony

Crimes—Murder—Sufficiency and Weight of Evidence—Setting of Fire by Defendant

Appeal from a judgment of the Supreme Court, Erie County (M. William Boller, A.J.), rendered May 20, 2022. The judgment convicted defendant upon a jury verdict of murder in the second degree (two counts).

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

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of two counts of murder in the second degree (Penal Law § 125.25 [1], [3]), stemming from allegations that, during a domestic dispute, he doused his girlfriend with gasoline and set her on fire, causing her death. We affirm.

We reject defendant’s contention that Supreme Court erred in denying his motion to substitute counsel when it did not give him an opportunity to state the grounds for his motion and failed to conduct a sufficient inquiry into his complaints about counsel. A court’s duty to consider a motion to substitute counsel is invoked only when a defendant makes a “seemingly serious request[]” for new counsel (*People v Porto*, 16 NY3d 93, 100 [2010] [internal quotation marks omitted]; see *People v Fredericks*, 43 NY3d 551, 557 [2025], *rearg denied* 43 NY3d 1014 [2025]; *People v Sides*, 75 NY2d 822, 824 [1990]). Only where a defendant makes “specific factual allegations of serious complaints about counsel” must the court make a “minimal inquiry” into “the nature of the disagreement or its potential for resolution” (*Porto*, 16 NY3d at 100 [internal quotation marks omitted]; see *People v Gibson*, 126 AD3d 1300, 1301-1302 [4th Dept 2015]), and the court is required to substitute counsel only where good cause is shown (see *Porto*, 16 NY3d at 100; *Sides*, 75 NY2d at 824; *Gibson*, 126 AD3d at 1302).

Here, although the court initially interrupted defendant when he began to explain his complaints about defense counsel, it thereafter allowed defendant to submit his pro se written motion requesting a substitution of counsel, and, in fact, permitted defendant to read out the contents of that written motion in open court. Thus, contrary to defendant’s contention, we conclude that the record amply establishes that defendant was able to set forth the basis for his application for substitute

counsel (see *People v Hubbert*, 227 AD3d 1547, 1548 [4th Dept 2024], *lv denied* 41 NY3d 1019 [2024]; *People v Konovalchuk*, 148 AD3d 1514, 1516 [4th Dept 2017], *lv denied* 29 NY3d 1082 [2017]; cf. *People v Jones*, 173 AD3d 1628, 1630 [4th Dept 2019]). Further, inasmuch as defendant's stated grounds were wholly without merit, there was no reason for the court to conduct any further inquiry. Defendant made no "specific factual allegations that would indicate a serious conflict with counsel" (*Porto*, 16 NY3d at 100-101; see *Fredericks*, 43 NY3d at 558; *Konovalchuk*, 148 AD3d at 1516). Indeed, we note that defendant's stated "loss of confidence in counsel arising from defense counsel's recommendation to accept a plea offer" is an "insufficient basis for substitution of counsel" (*People v Schojan*, 272 AD2d 932, 933 [4th Dept 2000], *lv denied* 95 NY2d 871 [2000]; see *People v Linares*, 302 AD2d 256, 256 [1st Dept 2003], *affd* 2 NY3d 507 [2004]).

Defendant's contention that the court deprived him of his constitutional right to present a defense when it excluded certain witness testimony suggesting that the victim started the fire that led to her death is unpreserved for our review inasmuch as he never objected to the court's determination at trial on that particular ground (see *People v Harris*, 229 AD3d 1055, 1056 [4th Dept 2024], *lv denied* 42 NY3d 971 [2024]; see generally CPL 470.05 [2]; *People v Lane*, 7 NY3d 888, 889 [2006]), and we decline to exercise our power to review that contention as a matter of discretion in the interest of justice (see CPL 470.15 [6] [a]). To the extent that defendant contends that the court erred in precluding him from eliciting such testimony on the basis that it constituted appropriate lay witness opinion testimony—a contention that is preserved—we conclude that it is without merit. "Generally, lay witnesses must testify only to the facts and not to their opinions and conclusions drawn from the facts, as it is the jury's province to draw the appropriate inferences arising from the facts" (*People v Reddick*, 164 AD3d 526, 527 [2d Dept 2018], *lv denied* 32 NY3d 1114 [2018] [internal quotation marks omitted]; see *People v Vizzini*, 183 AD2d 302, 307 [4th Dept 1992]). Nevertheless, a lay witness may give opinion testimony when, inter alia, "the subject matter of that testimony is such that it is impossible to accurately describe certain facts without including some opinion or impression" (*People v Dax*, 233 AD2d 177, 178 [1st Dept 1996], *lv denied* 89 NY2d 986 [1997]; see generally Guide to NY Evid rule 7.03, Opinion of Lay Witness, http://www.nycourts.gov/judges/evidence/7-OPINION/7.03_OPINION%20OF%20LAY%20WITNESS.pdf [last accessed Mar. 23, 2026]). Here, the court properly precluded defendant from

eliciting witness opinion testimony suggesting that the victim may have set defendant on fire based on the witness's observations of the manner in which defendant was on fire and how quickly his clothes had burned inasmuch as defendant failed to set forth any factual experiential foundation from which it could show that the witness had "sufficient experience" to offer such an opinion (*People v Gozdalski*, 239 AD2d 896, 897 [4th Dept 1997], *lv denied* 90 NY2d 858 [1997]; *see generally* *People v Caccese*, 211 AD2d 976, 977 [3d Dept 1995], *lv denied* 86 NY2d 780 [1995]).

Defendant's contention that he was deprived of a fair trial by prosecutorial misconduct is, for the most part, unpreserved for our review inasmuch as defendant failed to object to all but one of the statements he now challenges on appeal (*see People v Kellam*, 237 AD3d 1518, 1519 [4th Dept 2025]; *People v Watts*, 218 AD3d 1171, 1174 [4th Dept 2023], *lv denied* 40 NY3d 1013 [2023]; *People v Torres*, 125 AD3d 1481, 1484 [4th Dept 2015], *lv denied* 25 NY3d 1172 [2015]), and we decline to exercise our power to review the unpreserved part of that contention as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]). With respect to his preserved challenge, although it was improper for the prosecutor to sarcastically comment about agreeing to stipulate to "whatever other speculative statements that may have been made about this or Santa Claus or the Easter bunny," reversal is not required inasmuch as the court effectively "sustained [defendant's] prompt objection[] to the improper [comment], and defense counsel did not request [a] curative instruction[] [or] move for a mistrial" (*People v Evans*, 242 AD2d 948, 949 [4th Dept 1997], *lv denied* 91 NY2d 834 [1997]; *see People v Peck*, 272 AD2d 946, 947 [4th Dept 2000]; *see generally* *People v Gaffney*, 232 AD3d 1228, 1230 [4th Dept 2024], *lv granted* 43 NY3d 963 [2025]; *People v Mencil*, 206 AD3d 1550, 1554 [4th Dept 2022], *lv denied* 38 NY3d 1152 [2022]). Regardless, that one isolated comment was not so egregious that it deprived defendant of a fair trial (*see People v Soto*, 242 AD3d 1613, 1615 [4th Dept 2025], *lv denied* 44 NY3d 1068 [2026]; *People v Hills*, 234 AD3d 1311, 1314 [4th Dept 2025], *lv denied* 43 NY3d 963 [2025]; *People v Burke*, 197 AD3d 967, 968 [4th Dept 2021], *lv denied* 37 NY3d 1159 [2022]).

Defendant's contention that the People violated his statutory right to timely disclosure pursuant to CPL article 245 when the court admitted in evidence at trial several photographic exhibits created during trial is unpreserved for our review inasmuch as defendant never specifically objected to that evidence on that basis (*see generally* CPL 470.05 [2]; *People v*

Phillips, 239 AD3d 1421, 1423 [4th Dept 2025], *lv denied* 44 NY3d 1012 [2025]; *People v Jones*, 90 AD3d 1516, 1517 [4th Dept 2011], *lv denied* 19 NY3d 864 [2012]), and we decline to exercise our power to review that contention as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]). Defendant also contends that he was deprived of a fair trial by the prosecutor's alleged creation of those new exhibits during trial. We reject that contention. Here, the new exhibits at issue were not merely created in a manner that deprived defendant of the opportunity to contest their evidentiary foundation (*cf.* *People v Myles*, 232 AD3d 1295, 1297 [4th Dept 2024], *lv denied* 43 NY3d 945 [2025], *cert denied* 607 US —, — S Ct — [2026]). Rather, they were close-up photographs of physical items already in evidence, and defendant was afforded an opportunity to confront the admissibility of the photographs at trial. Regardless, we nevertheless conclude that any improper use of those exhibits did not deprive defendant of a fair trial (*see id.*; *People v King*, 224 AD3d 1313, 1314 [4th Dept 2024], *lv denied* 41 NY3d 1019 [2024]; *see generally* *People v Williams*, 29 NY3d 84, 89 [2017]). Defendant's further contention that he was deprived of a fair trial when the court improperly permitted a prosecution witness to give lay opinion testimony, thereby usurping the factfinding function of the jury, is unpreserved for our review inasmuch as defendant did not object on that specific basis at trial (*see* CPL 470.05 [2]; *Harris*, 229 AD3d at 1056), and we decline to exercise our power to review that contention as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]).

Defendant contends that there is legally insufficient evidence to establish that he started the fire that resulted in the victim's death. We reject that contention. Based on the evidence adduced at trial, we conclude that there is a valid line of reasoning and permissible inferences from which a rational jury could have found, beyond a reasonable doubt, that defendant set the fire that caused the victim's death. Although the People did not present evidence directly establishing that defendant started the fatal fire, the circumstantial evidence adduced at trial amply supported that conclusion. For example, the People presented evidence of defendant's motive to set the victim on fire (*see generally* *People v Gardner*, 26 AD3d 741, 741-742 [4th Dept 2006], *lv denied* 6 NY3d 848 [2006]). Specifically, the People presented evidence that defendant and the victim had recently broken up as a couple, and that, on the day of the fire, they had been arguing about what the victim was doing with property of defendant's that was still in her home. Text messages between defendant and the victim in the hours

leading up to the fire show defendant threatening the victim with fire, and stating that she would regret losing his belongings. Indeed, the victim's responses to defendant's text messages are best understood as responses to defendant threatening to burn her.

Additional evidence supported the reasonable inference that defendant arrived at the victim's home for the sole purpose of setting her on fire. Specifically, a witness testified at trial that, on the night in question, defendant suddenly entered the victim's home and proceeded straight upstairs to the victim's bedroom, whereupon the witness heard banging. Defendant was upstairs for about five minutes, during which time the fire started. Shortly thereafter, defendant left, himself on fire, and went to hide in a closet in a neighboring house, which is evidence of his consciousness of guilt. Further supporting a finding that defendant set the victim on fire—and not the other way around—is forensic evidence establishing that: the victim was the “fuel package,” i.e., that the victim, when covered in gasoline, was the combustible material that would sustain a fire; the fire started on her bed; and that no lighter or other ignition source was found close to her bed or body. Under these circumstances, we conclude that there is a valid line of reasoning and permissible inferences from which a rational jury could have found beyond a reasonable doubt that defendant started the fire that killed the victim (*see generally People v Danielson*, 9 NY3d 342, 349 [2007]).

Furthermore, viewing the evidence in light of the elements of the crimes as charged to the jury (*see id.*), we conclude that the verdict is not against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495 [1987]). Even assuming, arguendo, that a different verdict would not have been unreasonable, we cannot conclude “that the jury failed to give the evidence the weight it should be accorded” (*People v Maull*, 167 AD3d 1465, 1467 [4th Dept 2018], *lv denied* 33 NY3d 951 [2019] [internal quotation marks omitted]; *see generally Bleakley*, 69 NY2d at 495).

Defendant also contends that defense counsel was ineffective in failing to argue, on summation, that his severe back burns were inconsistent with the People's theory that he had started the fire and was burned as a result of a vapor flash. He further contends that counsel, in failing to pursue the aforementioned theory of the case, was ineffective in not calling either defendant's treating physician or another medical expert to testify about the severity of the burns defendant sustained as a result of the fire. We reject those contentions and conclude that de-

defendant failed to “‘demonstrate the absence of strategic or other legitimate explanations’ for counsel’s alleged shortcomings” in that regard (*People v Benevento*, 91 NY2d 708, 712 [1998], quoting *People v Rivera*, 71 NY2d 705, 709 [1988]). With respect to defense counsel’s failure to argue defendant’s theory that his burns were inconsistent with the People’s theory of the case, we note that defendant’s proposed theory was supported by an isolated statement made by one witness, who almost immediately hedged on that statement and thereafter offered other reasonable explanations for defendant’s burns that were, in fact, consistent with the People’s theory. Thus, it was perfectly reasonable for defense counsel to decide to primarily focus the summation on the theory that the People failed to prove beyond a reasonable doubt that *defendant* rather than the victim started the fire, rather than to rely on a theory that had, at best, dubious support in the record. Furthermore, to the extent that defendant contends that defense counsel was ineffective in failing to call a particular witness at trial, that contention is based on matters outside the record, and we note that a CPL 440.10 proceeding is the appropriate forum for reviewing that claim (*see People v Reeder*, 221 AD3d 1592, 1593 [4th Dept 2023], *lv denied* 41 NY3d 944 [2024]; *People v Belton*, 199 AD3d 1373, 1374-1375 [4th Dept 2021], *lv denied* 37 NY3d 1159 [2022]; *see generally People v Maffei*, 35 NY3d 264, 269-270 [2020]).

Finally, we conclude that defendant’s sentence is not unduly harsh or severe. Present—Curran, J.P., Bannister, Nowak, DelConte and Hannah, JJ.

82 Shawn Broton, Appellant, v County of Onondaga et al., Respondents. [— NYS3d —]

Limitation of Actions—Three-Year Statute of Limitations—Constitutional Tort

Appeal from an order of the Supreme Court, Onondaga County (Gregory R. Gilbert, J.), entered August 30, 2024. The order granted the motions for summary judgment of defendants William J. Fitzpatrick, individually and in his capacity as Onondaga County District Attorney, Duane Owens, individually and in his capacity as Onondaga County Commissioner of Personnel, and Steven Williams, individually and in his capacity as Investigative Consultant to Onondaga County Board of Ethics, and dismissed the second amended complaint in its entirety.

It is hereby ordered that the order so appealed from is unanimously affirmed without costs.

Memorandum: In this action asserting, among other things, state and federal constitutional tort claims, plaintiff appeals from an order that granted the motions of defendants William J. Fitzpatrick, individually and in his capacity as Onondaga County District Attorney, Duane Owens, individually and in his capacity as Onondaga County Commissioner of Personnel, and Steven Williams, individually and in his capacity as investigative consultant to the Onondaga County Board of Ethics, for summary judgment dismissing the second amended complaint against them, and also granted summary judgment dismissing the second amended complaint against defendants County of Onondaga (County) and Robert Durr, individually and in his capacity as Onondaga County Attorney. We affirm.

Plaintiff was appointed Deputy Chief of Police by the former Mayor of the City of Syracuse. When a new mayor was elected in 2017, plaintiff was removed as Deputy Chief and requested to be reinstated as a rank-and-file member of the Syracuse Police Department. Owens denied that request on or about December 18, 2017. In July 2019, plaintiff made a complaint to the Onondaga County Board of Ethics (BOE), alleging that Fitzpatrick had improperly influenced Owens to deny plaintiff's request for reinstatement. In January 2020, Williams, the outside counsel hired by the BOE to conduct the investigation into plaintiff's complaint, determined that plaintiff's allegations were unfounded.

Plaintiff commenced this action in January 2022, and in his second amended complaint, he asserts 12 causes of action. Following discovery, Fitzpatrick, Owens, and Williams (moving defendants) separately moved for summary judgment dismissing the second amended complaint against them. Supreme Court determined that, as a threshold issue, all causes of action are untimely and barred by the statute of limitations. The court further concluded in the alternative that the moving defendants are entitled to summary judgment on the merits, and also granted summary judgment dismissing the second amended complaint against the nonmoving defendants, i.e., the County and Durr, with prejudice.

At the outset, we note that on appeal plaintiff has not raised any challenge to the court's determination to dismiss the second amended complaint against Durr or the County, and he has therefore abandoned any such contention (*see Ciesinski v Town of Aurora*, 202 AD2d 984, 984 [4th Dept 1994]). We further note that, inasmuch as plaintiff does not contend that the 7th, 8th, 9th, 10th, and 11th causes of action were timely commenced, he has thus abandoned any challenge to the dismissal

of those causes of action on statute of limitations grounds (*see id.*), and his contention that he raised issues of fact with respect to those causes of action is academic (*see generally Matter of Sportsmen's Tavern LLC v New York State Liq. Auth.*, 195 AD3d 1557, 1558 [4th Dept 2021]).

On appeal, plaintiff contends that his causes of action against the moving defendants arising under the New York Constitution and 42 USC § 1983 are timely. Plaintiff's state constitutional tort claims, the 1st through 6th causes of action, are subject to a three-year statute of limitations (*see* CPLR 214 [5]; *Brown v State of New York*, 250 AD2d 314, 318 [3d Dept 1998]), as is plaintiff's 12th cause of action, asserting various 42 USC § 1983 claims (*see* CPLR 214 [5]; *BL Doe 3 v Female Academy of the Sacred Heart*, 199 AD3d 1419, 1420-1421 [4th Dept 2021]). The moving defendants established that those causes of action accrued on December 18, 2017, when Owens denied plaintiff's request for reinstatement. Thus, taking into account tolling of the statute of limitations pursuant to executive orders during the COVID-19 pandemic, the statute of limitations expired on August 3, 2021—228 days after December 18, 2020 (*see generally* 9 NYCRR 8.202.8 *et seq.*; *State of New York v Williams*, 224 AD3d 1356, 1357 [4th Dept 2024]). Plaintiff commenced this action in January 2022, which was after the expiration of the limitations period.

Plaintiff contends that his action was timely based on the continuing wrong doctrine. We reject that contention because the continuing wrong doctrine “does not apply where . . . [the] plaintiff's allegation of damages is predicated on a single specific act” (*Fang v Town of Amherst*, 238 AD3d 1473, 1475 [4th Dept 2025]) and, here, the damages are predicated on a single act, i.e., Owens' denial of plaintiff's request to be reinstated. Moreover, that doctrine “may only be predicated on continuing unlawful acts and not on the continuing effects of earlier unlawful conduct” (*Coe v Village of Waterloo*, 229 AD3d 1119, 1121 [4th Dept 2024], *lv denied* 42 NY3d 912 [2025] [internal quotation marks omitted]), and there are no continuing unlawful acts.

To the extent that plaintiff's causes of action against Williams may have been timely filed, we conclude that, contrary to plaintiff's contention, Williams is entitled to summary judgment dismissing the second amended complaint against him. In support of his motion, Williams submitted admissible evidence establishing that he is not liable under any of the causes of action asserted against him inasmuch as he merely investigated the BOE ethics complaint, did not take any adverse ac-

tion against plaintiff, and was uninvolved in the decision to terminate plaintiff which occurred some three years before Williams' involvement (*see generally Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). In opposition to Williams' motion, plaintiff has not shown that he was injured by any act or omission of Williams during the course of the BOE investigation, or that the BOE investigation impacted plaintiff's termination some three years earlier. We conclude that "[t]he proof submitted by [plaintiff] in opposition to the motion consisted of unsubstantiated allegations and mere conclusions that were lacking in evidentiary support and thus insufficient to defeat summary judgment" (*I.P.L. Corp. v Industrial Power & Light Corp.*, 202 AD2d 1029, 1029 [4th Dept 1994]).

We have reviewed plaintiff's remaining contentions and conclude that none warrants modification or reversal of the order. Present—Curran, J.P., Bannister, Nowak, DelConte and Hannah, JJ. **[Prior Case History: 83 Misc 3d 1285(A), 2024 NY Slip Op 51219(U).]**

83 The People of the State of New York, Respondent, v Jaquan C., Appellant. [— NYS3d —]

Crimes—Right to Counsel—Effective Representation—Failure to Request Hearing for Alternative Sentence as Victim of Domestic Violence

Appeal from a judgment of the Supreme Court, Erie County (Deborah A. Haendiges, J.), rendered March 15, 2023. The judgment convicted defendant upon his plea of guilty of manslaughter in the first degree.

It is hereby ordered that the judgment so appealed from is affirmed.

Memorandum: Defendant appeals from a judgment convicting him following his guilty plea of manslaughter in the first degree (Penal Law § 125.20 [1]). Contrary to defendant's contention, we conclude on this record that defendant's waiver of the right to appeal was knowing, voluntary, and intelligent (*see People v Bundscho*, 239 AD3d 1261, 1261 [4th Dept 2025], *lv dismissed* 44 NY3d 1064 [2026]; *People v Simpson*, 232 AD3d 1266, 1266 [4th Dept 2024], *lv denied* 42 NY3d 1082 [2025]; *see generally People v Thomas*, 34 NY3d 545, 559-564 [2019], *cert denied* 589 US 1302 [2020]). The valid waiver encompasses defendant's challenge to the severity of his sentence (*see People v Lollie*, 204 AD3d 1430, 1431 [4th Dept 2022], *lv denied* 38 NY3d 1134 [2022]).

Defendant also contends that he was denied effective assistance of counsel because defense counsel did not request a hearing to determine whether defendant should receive an

alternative sentence as a victim of domestic violence pursuant to the Domestic Violence Survivors Justice Act (DVSJA) (*see* Penal Law § 60.12). Defendant's conviction stems from an argument between defendant and the victim, his boyfriend, during which defendant stabbed the victim. The record contains indications, primarily in the presentence report, that if substantiated support the conclusion that defendant was subjected to domestic violence inflicted by the victim during the course of their relationship. We nonetheless respectfully disagree with our dissenting colleagues' view that the record is sufficiently developed to permit resolution of defendant's contention that defense counsel's failure to seek an alternative DVSJA sentence amounted to the failure to raise an argument that was "so clear-cut and dispositive that no reasonable defense counsel would have failed to assert it" (*People v Watkins*, 42 NY3d 635, 640 [2024], *cert denied* 604 US —, 145 S Ct 459 [2024] [internal quotation marks omitted]; *see People v Turner*, 5 NY3d 476, 480-481 [2005]). Here, the record is silent with respect to, among other things, whether defense counsel discussed the possibility of an alternative DVSJA sentence with defendant or raised the issue during plea negotiations with the prosecution (*cf. People v Linda R.M.*, 236 AD3d 1488, 1488-1489 [4th Dept 2025], *lv denied* 43 NY3d 1047 [2025]). Defendant's contention therefore involves matters outside the record and must be raised by means of a CPL article 440 motion (*see generally People v Ubanwa*, 242 AD3d 1520, 1522 [4th Dept 2025]; *People v Houle*, 236 AD3d 1296, 1297 [4th Dept 2025]).

All concur except Ogden and Nowak, JJ., who dissent and vote to modify in accordance with the following memorandum.

Ogden and Nowak, JJ. (dissenting). We agree with the majority that defendant's waiver of the right to appeal was knowing, voluntary, and intelligent, and that defendant's valid waiver encompasses his challenge to the severity of his sentence. However, we conclude that, on this record, defendant established that he was denied effective assistance of counsel based on defense counsel's failure to request a Penal Law § 60.12 hearing seeking alternative sentencing under the Domestic Violence Survivors Justice Act (DVSJA) (*see* § 60.12). Thus, we respectfully dissent.

Defendant and his boyfriend, the victim, engaged in an argument as defendant was dropping the victim off at work, during which defendant stabbed the victim in the chest with a knife. The victim collapsed in the front vestibule of the office building and died at the scene. Defendant stayed at the scene and called

911; he also called the victim's mother and sister to tell them what had happened. He was arrested at the scene shortly thereafter. Defendant and the victim were in a dating relationship at the time of the altercation.

At sentencing, defense counsel acknowledged that she and her cocounsel had reviewed the presentence investigation report and found it to contain no errors or omissions. The presentence investigation report reflects that defendant and the victim had "a history of domestic disputes" and that defendant previously had a stay-away order of protection in his favor against the victim. The author of the presentence investigation report, notably, referred to police records documenting that history of domestic disputes and found it "important to note that the victim was the aggressor in some of those past reports." While the majority implies that defendant and defense counsel may have discussed the possibility of DVSJA sentencing, in our view, the record affirmatively establishes that they did not. Defendant expressed no understanding that he could receive a lesser sentence under the DVSJA; quite the contrary, he repeatedly stated at the presentence interview that he believed that his negotiated prison term of 15 years was "harsh."

Defendant pleaded guilty and was sentenced without any inquiry into the possibility of DVSJA sentencing, and the sole live issue in this case was (or should have been) defendant's possible entitlement to DVSJA sentencing. Defendant did not dispute that he committed the offense, having called both 911 and the victim's mother and sister after stabbing the victim, yet defense counsel filed just a single omnibus motion before the plea and made no request for a Penal Law § 60.12 hearing between the time of the plea and sentencing.

Ineffective assistance may be predicated upon "[a] single error . . . but only when the error is sufficiently egregious and prejudicial as to compromise a defendant's right to a fair trial" (*People v Watkins*, 42 NY3d 635, 640 [2024], *cert denied* 604 US —, 145 S Ct 459 [2024], quoting *People v Caban*, 5 NY3d 143, 152 [2005]). "Such cases are rare . . . and typically involve the failure to raise a defense so clear-cut and dispositive that no reasonable defense counsel would have failed to assert it, and it must be evident that the decision to forgo the contention could not have been grounded in a legitimate trial strategy" (*id.* [internal quotation marks omitted]; see *People v Turner*, 5 NY3d 476, 480-481 [2005]).

Under the DVSJA, a court may apply an alternative sentencing scheme if it determines, upon a preponderance of the evidence following a hearing (see *People v Addimando*, 197 AD3d

106, 112 [2d Dept 2021]), “that (a) at the time of the instant offense, the defendant was a victim of domestic violence subjected to substantial physical, sexual or psychological abuse inflicted by a member of the same family or household as the defendant as such term is defined in [CPL 530.11 (1)]; (b) such abuse was a significant contributing factor to the defendant’s criminal behavior; [and] (c) having regard for the nature and circumstances of the crime and the history, character and condition of the defendant, that a sentence of imprisonment pursuant to [Penal Law §§ 70.00, 70.02, 70.06 or 70.71 (2) or (3)] would be unduly harsh” (Penal Law § 60.12 [1]; *see People v Nateonna R.*, 236 AD3d 1491, 1491-1492 [4th Dept 2025], *lv denied* 43 NY3d 1010 [2025]; *People v Wendy B.-S.*, 229 AD3d 1317, 1319 [4th Dept 2024], *lv denied* 42 NY3d 1022 [2024]).

In our view, defense counsel’s failure to pursue the possibility of alternate sentencing under the DVSJA amounted to a failure to raise an argument that was “so clear-cut and dispositive that no reasonable defense counsel would have failed to assert it” (*Watkins*, 42 NY3d at 640 [internal quotation marks omitted]; *see People v Evans*, 243 AD3d 1338, 1339 [4th Dept 2025]; *People v Allen*, 184 AD3d 1076, 1079 [4th Dept 2020]). We do not mean to suggest that defendant would necessarily have been entitled to DVSJA sentencing following a hearing (*see generally People v Wilson*, 164 AD3d 1012, 1020 [3d Dept 2018]). However, in our view, it is equally clear, given the details outlined in the presentence investigation report, that defendant would have been entitled to a *hearing* had it been requested, because defense counsel could have presented a colorable argument at such a hearing in favor of sentencing under Penal Law § 60.12 (*see* CPL 530.11 [1] [e]; *cf. People v Willis*, 105 AD3d 1397, 1397 [4th Dept 2013], *lv denied* 22 NY3d 960 [2013]; *see generally People v Wyatt*, 246 AD3d 1448, 1449-1450 [4th Dept 2026]). In other words, regardless of defendant’s ultimate success at such a hearing, we conclude that his entitlement to that hearing was “so clear-cut and dispositive that no reasonable defense counsel would have failed to [request] it” (*Watkins*, 42 NY3d at 640 [internal quotation marks omitted]). Nor can we conclude that defense counsel’s failure to seek a Penal Law § 60.12 hearing was part of a legitimate trial strategy (*see generally Wyatt*, 246 AD3d at 1449-1450); indeed, we can discern no possible reason for counsel to have failed to request such a hearing other than an erroneous belief that Penal Law § 60.12 did not apply because defendant and the victim were both men.

We would therefore modify the judgment by vacating the

sentence, and we would remit the matter for a Penal Law § 60.12 hearing. Present—Whalen, P.J., Lindley, Ogden, Nowak and DelConte, JJ.

84 Deutsche Bank National Trust Company, as Trustee for Ameriquest Mortgage Securities, Inc., Asset-Backed Pass-Through Certificates, Series 2006-R1, Appellant, v Michael J. Mercure, Also Known as Michael Jeremy Mercure, Respondent, et al., Defendant. [— NYS3d —]

Mortgages—Foreclosure—Standing

Appeal from an order of the Supreme Court, Washington County (Robert J. Muller, J.), entered February 14, 2024, in a foreclosure action. The order denied the motion of plaintiff for summary judgment.

It is hereby ordered that the order so appealed from is unanimously reversed on the law without costs, the motion is granted, and the matter is remitted to Supreme Court, Washington County, for further proceedings in accordance with the following memorandum: In 2005, defendants executed a note and mortgage in favor of nonparty Ameriquest Mortgage Company (Ameriquest). In 2006, Ameriquest, nonparty Ameriquest Mortgage Securities, Inc. (Ameriquest Securities), and Deutsche Bank National Trust Company (Deutsche Bank) entered into a pooling and servicing agreement (PSA), which created a trust, appointed Deutsche Bank as trustee for Ameriquest Securities, asset-backed pass-through certificates, series 2006-R1 (plaintiff), and provided that the note and mortgage would be assigned to plaintiff. In 2007, Ameriquest appointed nonparty Citi Residential Lending Inc. (Citi Residential), the prior loan servicer, as its attorney-in-fact pursuant to a limited power of attorney. Pursuant to the limited power of attorney, Ameriquest granted Citi Residential authority to substitute plaintiff as the mortgagee in accordance with the PSA. In 2009, Citi Residential executed the assignment of the note and mortgage to plaintiff.

Defendants later defaulted, and plaintiff commenced this action seeking to foreclose on the mortgage. Defendants served an answer that, inter alia, asserted an affirmative defense based upon plaintiff's purported lack of standing. Plaintiff moved for, inter alia, summary judgment on the complaint and the appointment of a referee, and Supreme Court denied the motion, concluding that plaintiff failed to meet its initial burden on the issue of standing. Plaintiff appeals, and we reverse.

“Generally, in moving for summary judgment in an action to

foreclose a mortgage, a plaintiff establishes its prima facie case through the production of the mortgage, the unpaid note, and evidence of default” (*Deutsche Bank Natl. Trust Co. v Brewton*, 142 AD3d 683, 684 [2d Dept 2016] [internal quotation marks omitted]; see *Bank of N.Y. Mellon v Anderson*, 151 AD3d 1926, 1927 [4th Dept 2017]; *HSBC Bank USA, N.A. v Spitzer*, 131 AD3d 1206, 1206-1207 [2d Dept 2015]). Where, as here, “the plaintiff’s standing has been placed in issue by reason of the defendant’s answer, the plaintiff additionally must prove its standing as part of its prima facie showing” (*HSBC Bank USA, N.A. v Baptiste*, 128 AD3d 773, 774 [2d Dept 2015]; see *Bank of N.Y. Mellon*, 151 AD3d at 1927).

We agree with plaintiff that the court erred in determining that it failed to meet its burden on the motion of establishing standing to foreclose on the mortgage. “‘In an action to foreclose a mortgage, the plaintiff has standing where, at the time the action is commenced, it is the holder or assignee of both the subject mortgage and the underlying note’” (*JPMorgan Chase Bank, N.A. v Kobee*, 140 AD3d 1622, 1623-1624 [4th Dept 2016]; see *NNPL Trust Series 2012-1 v Lunn*, 149 AD3d 1552, 1553 [4th Dept 2017]), “‘either by physical delivery or execution of a written assignment prior to the commencement of the action’” (*Sanfilippo v Bohme*, 217 AD3d 1498, 1499 [4th Dept 2023]). Here, by submitting on its motion the 2009 assignment of the note and mortgage to plaintiff, plaintiff established that it had standing to foreclose on the mortgage (see *Wells Fargo Bank, N.A. v Newhouse*, 218 AD3d 1117, 1120 [4th Dept 2023], *lv dismissed* 41 NY3d 977 [2024]; *U.S. Bank N.A. v Liebel*, 154 AD3d 1302, 1302-1303 [4th Dept 2017]). In opposition, defendants failed to raise an issue of fact with respect to plaintiff’s standing (see *U.S. Bank N.A.*, 154 AD3d at 1303; see generally *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). We therefore reverse the order, grant the motion, and remit the matter to Supreme Court for the appointment of a referee to compute the amount owed by defendants to plaintiff. Present—Bannister, J.P., Montour, Smith, Greenwood and Hannah, JJ. [**Prior Case History: 81 Misc 3d 1245(A), 2024 NY Slip Op 50153(U).**]

85 In the Matter of Attorneys in Violation of Judiciary Law § 468-a and 22 NYCRR 118.1. Attorney Grievance Committees for the Fourth Judicial Department, Petitioner. Gregory Jon Butler, Respondent. [253 NYS3d 452]—Order entered terminating suspension and granting application for reinstatement to the practice of law. Present—Curran J.P., Bannister, Montour, Greenwood and Hannah, JJ. (Filed Apr. 8, 2026.)

86 In the Matter of Donald T. Schmitt, an Attorney, Resignor. [253 NYS3d 452]—Application to resign for non-disciplinary reasons accepted and name removed from roll of attorneys. Present—Lindley, J.P., Ogden, Nowak and DelConte, JJ. (Filed Apr. 1, 2026.)

87 In the Matter of Paul David Stern, an Attorney, Resignor. [253 NYS3d 453]—Application to resign for non-disciplinary reasons accepted and name removed from roll of attorneys. Present—Curran, J.P., Bannister, Montour, Greenwood and Hannah, JJ. (Filed Apr. 21, 2026.)

88 In the Matter of Cody Blake Bartlett, an Attorney, Resignor. [253 NYS3d 453]—Application to resign for non-disciplinary reasons accepted and name removed from roll of attorneys. Present—Curran, J.P., Bannister, Montour, Greenwood and Hannah, JJ. (Filed Apr. 20, 2026.)

89 In the Matter of Peter John Brevorka, an Attorney, Resignor. [253 NYS3d 452]—Application to resign for non-disciplinary reasons accepted and name removed from roll of attorneys. Present—Curran, J.P., Bannister, Montour, Greenwood and Hannah, JJ. (Filed Apr. 20, 2026.)

90 In the Matter of Franklin William Heller, an Attorney, Resignor. [253 NYS3d 453]—Application to resign for non-disciplinary reasons accepted and name removed from roll of attorneys. Present—Curran, J.P., Bannister, Montour, Greenwood and Hannah, JJ. (Filed Apr. 21, 2026.)

91 In the Matter of Margaret M. Quinn, an Attorney, Resignor. [253 NYS3d 453]—Application to resign for non-disciplinary reasons accepted and name removed from roll of attorneys. Present—Curran, J.P., Bannister, Montour, Greenwood and Hannah, JJ. (Filed Apr. 21, 2026.)

92 Hoi Trinh, Appellant, v Joseph Thien Nguyen, Respondent. [253 NYS3d 475]—Motion for reargument or leave to appeal to the Court of Appeals denied. Present—Curran, J.P., Bannister, Ogden, DelConte and Hannah, JJ.

93 Joseph D. Burgdorf, Appellant, v Betsy Ross Nursing and Rehabilitation Center, Inc., Doing Business as Betsy Ross Nursing and Rehabilitation Center, et al., Respondents, et al., Defendants. [253 NYS3d 476]—Motion for reargument or leave to appeal to the Court of Appeals denied. Present—Whalen, P.J., Curran, Montour and Greenwood, JJ.

94 James R. Caputo, Appellant, v Nathan Holt et al., Respondents, et al., Defendants. [253 NYS3d 476]—Motion for re-

argument or leave to appeal to the Court of Appeals denied. Present—Curran, J.P., Bannister, Ogden and DelConte, JJ.

95 The People of the State of New York, Respondent, v Marques Garrett, Appellant. [253 NYS3d 476]—Motion to dismiss appeal granted. Matter remitted to Supreme Court, Erie County, to vacate judgment of conviction and dismiss indictment (*see People v Matteson*, 75 NY2d 745, 747 [1989]). Present—Whalen, P.J., Lindley, Curran, Bannister and Montour, JJ.

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- 140** *Rivera v Cruz*, 2026 NY Slip Op 50723(U). Courts—Small Claims—Substantial Justice—Damages. (App Term, 1st Dept, May 14, 2026)
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- 142** *People v Greer (Tyler)*, 2026 NY Slip Op 50748(U). Crimes—Criminal Trespass—Facial Sufficiency of Accusatory Instrument. (App Term, 1st Dept, May 18, 2026)
- 143** *ACP 150 W. End Ave. Assoc. L.P. v Hird*, 2026 NY Slip Op 50749(U). Landlord and Tenant—Rent Regulation—Succession Rights of Nontraditional Family Member. (App Term, 1st Dept, May 18, 2026)
- 144** *Nikgjonaj Realty Corp. v Garber*, 2026 NY Slip Op 50757(U). Landlord and Tenant—Summary Proceedings—Holdover Proceeding—Defective Notices. (App Term, 1st Dept, May 20, 2026)
- 145** *Suero v Citibank, N.A.*, 2026 NY Slip Op 50758(U). Judgments—Summary Judgment—Grounds. Banks and Banking—Safe-Deposit Box. (App Term, 1st Dept, May 20, 2026)
- 146** *940 Corp. v Lamonthe*, 2026 NY Slip Op 50759(U). Landlord and Tenant—Summary Proceedings—Licensee Holdover Proceeding—Standing to Assert Defenses. (App Term, 1st Dept, May 20, 2026)

[243 NYS3d 319]

In the Matter of CHRISTOPHER P. SCANLON, as Mayor of the City of Buffalo, et al., Petitioners, v BARBARA MILLER-WILLIAMS, as Comptroller of the City of Buffalo, Respondent.

Supreme Court, Erie County, September 24, 2025

HEADNOTES

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RESEARCH REFERENCES

By the Publisher's Editorial Staff

AM JUR 2d Mandamus §§ 35, 44, 71–72, 77, 110; AM JUR 2d Municipal Corporations, Counties, and Other Political Subdivisions §§ 160, 198, 233, 237, 239, 242; AM JUR 2d Public Securities and Obligations §§ 99, 103.

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NY JUR 2d Article 78 and Related Proceedings §§ 81, 114, 118–119.

SIEGEL, NY PRAC (6th ed) § 558.

ANNOTATION REFERENCE

See ALR Index under Bonds and Undertakings; Government Bonds or Securities; Mandamus; Municipal Corporations; Public Officers and Employees.

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APPEARANCES OF COUNSEL

Connors LLP (Terrence M. Connors and Andrew M. Debbins of counsel) for petitioners.

Woods Oviatt Gilman LLP (William F. Savino and Robert J. Marks of counsel) for respondent.

OPINION OF THE COURT

EMILIO COLAIACOVO, J.

In this CPLR article 78 proceeding, petitioners seek an order

and judgment compelling the respondent to issue and sell bonds pursuant to the capital improvement budget and bond resolutions adopted by the Buffalo Common Council on February 18, 2025. (See petition at 18; NY St Cts Elec Filing [NYSCEF] Doc No. 12.) In seeking this relief, petitioners argue that the Comptroller cannot escape performing her ministerial duty once the Common Council and Mayor have acted. Failing to do so, they insist, is in excess of her authority and jurisdiction. (*Id.*) Respondent maintains that her duty is to “superintend the fiscal affairs of the city” and that she possesses the discretionary authority to determine whether and when bonds that are authorized by the Common Council are ultimately issued. (See respondent’s mem of law at 4, quoting Buffalo City Charter § 7-4 [1]; NYSCEF Doc No. 22.)

Oral argument was held on September 22, 2025. The matter having been deemed submitted, the court’s decision is as follows.

Statement of Facts

The underlying facts are not in dispute. Petitioner Acting Mayor Christopher Scanlon (hereinafter Scanlon) submitted his proposed capital budget on November 1, 2024. The Common Council voted to approve the budget on December 10, 2024, by a vote of 6-1. In doing so, both the Executive and the Legislature authorized the issuance of bonds and notes and thereafter adopted bond resolutions for various projects and spending priorities. (See verified petition ¶ 35; NYSCEF Doc No. 12.) Pursuant to City Charter § 20-27, the Common Council voted to authorize the issuance of bonds for the 2025 capital budget. In that resolution, the City Comptroller was “authorized and directed” to issue bonds to fund those projects listed in the capital budget. Prior to these adoptions, the respondent issued a letter “implor[ing] all approving parties to seriously reconsider increasing the current debt cap and the financial implications involved.” (See Barbara Miller-Williams letter, dated Nov. 14, 2024; NYSCEF Doc No. 4.) In addition, Comptroller Miller-Williams wrote:

“It must be noted that the current proposal of \$110 million in borrowing exceeds the established debt cap of \$28 million by \$82 million for 2025. Since my tenure as Comptroller, no Capital Budget request has ever exceeded the Debt Cap to date. I must emphasize the importance of maintaining this limit given the City’s current and future fiscal

uncertainties, unspent funds on ongoing projects, and potential arbitrage issues.” (*Id.*)

Thereafter began the debate between the petitioners and respondent on the propriety and necessity of the borrowing. Petitioners insist that the City Charter contains no ambiguity or discretion, and that the Comptroller has the affirmative duty to borrow once the capital budget is passed by the City Council. The respondent insists that, as part of her duty to superintend the City’s finances, she has the discretion to determine whether bonds authorized by the Common Council will be issued. (*See* aff of Gregg S. Szymanski, CPA ¶ 4; NYSCEF Doc No. 20.)* Further, she maintains that Scanlon’s capital budget is part of a reckless plan to “borrow money in a vain attempt to leave a lasting legacy built on capital projects.” (*See* aff of Barbara Miller-Williams ¶ 12; NYSCEF Doc No. 14.)

While largely waging this dispute in the public eye, petitioners filed this action on September 8, 2025, seeking a writ of mandamus. The respondent answered on September 17, 2025. (*See* answer in special proceeding; NYSCEF Doc No. 13.) The parties engaged in mediation with Hon. Barbara Howe, J.S.C. (Ret). However, the parties were unable to reach a resolution. It was learned during oral argument that the respondent went to market on September 18, 2025, to borrow in excess of \$28,000,000, which was above her own self-imposed cap.

Decision

“The Legislative cannot transfer the Power of Making Laws to any other hands. For it being but a delegated Power from the People, they who have it, cannot pass it over to others. The People alone can appoint the Form of the Commonwealth, which is by Constituting the Legislative, and appointing in whose hands that shall be.” (John Locke, *The Works of John Locke* [1714].)

The present dispute is truly an examination of the function of government and the authority of the respondent as it relates to the budgetary process. Despite calls to describe it as a case of first impression or to make it worthy of a complicated analysis, it is neither.

* Gregg S. Szymanski, CPA, is the investment and debt manager for the City of Buffalo.

Standing and Statute of Limitations Objections

In her answer, respondent suggests that petitioners lack standing to bring this proceeding. While respondent argues that petitioners do not possess a legal right to compel the Comptroller to issue bonds, she nevertheless states that even if they did, the Common Council is the only party that can ask for a writ of mandamus, and not Scanlon or Nowakowski individually. (See answer ¶ 81; NYSCEF Doc No. 13.) This is untrue. Here, Scanlon seeks to ensure that the Comptroller performs her duty, which is to go to market and procure the bonds. Nowakowski is a member of the Common Council and was one of the legislators who voted for the resolution directing and authorizing Miller-Williams to go to market. Nowakowski insists that by her own actions, the respondent has “usurped the power of the legislator petitioner . . . by prohibiting [him] from performing [his] duties to represent his constituents and to make laws.” (See petitioners’ mem of law at 14, citing *Matter of Borrello v Hochul*, 221 AD3d 1484 [4th Dept 2023]; NYSCEF Doc No. 23.)

The Court of Appeals dispensed with the respondent’s argument not that long ago. In *Silver v Pataki*, the Court held “a controlling bloc of legislators” is not “a prerequisite to plaintiff’s standing as a Member . . . [P]laintiff’s injury in the nullification of his personal vote continues to exist whether or not other legislators who have suffered the same injury decide to join in the suit.” (*Silver v Pataki*, 96 NY2d 532, 540-541 [2001].)

Both Scanlon and Nowakowski have an interest in seeing the Comptroller act in accordance with her charter responsibilities and to ensure that legislative acts are not interfered with by a separate office that has no role in the process that delivered the budget. Because they have alleged a similar injury, they have standing to bring this action.

In her answer, respondent also argues that this action was commenced outside the four-month statute of limitations. Under CPLR article 78, a writ of mandamus to compel governmental bodies or officers “must be commenced within four months . . . after the respondent’s refusal, upon the demand of the petitioner or the person whom he represents, to perform its duty.” (CPLR 217 [1].)

Here, the third objection and point of law simply reads “the Petition is barred by the statute of limitations.” (See answer ¶ 80; NYSCEF Doc No. 13.) The objection provides little guidance as to how it is barred. Instead, the court is left alone to

determine if it ran. Nevertheless, because of the ongoing nature of the dispute, and the repeated requests and denials made, the statute of limitations argument is without merit.

Mandamus

Can the court compel the Comptroller to perform the act that was authorized and directed by the Common Council? This is the only substantive matter before the court.

Petitioners contend that the Comptroller cannot avoid acting on the resolution that authorized and directed her to go to market and issue the appropriate government financing bonds. The Comptroller argues that it is within her charter responsibilities and within her discretion not to do so. Article 7 of the City Charter provides that

“[t]he Comptroller shall superintend the fiscal affairs of the city; keep, audit and state all accounts in which the city is interested and keep accurate and proper books showing their condition at all times; examine, audit and settle accounts of all officers, departments, boards commissions and other agencies of the city and certify the amount or balance due thereon; examine and audit the accrual and collection of all revenues and receipts; examine all liquidated claims and accounts against the city and all vouchers, and audit the same, if an appropriation is available for the full payment thereof; prescribe such methods of accounting as are necessary for the performance of the foregoing duties; prepare, draw and sign checks drawn on the accounts of the city or its agencies; designate the depositories of all city moneys; approve as to sufficiency all bonds and undertakings of every kind given to the city; receive, preserve and keep on file in the comptroller’s office all contracts, undertakings and vouchers; keep an account between the city and the director of the treasury and therein charge the director with the balance in the treasury when the director came into office and with all moneys received by the director and credit the director with checks drawn on and paid by the director which accounts shall be balanced and settled at the end of each fiscal year.” (Buffalo City Charter § 7-4 [1].)

Implied in her charge, the Comptroller maintains that to “su-

perintend” includes oversight responsibilities. Further, she insists that City Common Council resolutions passed in 1945 and 1994 expressly provide her “the discretion to determine whether and when bonds that are authorized by the Common Council are ultimately issued.” (*See* respondent’s mem of law at 1; NYSCEF Doc No. 22.) She maintains that the petitioners possess no clear legal right or entitlement to mandamus relief.

Petitioners argue that the resolutions authorizing and directing the bonding “could not have been clearer.” (Petitioners’ mem of law at 1; NYSCEF Doc No. 23.) The Comptroller has a ministerial duty to issue the bonds which are not subject to interpretation or discretion. By failing to do so, petitioners insist, the Comptroller abrogated her duties under the City Charter.

The granting of a writ of mandamus rests largely in the discretion of the court. (*Matter of Frazier-Davis Constr. Co. v Gerosa*, 6 AD2d 112 [1st Dept 1958].) “The burden is thrown on the applicant for the order to demonstrate the necessity and the propriety of its use.” (*Matter of Coombs v Edwards*, 280 NY 361, 364 [1939].) “A proceeding pursuant to CPLR article 78 is the proper vehicle by which to compel officials to perform a mandatory duty.” (*Matter of Bonanno v Town Bd. of Town of Babylon*, 148 AD2d 532, 532 [2d Dept 1989].) “Mandamus to compel the performance of an official duty may only be granted where the act sought to be compelled is ministerial in nature and involves no exercise of discretion, and where the applicant has demonstrated a clear legal right thereto.” (*Matter of Margaret Cardy, LLC v Del Col*, 2013 NY Slip Op 32810[U], *3 [Sup Ct, Suffolk County 2013], citing *Matter of Savastano v Prevost*, 66 NY2d 47 [1985].) “Conduct that requires adherence to a governing rule or standard with compulsory results is considered to be a ministerial act.” (*Matter of Margaret Cardy, LLC v Del Col* at *3, citing *Tango v Tulevech*, 61 NY2d 34 [1983].)

The New York State Comptroller’s Office’s Opinion 91-8 is instructive. In Opinion 91-8, the secretary-treasurer of a fire district inquired if they would have a conflict of interest if he or she were to purchase bonds to be issued by the district? While the facts are not identical, the reasoning behind the Comptroller’s opinion is important. The State Comptroller opined that “the execution of a bond has been characterized as a ‘purely ministerial’ function, which may be enforced by mandamus where there is no doubt as to the regularity of the proceedings leading up to the execution of the bond.” (1991 Ops

St Comp No. 91-8, citing *Matter of Finigan v Zuber*, 156 Misc 479 [Sup Ct, Chenango County 1934].)

Here, there is no doubt that the resolutions were regular and legal. No one has suggested otherwise. Instead, the Comptroller simply refuses to borrow, citing her self-imposed budget cap. This does not override her statutory duty to act on the regular and legally issued resolutions which authorized and directed her to issue the bonds. This is a clear legal directive which she must abide.

In *Cohalan v Caputo* (94 AD2d 742 [2d Dept 1983]), the Second Department addressed a similar dispute. In *Cohalan*, an article 78 was brought to compel the Comptroller of Suffolk County to process certain requisitions to purchase police vehicles that had been lawfully appropriated. The Second Department held that the

“Comptroller of the County of Suffolk [did] not have the power or authority to refuse to encumber money which [had] been appropriated by the county legislature and approved to be expended by the county executive merely because he believe[d] that the items for which he was directed to encumber money are unnecessary.” (*Id.* at 742.)

Here, like in *Cohalan*, the City of Buffalo sets forth in its charter the budgetary process. In fact, it is outlined in section 20 of the Charter. While the Comptroller initially responds to the Mayor’s proposed budget, once submitted to the Common Council, the Comptroller’s only role is to abide by the authorization and direction of the council to borrow. The Comptroller has no policy making or supervisory role regarding the manner in which money is to be approved and appropriated. Once the money has been approved, and absent irregularity or illegality, the Comptroller “has no alternative but to encumber the funds and forward the acquisition to the proper vendor.” (*Id.* at 743.)

Since the Comptroller has not raised any illegality or irregularity, other than failing to comply with her self-imposed budgetary cap which is a nonbinding mechanism, the process is presumptively correct, and the Comptroller must act pursuant to the resolution’s authorization and directive. Because the Comptroller’s duty is ministerial, she has no discretion and she must bond as required. As such, the mandamus the petitioners seek is an appropriate remedy to compel the performance of a statutory duty that is ministerial in nature. (*See id.*, citing *Matter of Peirez v Caso*, 72 AD2d 797 [2d Dept 1979].)

No matter how well-intended the Comptroller is, absent any controlling legal authority empowering her to intervene in the budgetary process, her failure to act in this ministerial duty requires this judgment to compel her to act. While she cites to council resolutions from 1945 and 1994, they do not provide her the discretion she claims she possesses. No resolution exists that conveys a veto power to check that which the Executive and Legislature properly completed. To claim otherwise is unsupported by law and fact.

Earlier, this court quoted John Locke. As one of the foremost political philosophers who served as an inspiration to this country's founding fathers, his quote is informative. The process of governing is reserved to the legislature and the executive. It is a nondelegable prerogative that cannot be usurped. Regardless of her intentions, by inserting herself into this process, the Comptroller exceeded her mandate and failed to abide by her ministerial role as provided in the charter. The duly elected officials who are authorized in the City Charter with the responsibility for the budgetary process exercised their judgment and reached a decision they believed to be the best for the City of Buffalo. While the Comptroller has disagreed and made her views known, she does not possess a veto power. Instead, she has a ministerial duty to execute what the two branches of city government adopted. Her failure to do so necessitated this writ, which petitioners are entitled to. To permit otherwise would inflict a significant harm on the legislative process which has governed our national, state, and local politics.

The management of the public's business is left to those who have sought and gained the confidence of their constituents. Barbara Miller-Williams, herself an elected official, has gained a similar degree of confidence from city residents. However, the powers of her office do not include a role in the budgetary process other than the ministerial responsibilities as provided for in the charter. Her failure to act pursuant to the Council's resolution was a dereliction of her duty. A writ of mandamus is necessary to compel her to perform the duty that was previously authorized.

As such, the petition is hereby granted in its entirety. Petitioner shall submit an order and judgment consistent with this memorandum decision.

[— NYS3d —]

THE PEOPLE OF THE STATE OF NEW YORK v NIGEL WILKINS, Defendant.

Criminal Court of the City of New York, Kings County, September 21, 2025

HEADNOTES

Crimes — Disclosure — Automatic Discovery — Due Diligence in Providing Police Disciplinary Information

Motor Vehicles — Operating Vehicle while Under Influence of Alcohol or Drugs — What Constitutes Operation of Vehicle

RESEARCH REFERENCES

By the Publisher's Editorial Staff

AM JUR 2d Automobiles and Highway Traffic § 343; AM JUR 2d Criminal Law §§ 685, 697–699, 930, 937, 1160–1161.

CARMODY-WAIT 2d Discovery §§ 187:57, 187:61; CARMODY-WAIT 2d Pretrial Motions §§ 189:87, 189:156.

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

McKINNEY'S, Vehicle and Traffic Law § 1192.

NY JUR 2d Automobiles and Other Vehicles § 885; NY JUR 2d Criminal Law: Procedure §§ 1596, 1600, 1617, 1695, 1739, 1907, 1924.

ANNOTATION REFERENCES

What constitutes driving, operating, or being in control of motor vehicle for purposes of driving while intoxicated statute or ordinance. 93 ALR3d 7.

What Constitutes Driving, Operating, or Being in Control of Motor Vehicle for Purposes of Driving While Intoxicated Statute, Regulation, or Ordinance—Being in Physical Control or Actual Physical Control—General Principles. 92 ALR6th 295.

What Constitutes Driving, Operating, or Being in Control of Motor Vehicle for Purposes of Driving While Intoxicated Statute, Regulation, or Ordinance—Being in Physical Control or Actual Physical Control—Motorist Sleeping or Unconscious. 93 ALR6th 207.

What Constitutes Driving, Operating, or Being in Control of Motor Vehicle for Purposes of Driving While Intoxicated Statute, Regulation, or Ordinance—Being in Physical Control or Actual Physical Control—Passengers. 94 ALR6th 191.

What Constitutes Driving, Operating, or Being in Control

of Motor Vehicle for Purposes of Driving While Intoxicated Statute or Ordinance—Being in Actual Physical Control—Status of Vehicle. 95 ALR6th 1.

What Constitutes Driving, Operating, or Being in Control of Motor Vehicle for Purposes of Driving While Intoxicated Statute or Ordinance—Being in Actual Physical Control—Factors and Circumstances Establishing Actual Physical Control; Miscellaneous Situations. 96 ALR6th 355.

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APPEARANCES OF COUNSEL

Legal Aid Society, Brooklyn (*Emma Walker* of counsel), for defendant.

Eric Gonzalez, *District Attorney*, Brooklyn, for the People.

OPINION OF THE COURT

TEHILAH H. BERMAN, J.

This case raises the following issues: (i) where the defendant was charged with operating a motor vehicle in an impaired or intoxicated condition, whether the People's failure to produce *Giglio* records for the responding and arresting officers or exercise due diligence and make reasonable inquiries concerning their existence prior to filing their certificate of compliance (COC) rendered their COC invalid and their statement of readiness illusory; (ii) whether the court could sua sponte raise issues concerning facial insufficiency when defense counsel did not raise such issues in their motion to dismiss; and (iii) whether the defendant's turning on and off the vehicle without taking any action to move the vehicle constituted operation of a vehicle within the meaning of Vehicle and Traffic Law § 1192 (1) and (3).

Defendant Nigel Wilkins (defendant) moves for: (1) an order deeming the People's certificate of compliance (COC) invalid due to the People's failure to disclose discoverable materials under CPL 245.20 (1), and (2) dismissal pursuant to CPL 170.30 (1) (e) and 30.30 for failing to file a valid COC and statement of readiness (SOR) within the 90-day statutory limit. For the reasons set forth below, defendant's motion to dismiss is granted.

On January 13, 2025, defendant was arraigned on a misdemeanor complaint charging him with Vehicle and Traffic Law § 1192 (1) and (3). A person is guilty of violating Vehicle and Traffic Law § 1192 (1) when operating a motor vehicle while “the person’s ability to operate such motor vehicle is impaired by the consumption of alcohol.” A person is guilty of violating Vehicle and Traffic Law § 1192 (3) when operating a motor vehicle “while in an intoxicated condition.” The complaint alleges that the deponent Police Officer (PO) Perry was informed by PO Damico (informant) (the responding officer), that on January 12, 2025, at approximately 9:20 p.m. at 312 Osborn St., County of Kings, “which is a public roadway,” the informant observed defendant behind the wheel of a double-parked vehicle and that defendant “turned the vehicle on before then turning it back off.” Deponent further states that he observed defendant “exhibiting signs of intoxication: to wit, red watery eyes, odor of alcoholic beverage on breath, and an unsteady gait.”

The People served the court with a police department report of refusal to submit to a chemical test (refusal report), which was appended to the accusatory instrument. Section B of the report, which asked for “details” of the impairment or intoxication “such as poor coordination, alcohol beverage odor,” was completed as follows: “IMPAIRMENT OF ALCOHOLIC BEVERAGE AND BLOODSHOT EYES.” PO Perry was listed as the arresting officer, and PO Foisal was listed as the officer giving warning and witnessing the refusal. On the one hand, PO Foisal signed the report on January 12, 2025, and on the other hand, PO Perry signed the report on January 13, 2025. The People also filed a CPL 710.30 (1) (a) notice wherein defendant stated to PO Perry in sum and substance, “I was not driving and did not drink.”

On January 24, 2025, the People sent a discovery request via email to the 73rd Precinct requesting a number of items.¹ Notably missing was a request for *Giglio* materials. On February 18, 2025, the People served initial discovery upon defense counsel. On April 3, 2025, the People emailed PO Perry and PO Damico and the 73rd Precinct discovery liaisons, generally requesting discovery that was still outstanding.

1. The requested items were: (1) finalized January 13, 2025 activity logs for all known related officers, (2) any and all colored photos, (3) the vouchers for all safekeeping, (4) Zfinest searches, (5) the vehicle seizure form, (6) the vehicle report worksheet, (7) the vehicle stop report, (8) the vehicle voucher, (9) the vehicle inventory search, and (10) towing paperwork.

On April 9, 2025, the People filed the supporting deposition of PO Damico, dated April 4, 2025, stating under penalty of perjury: “I, David Damico, have read the accusatory instrument filed in this action. The facts in that instrument stated to be on information furnished by me are true to my personal knowledge.” On April 10, 2025, the People filed their COC and statement of readiness (SOR).

On April 24, 2025, defense counsel informed ADA Malloy that the activity logs and PO Perry’s body worn camera (B.C.) footage that the People produced were from January 13, 2025, a day after the alleged incident. On May 15, 2025, the People received updated activity logs from PO Perry and provided them to defense counsel but did not file a supplemental COC. On May 20, 2025, defense counsel sent another conferral email requesting additional discovery, including *Giglio* material for PO Perry. The People’s COC stated that *Giglio* letters for certain law enforcement officers, including PO Foisal, had been served on defendant on April 10, 2025, via OneDrive, but did not indicate that any had been produced for PO Damico and PO Perry. The COC states:

“The Kings County District Attorney’s Office has a request pending with the New York City Police Department that may result in the Office’s obtaining discoverable material. However, some aspects of this search are ongoing due to the volume of requests received by the Police Department. As any discoverable material becomes available, the People will produce such material as soon as practicable.”

However, to date, the People have not produced *Giglio* records for PO Damico and PO Perry.

CPL 245.20 (1) (k) provides that the prosecutor has a duty to disclose “[a]ll evidence and information that relate to the subject matter of the case,” including that which “tends to impeach the credibility of a testifying prosecution witness.” (*People v Coley*, 240 AD3d 122, 127 [2d Dept 2025]; *People v Jawad*, 84 Misc 3d 31, 34 [App Term, 2d Dept, 2d, 11th & 13th Jud Dists 2024].) Police disciplinary records may contain evidence that negates a defendant’s guilt, reduces culpability, supports a defense, or disproves the identification of the defendant as the perpetrator of the crime. (*People v Aron*, 85 Misc 3d 1231[A], 2025 NY Slip Op 50319[U] [Crim Ct, NY County 2025].) In using the phrase “all evidence and information,” the Legislature intended to provide the broadest discovery possible

to defendants of impeachment material. (*Coley*, 240 AD3d at 127.) PO Perry was the deponent on the accusatory instrument and the arresting officer named on the refusal report, was listed among law enforcement personnel who may have evidence or information relevant to the offenses charged or to any potential defense thereto, and was designated as someone who may be called as a witness by the People. These facts, taken in totality, render the *Giglio* material for PO Perry related to the subject matter of the case. (*People v Tavares*, 81 Misc 3d 1245[A], 2024 NY Slip Op 50156[U], *6 [Crim Ct, Bronx County 2024].)

Similarly, PO Damico, the named informant in the complaint, witnessed defendant turn the vehicle on and off and allegedly observed defendant “exhibiting signs of intoxication: to wit, red watery eyes, odor of alcoholic beverage on breath, and an unsteady gait.” These allegations form the basis for the Vehicle and Traffic Law § 1192 (1) and (3) charges against defendant. Therefore, PO Damico’s testimony is critical to the case, and any *Giglio* information that would impeach his credibility relates to the prosecution of the charges against defendant. (*Tavares*, 2024 NY Slip Op 50156[U], *4.) *Giglio* letters are of particular importance here since in this case an issue is raised as to PO Perry’s credibility as she signed the refusal report on January 13, 2025, a day after defendant’s arrest. Furthermore, an issue is raised as to PO Damico’s credibility because his description of defendant as exhibiting signs of intoxication in the accusatory instrument was at odds with the description of mere impairment as set forth in the refusal report. The distinction between being impaired and intoxicated is significant. A person is impaired when their physical or mental abilities to operate a motor vehicle are impaired “to any extent,” whereas intoxication is a state where a driver has “consumed alcohol to the extent that he or she is incapable of employing those physical and mental abilities.” (*People v Stack*, 140 AD2d 389, 391 [2d Dept 1988] [internal quotation marks omitted].)

In evaluating the validity of the People’s COC, the court must determine whether the People have complied with their disclosure obligations under CPL 245.20, and exercised due diligence and made reasonable inquiries to ascertain the existence of material and information subject to discovery. (*People v Cooperman*, 225 AD3d 1216, 1218 [4th Dept 2024]; *People ex rel. Nieves v Maginley-Liddie*, 232 AD3d 568, 569-570 [2d Dept 2024]; *People v Drayton*, 231 AD3d 1057, 1059 [2d Dept 2024].) The People had an obligation to ascertain the existence of

impeachment evidence before filing their COC. (*People v Stamm*, 85 Misc 3d 136[A], 2025 NY Slip Op 50497[U] [App Term, 2d Dept, 9th & 10th Jud Dists 2025].) The court must look to the following factors in assessing due diligence:

“[T]he efforts made by the prosecutor to comply with the requirements of this article; the volume of discovery provided and the volume of discovery outstanding; the complexity of the case; whether the prosecutor knew that the belatedly disclosed or allegedly missing material existed; the explanation for any alleged discovery lapse; the prosecutor’s response when apprised of any allegedly missing discovery; whether the belated discovery was substantively duplicative, insignificant, or easily remedied; whether the omission was corrected; whether the prosecution self-reported the error and took prompt remedial action without court intervention; and whether the prosecution’s delayed disclosure of discovery was prejudicial to the defense or otherwise impeded the defense’s ability to effectively investigate the case or prepare for trial” (CPL 245.50 [5] [a]).

Although the People’s notice/disclosure form listed eight police officers as potential witnesses, they only provided *Giglio* letters for six officers, and did not provide *Giglio* letters for PO Perry, the arresting officer, and PO Damico, the responding officer, two key witnesses in the People’s case. This court finds that the People’s statement in their COC that they had a request pending in the New York City Police Department for exculpatory material did not demonstrate due diligence, as it lacked specificity and did not provide any sworn allegations of fact that would permit the court to determine whether the prosecutor made any effort to obtain the *Giglio* letters for PO Perry and PO Damico before filing their COC. (*See People v Hutchins*, 74 Misc 3d 1234[A], 2022 NY Slip Op 50327[U], *1 [Sup Ct, Kings County 2022] [court found lack of due diligence where prosecutor did not articulate the efforts they made to obtain a 911 call].) Furthermore, the People did not demonstrate that they corrected their omission or took any remedial action, as required by CPL 245.50 (5) (a).

The People have a duty to disclose all evidence and information which tends to impeach the credibility of a testifying witness. (*People v Hamizane*, 80 Misc 3d 7, 11 [App Term, 2d Dept, 9th & 10th Jud Dists 2023].) Disciplinary records of a potential

police witness which were created in a different case go to the weight of such witness's credibility. (*Id.*) Therefore, it was the People's duty to inform the defense whether or not disciplinary records for PO Perry and PO Damico existed, and to provide the defense with copies of any existing records. Since the People failed to exercise due diligence and did not turn over *Giglio* material for testifying officers, this court deems their COC invalid. (*See People v Mendoza*, 86 Misc 3d 1201[A], 2025 NY Slip Op 50807[U], *2 [Crim Ct, Kings County 2025].) This court does not reach the belated discovery issues raised by defendant's motion since they are moot.

Though not an issue specifically raised in the motion to dismiss, facial sufficiency is a non-waivable, jurisdictional prerequisite to a misdemeanor prosecution. (*People v Dumay*, 23 NY3d 518, 522 [2014].) The issue of facial sufficiency "can be raised sua sponte by the Court to assure the court retains subject matter jurisdiction over a case." (*People v Holiday*, 78 Misc 3d 1217[A], 2023 NY Slip Op 50250[U], *1 [Crim Ct, NY County 2023].) This court finds that the accusatory instrument is facially insufficient to the extent that it does not provide reasonable cause to believe that defendant was operating the motor vehicle when he was approached by the police. An information is "sufficient on its face" when it substantially conforms to the requirements of CPL 100.15 (CPL 100.40 [1] [a]), the "allegations of the factual part of the information, together with those of any supporting depositions which may accompany it, provide reasonable cause to believe that the defendant committed the offense charged in the accusatory part of the information" (CPL 100.40 [1] [b]) and the "[n]on-hearsay allegations of the factual part of the information and/or of any supporting depositions establish, if true, every element of the offense charged and the defendant's commission thereof." (CPL 100.40 [1] [c]; *see People v Hill*, 38 NY3d 460, 463-464 [2022]; *People v Smalls*, 26 NY3d 1064, 1066 [2015].) Reasonable cause "exists when evidence or information which appears reliable discloses facts or circumstances which are collectively of such weight and persuasiveness as to convince a person of ordinary intelligence, judgment and experience that it is reasonably likely that such offense was committed and that such person committed it." (CPL 70.10 [2].)

In order to find that defendant "operated" a motor vehicle in an impaired or intoxicated state, the People must first establish that defendant was actually operating the motor vehicle. A

person may be deemed to operate a motor vehicle when, “in the vehicle, he intentionally does any act or makes use of any mechanical or electrical agency which alone or in sequence will set in motion the motive power of the vehicle.” (*People v Prescott*, 95 NY2d 655, 662 [2001].) The term “operate” is broader than the term “drive,” and the People need not prove that a defendant actually put the vehicle into motion to establish operation of a motor vehicle. (*People v Allaico*, 70 Misc 3d 134[A], 2021 NY Slip Op 50026[U] [App Term, 2d Dept, 2d, 11th & 13th Jud Dists 2021].) For example, a person is deemed to operate a motor vehicle under Vehicle and Traffic Law § 1192 (3) when such person is asleep at the wheel with the key in the ignition and the engine running. (*People v Johnson*, 140 AD3d 978, 979 [2d Dept 2016]; *People v Garcia*, 61 Misc 3d 14, 18 [App Term, 2d Dept, 9th & 10th Jud Dists 2018]; *see also People v Gomez-Gutierrez*, 85 Misc 3d 135[A], 2025 NY Slip Op 50485[U] [App Term, 2d Dept, 9th & 10th Jud Dists 2025] [information, together with supporting deposition, established that the defendant operated a motor vehicle where a park ranger observed the defendant sleeping in the driver’s seat of a parked motor vehicle, and when the park ranger attempted to communicate with defendant, defendant woke up and started the engine].) This court finds that the allegation that defendant was observed behind the wheel of a double-parked vehicle and that he “turned the vehicle on before then turning it back off” is insufficient to establish that he operated the motor vehicle inasmuch as the ignition was off and defendant made no attempt to move the vehicle. (*See Ebbe v City of Pataskala Div. of Police*, 2018 WL 3057722, *7, 2018 US Dist LEXIS 103380, *19 [SD Ohio, June 20, 2018, Case No. 2:16-cv-283] [plaintiff ceased to operate his vehicle once he brought it to a complete stop because he made no further attempt to move the vehicle].) A simple explanation can be that defendant turned the vehicle on and off to open the window in order to speak to the responding police officer.

Furthermore, defendant’s statement to PO Perry upon his arrest that “I was not driving and did not drink,” which statement was appended to the accusatory instrument and served on notice to defendant at his arraignment pursuant to CPL 710.30 (1) (a), can be considered by this court in determining the sufficiency of the accusatory instrument. (*People v Anzalone*, 85 Misc 3d 648 [Orchard Park Just Ct 2024]; *see also People v Hardy*, 35 NY3d 466, 475 [2020] [“in evaluating the

sufficiency of an accusatory instrument we do not look beyond its four corners (including supporting declarations appended thereto”). Defendant’s statement to PO Perry further raises doubt as to whether there was reasonable cause to believe that he drank or operated the motor vehicle. Accordingly, this court deems the accusatory instrument to be facially insufficient.

Vehicle and Traffic Law § 1194 (2) (a) (1) provides that a defendant is deemed to have given consent to a chemical test to their blood provided that the test is performed “within two hours after such person has been placed under arrest for” driving while intoxicated. Inasmuch as a chemical test is no longer authorized after the two-hour period has expired, evidence of a defendant’s refusal after the two-hour period expired must be suppressed. (*People v Odum*, 31 NY3d 344, 351-352 [2018].) Here, defendant was arrested on January 12, 2025, at 9:20 p.m., yet PO Perry signed and dated the refusal report on January 13, 2025, which was more than two hours later. Accordingly, the refusal report could not be used to evince defendant’s consciousness of guilt. Further questions are raised because there is a discrepancy between what is alleged in the accusatory instrument and the refusal report regarding defendant’s level of impairment—while the refusal report merely describes impairment of alcoholic beverage and bloodshot eyes, the accusatory instrument alleges that defendant exhibited signs of intoxication.

CPL 100.20 provides that a supporting deposition must contain factual allegations of an evidentiary character which “supplement” those of the accusatory instrument, i.e., provide “additional or corroborative facts or evidentiary material which may be necessary to demonstrate a sufficient case.” (*People v Johnson-McLean*, 71 Misc 3d 31, 37 [App Term, 1st Dept 2021].) Here, PO Damico’s supporting deposition did not contain additional or corroborative facts of an evidentiary character to demonstrate that defendant operated a motor vehicle while he was impaired or intoxicated. Therefore, his supporting deposition did not cure the facial insufficiency.

The “filing of a valid COC is a prerequisite to the People validly stating ready and stopping the speedy trial clock under CPL 30.30.” (*People v Earl*, 84 Misc 3d 44, 46 [App Term, 2d Dept, 2d, 11th & 13th Jud Dists 2024].) Pursuant to CPL 30.30, dismissal is required “if the People did not file a proper COC and the speedy trial period has run.” (*People v Bay*, 41 NY3d 200, 214 [2023].) In this case, the People’s failure to comply

with their disclosure obligations under CPL 245.20 (1) (k) and to exercise due diligence renders their COC invalid and their statement of readiness illusory,² and, therefore, the People's COC failed to stop the speedy trial clock under CPL 30.30. (*People v Sanchez*, 87 Misc 3d 1204[A], 2025 NY Slip Op 51458[U] [Crim Ct, Kings County 2025].)

Furthermore, since the accusatory instrument was facially insufficient, it was jurisdictionally defective, and "the People could not validly declare themselves ready until there was an accusatory instrument sufficient for trial." (*People v Sosa*, 71 Misc 3d 140[A], 2021 NY Slip Op 50519[U], *3 [App Term, 2d Dept, 2d, 11th & 13th Jud Dists 2021].)

CPL 30.30 limitation periods are calculated based on the most serious offense charged in the accusatory instrument and are measured from the date of commencement of the criminal action. (*People v Cooper*, 98 NY2d 541, 543 [2002].) In this matter, the top count, Vehicle and Traffic Law § 1192 (3) (operating a motor vehicle while in an intoxicated condition) is a misdemeanor punishable by a term of imprisonment of up to one year. (Vehicle and Traffic Law § 1193 [1] [b].) Pursuant to CPL 30.30 (1) (b), the People were required to announce their readiness for trial within 90 days following the commencement of the criminal action. The first day counted for speedy trial purposes is January 14, 2025, the day following the commencement of the criminal action (*People v Stiles*, 70 NY2d 765, 767 [1987].) The prosecution filed and served their COC on April 10, 2025. However, as discussed above, the People's COC was invalid and failed to toll the speedy trial clock. The speedy trial clock was tolled on April 28, 2025, when the instant motion schedule was set. There are 104 days charged from January 14, 2025, to April 28, 2025. Accordingly, 104 days are chargeable to the People, and their 90-day speedy trial period has elapsed. The motion to dismiss under CPL 170.30 (1) (e) is granted. Sealing is stayed for 30 days from the date of this order.

2. The People's statement of readiness was also rendered illusory because the accusatory instrument was not sufficient. (*People v Sosa*, 71 Misc 3d 140[A], 2021 NY Slip Op 50519[U] [App Term, 2d Dept, 2d, 11th & 13th Jud Dists 2021].)

[245 NYS3d 529]

In the Matter of ABRAMS FENSTERMAN, LLP, Petitioner, v THE PEOPLE OF THE STATE OF NEW YORK, by LETITIA JAMES, Attorney of the State of New York, Respondent.

Supreme Court, New York County, November 6, 2025

HEADNOTES

Attorney and Client — Disqualification — Violation of Rules of Professional Conduct — Government Employee

RESEARCH REFERENCES

By the Publisher's Editorial Staff

AM JUR 2d Attorney General § 3; AM JUR 2d Attorneys at Law § 188.

CARMODY-WAIT 2d § 190:49.

NY JUR 2d Attorneys at Law §§ 103, 115–116; NY JUR 2d State of New York § 35.

ANNOTATION REFERENCE

Disqualification of prosecuting attorney in state criminal case on account of relationship with accused. 42 ALR5th 581.

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APPEARANCES OF COUNSEL

Abrams Fensterman, LLP, Brooklyn (*Alyssa A. Friedman* of counsel), for petitioner.

Letitia James, Attorney General, New York City (*Glenna Goldis*, *Christopher McCall*, *Benjamin Fishman* and *Laura J. Levine* of counsel), for respondent.

OPINION OF THE COURT

EMILY MORALES-MINERVA, J.

In this special proceeding, pursuant to CPLR 2304, petitioner Abrams Fensterman, LLP, moves, by notice of motion (seq No. 02), for an order disqualifying Sarah Rosenthal, an assistant attorney general (AAG) of Letitia James, Attorney General of

the State of New York (NYAG), from participating in NYAG's civil investigation of petitioner's debt collection practices (*see generally* 2025 NY Slip Op 34107[U] [Sup Ct, NY County 2025]; NY St Cts Elec Filing [NYSCEF] Doc No. 75, decision & order, dated Oct. 24, 2025 [providing background on NYAG's inquiry]).¹

In support of this application, petitioner relies on rule 1.11 (d) (2) of the Rules of Professional Conduct.² NYAG appears and submits written opposition.³

For the reasons set forth below, the court denies petitioner's motion entirely.

Analysis

It is well-settled that “jurisdiction to discipline an attorney for misconduct is vested exclusively in the Appellate Division” (*Matter of Erlanger [Erlanger]*, 20 NY2d 778, 779 [1967]). However, “disqualification in a particular matter should be sought in the court in which the action is pending or, if [as here] no action is pending, at a Special Term of the Supreme Court” (*id.*).

The Code of Professional Conduct is “essentially the legal profession's document of self-governance, embodying principles of ethical conduct for attorneys as well as rules for professional discipline” (*Niesig v Team I*, 76 NY2d 363, 369 [1990, Kaye, J.]

1. Pursuant to CPLR 2304: “If (a) subpoena is not returnable in a court, a request to withdraw or modify the subpoena shall first be made to the person who issued it *and a motion to quash . . . may thereafter be made in the supreme court*” (emphasis added; *see also* Patrick M. Connors, Prac Commentaries, McKinney's Cons Laws of NY, CPLR C2304:5 [“CPLR 2304 says explicitly that the application shall be by ‘motion.’ If the subpoena is returnable in a court, the main procedural steps for the motion to quash are well prescribed by the CPLR But when a motion to quash a subpoena (is not returnable in court) . . . there is no existing judicial context to house the motion . . . (and, for purposes of jurisdiction, it is) best to commence a special proceeding against the one who issued the subpoena”]).

2. Rule 1.11 (d) of the Rules of Professional Conduct (22 NYCRR 1200.0) states, in pertinent part:

“Except as law may otherwise expressly provide, a lawyer currently serving as a public officer or employee: . . .

“(2) shall not participate in a matter, unless under applicable law no one is (or by lawful delegation may be) authorized to act in the lawyer's stead in the matter, if the lawyer . . .

“(ii) participated personally and substantially in the matter while in private practice or nongovernmental employment.”

3. Preliminarily, NYAG argues that petitioner has no “standing” to bring this motion. However, as NYAG does not set forth or apply the standing doctrine in its analysis, the court rejects this argument as unsupported.

[discussing the former Code of Professional Responsibility]). Yet, while of undeniable importance and respect, the Code is “not a statute” (*Niesig*, 76 NY2d at 369). It is well-settled that neither opinions of the New York State Bar Association Committee on Professional Ethics—nor the Code of Professional Conduct upon which they are based—“have the effect of law” (*People v Herr*, 86 NY2d 638, 641-642 [1995, Levine, J.] [discussing the code formerly known as Code of Professional Responsibility]).

The distinction between the Code and the rule of law “is particularly significant when a disciplinary rule is invoked in litigation, which in addition to matters of professional conduct by attorneys, implicates the interests of nonlawyers” (*Niesig*, 76 NY2d at 369 [citation omitted]; *see also Herr*, 86 NY2d at 642; *People v Addimando*, 197 AD3d 106 [2d Dept 2021] [citing the same principle]). Courts should “look to the rules as guidelines to be applied with due regard for the broad range of interests at stake” (*Herr*, 86 NY2d at 642).

“Generally, a violation of the Rules of Professional Conduct, while relevant to the issue whether [an] attorney’s continued participation will taint a case, is not, in and of itself, sufficient to warrant disqualification” (*Selim v Castillo*, 2023 NYLJ LEXIS 2107, *22 [Sup Ct, Bronx County 2023] [involving a motion seeking petitioner Abrams Fensterman, LLP’s disqualification on the basis of alleged violations of the disciplinary rules], quoting *Harris v Erie County Med. Ctr. Corp.*, 175 AD3d 1104, 1106 [4th Dept 2019]). “Disqualification often turns on whether the conduct complained of results in actual, or a reasonable probability of unauthorized disclosure of confidential information” (*Roberts v Corwin*, 118 AD3d 571, 573 [1st Dept 2014]).

Further, “[a] court may intervene to disqualify an attorney only under limited circumstances” (*Matter of Schumer v Holtzman*, 60 NY2d 46, 54-55 [1983]), and disqualification rests with the discretion of the court (*see generally Cardinale v Golinello*, 43 NY2d 288, 292 [1977] [“There was no abuse of discretion” when the courts below held that counsel was disqualified]).

“The party seeking to disqualify a law firm or an attorney bears the burden to show sufficient proof to warrant such a determination” (*Koumantaros v Hephaistos Developing, LLC*, 203 AD3d 907, 908 [2d Dept 2022] [citations omitted]).

Here, petitioner invokes rule 1.11 (d) (2) of the Rules of Professional Conduct in support of its motion to disqualify As-

sistant Attorney General Sarah Rosenthal (AAG). Rule 1.11 (d) (2) states, in applicable part:

“Except as law may otherwise expressly provide, a lawyer currently serving as a public officer or employee: . . .

“(2) shall not participate in a matter, unless under applicable law no one is (or by lawful delegation may be) authorized to act in the lawyer’s stead in the matter, if the lawyer . . .

“(ii) participated personally and substantially in the matter while in private practice or nongovernmental employment” (22 NYCRR 1200.0).

The term “matter” as set forth in the rules “includes any litigation, judicial or administrative proceeding, case, claim, application, . . . investigation . . . or any other representation involving a *specific party or parties*” (*id.* rule 1.0 [l] [emphasis added]).

As guidance, the comment section to rule 1.11 recognizes that paragraph (d) refers to the obligation of a government-employed lawyer “toward a former government or private *client*” (Rules of Prof Conduct [22 NYCRR 1200.0] rule 1.11 Comment [2] [NY St Bar Assn rev July 2025] [emphasis added]). Further, the comment elaborates that the obligation to a former client does not attach “to all substantive issues on which the lawyer worked” (*id.*, Comment [4]).

Considering if a governmental lawyer should be disqualified for participating in a former matter outside the confines of rule 1.11 (d), the New York State Court of Appeals has found “disqualification is required when there is a ‘risk of prejudice attendant on the abuse of confidence’ ” (*People v Herr*, 86 NY2d at 641, quoting *People v Shinkle*, 51 NY2d 417, 421 [1980]). Key to the disqualification analysis appears to be “prevent[ing] situations in which former clients must depend on the good faith of their former lawyers turned adversaries to protect and honor confidences shared during the now extinct relations” (*id.*).

Applying these principles here, the court finds no grounds for disqualifying AAG from assisting NYAG in a pending civil investigation of petitioner’s debt collection practices involving nursing home admissions agreements. Petitioner highlights an action where AAG represented two third-party defendants against a plaintiff nursing home that petitioner represented as counsel. There, AAG provided limited-scope pro bono services to the extent of drafting an answer.

Petitioner characterizes this bespoke representation as AAG having “previously represented *parties who were adverse to the Petitioner*” Abrams Fensterman, LLP (*see* NYSCEF Doc No. 67, reply mem of law at 6 [emphasis added]). However, such framing is inaccurate and unduly personalized.

Counsel were advocates representing opposing parties, not opposing parties themselves. Suggesting animus where none inherently exists appears tenuous. Further, even if petitioner and AAG were opposing parties in said action—which they were not—such posture, without more, would not make AAG privy to confidences or secrets of petitioner’s law firm.

Petitioner also highlights AAG’s prior role at New York Law Assistant Group (NYLAG). At NYLAG, AAG supervised attorneys representing third-party defendants in matters where nursing homes sued them, pursuant to admissions agreements. However, petitioner did not represent those plaintiffs or any parties therein.

Contrary to petitioner’s contention, this supervision, even in combination with AAG’s pro bono work, does not substantiate a finding that AAG harbors any personal or institutional bias toward Abrams Fensterman, LLP, or its nursing home clients. To infer such bias or impropriety solely from an attorney’s area of specialization would gratuitously conflate expertise with partiality.

Further, if concentration in a particular field of law was sufficient to suggest bias, aspiring assistant attorney generals would be discouraged from developing specialties. Consequently, NYAG’s capacity to recruit experienced attorneys equipped to manage complex matters of public concern may also unjustifiably suffer.

In this way, petitioner’s argument seems counter to the principle set forth in *Matter of Coleman* (69 AD3d 846, 849 [2d Dept 2010]), upon which petitioner relies. There, the Second Department stated: “rules governing lawyers presently or formerly employed by a government agency should not be so restrictive as to inhibit transfer of employment to and from the government” (*Coleman*, 69 AD3d at 849 [citation omitted]).

To the extent that petitioner relies on *Green v City of New York* (2011 WL 2419864, 2011 US Dist LEXIS 62089 [SD NY, June 6, 2011, 10 Civ. 8214 (PKC)]) to support AAG’s disqualification, such reliance is also misplaced. *Green* involved a private lawyer, who previously represented the City of New York (the

City) and certain Department of Correction (DOC) employees in a class action lawsuit that challenged the lawfulness of strip-searches in DOC facilities. Said lawyer subsequently filed suit against the City and DOC on behalf of a private client alleging her unlawful strip-search in their custody (*id.*). Determining disqualification was appropriate, the federal court found compelling the lawyer's acquisition—as former government counsel—of “confidential information on how strip-searches of detainees and others work[ed] in actual practice” (2011 WL 2419864, *2, 2011 US Dist LEXIS 62089, *6).

Here, none of petitioner's allegations implicate AAG's access to, or acquisition of, petitioner's confidential or secret information. Further, in the event AAG had such access—which is only speculated on this record—there would be no risk of prejudice *attendant on an abuse of confidence*. Their professional relationship, as opposing counsel on one matter, did not entail the same, if any, expectation of mutual trust or confidentiality that exists between a former client and counsel.

Similarly unavailing is plaintiff's reliance on *Telsaint v City of New York* (2024 NY Slip Op 31383[U] [Sup Ct, Kings County 2024]). There, the issue of disqualification arose between a party seeking disqualification of its adversary's counsel because said counsel previously represented the party. Again, disqualification was warranted given the former client's exposure of confidential information. No level of such exposure has existed between petitioner and AAG, who interacted, if at all, as counsel in the context of AAG drafting an answer. Indeed, petitioner does not identify one person at its law firm who engaged with AAG in any litigation.

Finally, NYAG's civil investigation of petitioner is in the preliminary stage; no findings have been issued and no litigation has been commenced. Therefore, petitioner's application to disqualify AAG based on harm or prejudice appears premature.

Accordingly, it is ordered that petitioner Abrams Fensterman, LLP's motion (seq No. 02) to disqualify an assistant attorney general is denied.

- 692** N.M. v K.L.M., 2026 NY Slip Op 50724(U). Husband and Wife and Other Domestic Relationships—Separation Agreement—Incorporation—Validity. (Sup Ct, Rensselaer County, May 13, 2026, Mendez, J.)
- 693** People v Campbell (Clarence), 2026 NY Slip Op 50725(U). Crimes—Identification of Defendant. Crimes—Unlawful Search and Seizure—Police Encounter. (Crim Ct, Bronx County, May 6, 2026, Krompinger, J.)
- 694** People v Hernandez (Francisco), 2026 NY Slip Op 50726(U). Crimes—Unlawful Search and Seizure—Reasonable Suspicion. Crimes—Arrest—Probable Cause. (Crim Ct, Bronx County, May 4, 2026, Krompinger, J.)
- 695** People v Burnett (Ashante), 2026 NY Slip Op 50727(U). Crimes—Right to Speedy Trial—Excludable Time—Waiver of Right to be Present. (Mount Vernon City Ct, May 12, 2026, Johnson, J.)
- 696** People v Bernal (Kelsey), 2026 NY Slip Op 50728(U). Crimes—Disclosure—Automatic Discovery—Good Faith and Due Diligence. (Crim Ct, NY County, May 13, 2026, Coleman, J.)

- 697** *Graham v 425 E. 96th Co LLC*, 2026 NY Slip Op 50729(U). Bailments—Existence of Bailment—Theft of Motorcycle from Parking Garage—No Agreement to Store Motorcycle. Contracts—Breach or Performance of Contract—Theft of Motorcycle from Parking Garage—No Agreement to Store Motorcycle. (Civ Ct, Kings County, May 4, 2026, Berman, J.)
- 698** *BG v PSH*, 2026 NY Slip Op 50730(U). Disclosure—Examination before Trial—Extension of Deadline. (Sup Ct, Richmond County, Apr. 9, 2026, Castorina, Jr., J.)
- 699** *Estate of Goldstein v Rayner*, 2026 NY Slip Op 50731(U). Trial—Right to Jury Trial—Claims for Legal and Equitable Relief Arising out of Same Transaction—Incidental Equitable Relief Doctrine. (Sup Ct, Rockland County, May 14, 2026, Collins, Jr., J.)
- 700** *Samson MCA LLC v DI Constr. LLC*, 2026 NY Slip Op 50732(U). Contracts—Unconscionable Contracts—Stipulation of Settlement for Breach of Merchant Advance Agreement—Attorneys' Fees. (Sup Ct, Monroe County, May 5, 2026, Doyle, J.)
- 701** *Synchrony Bank v Dominic*, 2026 NY Slip Op 50733(U). Contracts—Breach or Performance of Contract—Credit Card. (Civ Ct, Kings County, Apr. 24, 2026, Eze, J.)
- 702** *Refuah Helpline, Matter of, v McDonald*, 2026 NY Slip Op 50734(U). Health—Establishment of Hospital—Safety Net Transformation Program—Waiver of Public Health Council Review. (Sup Ct, Albany County, May 12, 2026, Hartman, J.)
- 703** *Computershare Trust Co., N.A. v Cohen*, 2026 NY Slip Op 50735(U). Attorney and Client—Withdrawal from Representation—Stay of Action. (Sup Ct, NY County, May 14, 2026, Reed, J.)
- 704** *People v Dvorin (Joshua)*, 2026 NY Slip Op 50736(U). Crimes—Suppression Hearing—Post-Arrest Police Observations of Defendant. (Crim Ct, NY County, May 15, 2026, Coleman, J.)
- 705** *People v Thomas (Laquande)*, 2026 NY Slip Op 50737(U). Crimes—Suppression Hearing. Crimes—Disclosure. (Crim Ct, NY County, May 15, 2026, Coleman, J.)
- 706** *RJ v KJ*, 2026 NY Slip Op 50738(U). Torts—Trespass—Property Held in Trust—Preliminary Injunction. (Sup Ct, Richmond County, Apr. 10, 2026, Castorina, Jr., J.)
- 707** *Taylor v Capital One Bank*, 2026 NY Slip Op 50739(U). Courts—Small Claims—Prompt Trial. (Civ Ct, Queens County, May 12, 2026, Lane, J.)

- 708** Janati-Atrie v HP, Inc., 2025 NY Slip Op 52232(U). Courts—New York City Civil Court—Monetary Jurisdictional Limit. Contracts—Breach or Performance of Contract—Sufficiency of Pleading—Economic Loss Doctrine. (Civ Ct, NY County, July 1, 2025, Li, J.)
- 709** Pierre v New York Community Hosp. of Brooklyn, Inc., 2026 NY Slip Op 50740(U). Hospitals—Malpractice—Patient Fall. Witnesses—Expert Witness—Nurse. (Sup Ct, Kings County, May 15, 2026, Mallafre Melendez, J.)
- 710** Eisner v Berland, 2026 NY Slip Op 50741(U). Courts—Jurisdiction—Long-Arm Jurisdiction. (Sup Ct, Kings County, May 15, 2026, Maslow, J.)
- 711** Brighthill Capital, LLC v Abrams, 2026 NY Slip Op 50742(U). Attorney and Client—Withdrawal from Representation—Failure of Client to Pay Fees and Communicate with Attorney. (Sup Ct, NY County, May 15, 2026, Reed, J.)
- 712** Sairitupac v Sanchez, 2026 NY Slip Op 50743(U). Pleading—Verification—Affidavit. (Sup Ct, NY County, May 1, 2026, Grieco, J.)
- 713** Jacobson v Bergdale, 2026 NY Slip Op 50744(U). Pleading—Verification—Affidavit. (Sup Ct, NY County, May 1, 2026, Grieco, J.)
- 714** Sanchez v Vargas, 2026 NY Slip Op 50745(U). Trial—Place of Trial—Demand for Change of Venue—Election Law Proceeding. (Sup Ct, NY County, Apr. 27, 2026, Grieco, J.)
- 715** Evergreen Florist & Greenhouse, Inc. v Levy, 2026 NY Slip Op 50746(U). Courts—Jurisdiction—Long-Arm Jurisdiction—Breach of Contract—Floral Arrangements. Courts—Forum Non Conveniens—Breach of Contract—Floral Arrangements. (Sup Ct, Richmond County, Apr. 17, 2026, Castorina, Jr., J.)
- 716** Cascione v Eger Health Care & Rehabilitation Ctr., 2026 NY Slip Op 50750(U). Parties—Substitution of Parties—Timeliness. (Sup Ct, Richmond County, Apr. 22, 2026, Castorina, Jr., J.)
- 717** West Farms Estates Co. v Miranda, 2026 NY Slip Op 50751(U). Stipulations—Validity. (Civ Ct, Bronx County, May 18, 2026, Donoghue, J.)
- 718** Stepenskaya, Matter of, 2026 NY Slip Op 50752(U). Attorney and Client—Death of Attorney—Designation of Successor Signatory for Account. (Sup Ct, Kings County, May 11, 2026, Maslow, J.)

- 719** Bellegarde v Singh, 2026 NY Slip Op 50753(U). Disclosure—Discovery and Inspection—Preclusion Motion—Willfulness in Failing to Disclose Dashcam Video. (Sup Ct, Kings County, May 18, 2026, Maslow, J.)
- 720** People v Brooks (Breon), 2026 NY Slip Op 50754(U). Crimes—Unlawful Search and Seizure—Traffic Stop—Canine Sniff of Vehicle Exterior. Crimes—Unlawful Search and Seizure—Traffic Stop—Obstruction of License Plate. (Tompkins County Ct, May 18, 2026, Miller, J.)
- 721** Shaw v Sageer, 2026 NY Slip Op 50755(U). Judgments—Default Judgment—Reasonable Excuse for Untimely Answer. Attorney and Client—Disqualification—Communication with Party before Engaging Counsel. (Utica City Ct, Oneida County, May 19, 2026, Giruzzi, J.)
- 722** Express Repair LLC v Mykhailov, 2026 NY Slip Op 50756(U). Pleading—Verification—Summary Judgment. (Civ Ct, Kings County, May 1, 2026, Eze, J.)
- 723** Kanter v George Hodosh Assoc.-Architects, P.C., 2026 NY Slip Op 50760(U). Motions and Orders—Timeliness of Motion—Summary Judgment. Contracts—Breach or Performance of Contract—Architecture Agreement. (Sup Ct, Rockland County, May 19, 2026, Collins, Jr., J.)
- 724** Aterian Group, Inc. v FCO Genesis I, Inc., 2026 NY Slip Op 50761(U). Attorney and Client—Withdrawal from Representation—Notice to Client. (Sup Ct, NY County, May 19, 2026, Reed, J.)
- 725** U.S. Bank Trust N.A. v Mordente, 2026 NY Slip Op 50762(U). Mortgages—Modification—Recording. Taxation—Mortgage Recording Tax—Evidence. (Sup Ct, Suffolk County, May 14, 2026, Hackeling, J.)
- 726** McDonald v Montefiore Med. Ctr., 2026 NY Slip Op 50763(U). Hospitals—Malpractice—Pressure Ulcers. Health—Nursing Homes—Pressure Ulcers. (Sup Ct, Westchester County, May 19, 2026, Clerkin, J.)
- 727** People v Wilson (Ronald), 2026 NY Slip Op 50764(U). Crimes—Information—Facial Sufficiency—Crime on Video Surveillance. (Crim Ct, Bronx County, May 21, 2026, Pilmar, J.)
- 728** People v C.J., 2026 NY Slip Op 50765(U). Crimes—Disclosure—Automatic Discovery—Good Faith and Due Diligence. (Crim Ct, NY County, May 21, 2026, Coleman, J.)

- 729** People v Zayas (Omal), 2026 NY Slip Op 50766(U). Crimes—Information—Conversion—Hearsay. Crimes—Disclosure—Automatic Discovery—Good Faith and Due Diligence. (Crim Ct, NY County, May 20, 2026, McCormick, J.)
- 730** Jehle, Matter of, 2026 NY Slip Op 50767(U). Wills—Probate—Validity of Testamentary Document—Ancient Will. (Sur Ct, Richmond County, May 19, 2026, Titone, S.)
- 731** 140 E 35st St. LLC. v Booker, 2026 NY Slip Op 50768(U). Landlord and Tenant—Summary Proceedings—Limited Liability Company—Cure of Publication Defect after Commencement of Proceeding. (Civ Ct, Kings County, May 21, 2026, Cohen, J.)

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