SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

JUNE 28, 2016

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Acosta, J.P., Renwick, Andrias, Moskowitz, JJ.

366 In re Raymond Castro, Index 101472/13
Petitioner-Appellant,

-against-

Dr. Dora Schriro, etc., et al.,
Respondents-Respondents.

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Koehler & Isaacs LLP, New York (Liam L. Castro of counsel), for appellant.

Zachary W. Carter, Corporation Counsel, New York (Ingrid R. Gustafson of counsel), for respondents.

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Judgment, Supreme Court, New York County (Carol E. Huff, J.), entered August 21, 2014, denying the petition seeking to annul respondents' determination, dated July 19, 2013, which terminated petitioner's employment as a probationary correction officer, and granting respondents' cross motion to dismiss the proceeding brought pursuant to CPLR article 78, reversed, on the law, without costs, the petition reinstated, and the matter remanded to Supreme Court for further proceedings.

Petitioner Raymond Castro commenced this article 78

proceeding to contest respondent New York City Department of Correction's (DOC) termination of his employment as a probationary correction officer. His termination occurred after an inmate died because petitioner's superior, a captain, thwarted the efforts of several people, including Officer Castro, to assist the inmate with his medical condition. Officer Castro cooperated in the investigation of the inmate's death and the federal prosecution of his superior. As fully detailed below, on the present record, Officer Castro's conduct, both in response to the inmate's medical emergency and during the investigation of the inmate's death, appears appropriate. Likewise, Officer Castro's termination, without an explanation, appears questionable and in bad faith. Under the circumstances, this Court is unable to conclude that his claim of wrongful termination as a probationary correction officer is without foundation to warrant a pre-answer dismissal based solely on the ground that it fails to state a cause of action.

Factual Background

In this pre-answer context, the essential facts are strictly gathered from the petition. Because this case arises on a motion to dismiss this article 78 petition under CPLR 3211, we take the facts alleged by petitioner to be true. Where the allegations

are ambiguous, we resolve the ambiguities in petitioner's favor.

The verified petition states that on August 17, 2012, Officer Castro was assigned to the Mental Health Assessment Unit (MHAU) at the George R. Vierno Center (GRVC) on Rikers Island. Officer Castro's shift began at 3:00 p.m. and ended at 11:00 p.m. The MHAU is a unit to which DOC sends inmates who are under mental observation and have a disciplinary history. These particular inmates are sent there for housing in traditional cells.

On that day, Officer Castro was assigned to housing area 11A, which had 25 cells, and was on the first tier. A second officer was assigned to another section of housing area 11A, which also had 25 cells but was on the second tier. During Officer Castro's tour, there was one supervising captain for his area. Officer Castro's duties included the care, custody, and control of the inmates therein. To those ends, Officer Castro regularly toured the area where the inmates were housed.

At some point during his 3:00 p.m. to 11:00 p.m. shift, as Officer Castro toured the cells, inmate Echevarria, who was in his cell, told Officer Castro that he swallowed a soap ball, which contained bleach, and that he wanted to get medical attention. Officer Castro immediately informed the officer

assigned to the "bubble" or watch post of what the inmate said. Officer Castro could only inform the bubble officer of the situation because Officer Castro's post did not have a phone. That second officer (the bubble officer) informed Officer Castro that the captain was about to tour the area.

Moments later, Captain Pendergrass and Officer Castro met at the housing area 11A desk. There, Officer Castro informed his superior of what Echevarria had said. Officer Castro did this in order to obtain permission from Captain Pendergrass to contact medical staff, or to otherwise obtain instruction from him. Captain Pendergrass instructed Officer Castro that there was no need to contact medical staff. Instead, Captain Pendergrass told Officer Castro, "[D]on't call me if you have live, breathing bodies. Only call me if you need an extraction, or if you have a dead body. Tell him [the inmate] to hold that" (second alteration in petition).

Sometime thereafter, Officer Castro began another tour of the area. During this second tour, Officer Castro noticed vomit in Echevarria's cell. Again, Officer Castro informed his superior, Captain Pendergrass, of his observations. At the time, Captain Pendergrass was inside of the bubble. Again, Captain Pendergrass instructed Officer Castro to tell the inmate to

"[h]old it" (alteration in petition).

Within one hour thereafter, a pharmacy technician and her escort officer began medical rounds to provide certain inmates with medication. The pharmacy technician informed Officer Castro that she noticed that Echevarria needed medical attention. Officer Castro informed the technician that he would notify the Captain, and that she should do the same as well. Officer Castro then went to Captain Pendergrass along with the escort officer. The escort officer, officer Lizarte, informed Captain Pendergrass that the inmate claimed he ingested a soap ball with bleach and needed medical attention. Captain Pendergrass ordered Officer Lizarte to write a report. At that time, Officer Castro attempted to contact medical staff, but could not find the medical number on an old and faded phone contact list. The phone that Officer Castro attempted to use was in the bubble. Captain Pendergrass approached Officer Castro and asked, "[D]id you contact anyone of significance." Officer Castro informed his superior that he was looking for the extension number to the medical staff. Captain Pendergrass then ordered Officer Castro to take his post. Officer Castro again informed him that he was looking for the medical number. Captain Pendergrass then said, "I am giving you a direct order to take your post." Officer

Castro complied with the captain's order.

After Officer Castro manned his post, Officer Lizarte arrived at Officer Castro's desk with a blank report form, and began to write his report. Moments later, Captain Pendergrass asked Officer Lizarte if he was sure he had heard the inmate correctly. Officer Lizarte responded, "[Y]es." Captain Pendergrass then said, "I believe you heard him incorrectly. I just spoke to the nurse and she did not hear that at all." Captain Pendergrass then ordered Officer Lizarte to follow him, and they left the area.

At some point thereafter, Officer Castro noticed that Captain Pendergrass went to Echevarria's cell, remained there for a few seconds, and then left the area. Officer Castro was relieved of his post at 11:30 p.m. The next day, another officer informed Officer Castro that Echevarria was found dead in his cell in the morning, many hours after Officer Castro had been relieved of his post.

In the days and months after the incident, Officer Castro was ordered to verbally inform DOC of his involvement with Echevarria, and then was interviewed by the DOC, the United States Attorney's Office for the Southern District of New York, the City's Department of Investigation, and the New York County's

District Attorney's Office. Eventually, in May 2014, Captain Pendergrass was federally indicted. In December 2015, Pendergrass was convicted of violating inmate Echevarria's Civil Rights under the Due Process Clause of the 14th Amendment of the United States Constitution. In July 2015, he was sentenced to five years in prison.

Meanwhile, in July 2013, Officer Castro was terminated from his employment as a probationary correction officer. After exhausting his administrative remedies, Officer Castro commenced this article 78 proceeding seeking an order annulling DOC's determination. Prior to serving an answer, DOC moved to dismiss the petition, contending only that petitioner had failed to state a cause of action. Supreme Court granted the motion and dismissed the petition. This appeal ensued.

Discussion

A probationary employee may be dismissed for almost any reason, or for no reason at all, and the employee has no right to challenge the termination in a hearing or otherwise, absent a showing that he or she was dismissed in bad faith or for an improper or impermissible reason (*see Matter of Swinton v Safir*, 93 NY2d 758, 762-763 [1999]). The burden falls on the petitioner to demonstrate by competent proof that bad faith exists, or that

the termination was for an improper or impermissible reason (*see Matter of Che Lin Tsao v Kelly*, 28 AD3d 320, 321 [1st Dept 2006]).

This case presents the unique procedural scenario where DOC sought to dismiss this article 78 petition at the pre-answer stage on the sole ground that the petition fails to state a cause of action. We disagree with Supreme Court's determination that the petition fails to sufficiently state a claim of improper termination of a probationary correction officer. On the contrary, petitioner alleges that his termination was arbitrary and capricious, and in bad faith. In addition, petitioner provides a factual predicate for his allegations. In sum and substance, the petition avers that despite serving as a correction officer who acted in complete accord with DOC's rules and proper protocol, pursuant to orders from his supervisor, and in full cooperation with the investigation of inmate Echevarria's death, which lead to Captain Pendergrass' indictment, Officer Castro was inexplicably terminated.

For instance, with regard to his activities in response to the inmate's statement that he had harmed himself by swallowing a soap ball, Officer Castro alleges that he acted pursuant to "normal protocol" and that he was "trained to [] contact a

supervisor in these situations." Similarly, with regard to his activities in response to his observation of the inmate's vomit, Officer Castro alleges that he acted "pursuant to the protocol . . . of inform[ing] his superior, Captain Pendergrass, of his observations." Moreover, with regard to his return to his post after attempting unsuccessfully to contact medical personnel, Officer Castro alleges that he was acting in "compli[ance] with his captain's order." Significantly, to support his allegation that these actions were made pursuant to and consistent with DOC rules and proper protocols, petitioner cites to DOC Rules, 610.030 and 7.05.090 and DOC Directives 4516(IV)(A) and 5001R(III), (IV)(A) and (V).[1] Finally, not knowing the reason for his termination, petitioner surmises dubitably that, "[u]pon information and belief, [he] was terminated for some 'misconduct' surrounding the death of inmate Echevarria," for which only the

[1] In his petition, Officer Castro gives a summary explanation of these rules and directives. He explained as follows: "DOC Rule 6.10.030 requires a correction officer to inform a captain when he believes an inmate may harm himself (e.g. swallow soap to harm himself). DOC Rule 7.05.090 . . . requir[es] a correction officer to inform his captain of any abnormal conditions that may indicate suicidal tendencies). Likewise, and more to the point, DOC Directive 4516(IV)(A) requires the Petitioner to inform his captain of an inmate's complaint of an injury. And, DOC Directive 5001R(III), (IV)(A), and (V) further require the tour commander (captain) to notify the proper authorities regarding an inmate's illness" (internal citations omitted).

captain was prosecuted and convicted. Considered as a whole, these uncontradicted allegations present a substantial issue of bad faith – namely, whether petitioner's discharge was unrelated to work performance - sufficient to require a denial of the pre-answer motion to dismiss.

In this appeal, however, DOC makes no attempt to refute or let alone shed light on these allegations; DOC simply argues that, as a probationary employee, Officer Castro was not required to be furnished with the charges against him and could have been dismissed without a reason (*see Matter of Swinton v Safir*, 93 NY2d at 762-763; *Matter of York v McGuire*, 63 NY2d 760, 761 [1984]). Petitioner's situation, however, is an exception to this general principle. Where a substantial but issue of bad faith is raised, as here, in that the termination of the probationary employment may not have been the result of the petitioner's failure to perform his or her duties satisfactorily but may have been due to some improper basis, a petition should not be dismissed on the pleadings (*cf. Matter of Higgins v La Paglia*, 281 AD2d 679 [3d Dept 2001] [a hearing was directed regarding the termination of a probationary correction officer where an issue was raised as to good faith because of, inter alia, conflicting evaluation reports], *appeal dismissed*, 96 NY2d

854 [2001]; *Matter of Ramos v Department of Mental Hygiene, of State of N.Y.*, 34 AD2d 925 [1st Dept 1970] [a hearing was directed because a substantial issue had been raised regarding whether the probationary employee's discharge was in reality the result of a personality conflict with a supervisor]).

The dissent gratuitously accuses the majority of "giving lip service" to the law applicable to probationary employees. What the dissent turns a blind eye to and wishes us to ignore is the fact that an employee has the right to challenge a termination when it appears to be based on bad faith or for an improper or impermissible reason (*see Matter of Swinton v Safir*, 93 NY2d at 763). Thus, when a termination is putatively related to work-related deficiencies, one would expect an agency like DOC to refute contrary allegations or, if true, to provide an explanation of the work-related deficiencies. Here, however, DOC presents nothing other than a pre-answer motion to dismiss based on the sole ground that the petition fails to state a claim of improper termination. At the very least, DOC, the firing agency, should be required to provide responsive pleadings so as to explain the basis of the termination. Of course, ultimately, the burden falls squarely on petitioner to demonstrate by competent proof at an evidentiary hearing that his termination was for an

improper or impermissible reason.

The dissent's argument that the petition fails to state a claim of improper termination is not persuasive. In fact, the dissent completely misconstrues and mischaracterizes petitioner's conduct surrounding the death of inmate Echevarria as "just following orders." Likewise, the dissent mischaracterizes the majority's position as viewing any possible DOC finding of misconduct by Officer Castro as a possible "mistake." The dissent's characterization is disingenuous. We simply hold that, at this stage of the proceedings, where DOC has not answered the petition, we are not willing to speculate as to whether petitioner's or DOC's actions were inappropriate under any standard.

Rather, at this juncture, we construe the petition in the light most favorable to petitioner, as required on a pre-answer motion to dismiss. The reasonable inferences to be drawn from petitioner's factual allegations belie the dissent's conclusion that Officer Castro's conduct surrounding the inmate's death was "gross indifference" to the inmate's safety and constitutional rights. Indeed, without basis in fact, the dissent belittles petitioner's apparently sincere efforts to assist the inmate, by among other things, repeatedly informing his superior and

attempting to call medical personnel. Moreover, the dissent minimizes the fact that at the time the captain thwarted petitioner's efforts to assist the inmate, the pharmacy technician, who presumably had medical training and direct access to medical personnel, the escort officer, who was directed to complete an accident report, and the bubble officer, were all alerted to and involved in the inmate's situation. Under the circumstances, the dissent's ominous conclusions -- that petitioner was fully aware that his failure to take any further and immediate action, in contravention of his superior's efforts, would lead to the inmate's death – dehors the record and is pure speculation.

In short, at no time during these proceedings has anyone -- other than the dissent -- characterized petitioner's activities surrounding the inmate as a callous indifference to Echevarria's safety and constitutional rights.

All concur except Andrias, J. who dissents in a memorandum as follows:

ANDRIAS, J. (dissenting)

While giving lip service to the law governing the discharge of a probationary employee, the majority in fact finds that the petition should not have been dismissed because it cannot be determined at this juncture whether petitioner's or respondents' actions were "inappropriate under any standard," and any finding of misconduct on petitioner's part may have been a mistake However, a probationary employee may be dismissed for almost any reason, or for no reason at all, and the majority utterly ignores petitioner's total failure to carry his heavy burden of establishing by competent evidence that his termination was motivated by bad faith or for any other improper reason.

Particularly, at the heart of petitioner's challenge is his claim that he did not do anything wrong because he adhered to respondent Department of Correction's (DOC) protocol and was just "following his c]aptain's orders" when he failed to obtain medical aid for Jason Echevarria, an inmate in his care, whose condition progressively worsened after he ingested a toxic "soap ball" containing bleach. The "just following orders" defense has long been discredited by international institutions and tribunals; similarly, it has no place whatsoever in this state's twenty-first century jurisprudence, and a rejection of the

defense by respondents would certainly not be tantamount to bad faith.

Petitioner also cherry picks from DOC regulations, relying on provisions relating to reporting obligations, and ignoring the regulations which establish that a correction officer's primary duty is to ensure the health and safety of his or her charges. In contravention of that duty, during his shift, the only action taken by petitioner was to report Echevarria's condition to Pendergrass. Furthermore, the hollowness of his "I tried to help, but the captain prevented me" defense is glaringly illustrated by his conduct at the end of his tour when he failed to summon medical personnel, contact a deputy warden, call 911 or otherwise sound the alarm, even though nothing prevented him from doing so at that time. Rather, he simply went home, leaving Echevarria in distress in his cell.

Consequently, for these reasons, and those that follow, I respectfully dissent.

According to the petition, on August 17, 2012, during his 3:00 p.m. to 11:00 p.m. shift, petitioner was touring his assigned area in the Mental Health Assessment Unit at Rikers Island when Echevarria told him that he had ingested the toxic soap ball and requested medical attention. Petitioner advised

his supervisor, Captain Terrence Pendergrass, of the situation and Pendergrass responded that there was no need to contact medical and that he should contact Pendergrass only "if [he] need[ed] an extraction, or if [he] ha[d] a dead body." Petitioner complied.

Later in his tour, petitioner noticed vomit in Echevarria's cell. He reported his observation to Pendergrass, who essentially told him to "hold it." Once again, petitioner complied and took no further action to aid Echevarria. Later that evening, a pharmacy technician and an escort officer also saw the vomit in Echevarria's cell and the technician told petitioner that Echeverria needed medical help. Petitioner and the escort officer reported this to Pendergrass, who told the escort officer to fill out a report. However, when petitioner started to look for the telephone number for medical support, but purportedly could not find it "on a[n] old and faded phone contact list," Pendergrass ordered him to return to his post immediately and to not contact anyone. Petitioner again complied without protest and made no further effort to obtain medical care for Echevarria, or to contact Pendergrass's superiors, during the remainder of his shift or after his shift had ended. When petitioner returned the next morning, he learned that Echevarria

had died.

Following investigations by DOC, the New York City Department of Investigation, the office of the District Attorney of the county concerned, and the United States Attorney for the Southern District of New York, petitioner's probationary employment was terminated on July 19, 2013. Pendergrass was criminally charged and subsequently convicted in federal court of violating Echevarria's civil rights and sentenced to five years in prison.

Petitioner alleges that respondent's decision to terminate his probationary employment, "[u]pon information and belief, . . . for some 'misconduct' surrounding the death of a Inmate [Jason] Echevarria," "was affected by an error of law, arbitrary and capricious, and/or an abuse of discretion." This argument misapprehends the governing principle of law that a probationary employee may be discharged for "almost any reason, or for no reason at all," without a hearing and without a statement of reasons, as long as it is not "in bad faith or for an improper or impermissible reason" (*Matter of Swinton v Safir*, 93 NY2d 758, 762-763 [1999]; *see also Matter of Smith v New York City Dept. of Correction*, 292 AD2d 198, 198-199 [1st Dept 2002]; *Matter of Garcia v New York City Probation Dept.*, 208 AD2d 475, 476 [1st

Dept 1994]).

The petitioner "bears the burden of establishing bad faith or illegal reasons by competent evidence . . . [and] [s]peculative and/or conclusory allegations of bad faith [or] improper motive . . . are insufficient to meet this burden" (*Matter of Robinson v Health & Hosps. Corp.*, 29 AD3d 807, 809 [2d Dept 2006] [internal quotation marks omitted][alterations in original], *appeal dismissed* 7 NY3d 845 [2006]; *see also Smith v NYC Dept. of Correction*, 292 AD2d at 198). Thus, when a probationary employee challenges his or her termination in an article 78 proceeding, the function of the court "should not be to 'second guess' . . . [but] is simply to determine if petitioner has shown bad faith on the part of the respondent" (*Matter of Soto v Koehler*, 171 AD2d 567, 569 [1st Dept 1991], *lv denied* 78 NY2d 855 [1991]). Applying these principles, petitioner has failed to raise a material issue as to bad faith or any other improper reason for his discharge and the petition was correctly dismissed (*see Matter of Green v New York City Hous. Auth.*, 25 AD3d 352, 353 [lst Dept 2006]).

While petitioner contends that respondents improperly terminated his probationary employment for some misconduct surrounding Echevarria's death, other than providing conclusory

assertions, he presents nothing that would support an inference that the termination was for an illegal reason or that the investigation which led to it was conducted in bad faith (*see Matter of Phucien v City of N.Y. Dept. of Corr.*, 129 AD3d 505, 506[1st Dept 2015] ["Petitioner's unsupported assertions that respondent Department of Correction improperly terminated his probationary employment are insufficient to satisfy his burden of establishing that his dismissal was in bad faith"]; *see also Matter of Lane v City of New York*, 92 AD3d 786, 787 [2d Dept 2012], *lv denied* 19 NY3d 810 [2012]; *Walsh v New York State Thruway Auth.*, 24 AD3d 755, 757 [2d Dept 2005]). "At best, petitioner merely raise[s] factual disputes [as to whether the alleged determination that he engaged in misconduct with respect to Echevarria's death is correct] that do not entitle [him] to a hearing" (*Matter of Bradford v New York City Dept. of Correction*, 56 AD3d 290, 291 [1st Dept 2008], *lv denied* 12 NY3d 711 [2009]).

The majority finds that petitioner "present[s] a substantial issue of bad faith — namely, whether [his] discharge was unrelated to work performance — sufficient to require a denial of the pre-answer motion to dismiss." The majority also states that petitioner established a factual predicate for his claim that his termination was arbitrary and capricious, and in bad faith, by

virtue of his allegations, which respondents did not attempt to refute, that he acted according to DOC rules, which required him to report the incident to his supervisor, that he was obligated to follow his supervisor's orders telling him not to do anything, that he could not leave his post, and that he fully cooperated with the investigation of Echevarria's death.

However, respondents were not obligated to provide a statement of reason for the discharge of a probationary employee or to conduct a hearing. Furthermore, contrary to the view of the majority, respondents' motion to dismiss for failure to state a cause of action does not present a "unique procedural scenario" and respondents' submissions established that petitioner failed to allege any facts from which the court could conclude that his termination was in bad faith, or otherwise unlawful.

The majority's position rests on the flawed premise that if petitioner is correct that DOC's finding of misconduct (after an internal investigation) was in error because he was just following orders and DOC protocol, then the termination of his probationary employment would have been in bad faith. However, even assuming, for the purposes of respondents' motion to dismiss, that respondents were somehow mistaken when they found, after conducting an extensive investigation, that petitioner's

role in Echevarria's death constituted misconduct, petitioner has not raised any factual issue as to whether that determination was made in bad faith or that he was terminated for an improper reason (*see Matter of Turner v Horn*, 69 AD3d 522, 523 [lst Dept 2010] [proceeding properly dismissed where "petitioner submitted evidence challenging the investigators' conclusion, but did not submit any evidence raising a substantial issue as to respondents' bad faith in investigating the alleged violation or in deciding to terminate her employment"]; *Matter of Lane v City of New York*, 92 AD3d at 786-787 ([2d Dept 2012] [cross motion to dismiss properly granted where "[the petitioner's] claims that the Command Discipline issued for his violation of departmental rules and regulations was erroneous, and that his use of force in dealing with inmates was justified, were insufficient to establish that his employment was terminated in bad faith"]; *Matter of Green v New York City Hous. Auth.*, 25 AD3d at 352-353 [order directing a hearing as to the propriety of the challenged determination was reversed and the petition denied insofar as it challenged the petitioner's termination, where the petitioner was terminated after the respondent investigated complaint and found that the petitioner had assaulted another employee; while the petitioner showed that the respondent's determination may have

been mistaken, she raised no issue as to whether it was made in bad faith]).

The majority believes that petitioner acted appropriately. However, even were we to consider petitioner's self-serving justifications for his failure to obtain medical care for Echevarria, the record amply demonstrates, at a minimum, petitioner's gross indifference to his charge. Although petitioner reported Echevarria's condition to Pendergrass on multiple occasions, each time the captain told him to do nothing and return to his post, petitioner obeyed without protest, placing his personal concerns as to potential consequences of disobeying Pendergrass's unlawful and unreasonable orders over the well-being of Echevarria.

Petitioner's selective reading of DOC rules, focusing only on reporting requirements to support his assertions that he did not engage in misconduct, which the majority accepts, mischaracterizes the overall import of the rules, which make inmate safety and medical care the priority of every correction officer. DOC rule 2.30.010 provides as follows: "Correction Officers shall be held responsible for the safety, sanitation, and security of their posts, for the proper care, custody, control and treatment of inmates and the enforcement of the Rules

and Regulations of the Department and the command." Rule 7.10.040 provides that "[w]henver an inmate complains or appears to be injured or sick, *prompt action* shall be taken to ensure that the inmate is examined by authorized medical personnel . . ." (emphasis added). Although a Directive from DOC, effective February 21, 1997, provides that a correction officer who receives an injury complaint from an inmate shall notify the area supervisor as soon as possible, the directive also provides that "[i]n the event that the urgency of the situation precludes such notification because a delay obtaining medical treatment could cause a worsening of the inmate's condition, the notification shall be made as soon as possible, while the inmate is either being treated or immediately thereafter." Thus, it is clear that DOC regulations mandate that ensuring inmate safety, rather than prompt reporting, is a correction officer's primary duty.

Contrary to the view of the majority, DOC Rules 6.10.030 and 7.05.090, which respectively require a correction officer to inform his or her captain that an inmate may harm himself or has suicidal tendencies, do not justify petitioner's failure to seek aid for Echevarria. Petitioner was told by Echevarria that he had already swallowed the "soap ball," not that he *may* swallow

it, after which petitioner personally observed Echevarria's condition deteriorating.

Petitioner was also told by a pharmacy technician that medical attention was needed. Still, petitioner did not obtain medical care for Echevarria during his shift, choosing instead to blindly follow Pendergrass's orders rather than contact Pendergrass's superiors or the medical unit to report the obvious threat to Echevarria's well-being. Most significantly, after his shift ended, at which time he was no longer bound to his post or under the control of Pendergrass, petitioner still failed to alert anybody in a supervisory or medical role as to Echevarria's deteriorating condition or to seek any help for him. He just went home, knowing that Echevarria had not received any medical help. That others may also have been aware of Echevarria's worsening condition and also failed to obtain medical care for him does not absolve petitioner of responsibility for his own conduct. He was the officer that was directly responsible for Echevarria's care and safety and should have obtained the medical assistance that he knew Echevarria so desperately needed, notwithstanding Pendergrass's orders to the contrary.

While neither Pendergrass nor petitioner were indicted by the District Attorney's office that investigated, and only

Pendergrass was indicted by the U.S. Attorney, we do not have to speculate as to whether petitioner was not indicted because the U.S. Attorney needed his eyewitness testimony to prosecute Pendergrass. Even assuming that petitioner's conduct did not rise to the level of criminal liability, his not being indicted has no bearing in this article 78 proceeding. Petitioner has not met his burden of establishing that his conduct, as he himself describes it, could not support the dismissal of a probationary employee — who may be dismissed for any reason or no reason at all— except for an illegal reason or in bad faith.

Matter of Higgins v La Paglia (281 AD2d 679 [3d Dept 2001], *appeal dismissed* 96 NY2d 854 [2001]) and *Matter of Ramos v Department of Mental Hygiene* (34 AD2d 925 [1st Dept 1970]), cited by the majority, are inapposite. In *Higgins*, a hearing was directed regarding the termination of a probationary correction officer where an issue was raised as to good faith because of, among other things, conflicting evaluation reports and allegations by the petitioner that he, unlike other newly hired correction officers, was not afforded academy training (282 AD2d at 681). In *Ramos*, a hearing was directed where the petitioner claimed that her dismissal was not the result of the failure to perform her duties satisfactorily but was due to a personality

conflict with a supervisor (34 AD2d at 925). In contrast, here petitioner alleges that upon information and belief he was terminated for alleged job-related misconduct surrounding the death of an inmate, not for a personality conflict unrelated to his work, and he has not produced any performance evaluations or other evidence that would support his claim that he was discharged in bad faith.

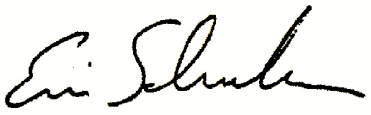
In sum, the death of an inmate while in custody is a very serious matter and petitioner's assertion that he did not commit any misconduct because he followed reporting protocol and Pendergrass's orders is, in and of itself, insufficient to raise a substantial issue as to whether the termination of his probationary employment was in bad faith or otherwise improper. Since World War II, the "just following orders" or "Nuremberg" defense has not occupied a valid place in our jurisprudence and petitioner's conduct, under any standard, cannot be deemed appropriate. Although a correction officer must usually follow a superior's orders, there are situations where a reasonable decision maker could conclude that the officer should not have done so. This is such a case, where petitioner was told by Echevarria that he had ingested a toxic substance and needed medical care, personally observed Echevarria's prolonged distress

and was told by a pharmacy technician that medical help was required, and nevertheless chose to follow Pendergrass's orders not to get help, even though the orders were objectively unreasonable in that they clearly violated Echevarria's constitutional rights and imperiled his health and safety. Indeed, given the ongoing criticism of the treatment of inmates on Rikers Island, one can only imagine what the reaction would have been had DOC accepted petitioner's "just following orders" defense and retained him, continuing the misguided practice of not holding responsible officers accountable.

Accordingly, the judgment denying the petition and granting respondents' cross motion to dismiss the proceeding should be affirmed.

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

ENTERED: JUNE 28, 2016



DEPUTY CLERK

Mazzarelli, J.P., Moskowitz, Manzanet-Daniels, Gesmer, JJ.

1156 Arbor Realty Funding, LLC, Index 651079/11
Plaintiff-Appellant, 651623/11
601122/12

-against-

Herrick, Feinstein LLP,
Defendant-Respondent.

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Tannenbaum Helpern Syracuse & Hirschtritt LLP, New York (Vincent J. Syracuse of counsel), for appellant.

Davis Polk & Wardwell LLP, New York (Paul Spagnoletti of counsel), for respondent.

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Order, Supreme Court, New York County (Carol R. Edmead, J.), entered April 17, 2015, which, to the extent appealed from as limited by the briefs, granted defendant's motion for leave to renew its motion for spoliation sanctions, and upon renewal, dismissed the complaint, and denied plaintiff's cross motion for attorneys' fees and costs, unanimously modified, on the law, the facts, and in the exercise of discretion, to the extent of, upon renewal, adhering to the court's original determination awarding defendant an adverse inference charge at trial as to the spoliated evidence, awarding monetary discovery sanctions in the amount of $10,000, and otherwise affirmed, without costs.

In this action, plaintiff Arbor Realty Funding, LLC (Arbor) seeks damages for legal malpractice from defendant Herrick,

Feinstein LLP (Herrick) in connection with Herrick's representation of Arbor in negotiating a high rise construction loan with a developer. The loan closed on May 8, 2007 and the developer defaulted on the loan in or about July 2008. Arbor contends, inter alia, that Herrick gave it faulty advice in 2007 in connection with zoning issues, the existence of which led to the revocation of building permits following a crane collapse at the site, and the borrower's default. Herrick argues, inter alia, that Arbor would have issued the loans regardless of any potential zoning issues and that Arbor later assigned the loans and/or failed to mitigate its damages.

The instant motion concerns Arbor's alleged spoliation of evidence. It is undisputed that Arbor's obligation to preserve evidence arose at least as early as June 2008, when Arbor retained counsel in connection with its claims against Herrick. However, Arbor did not issue a formal litigation hold until May 2010. As a consequence, Arbor's internal electronic record destruction policies, including recycling of backup tapes, deletion of employees' emails stored in their inboxes or sent items folders for 189 days, and erasure of employee hard drives and email accounts upon the employee's departure from the firm, were not suspended until May 2010. In addition, Arbor's CEO

deleted his emails on a regular basis between June 2007 and June 2010, with the result that only one of his emails from the relevant period was produced. Arbor produced no emails from the relevant period from its Executive Vice President of Structured Finance, who was involved in the transaction.

Arbor commenced this action in 2011. In or about June 2014, Herrick filed a motion seeking dismissal of the complaint as a sanction for Arbor's failure to preserve evidence, including the electronic records of six key witnesses. The court found that Arbor's failure to preserve evidence constituted ordinary negligence, and granted Herrick's motion only to the extent of directing that Herrick be entitled to an adverse inference at trial, citing PJI 1:77. Arbor did not appeal that order. Approximately six weeks later, Arbor produced to Herrick the minutes from a May 10, 2007 structured loan committee meeting, which identified eight additional Arbor employees who were involved in the loan transaction. Arbor claims that its failure to produce the minutes earlier was inadvertent. In or about January 2015, Herrick moved to renew its spoliation motion, based on the new information in the minutes, including the identification of additional witnesses, much of whose electronic records had been destroyed by Arbor, either due to its failure to

timely institute a litigation hold, or deliberately, and Arbor cross moved for sanctions.

Although the motion court properly granted renewal based on the new facts presented in defendant's renewal motion (*see Eshaghian v Roshanzamir*, 127 AD3d 448 [1st Dept 2015]), the court improvidently exercised its discretion in, upon renewal, dismissing the complaint as a spoliation sanction. As this court has previously stated,

> "Failures which support a finding of gross negligence, when the duty to preserve electronic data has been triggered, include: (1) the failure to issue a written litigation hold []; (2) the failure to identify all of the key players and to ensure that their electronic and other records are preserved; and (3) the failure to cease the deletion of e-mail"

(*VOOM HD Holdings LLC v EchoStar Satellite L.L.C.*, 93 AD3d 33, 45 [1st Dept 2012]). Here, the motion court correctly determined that Arbor's destruction of evidence was, at a minimum, gross negligence, since Arbor failed to institute a formal litigation hold until approximately two years after even Arbor admits it had an obligation to do so. The minutes further reveal the extent to which Arbor failed to identify all of the key players in the loan transaction, and failed to preserve their electronic records. Where, as here, the spoliation is the result of the plaintiff's

intentional destruction or gross negligence, the relevance of the evidence lost or destroyed is presumed (*Pegasus Aviation I, Inc. v Varig Logistica S.A.*, 26 NY3d 543, 547 [2015]; *VOOM HD Holdings LLC*, 93 AD3d at 45). Plaintiff failed to rebut this presumption. Accordingly, the motion court properly determined an appropriate sanction should be imposed on plaintiff. However, the sanction must reflect "an appropriate balancing under the circumstances," (*Voom HD Holdings LLC*, 93 AD3d at 47). Generally, dismissal of the complaint is warranted only where the spoliated evidence constitutes "the sole means" by which the defendant can establish its defense (*Alleva v United Parcel Serv., Inc.*, 112 AD3d 543, 544 [1st Dept 2013]), or where the defense was otherwise "fatally compromised" (*Jackson v Whitson's Food Corp.*, 130 AD3d 461, 463 [1st Dept 2015]) or defendant is rendered "prejudicially bereft" of its ability to defend as a result of the spoliation (*Suazo v Linden Plaza Assoc., L.P.*, 102 AD3d 570, 571 [1st Dept 2013] [internal quotation marks omitted]). The record upon renewal does not support such a finding, given the massive document production and the key witnesses that are available to testify, including the eight additional persons identified in the minutes, on whom Herrick had not yet served interrogatories or deposition notices at the time it filed its renewal motion. Accordingly, an

adverse inference charge is an appropriate sanction under the circumstances (*see id.; see also VOOM*, 93 AD3d at 46-47; *Ahroner v Israel Discount Bank of N.Y.*, 79 AD3d 481 [2010]), since it will permit the jury to: (1) find that the missing emails and other electronic records would not have supported Arbor's position, and would not have contradicted evidence offered by Herrick, and (2) draw the strongest inference against Arbor on the issues of whether Arbor would have made the loans regardless of any potential zoning issues, and the measure of Arbor's damages taking into account its assignment of the loans and/or failure to mitigate its damages (PJI 1:77). In addition, plaintiff shall be required to pay discovery sanctions of $10,000 to defendant Herrick, Feinstein, LLP for its failure to produce the loan committee meeting minutes until after the motion court had decided the initial spoliation motion (CPLR 3126). This court's modification of the motion court's order is without prejudice to Herrick seeking dismissal of the complaint or other spoliation sanctions in the future, should there be further revelations making such a motion appropriate.

Defendant's motion to renew was not frivolous and thus plaintiff is not entitled to attorneys' fees and costs incurred in opposing the motion (*see* 22 NYCRR 130-1.1).

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

ENTERED: JUNE 28, 2016

DEPUTY CLERK

Corrected Order - July 13, 2016

Mazzarelli, J.P., Moskowitz, Manzanet-Daniels, Gesmer, JJ.

1160-
1161-
1162 Index 190114/13

In re New York City Asbestos Litigation

- - - - -

Ralph P. North,
Plaintiff-Respondent,

-against-

Air & Liquid Systems Corporation successor by merger to Buffalo Pumps, Inc., et al.,
Defendants,

National Grid Generation, LLC,
Defendant-Respondent-Appellant,

O'Connor Constructors, Inc.,
Defendant-Appellant-Respondent.

_____

Coughlin Duffy LLP, New York (Kevin T. Coughlin of counsel), for appellant-respondent.

Ingram Yuzek Gainen Carroll & Bertolotti, LLP, New York (John G. Nicolich of counsel), for respondent-appellant.

Levy Konigsberg LLP, New York (Jerome H. Block of counsel), for respondent.

_____

Judgment, Supreme Court, New York County (Martin Shulman, J.), entered January 28, 2015, after a jury trial, awarding plaintiff, inter alia, $3,500,000,00 in damages for future pain and suffering as against defendant National Grid Generation, LLC, unanimously affirmed, without costs. Order, same court and Justice, entered March 13, 2015, which granted National Grid's

motion for summary judgment on its claim against defendant O'Connor Constructors, Inc. for indemnification, except for attorneys' fees, and denied O'Connor's motion for summary judgment dismissing National Grid's indemnification claim as against it, unanimously modified, on the law, to grant National Grid's motion as to attorneys' fees solely in connection with its defense against plaintiff's action, and otherwise affirmed, without costs.

The jury verdict is based on sufficient evidence and is not against the weight of the evidence (*see Cohen v Hallmark Cards*, 45 NY2d 493, 498-499 [1978]). The evidence demonstrates that LILCO, defendant National Grid's predecessor in interest, issued detailed specifications directing contractors in the means and methods of mixing and applying asbestos-containing concrete and insulation at the power plant, thus supporting the jury's finding of a violation of Labor Law § 200 (*see Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 505 [1993]). It is of no consequence that LILCO ensured that its directives were followed by supervising the superintendents, rather than by supervising the workers directly. Further, LILCO was admittedly in charge of trade coordination, i.e., directing the trades as to where and when to do their work, which resulted in plaintiff's working in close contact with the asbestos-dust-producing insulators (*see Rizzuto v L.A. Wenger Contr. Co.*, 91 NY2d 343, 352-353 [1998]).

The jury's finding that O'Connor, which settled with plaintiff before trial, was negligent but that its negligence was not a proximate cause of plaintiff's injuries and that LILCO was 100% responsible was a fair interpretation of the evidence in light of LILCO's supervision and control of the injury-producing activity (*see Matter of New York Asbestos Litig. [Marshall]*, 28 AD3d 255 [1st Dept 2006]).

The award for future pain and suffering does not deviate materially from what would be reasonable compensation (CPLR 5501; *see e.g. Matter of New York City Asbestos Litig. [Konstantin & Dummit]*, 121 AD3d 230, 255 [1st Dept 2014], *motion to dismiss appeal denied* 24 NY3d 1216 [2015]; *Penn v Amchem Prods.*, 85 AD3d 475 [1st Dept 2011]).

While, as National Grid argues, it was error to permit the jury to deliberate on a theory of a defective condition of the premises under Labor Law § 200 and on the issue of LILCO's recklessness, these errors are harmless in light of the jury's other findings. Any error in the wording of the charge directing the jury not to find plaintiff's employers liable during the time he was employed by them is unpreserved.

The trial court correctly granted National Grid summary judgment on its claim against O'Connor for contractual indemnification (*see Balbuena v New York Stock Exch., Inc.*, 49 AD3d 374, 376 [1st Dept 2008], *lv denied* 14 NY3d 709 [2010];

Urbina v 26 Ct. St. Assoc., LLC, 46 AD3d 268 [1st Dept 2007]). The clause in the contract between LILCO and O'Connor (which predates the enactment of General Obligations Law § 5-322.1) provided for indemnification of LILCO by O'Connor for "all losses, damages, claims, liens and encumbrances, or any or all of them, arising out of or in any way connected with the work," whether or not LILCO was negligent. The clause was triggered by the trial evidence. O'Connor's contention that National Grid is not a successor in interest to LILCO on the contract is without merit.

Although National Grid is not entitled to attorneys' fees incurred in prosecuting the indemnification claim against O'Connor (*see Hooper Assoc. v AGS Computers*, 74 NY2d 487 [1989]), it is entitled to attorneys' fees incurred in defending against plaintiff's action (*see e.g. DiPerna v American Broadcasting Cos.*, 200 AD2d 267 [1st Dept 1994]; *Breed, Abbott & Morgan v Hulko*, 139 AD2d 71 [1st Dept 1988], *affd* 74 NY2d 686 [1989]).

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

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

ENTERED: JUNE 28, 2016

DEPUTY CLERK

Mazzarelli, J.P., Andrias, Richter, Manzanet-Daniels, Kahn, JJ.

1250 In re Ibrahim Donmez, Index 400412/14
Petitioner-Respondent,

-against-

Department of Consumer
Affairs, et al.,
Respondents-Appellants.

_____

Zachary W. Carter, Corporation Counsel, New York (Damion K. L. Stodola of counsel), for appellants.

Ibrahim Donmez, respondent pro se.

_____

Order and judgment (one paper), Supreme Court, New York County (Peter H. Moulton, J.), entered June 20, 2014, which granted the petition pursuant to CPLR article 78 to the extent of finding that respondent Department of Consumer Affairs (DCA or the Department), in its decision dated November 6, 2013, exceeded its authority in denying petitioner's application to renew his pedicab business license based on Administrative Code of City of NY §§ 20-101 and 20-104(e)(3), and remanded the matter to DCA to complete the processing of petitioner's application for renewal of his license on an expedited basis, unanimously affirmed, without costs.

On September 21, 2012, petitioner, a pedicab driver, was issued a summons for picking up passengers in a non-designated

area at the Loeb Boathouse in Central Park (Administrative Code § 20-259) and for failing to display a copy of his photo identification card in a manner visible to passengers and enforcement officers (Administrative Code § 20-258[b]). Although petitioner owns and operates his own pedicab business, the pedicab driven by petitioner at the time of the violations was owned by a business operated by a third party.

On January 28, 2013, following a hearing, the Administrative Law Judge issued a decision and order finding petitioner guilty of both violations and imposing the maximum fines of $500 on each violation. In approving that decision and order, the DCA Deputy Director of Adjudication additionally stated that "[f]ailure to comply with [the] order within [30] days shall result in the suspension of the license at issue, and may result in the suspension of any other Department of Consumer Affairs license(s) held by [petitioner]." On petitioner's administrative appeal, the DCA Director of Adjudication on June 28, 2013, upheld the decision and order of the Administrative Law Judge. On September 29, 2013, the Department suspended petitioner's pedicab driver license pending satisfaction of the fines, which remained unpaid.

On October 31, 2013, petitioner appeared at the Department to renew his pedicab business license and paid the license fee of

$110. According to petitioner, initially DCA refused to accept his application form based upon his two outstanding driver license violations. After his protest, DCA informed him that his application would be denied.

On November 1, 2013, with his outstanding fines for the two pedicab driver license violations still unpaid, petitioner sent an email message to the Executive Deputy General Counsel of DCA, Sanford Cohen, protesting DCA's refusal to permit him to renew his license. In that email message, he explained that he could not afford the $1000 in driver license fines and that he believed that the fines were "an excessive penalty for two minor violations that has nothing to do with public safety." He also stated, "I will NEVER pay DCA $1,000 for those two minor violations for my first DCA ticket since pedicabs were first licensed in 2009." Petitioner requested a hearing on the denial of his business license renewal application.

By email message and letter dated November 6, 2013, Mr. Cohen responded that petitioner's business license renewal application would be denied pursuant to Administrative Code §§ 20-104(e)(3) and 20-101 because his "refusal to pay the assessed fines demonstrate[d] that h[e] lack[ed] the honesty and integrity required of all persons who hold a license issued by the

Department."

On November 4, 2013, petitioner commenced this article 78 proceeding pro se, alleging that denial of his pedicab business license renewal application without a hearing violated his right to due process under the Fourteenth Amendment (US Const Amend XIV). As noted above, in an order entered on June 20, 2014, the article 78 court granted the petition. The court held that the refusal of the Department to renew petitioner's business license exceeded the Department's statutory powers based upon its misinterpretation of Administrative Code §§ 20-101 and 20-104(e)(3). Specifically, the article 78 court found that the Department proffered no legal authority for its contention that petitioner's refusal to pay the fines demonstrated his lack of adherence to standards of honesty and integrity under Administrative Code § 20-101. The court additionally found that Administrative Code § 20-104(e)(3) authorized DCA action only as to the particular license under which an unpaid fine is issued, which in this case was petitioner's pedicab driver license, and provides for suspension, rather than refusal to renew, such license. Neither section provided any support for DCA's refusal to renew petitioner's pedicab business license, the court concluded. Finding that DCA had exceeded its statutory

authority, the court did not reach petitioner's constitutional due process argument.

The Department now appeals.

On this appeal, the Department first argues that the article 78 court erred in failing to recognize its broad discretionary powers, consistent with legislative intent, to deny petitioner's application to renew his business license, based upon its authority to uphold "standards of integrity [and] honesty" under Administrative Code § 20-101.

Section 20-101, entitled "Legislative intent," provides for "protection and relief of the public from deceptive, unfair and unconscionable practices, for the maintenance of standards of integrity, honesty and fair dealing among persons and organizations engaging in licensed activities." That section also sets forth the legislature's intent that DCA issue licenses to businesses as a means of regulation of business operations, without establishing any standard for denial of renewal of business licenses.

Here, petitioner's violations for picking up passengers at an unauthorized location and for failure to display a photo identification card have no relationship to "protection and relief of the public from deceptive, unfair and unconscionable

practices" or "standards of integrity, honesty and fair dealing" in business operations. Therefore, Administrative Code § 20-101 was not a proper basis for DCA's determination not to renew petitioner's pedicab business license.

The Department next argues that the article 78 court erred in failing to recognize that the agency's actions in refusing to renew petitioner's business license were authorized by Administrative Code § 20-104(e)(3), which gives the agency the authority to suspend a license for any violations of DCA's pedicab licensing rules or regulations.

Administrative Code § 20-104(e)(3) provides that "[t]he commissioner or the commissioner's designee shall be authorized to suspend the license of any person pending payment of such fine or civil penalty or pending compliance with any other lawful order of the department."

As the article 78 court correctly concluded, the plain meaning of Administrative Code § 20-104(e)(3) is that "the license" which DCA is authorized to suspend upon failure to pay a fine or penalty is the particular license under which the fine or penalty was issued. Furthermore, the plain meaning of the phrase "or pending compliance with any other lawful order of the department" is that it is applicable to instances of

noncompliance with an agency order other than those based upon failure to pay a fine or penalty, which are already expressly referenced in the statute. And, while Administrative Code § 20-104(e)(3) authorizes the Department to suspend a license for non-payment of a fine, it makes no mention of authorizing the Department to refuse to renew a license for such failure.

In this case, because the fines in question were issued with respect to petitioner's pedicab driver license, rather than his business license, upon petitioner's failure to pay those fines, DCA's authority under section 20-104(e)(3) was limited to suspension of petitioner's driver license. Thus, the reference by the Deputy Director of Adjudication to possible suspension of any other DCA licenses held by petitioner would not be grounds for refusal to renew his pedicab business license, as such refusal would not be authorized by section 20-104(e)(3).

In any event, at the time petitioner committed the driver license violations, he was operating a pedicab owned by a business other than his own. Petitioner's own pedicab business played no role in the incident. Further, at the time petitioner applied for renewal of his business license, petitioner's pedicab driver license had already been suspended.

Accordingly, in refusing to renew petitioner's pedicab

business license based upon his unpaid driver license fines, DCA exceeded its authority under Administrative Code § 20-104(e)(3).

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

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

ENTERED: JUNE 28, 2016

DEPUTY CLERK

Friedman, J.P., Renwick, Andrias, Gische, Webber, JJ.

1390 The People of the State of New York, Respondent, SCI 2069/13 Ind. 4042/13

-against-

Bryant Green, Defendant-Appellant.

_____

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

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

_____

Judgment, Supreme Court, New York County (Larry R.C. Stephen, J.), rendered October 9, 2013, convicting defendant, upon his plea of guilty, of attempted burglary in the second degree, and sentencing him to a term of two years, plus 2 years of postrelease supervision, and judgment, same court (Rena K. Uviller, J. at plea; Robert M. Stolz, J. at sentencing), rendered May 14, 2014, convicting defendant of grand larceny in the fourth degree, and sentencing him to a concurrent term of one year, unanimously affirmed.

Defendant's claim that his plea was not knowing, intelligent, and voluntary because the court failed to specify the sentence he would receive if he violated the terms of his plea agreement, or that the sentence would include postrelease

supervision, was subject to preservation requirements in the circumstances presented. At the plea proceeding, defendant was told he would receive probation if he complied with the plea conditions, but would otherwise face an unspecified state prison sentence. Defendant had a practical ability to seek clarification, or to challenge the validity of the plea, during the plea and sentencing proceedings, as well as the various intervening calendar appearances at which defendant's new arrests and their effect on sentencing were discussed; however, he failed to do so (*see People v Williams* (__ NY3d __, 2016 NY Slip Op 02551 [2016]; *People v Crowder*, 24 NY3d 1134 [2015]). We decline to review this unpreserved claim in the interest of justice. In light of this determination, defendant's challenge to his grand larceny conviction is academic.

Although defendant did not knowingly waive his right to make

an excessive sentence claim on appeal (*see People v Maracle*, 19 NY3d 925, 928 [2012]; *People v Johnson*, 14 NY3d 483 [2010]), we perceive no basis for reducing the sentence.

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

ENTERED: JUNE 28, 2016

DEPUTY CLERK

Friedman, J.P., Sweeny, Webber, Gesmer, JJ.

1456 In re Frank Monte, Ind. 1021/14
[M-2189] Petitioner,

-against-

Deputy Director Vincent Miccoli,
et al.,
Respondents.

_____

Frank Monte, petitioner pro se.

Cyrus R. Vance, Jr., District Attorney, New York (Grace Vee of counsel), for respondents.

_____

The above-named petitioner having presented an application to this Court praying for an order, pursuant to article 78 of the Civil Practice Law and Rules,

Now, upon reading and filing the papers in said proceeding, and due deliberation having been had thereon,

It is unanimously ordered that the application be and the same hereby is denied and the petition dismissed, without costs or disbursements.

ENTERED: JUNE 28, 2016

DEPUTY CLERK

Mazzarelli, J.P., Andrias, Saxe, Gische, Kahn, JJ.

1525 In re Frank Monte, Ind. 1021/14
[M-1846] Petitioner,

-against-

Warden Maxsolaine Mingo, N.Y.C.
Dept. Of Corrections, etc., et al.,
Respondents.

_____

Frank Monte, petitioner pro se.

Cyrus R. Vance, Jr., District Attorney, New York (Grace Vee of counsel), for respondents.

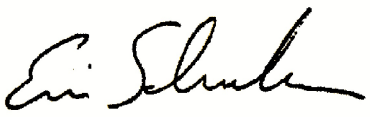
_____

The above-named petitioner having presented an application to this Court praying for an order, pursuant to article 78 of the Civil Practice Law and Rules, and for related relief,

Now, upon reading and filing the papers in said proceeding, and due deliberation having been had thereon,

It is unanimously ordered that the application and request for related relief be and the same hereby are denied and the petition dismissed, without costs or disbursements.

ENTERED: JUNE 28, 2016



DEPUTY CLERK

Sweeny, J.P., Acosta, Feinman, Kapnick, Webber, JJ.

1575 The People of the State of New York, Ind. 4346/12
Respondent,

-against-

Charles Scott,
Defendant-Appellant.

_____

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

Cyrus R. Vance, Jr., District Attorney, New York (John T. Hughes of counsel), for respondent.

_____

Judgment, Supreme Court, New York County (Juan M. Merchan, J.), rendered April 10, 2013, as amended May 1, 2013, convicting defendant, upon his plea of guilty, of attempted criminal possession of a weapon in the third degree, and sentencing him, as a second felony offender, to a term of 1½ to 3 years, unanimously affirmed.

Defendant's challenge to the voluntariness of his plea is unpreserved (*see People v Conceicao*, 26 NY3d 375 [2015]), and we decline to review it in the interest of justice. As an alternative holding, we find that the voluntariness of the plea was not undermined by the court's brief reference to defendant (who had numerous prior felony convictions) as a "discretionary persistent felony offender," especially since the court

immediately stated that the maximum sentence defendant could receive if convicted after trial was 3½ to 7 years; such a sentence would assume sentencing as a second, but not persistent, felony offender.

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

ENTERED: JUNE 28, 2016

DEPUTY CLERK

Sweeny, J.P., Acosta, Feinman, Kapnick, Webber, JJ.

1576 In re Jean Severe, Index 100669/14
Petitioner-Appellant,

-against-

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

_____

Ungaro & Cifuni, LLP, New York (Robert A. Ungaro of counsel), for appellant.

Zachary W. Carter, Corporation Counsel, New York (Marta Ross of counsel), for respondents.

_____

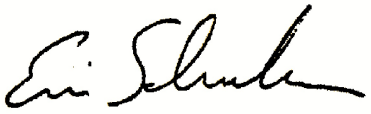
Order, Supreme Court, New York County (Cynthia S. Kern, J.), entered January 12, 2015, which denied the petition to annul the determination of respondent Board of Trustees of the Police Pension Fund, Article II, dated March 12, 2014, denying petitioner's application for accident disability retirement (ADR), unanimously affirmed, without costs.

In 2010, petitioner applied for ADR, but was subsequently retired on ordinary disability retirement after respondent Board of Trustees determined that he had, inter alia, cubital syndrome of his left elbow and bilateral carpal tunnel syndrome unrelated to his city service. In connection with petitioner's 2010 ADR application, the Medical Board found no objective substantiation of injury to his left shoulder.

Following the Board of Trustees' determination of petitioner's 2010 application, he applied in 2012 for ADR claiming a line of duty injury to his neck and left shoulder. The Medical Board's determination that the credible evidence before it failed to establish that petitioner sustained a disability due to any injury to his neck or left shoulder was not arbitrary or capricious (*see Matter of Cassidy v Ward*, 169 AD2d 482 [1st Dept 1991]). We note that the Board of Trustees' denial of petitioner's 2010 application for ADR is not before us on this appeal.

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

ENTERED: JUNE 28, 2016



DEPUTY CLERK

Sweeny, J.P., Acosta, Feinman, Kapnick, Webber, JJ.

1577 In re Patricia A., and Others,

Children Under Eighteen Years
of Age, etc.,

Norman A., et al.,
Respondents-Appellants,

Administration for Children's Services,
Petitioner-Respondent.

_____

Schpoont & Cavallo, LLP, New York (Carrie Anne Cavallo of counsel), for appellants.

Zachary W. Carter, Corporation Counsel, New York (Janet L. Zaleon of counsel), for respondent.

Tamara A. Steckler, The Legal Aid Society, New York (Marcia Egger of counsel), attorney for the children.

_____

Order, Family Court, New York County (Stewart H. Weinstein, J.), entered on or about April 28, 2015, which denied respondent parents' motion to change the subject children's permanency goal from adoption to reunification, unanimously affirmed, without costs.

The appeal is not moot (*see Matter of Jacelyn TT. [Tonia TT.—Carlton TT.*, 80 AD3d 1119, 1120 [3d Dept 2011]). In the order on appeal, Family Court properly denied respondents' motion, because a preponderance of the evidence in the record supported the determination that the permanency goal of adoption

was in the children's best interest (*id.* at 1120-1121; *see also Matter of Cristella B.*, 65 AD3d 1037, 1039 [2d Dept 2009]).

We have considered respondents' remaining contentions and find them unavailing.

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

ENTERED: JUNE 28, 2016

DEPUTY CLERK

Sweeny, J.P., Acosta, Feinman, Kapnick, Webber, JJ.

1578-
1579-
1580 Index 309886/10

Pedro Castillo, as Administrator
of the Estate of Jessenia Castillo,
Deceased,
Plaintiff-Appellant,

-against-

The Mount Sinai Hospital, et al.,
Defendants-Respondents,

Dominick Hollman, M.D, et al.,
Defendants.

_____

Wolf & Fuhrman, LLP, Bronx (Carole R. Moskowitz of counsel), for appellant.

Bartlett, McDonough & Monaghan, LLP, Mineola (Robert G. Vizza of counsel), for respondents.

_____

Judgment, Supreme Court, Bronx County (Stanley Green, J.), entered on or about February 19, 2015, dismissing the complaint as against defendants Mount Sinai Hospital and Arik Olson, M.D., (defendants) unanimously affirmed, without costs. Order same court and Justice, entered on or about June 16, 2015, which, upon reargument, adhered to the original order, same court and Justice, entered on or about February 18, 2015, which granted defendants' motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

Defendants made a prima facie showing that they did not deviate from the standard of care in treating plaintiff's decedent. In support of his contention that defendants' failure to treat the decedent with the drug Eculizumab was a proximate cause of her death, plaintiff submitted an expert affirmation that fell short of establishing that Eculizumab was the standard of care for treatment of atypical hemolytic uremic syndrome (aHUS) (*see Alvarado v Miles*, 32 AD3d 255 [1st Dept 2006], *affd* 9 NY3d 902 [2007]). The expert's strongest statement was that Eculizumab was "a promising new therapy for the treatment of [aHUS] [that] should have been known to her physicians and used by them."

The medical literature submitted by plaintiff shows that some researchers in the medical community believed in 2009 that the drug Eculizumab was a promising new therapy for the treatment of aHUS, but it also shows that the drug was not FDA-approved for use in aHUS, that there had been no controlled studies, and that there were no established protocols, for example, dosage or length of treatment, for its use. The literature shows, moreover, that the treatment protocol for aHUS in 2009 (plasma therapy) was the same as that for thrombotic thrombocytopenic purpura (TTP), another syndrome included in the decedent's

differential diagnosis. Plasma therapy was the very treatment that the decedent received.

While Supreme Court purportedly denied plaintiff's motion for reargument, since it addressed the merits of the motion and adhered to the original determination, the order is appealable (*see Lipsky v Manhattan Plaza, Inc.*, 103 AD3d 418 [1st Dept 2013]).

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

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

ENTERED: JUNE 28, 2016

DEPUTY CLERK

Sweeny, J.P., Acosta, Feinman, Kapnick, Webber, JJ.

1581 David Blumenstein, Index 651168/14
Plaintiff-Appellant,

-against-

Waspit Group, Inc., et al.,
Defendants-Respondents.

_____

Blackstone Law Group LLP, New York (Alexander J. Urbelis of counsel), for appellant.

Mintz & Fraade, P.C., New York (Alan P. Fraade of counsel), for respondents.

_____

Order, Supreme Court, New York County (Donna M. Mills, J.), entered October 20, 2014, which granted defendants' motion for reargument, and, upon reargument, vacated so much of a prior order as granted plaintiff's motion for summary judgment in lieu of complaint (CPLR 3213), and denied plaintiff's motion, unanimously reversed, on the law, with costs, and plaintiff's motion granted. The Clerk is directed to enter judgment accordingly.

Plaintiff established his entitlement to summary judgment in lieu of complaint by submitting a promissory note executed by defendants and proof of defendants' failure to make payments according to its terms (*see Zyskind v FaceCake Mktg. Tech., Inc.*, 101 AD3d 550, 551 [1st Dept 2012]).

In opposition, defendants failed to raise an issue of fact as to a bona fide defense (*see id.*). Their argument that the note was usurious improperly relies on facts extrinsic to the note (*see Alard, L.L.C. v Weiss*, 1 AD3d 131 [1st Dept 2003]; *see generally Interman Indus. Prods. v R.S.M. Electron Power*, 37 NY2d 151, 155 [1975]). Their argument that the note was not an instrument for the payment of money only is defeated by their failure to establish that the note and the deed of settlement executed simultaneously with it were inextricably intertwined (*compare Technical Tape, Inc. v Spray Tuck*, 131 AD2d 404, 406 [1st Dept 1987] ["The note is expressly subject to the terms and conditions of the agreement of sale . . . [which] outlines a complicated formula for the finalization of the price, and requires the production of documents and records in relation thereto"]). While the note states that it was executed "pursuant to" and "in consideration of" the deed, it does not state that it was "subject to the terms and conditions of" the deed (*see id.*).

Nothing in the deed affects the value of the principal due under the note or otherwise alters defendants' obligations to pay under the note (*see e.g. Boland v Indah Kiat Fin. (IV) Mauritius*, 291 AD2d 342 [1st Dept 2002]).

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

ENTERED: JUNE 28, 2016

DEPUTY CLERK

Sweeny, J.P., Feinman, Gische, Kapnick, JJ.

1582 Liberty Surplus Insurance Corporation, et al., Plaintiffs-Appellants, Index 154336/14E

-against-

Harleysville Insurance Company of New York, et al., Defendants-Respondents.

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Hardin, Kundla, McKeon & Poletto, P.A., New York (George R. Hardin of counsel), for appellants.

Riker Danzig Scherer Hyland & Perretti LLP, New York (Lance J. Kalik of counsel), for Harleysville Insurance Company of New York, respondent.

O'Connor Redd LLP, Port Chester (Joseph M. Cianflone of counsel), for Big Shot Electric Corp., respondent.

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Order, Supreme Court, New York County (Cynthia S. Kern, J.), entered December 11, 2014, which granted defendant Big Shot Electrical Corp.'s motion to dismiss the complaint as against it, and sua sponte dismissed the complaint as against defendant Harleysville Insurance Company of New York and nominal defendant Slawomir Pietrzyk, unanimously reversed, on the law, without costs, the dismissals vacated, and the matter remanded to the Supreme Court.

While we recognize that there are similar issues, and parties with aligned interests, in this and the third party

action pending in Supreme Court, Kings County, entitled *St. Hilda's & St. Hugh's Sch. & Eurostruct, Inc. v Big Shot Elec. Corp.* (Index no. 12254/13), we disagree that this declaratory judgment action should be dismissed outright pursuant to CPLR 3211(a)(4). This decision is without prejudice to the parties seeking relief in Kings County for a transfer of venue and consolidation and/or to have this action joined with the pending Kings County action. We do not reach the issue or decide the merits of Harleysville's arguments in favor of dismissal since those arguments were not raised before nor considered by the motion court.

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

ENTERED: JUNE 28, 2016

DEPUTY CLERK

Sweeny, J.P., Acosta, Feinman, Kapnick, Webber, JJ.

1583-
1583A Index 117013/09

Ithilien Realty Corp.,
Plaintiff-Appellant-Respondent,

-against-

180 Ludlow Development LLC,
Defendant-Respondent-Appellant,

Prime Asset Funding LLC,
Defendant.

_____

Solomon & Bernstein, New York (Joel Bernstein of counsel), for appellant-respondent.

Rex Whitehorn & Associates, P.C., Great Neck (Rex Whitehorn of counsel), for respondent-appellant.

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Order and judgment (one paper), Supreme Court, New York County (Debra A. James, J.), entered October 20, 2015, which, to the extent appealed from as limited by the briefs, denied plaintiff Ithilien Realty Corp.'s (Ithilien) motion for summary judgment on its second cause of action for declaratory judgment with regard to breach of contract claims for (1) failure to procure insurance; (2) numerous instances of damage to its property; and (3) service of an unauthorized notice of cure, and dismissed those claims pursuant to CPLR 3212(b), unanimously affirmed, without costs. Appeal from said order and judgment by defendant 180 Ludlow Development LLC, unanimously dismissed,

without costs, as abandoned.

In this action arising from a dispute between neighboring property owners during the demolition of a preexisting structure on defendant's property, and the construction of what is now a hotel on plaintiff's property in downtown Manhattan, the IAS court properly denied plaintiff summary judgment on its second cause of action insofar as it asserted declaratory judgment claims sounding in breach of contract.

A cause of action for declaratory judgment is "unnecessary and inappropriate when the plaintiff has an adequate, alternative remedy in another form of action, such as breach of contract" or injunctive relief (*Apple Records v Capitol Records*, 137 AD2d 50, 54 [1988]; *Arthur Young & Co. v Fleischman*, 85 AD2d 571, 571 [1st Dept 1981]). The IAS court granted Ithilien the main form of relief it requested in this action by enjoining the enforcement of defendant's notice to cure (the third cause of action). With respect to its other allegations, Ithilien has or should have sought the appropriate relief through its first cause of action sounding in breach of contract (*id.*).

Ithilien has not moved for summary judgment on its first cause of action. And in any event, there remain numerous factual

issues surrounding who or what caused the damage to Ithilien's property, and whether defendant breached the parties' agreement as to procurement of insurance.

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

ENTERED: JUNE 28, 2016

DEPUTY CLERK

Sweeny, J.P., Acosta, Feinman, Kapnick, Webber, JJ.

1584 State of New York ex rel. Thomas C. Willcox, Plaintiff-Appellant, -against- Credit Suisse Securities (USA) LLC, etc., et al., Defendants-Respondents. Index 100185/13

Thomas C. Willcox, appellant pro se.

Morgan, Lewis & Bockius LLP, New York (Jeffrey Q. Smith of counsel), for respondents.

Order, Supreme Court, New York County (Kelly O'Neill Levy, J.), entered July 22, 2015, which, insofar appealed from as limited by the briefs, granted defendants' motion to dismiss the amended complaint and denied relator Thomas C. Willcox's motion for leave to file a third amended complaint, unanimously affirmed, without costs.

As relator basically concedes on appeal, the claims pled in his amended complaint were time-barred. Hence, the real issue is whether the court properly denied his motion for leave to file a third amended complaint.

While leave to amend should be freely given (*see e.g. McGhee v Odell*, 96 AD3d 449, 450 [1st Dept 2012]), "a court must examine

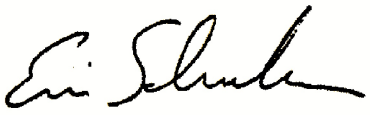
the merit of the proposed amendment in order to conserve judicial resources" (*360 W. 11th LLC v ACG Credit Co. II, LLC,* 90 AD3d 552, 553 [1st Dept 2011]). Relator fails to state a claim for violation of State Finance Law § 189(1)(g).[1] His theory – that *if* defendants' alleged underreporting of their income in 1999 created a deficiency that carried over into subsequent years, their New York state corporate franchise tax returns filed between January 2002 and January 2013 constituted false claims under the doctrine of implied false certification – is speculative. A complaint is properly dismissed if it is "based on pure speculation" (*HT Capital Advisors v Optical Resources Group,* 276 AD2d 420, 420 [1st Dept 2000]; *see also United States ex rel. Ramos v Icahn Sch. of Medicine at Mt. Sinai,* 2015 WL 5472933, *7, 2015 US Dist LEXIS 124090, *19 [SD NY, Sept. 16, 2015, No. 12 Civ 5089(GBD)] ["speculative general assertion" not enough for False Claims Act]; *Ebeid ex rel. United States v Lungwitz,* 616 F3d 993, 999 [9th Cir 2010] [relator must "supply reasonable indicia that false claims were actually submitted"],

[1]On appeal, he does not contest the motion court's rulings regarding conspiracy; therefore, we need not examine his cause of action for violation of section 189(1)(c).

cert denied 562 US 1102 [2010]).[2] Furthermore, "the implied certification theory of liability should not be applied expansively" (*United States ex rel. Wilkins v United Health Group, Inc.*, 659 F3d 295, 307 [3d Cir 2011]; *see also Mikes v Straus*, 274 F3d 687, 699 [2d Cir 2001]), and State Finance Law § 189(1)(g) requires the "false record or statement" to be "*material* to [the] obligation to pay . . . money . . . to the state . . . government" (emphasis added).

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

ENTERED: JUNE 28, 2016



DEPUTY CLERK

[2]"The [New York False Claims Act] follows the federal False Claims Act . . . and therefore it is appropriate to look toward federal law when interpreting the New York act" (*State of New York ex rel. Seiden v Utica First Ins. Co.*, 96 AD3d 67, 71 [1st Dept 2012], *lv denied* 19 NY3d 810 [2012]).

Sweeny, J.P., Acosta, Feinman, Kapnick, Webber, JJ.

1585 Andrea V. Liberman, et al., Index 602321/09
Plaintiffs, 590067/11

-against-

Cayre Synergy 73rd LLC, et al.,
Defendants-Respondents,

Cayre 73rd LLC, et al.,
Defendants.

- - - - -

Cayre Synergy 73rd LLC,
Third-Party Plaintiff-Respondent,

-against-

MG New York Architect PLLC, et al.,
Third-Party Defendants,

HHF Design Consulting, Ltd., et al.,
Third-Party Defendants-Appellants,

Foremost Contracting, LLC,
Third-Party Defendant-Respondent.

_____

Rawle & Henderson, LLP, New York (Anthony D. Luis of counsel), for HHF Design Consulting, Ltd. and Helmut Hans Fenster, appellants.

Catalano, Gallardo & Petropoulos, LLP, Jericho (Domingo Gallardo of counsel), for Alcon Builders Group, Inc. and Darragh Collins, appellants.

Seyfarth Shaw, LLP, New York (Eddy Salcedo of counsel), for respondent.

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Order, Supreme Court, New York County (Paul Wooten, J.),

entered March 20, 2015, which, to the extent appealed from,

denied third-party defendants Alcon Builders Group and Darragh Collins's (together, Alcon) and HHF Design Consulting Ltd. and Helmut Hans Fenster's (together, HHF) motions for summary judgment dismissing the third-party complaint as against them, unanimously affirmed, without costs.

The motion court correctly rejected third-party defendants' argument that the decision of this Court in a prior appeal in this case bars third-party plaintiff's claims against them for indemnification (*see* 108 AD3d 426 [1st Dept 2013]). In that decision, we found that the work that Alcon, the general contractor on the condominium conversion, was performing in plaintiffs' apartment pursuant to a direct agreement with plaintiffs could not have been the cause of any leaks. We did not rule on the claims at issue on this appeal: whether Alcon can be held liable for water damage caused by work it did as general contractor on behalf of the building sponsor (third-party plaintiff) and the merits of the sponsor's indemnification claims as against HHF, a project engineering contractor.

The contractors' argument, raised for the first time on appeal, that the sponsor's indemnification claims must be dismissed as against them because the sponsor itself was

negligent (*see* 108 AD3d 426) is without merit (*see 17 Vista Fee Assoc. v Teachers Ins. & Annuity Assn. of Am.*, 259 AD2d 75 [1st Dept 1999]).

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

ENTERED: JUNE 28, 2016

DEPUTY CLERK

Sweeny, J.P., Acosta, Feinman, Kapnick, Webber, JJ.

1586 The People of the State of New York, Ind. 4277/11
Respondent,

-against-

Juan Martinez,
Defendant-Appellant.

_____

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

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

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Judgment, Supreme Court, New York County (Ruth Pickholz, J.), rendered June 7, 2013, convicting defendant, after a jury trial, of two counts of robbery in the second degree, and sentencing him, as a second felony offender, to concurrent terms of 10 years, unanimously affirmed.

The verdict was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). There is no basis for disturbing the jury's determinations concerning

identification and credibility. The evidence also supports the conclusion that property was taken from the victim during the incident.

We do not find the sentence to be excessive.

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

ENTERED: JUNE 28, 2016

DEPUTY CLERK

Sweeny, J.P., Acosta, Feinman, Kapnick, Webber, JJ.

1587 In re Johnny Eugene P. III,
Petitioner-Appellant,

-against-

Michelle K. P.,
Respondent-Respondent.

_____

Neal D. Futerfas, White Plains, for appellant.

Kass & Navins, PLLC, Tarrytown (Dana Forster-Navins of counsel), for respondent.

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

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Order, Family Court, New York County (Christopher W. Coffey, Referee), entered on or about June 30, 2015, which, after a hearing, denied petitioner's petition for modification of an order of custody to award the parties joint physical custody of their children, and granted respondent's amended petition to modify the order to grant her sole legal custody, unanimously affirmed, without costs.

Although petitioner established a change in circumstances that would support a modification in custody by demonstrating that he was employed and had an apartment, he failed to establish that joint physical custody would be in the children's best interests (*see Matter of Sergei P. v Sofia M.*, 44 AD3d 490 [1st

Dept 2007]). The children have resided primarily with respondent their entire lives; she cared for and provided for them while petitioner was seeking an apartment and getting himself established. Moreover, there is evidence that staying with petitioner is disruptive of the children's routines to the children's detriment.

The record supports the court's determination that the best interests of the children would be served by leaving sole physical custody with respondent and awarding respondent sole legal custody as well (*see Eschbach v Eschbach*, 56 NY2d 167, 173 [1982]; *Matter of Jamel W. v Stacey J.*, 136 AD3d 552 [1st Dept 2016]). There has been a complete breakdown in communications between the parties, who are unable to reach agreement on any issue involving the children (*see e.g. Matter of Jamel W.*, 136 AD3d at 552-553; *Sendor v Sendor*, 93 AD3d 586 [1st Dept 2012]).

The court providently exercised its discretion in denying petitioner's request to disqualify the attorney for the children.

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

ENTERED: JUNE 28, 2016

DEPUTY CLERK

Sweeny, J.P., Acosta, Feinman, Kapnick, Webber, JJ.

1588 Probate Proceedings, Estate of Duncan A. MacGuigan, Deceased. SCI 1344/12

- - - - -

Lorre Eng,
Proponent-Respondent,

-against-

Candace Roosevelt,
Objectant-Appellant.

_____

Teahan & Constantino LLP, Millbrook (Stephen C. F. Diamond of counsel) and Law Office of Laurence G. Bodkin, Larchmont (Laurence G. Bodkin of counsel), for appellant.

McLaughlin & Stern LLP, New York (Daniel J. Horwitz of counsel), for respondent.

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Order, Surrogate's Court, New York County (Rita Mella, S.), entered April 15, 2015, which, to the extent appealed from as limited by the briefs, granted proponent's motion for summary judgment dismissing the objection based on the ground of undue influence, unanimously affirmed, without costs.

In order to invalidate a will based on undue influence, it must be shown that the influence exerted "amounted to a moral coeercion, which restrained independent action and destroyed free agency, or which, by importunity which could not be resisted, constrained the testator to do that which was against his free

will and desire, but which he was unable to refuse or too weak to resist. It must not be the promptings of affection; the desire of gratifying the wishes of another; the ties of attachment arising from consanguinity, or the memory of kind acts and friendly offices, but a coercion produced by importunity, or by a silent, resistless power which the strong will often exercise[] over the weak and infirm, and which could not be resisted, so that the motive was tantamount to force or fear" (*Children's Aid Socy. of City of N.Y. v Loveridge,* 70 NY 387, 394-395 [1877]; *Matter of Walther,* 6 NY2d 49, 53-54 [1959]).

The court properly concluded that proponent, decedent's long-term girlfriend, did not exert such influence over decedent based on the testimony of his financial advisor that she was reluctant to influence decedent's investment decisions and receive his power of attorney and the evidence of his treating physician that he suffered only mild memory loss at the time the will was executed. Moreover, the record reflects that the attorney who prepared the will and the witnesses to its execution all believed that decedent's determinations were based on his own free will. Objectant, decedent's sister, did not dispute that she had very limited contact with him over the years and that their relationship was distant.

Objectant contends that the financial assistance and loan decedent provided to proponent was evidence of proponent's undue influence over decedent. However, it was undisputed that decedent initially required proponent to repay the loan in monthly installments, and objectant does not challenge decedent's decision to provide proponent with his power of attorney and health care proxy.

The court properly rejected objectant's claim that proponent and decedent were in a confidential relationship, which would place the burden on proponent to offer an explanation of the bequest other than her undue influence (*see Matter of Bach,* 133 AD2d 455 [2d Dept 1987]). As noted, there was no showing that proponent had control over decedent, and, in any event, the bequest was explained by the evidence of longstanding ties of affection between decedent and proponent.

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

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

ENTERED: JUNE 28, 2016

DEPUTY CLERK

Sweeny, J.P., Acosta, Feinman, Kapnick, Webber, JJ.

1589 Maria Rose Gallimore, Index 805094/13
Plaintiff-Appellant,

-against-

Karen M. Allison, M.D., et al.,
Defendants-Respondents,

Lenox Hill Hospital,
Defendant.

_____

Arnold E. DiJoseph, P.C., New York (Arnold E. DiJoseph, III of counsel), for appellant.

Ekblom & Partners, LLP, New York (Deborah I. Meyer of counsel), for respondents.

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Judgment, Supreme Court, New York County (Alice Schlesinger, J.), entered July 14, 2015, to the extent appealed from as limited by the briefs, dismissing the complaint as against defendants Karen M. Allison, M.D. and Karen M. Allison, M.D., P.C., and bringing up for review an order, same court and Justice, entered on or about June 23, 2015, which, inter alia, granted defendants' motion for summary judgment, unanimously modified, on the law, to deny the motion to the extent it seeks summary dismissal of the cause of action alleging lack of informed consent, and otherwise affirmed, without costs.

The court properly granted the motion of defendants Karen M.

Allison, M.D., an ophthalmologist, and her P.C., for summary judgment dismissing the malpractice claim arising from the care rendered to plaintiff in the performance of cataract extraction surgery. Defendants, by their expert, demonstrated, prima facie, that Dr. Allison took an adequate medical history from plaintiff, but plaintiff failed to disclose that she carried the sickle cell trait. Defendants' expert further established that Dr. Allison did not depart from accepted medical practices during the surgery, and opined that it was the surgeon who chose which anaesthesia to use and that all options available to Dr. Allison were proper.

In opposition, plaintiff's expert failed to raise a triable issue of fact on her malpractice claims. Plaintiff's expert's opinion that Dr. Allison's use of a retrobulbar anaesthetic injection caused plaintiff's arterial occlusion cannot cast her in damages, since the expert opined that the arterial occlusion arose from either a retrobulbar hemorrhage - which an MRI showed was not present - or sickling of hemoglobin in a "patient who is sickle cell trait positive," a condition about which Dr. Allison had no knowledge.

While plaintiff's expert further opined that Dr. Allison was negligent in the administration of the injection itself, the

expert failed to explain what she did that was negligent. This failure rendered the opinion conclusory, and insufficient to defeat defendants' motion for summary judgment (*Roques v Noble*, 73 AD3d 204, 207 [1st Dept 2010]; *see Alvarez v Prospect Hosp.*, 68 NY2d 320, 324-325 [1986]).

In opposition to defendants' prima facie showing that Dr. Allison adequately informed plaintiff of all the risks, benefits and alternatives to cataract surgery, plaintiff raised issues of fact as to whether Dr. Allison informed her of the potential complications associated with the anaesthetic injection Dr. Allison administered and the available alternatives thereto (*D'Esposito v Kung*, 65 AD3d 1007, 1008 [2nd Dept 2009]; *see Janeczko v Russell*, 46 AD3d 324, 325 [1st Dept 2007]). Accordingly, plaintiff's cause of action alleging lack of informed consent is reinstated.

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

ENTERED: JUNE 28, 2016

DEPUTY CLERK

Sweeny, J.P., Acosta, Feinman, Kapnick, Webber, JJ.

1591 The People of the State of New York, Ind. 302/14
Respondent,

-against-

Diamond M.,
Defendant-Appellant.

_____

Richard M. Greenberg, Office of the Appellate Defender, New York (Matthew W. Wasserman of counsel), for appellant.

Darcel D. Clark, District Attorney, Bronx (James Wen of counsel), for respondent.

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Judgment, Supreme Court, Bronx County (Judith Lieb, J.), rendered September 5, 2014, convicting defendant, upon her plea of guilty, of assault in the second degree, adjudicating her a youthful offender, and sentencing her to a term of 1 1/3 - 4 years, unanimously affirmed.

Although we do not find that defendant made a valid waiver of the right to appeal (*see People v Powell*, __ AD3d __, 2016 NY

Slip Op 04296), we perceive no basis for reducing the sentence.

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

ENTERED: JUNE 28, 2016

CLERK

Sweeny, J.P., Acosta, Feinman, Kapnick, Webber, JJ.

1592 Sharon Ingram, Index 107442/10
Plaintiff-Respondent,

-against-

Life Fitness, etc., et al.,
Defendants-Appellants.

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Reed Smith LLP, Chicago, IL (M. David Short of the bar of the State of Illinois, admitted pro hac vice, of counsel), for Life Fitness, a Division of Brunswick Corporation, appellant.

Gordon & Rees, LLP, Harrison (Lorraine M. Girolamo of counsel), for Town Sports International Holdings, Inc., appellant.

The Law Firm of Vaughn, Weber & Prokope, PLLC, Mineola (John A. Weber IV of counsel), for respondent.

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Order, Supreme Court, New York County (Manuel J. Mendez, J.), entered April 6, 2015, which, insofar as appealed from as limited by the briefs, denied defendants' motions for summary judgment dismissing the negligence and strict products liability claims, unanimously reversed, on the law, without costs, and the motion granted. The Clerk is directed to enter judgment dismissing the complaint.

The negligence claim is barred as a matter of law by the doctrine of primary assumption of the risk (*see Morgan v State of New York*, 90 NY2d 471, 484 [1997]). Plaintiff's testimony established that she was a long-time user of treadmills, that she

used defendant Town Sports International Holdings, Inc.'s sports club five times a week after joining it, that she had several times seen other club members jump off treadmills that were still running, and that she had used treadmills at the club at least 10 times. Given plaintiff's familiarity with the use and operation of treadmills, she assumed the obvious and inherent risks attendant to their use (*see id.* at 484; *DiBenedetto v Town Sports Intl., LLC*, 118 AD3d 663 [2d Dept 2014]; *Davis v Town Sports Intl.*, 49 Misc 3d 128[A], 2015 NY Slip Op 51393[U] [App Term, 1st Dept 2015]; *see also Digiulio v Gran, Inc.*, 74 AD3d 450 [1st Dept 2010], *affd* 17 NY3d 765 [2011]). Plaintiff failed to raise a triable issue of fact as to whether defendant Town Sports "concealed or unreasonably increased [those] risks" (*Morgan*, 90 NY2d at 485).

The strict products liability claim must be dismissed because there is no evidence that the treadmill at issue was defective (*see Voss v Black & Decker Mfg. Co.*, 59 NY2d 102, 106 [1983]). Plaintiff alleges a design defect relating to the feature of the treadmill intended automatically to stop the treadmill after 30 seconds of non-use ("SmartStop"). Defendant Life Fitness, the manufacturer, demonstrated that the treadmill complied with industry safety standards, which do not require

automatic stopping mechanisms, and that the treadmill had another safety feature to alert users to the moving of the belt. Plaintiff admitted that she "walked right up to [the treadmill] and stepped onto it"; thus, she had no way of knowing whether or not 30 seconds had elapsed since its last use.

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

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

ENTERED: JUNE 28, 2016

DEPUTY CLERK

Sweeny, J.P., Acosta, Feinman, Kapnick, Webber, JJ.

1593 Richard Josephberg, Index 650915/13
Plaintiff-Appellant,

-against-

Crede Capital Group, LLC, et al.,
Defendants-Respondents.

_____

Liddle & Robinson, L.L.P., New York (Blaine H. Bortnick of counsel), for appellant.

Jackson Lewis, P.C., New York (Conrad S. Kee of counsel), for respondents.

_____

Order, Supreme Court, New York County (Melvin L. Schweitzer, J.), entered April 17, 2014, which granted defendants' motion to dismiss the complaint, unanimously reversed, on the law, without costs, and the motion denied.

The motion court erred in dismissing plaintiff's breach of contract causes of action as barred by the statute of frauds (*see* CPLR 3211[a][5]). Plaintiff alleges that defendant Socius orally agreed to provide him with 15% of the profits generated by financing transactions originated by him. The emails to which he points, authored by defendants Wachs and Peizer, equal partners in Socius, confirm the material elements of this alleged agreement and therefore satisfy the requirements of the statute

of frauds (*see Morris Cohon & Co. v Russell*, 23 NY2d 569, 574-575 [1969]; *see also* General Obligations Law § 5-701[a][10]).

Since the statute of frauds constituted the motion court's only basis for dismissal of plaintiff's equitable claims, and defendants do not on appeal proffer any alternative basis for affirmance of the dismissal of those causes of action, plaintiff's satisfaction of the statute of frauds likewise warrants reinstatement of his promissory estoppel, unjust enrichment, and quantum meruit causes of action.

Reinstatement of the unjust enrichment cause of action warrants reinstatement of the constructive trust cause of action, particularly given defendants' agreement on appeal, that, under appropriate circumstances, unjust enrichment, standing alone, may support the imposition of a constructive trust (*see Simonds v Simonds*, 45 NY2d 233, 241-242 [1978]).

The motion court erred in dismissing plaintiff's Labor Law § 191(1)(c) claim on the ground that he was not a "commission

salesperson" within the meaning of that statute (*see* Labor Law §§ 191[1][c]; 190[6]), as the record does not supply any basis upon which to make such a determination (*see Matter of Dean Witter Reynolds, Inc. v Ross*, 75 AD2d 373, 380-381 [1st Dept 1980]).

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

ENTERED: JUNE 28, 2016

DEPUTY CLERK

Sweeny, J.P., Acosta, Feinman, Kapnick, Webber, JJ.

1596N The American Youth Dance Theater, Inc., Plaintiff-Respondent, Index 650288/15

-against-

4000 East 102nd St. Corp., Defendant-Appellant.

Cyruli Shanks Hart & Zizmor LLP, New York (James E. Schwartz of counsel), for appellant.

Albanese & Albanese LLP, Garden City (Diana C. Prevete of counsel), for respondent.

Order, Supreme Court, New York County (Shirley Werner Kornreich, J.), entered February 19, 2016, which granted plaintiff tenant's for a *Yellowstone* injunction, unanimously affirmed, without costs.

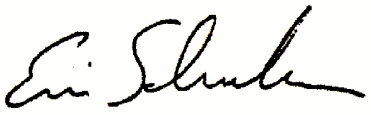
The motion court properly found that plaintiff's defaults were curable and that, having demonstrated its willingness to cure them, plaintiff should be permitted to do so within a reasonable time (*see Baruch, LLC v 587 Fifth Ave., LLC*, 44 AD3d 339 [1st Dept 2007]; *Empire State Bldg. Assoc. v Trump Empire State Partners*, 245 AD2d 225, 229 [1st Dept 1997]). The lease, lease rider, and lease amendment, as well as the course of dealing between the parties, establish that the parties intended

that plaintiff would continue working toward obtaining the certificate of occupancy (C/O) after the deadline passed, and an uncontroverted affidavit by plaintiff's president detailing plaintiff's efforts to obtain approval of the renovation plans and the C/O establishes that, despite its best efforts, plaintiff was unable to obtain a C/O.

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

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

ENTERED: JUNE 28, 2016



DEPUTY CLERK

Sweeny, J.P., Acosta, Feinman, Kapnick, Webber, JJ.

1597 In re Frank Monte, Ind. 1021/14
[M-2595] Petitioner,

-against-

Deputy Director Vincent Miccoli,
et al.,
Respondents.

_____

Frank Monte, petitioner pro se.

Cyrus R. Vance, Jr., District Attorney, New York (Grace Vee of counsel), for respondents.

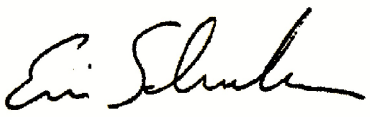
_____

The above-named petitioner having presented an application to this Court praying for an order, pursuant to article 78 of the Civil Practice Law and Rules,

Now, upon reading and filing the papers in said proceeding, and due deliberation having been had thereon,

It is unanimously ordered that the application be and the same hereby is denied and the petition dismissed, without costs or disbursements.

ENTERED: JUNE 28, 2016



DEPUTY CLERK

Friedman, J.P., Andrias, Saxe, Kahn, JJ.

1598 The People of the State of New York, Ind. 585/11
Respondent,

-against-

Keybe Ortiz,
Defendant-Appellant.

_____

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

Darcel D. Clark, District Attorney, Bronx (Shannon Henderson of counsel), for respondent.

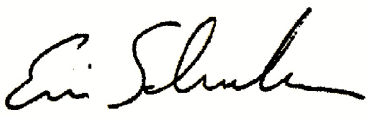
_____

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, Bronx County (Troy K. Webber, J.), rendered July 18, 2013,

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.

ENTERED: JUNE 28, 2016



DEPUTY CLERK

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

Friedman, J.P., Andrias, Saxe, Richter, Kahn, JJ.

1600 In re Madison M.,

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

Jennifer P.,
Respondent-Appellant,

The Administration for Children's Services,
Petitioner-Respondent.

_____

Simpson Thacher & Bartlett LLP, New York (Robert Arnay of counsel), for appellant.

Zachary W. Carter, Corporation Counsel, New York (Ellen Ravitch of counsel), for respondent.

Karen D. Steinberg, New York, attorney for the child.

_____

Order, Family Court, Bronx County (Valerie Pels, J.), entered on or about February 10, 2015, which, after a hearing, found that respondent mother had neglected the subject child, unanimously affirmed, without costs.

Petitioner agency established by a preponderance of the evidence that the mother had neglected the child by misusing a drug or drugs (*see* Family Ct Act § 1012[f][i][B]). The mother had a prior neglect finding against her with respect to another child based on her misuse of drugs; was arrested for drug use within nine months of her pregnancy with the subject child;

initially refused to submit herself or the child for drug screening when the child was born, even though the mother appeared to be under the influence of drugs; was present at crack houses with the child when the child was only 18 days old; and was arrested for possession of crack cocaine and a crack pipe after a detective observed her at the crack houses. This evidence, and her behavior of leaving the newborn child in the lobby of one of the crack houses when she saw the detective, evidenced "a substantial impairment of judgment[] or a substantial manifestation of irrationality" as a result of repeated misuse of drugs sufficient to trigger the statutory presumption of neglect, which she failed to rebut (Family Ct Act § 1046[a][iii]; *see Matter of Nasiim W. [Keala M.]*, 88 AD3d 452, 453-454 [1st Dept 2011]).

The mother failed to preserve for appellate review her contention that Family Court had improperly granted the attorney for the child's request to conform the pleadings to the proof (*see Matter of Richard S. [Lacey P.]*, 130 AD3d 630, 632-633 [2d Dept 2015], *lv denied* 26 NY3d 906 [2015]), and, in any event, her

argument is unavailing (*id.*).

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

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

ENTERED: JUNE 28, 2016

DEPUTY CLERK

Friedman, J.P., Andrias, Saxe, Richter, Kahn, JJ.

1601 In re Okolie Cyril, Index 101364/13
Petitioner,

-against-

New York City Department of Housing
Preservation and Development, et al.,
Respondents.

_____

Okolie Cyril, petitioner pro se.

Zachary W. Carter, Corporation Counsel, New York (Jonathan Popolow of counsel), for New York City Department of Housing Preservation and Development, respondent.

_____

Determination of respondent New York City Department of Housing Preservation and Development, dated June 5, 2013, which, after a hearing, issued a certificate of eviction upon a finding that the Mitchell-Lama apartment leased to petitioner was not his primary residence, unanimously confirmed, the petition denied, and the proceeding brought pursuant to CPLR article 78 (transferred to this Court by order of Supreme Court, New York County [Joan B. Lobis, J.], entered April 23, 2014), dismissed, without costs.

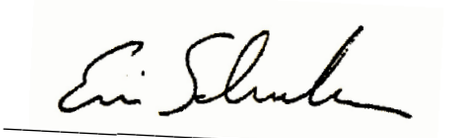
The determination that petitioner failed to maintain the apartment as his primary residence, in violation of the rules applicable to Mitchell-Lama apartments (*see* 28 RCNY 3-02[n][4]),

is supported by substantial evidence (*see 300 Gramatan Ave. Assoc. v State Div. of Human Rights*, 45 NY2d 176, 181-182 [1978]), including evidence that he used an address other than the apartment's address for voting registration purposes, in unrelated court proceedings, and on his tax returns and W2 forms (*see* 28 RCNY 3-02[n][4][i], [ii]; *Matter of Ayvazayan v City of N.Y. Dept. of Hous. Preserv. & Dev.*, 129 AD3d 494 [1st Dept 2015]; *Matter of Santiago v East Midtown Plaza Hous. Co., Inc.*, 59 AD3d 174 [1st Dept 2009]).

We have considered petitioner's remaining contentions, including his argument that the record is incomplete, and find them unavailing.

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

ENTERED: JUNE 28, 2016



DEPUTY CLERK

Friedman, J.P., Andrias, Saxe, Richter, Kahn, JJ.

1602 Shatima Turner, et al., Index 20229/12E
Plaintiffs-Appellants,

-against-

Owens Funeral Home, Inc., et al.,
Defendants-Respondents,

"John Doe No. 1", et al.,
Defendants.

_____

C. Robinson & Associates, LLC, New York (W. Charles Robinson of counsel), for appellants.

Goldman & Grossman, New York (Eleanor R. Goldman of counsel), for Owens Funeral Home, Inc., Isaiah Owens, and Andrew Cleckley, respondents.

Decorato Cohen Sheehan & Federico, LLP, New York (Rory J. Bellantoni of counsel), for North Shore-Long Island Jewish Medical Center, North Shore-Long Island Jewish Health System, Inc., North Shore-Long Island Jewish Medical Care, PLLC and North Shore-Long Island Jewish Medical Group, respondents.

_____

Order, Supreme Court, Bronx County (Alexander W. Hunter, Jr., J.), entered February 27, 2015, which, insofar as appealed from, denied plaintiffs' motions for entry of a default judgment against defendant Cleckley, partial summary judgment against defendants Cleckley and Owens, severance of the claims against Owens Funeral Home from the claims against the hospital defendants, and disqualification of counsel for defendants Cleckley, Owens, and Owens Funeral Home, Inc., and granted the

remaining defendants' cross motion for summary judgment dismissing plaintiff Shatima Turner's claims, unanimously affirmed, without costs.

Plaintiffs assert claims in connection with the alleged mishandling of the remains of their relative, James Turner, against the funeral home that took possession of the decedent's body and two of its employees, as well as the hospital in which the decedent died.

Plaintiffs' motion for a default judgment against Cleckley was properly denied because Cleckley was never properly served, and thus his obligation to respond was never triggered. Plaintiffs failed to meet the requirements of CPLR 308(2) that delivery be made upon Cleckley at his *actual* place of business and that an affidavit of service be filed within twenty days of delivery and mailing.

Plaintiffs' motion for summary judgment as to liability against defendants Owens and Cleckley was properly denied. Their argument that a prior order granting partial summary judgment against defendant Owens Funeral Home resolves the issues against the individual defendants is meritless, since the prior order expressly denied the motion with respect to Owens. The subsequent motion was not designated as a motion to renew or

reargue (CPLR 2221). As to Cleckley, the motion was premature since he had not yet appeared in the action.

The motion court did not improvidently exercise its discretion in denying plaintiffs' motion to sever the claims against Owens Funeral Home from the claims against the hospital defendants. Given the interrelatedness of the claims, the existence of cross claims, and the potential prejudice to the remaining defendants' ability to conduct discovery, it was not improper to conclude that the interests of judicial economy and avoidance of prejudice are best served by not severing (*see Sichel v Community Synagogue*, 256 AD2d 276, 276 [1st Dept 1998]; *35 Hamilton Realty Co. v Consolidated Edison Co. of N.Y.*, 238 AD2d 253, 254 [1st Dept 1997]).

Plaintiffs' motion to disqualify Crisci, Weiser & McCarthy as counsel for Owens Funeral Home, Owens, and Creckley was properly denied. Because plaintiffs never had any attorney-client relationship with Crisci, Weiser & McCarthy, they do not have standing to seek disqualification (*Develop Don't Destroy Brooklyn v Empire State Dev. Corp.*, 31 AD3d 144, 150 [1st Dept 2006], *lv denied* 8 NY3d 802 [2007]).

Last, the hospital defendants' cross motion for summary judgment dismissing plaintiff Shatima Turner's claims was

properly granted. Although Shatima has "standing," she does not have "priority" to control the disposition of the decedent's remains under Public Health Law § 4201 (2) (*see Shepherd v Whitestar Dev. Corp.*, 113 AD3d 1078, 1080-1081 [4th Dept 2014]). It is undisputed that Shatima is the decedent's granddaughter, whereas the remaining plaintiffs are his adult children. Surviving adult children have a higher priority than grandchildren (Public Health Law § 4201[2][a][iii], [vii], [ix]). That decedent's children elected Shatima to act as their agent to handle the funeral arrangements does not elevate her priority where, as here, they nonetheless indicated their willingness to control the disposition of Turner's remains (*see* Public Health Law § 4201[2][b]).

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

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

ENTERED: JUNE 28, 2016

DEPUTY CLERK

Friedman, J.P., Andrias, Saxe, Richter, Kahn, JJ.

1603 Orest Pripkhan, Index 80144/10
Plaintiff-Appellant,

-against-

Sharon Karmon, M.D., et al.,
Defendants-Respondents.

_____

Queller, Fisher, Washor, Fuchs & Kool, LLP, New York (Matthew J. Maiorana of counsel), for appellant.

Zachary W. Carter, Corporation Counsel, New York (Kathy Chang Park of counsel), for Sharon Karmon, M.D., Nila Dharan, M.D., Sumathi Sivapalasingam, M.D. and New York City Health and Hospitals Corp., respondents.

Morris Duffy Alonso & Faley, New York (Iryna Krauchanka and Andrea Alonso of counsel), for William J. Weber and The New York Fellowship, Inc., respondents.

_____

Order, Supreme Court, New York County (Douglas E. McKeon, J.), entered on or about May 7, 2015, which granted the motion of defendants physicians and hospital (collectively medical defendants) and the motion of defendants William J. Weber and the New York Fellowship, Inc. (collectively Weber) for summary judgment dismissing the complaint, unanimously affirmed, without costs.

The medical defendants established their entitlement to judgment as a matter of law in this action where plaintiff was injured when, while walking on the highway, he was struck by a

vehicle driven by Weber. As a result of the accident, plaintiff's right leg was crushed and was ultimately amputated below the knee. The medical defendants submitted evidence, including expert affirmations, demonstrating that the treatment provided to plaintiff comported with good and accepted medical practice (*see e.g. Pullman v Silverman*, 125 AD3d 562 [1st Dept 2015]).

In opposition, plaintiff submitted the conclusory affirmation of an expert, which was insufficient to raise an issue of fact (*see Abalola v Flower Hosp.*, 44 AD3d 522 [1st Dept 2007]). The expert opined that the medical defendants' failure to timely change plaintiff's antibiotic from Zosyn to a fluoroquinolone caused plaintiff's amputation. However, the expert did not address the specific assertions of the medical defendants' experts that an organism is often sensitive to more than one antibiotic, that the choice of an antibiotic is a matter of physician judgment (*see Park v Kovachevich*, 116 AD3d 182, 190 [1st Dept 2014], *lv denied* 23 NY3d 906 [2014]), and that the medical defendants were not required to switch antibiotics sooner because Zosyn contained the infection and was therefore effective against E. coli, the only organism that appeared on plaintiff's wound cultures.

Plaintiff's expert also failed to address the conclusions of the medical defendants' experts as to causation (*see Giampa v Marvin L. Shelton, M.D., P.C.*, 67 AD3d 439 [1st Dept 2009]). Plaintiff's claim that he would not have elected to amputate if he had received a fluoroquinolone earlier, is speculative and unsupported by the record (*see Rodriguez v Montefiore Med. Ctr.*, 28 AD3d 357 [1st Dept 2006]).

Furthermore, dismissal of the complaint as against Weber was proper since Weber's testimony established that he was driving his vehicle in a non-negligent manner at 30 miles per hour, when the severely intoxicated plaintiff suddenly appeared in his lane of traffic (*see Brown v Muniz*, 61 AD3d 526 [1st Dept 2009], *lv denied* 13 NY3d 715 [2010]). The emergency situation of plaintiff's sudden appearance in Weber's lane of traffic left Weber without time to sound his horn, apply his brakes, or even swerve to avoid hitting plaintiff, since only two to three seconds had elapsed from the time Weber saw plaintiff to the time

of impact (*see Bender v Gross*, 33 AD3d 417 [1st Dept 2006]).

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

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

ENTERED: JUNE 28, 2016

DEPUTY CLERK

Friedman, J.P., Andrias, Saxe, Richter, Kahn, JJ.

1604 Chiomenti Studio Legale, L.L.C., Index 653047/11
Plaintiff-Appellant-Respondent,

-against-

Prodos Capital Management LLC, et al.,
Defendants-Respondents-Appellants.

_____

Malone Law PLLC, New York (Daniel C. Malone of counsel), for appellant.

Wrobel Markham Schatz Kaye & Fox LLP, New York (David C. Wrobel of counsel), for respondents.

_____

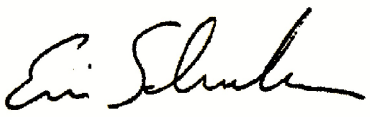
Order, Supreme Court, New York County (Anil C. Singh, J.), entered March 9, 2015, which, to the extent appealed from as limited by the briefs, granted defendants' motion for summary judgment dismissing plaintiff's veil-piercing cause of action, and denied plaintiff's cross motion for summary judgment on that cause of action, unanimously affirmed, without costs.

The motion court correctly noted that "New York does not recognize a separate cause of action to pierce the corporate veil" (*Fiber Consultants, Inc. v Fiber Optek Interconnect Corp.*, 15 AD3d 528, 529 [2d Dept 2005], *lv dismissed* 4 NY3d 882 [2005]; *see also Matter of Morris v New York State Dept. of Taxation & Fin.*, 82 NY2d 135, 141 [1993]). Further, the motion court correctly dismissed the veil-piercing allegations, because there

is insufficient evidence to justify piercing the corporate veil to hold the individual defendant liable for the corporate defendant's obligations. The evidence does not show that the individual defendant dominated or controlled the corporate defendant by undercapitalizing it, intermingling funds, disregarding the corporate form, or otherwise (*Matter of Morris*, 82 NY2d at 141; *Tap Holdings, LLC v Orix Fin. Corp.*, 109 AD3d 167, 174 [1st Dept 2013]). Neither did plaintiff establish the existence of a fraud or wrong against it (*id.*). The corporate defendant's alleged failure to pay legal fees owed under the parties' agreement does not constitute a fraud or wrong sufficient to pierce the corporate veil (*Bonacasa Realty Co., LLC v Salvatore*, 109 AD3d 946, 947 [2d Dept 2013]).

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

ENTERED: JUNE 28, 2016



DEPUTY CLERK

Friedman, J.P., Andrias, Richter, Kahn, JJ.

1605-
1606 The People of the State of New York,
Respondent,

-against-

Aaron Hand,
Defendant-Appellant.

Ind. 3578/09
4807/11

_____

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

Cyrus R. Vance, Jr., District Attorney, New York (David M. Cohn of counsel), for respondent.

_____

Judgment, Supreme Court, New York County (Carol Berkman, J.), rendered September 21, 2010, as amended September 23, 2010, convicting defendant, after a jury trial, of enterprise corruption, scheme to defraud in the first degree, conspiracy in the fifth degree, 5 counts of grand larceny in the first degree and 18 counts of grand larceny in the second degree and sentencing him to an aggregate term of 8⅓ to 25 years, and judgment, same court (Laura A. Ward, J.), rendered February 6, 2012, as amended February 17, 2012, convicting defendant, upon his plea of guilty, of conspiracy in the second degree, and sentencing him, as a second felony offender, to a consecutive term of 8 to 16 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]). The evidence established that the mortgage brokerage business headed by defendant was a "criminal enterprise," in that defendant and his accomplices shared "a common purpose of engaging in criminal conduct associated in an ascertainable structure" (Penal Law 460.20[3]) by engaging in mortgage fraud, conducting fraudulent transfers of property to "straw buyers" and diverting the mortgage proceeds to shell accounts and corrupt individuals within their control (*see generally People v Kancharla*, 23 NY3d 294, 303-306 [2014]). The evidence also demonstrated that, in making loans, banks relied on the misrepresentations of buyers' incomes and assets, as well as inflated property appraisals, that were provided by defendant and his accomplices, and thus the evidence established defendant's guilt of the grand larceny charges, along with conspiracy and scheme to defraud. We have considered and rejected defendant's remaining arguments relating to the sufficiency and weight of the evidence.

By declining the trial court's offer of a jury instruction on the issue of the geographical jurisdiction of New York County, defendant waived any challenge to venue as an issue of fact (*see*

People v Greenberg, 89 NY2d 553 [1997]). To the extent that his pretrial motion to dismiss all but the enterprise corruption count on that ground could be deemed to preserve a claim that venue was improper as a matter of law, we reject that claim.

With regard to the second-degree conspiracy conviction, arising out of a plot to murder a witness who testified at the trial, defendant's guilty plea forfeited review of his venue claim (*see People v Williams*, 14 NY2d 568 [1964]). Moreover, that claim is unpreserved and waived.

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

ENTERED: JUNE 28, 2016

DEPUTY CLERK

Friedman, J.P., Andrias, Saxe, Richter, Kahn, JJ.

1607 Nelda Batilo, Index 152461/15
Plaintiff-Respondent,

-against-

Mary Manning Walsh Nursing Home Co., Inc., et al.,
Defendants,

Roman Catholic Archdiocese of New York,
Defendant-Appellant.

_____

Jackson Lewis P.C., New York (Wendy J. Mellk of counsel), for appellant.

Gligoric C. Garupa, Brentwood, for respondent.

_____

Order, Supreme Court, New York County (Debra A. James, J.), entered December 3, 2015, which denied defendant Roman Catholic Archdiocese of New York's motion to dismiss the complaint or, in the alternative, for summary judgment, unanimously reversed, on the law, without costs, and the motion granted. The Clerk is directed to enter judgment accordingly.

Accorded the benefit of every favorable inference, plaintiff's factual allegations and averments, as amplified by her affidavit in opposition, do not state any basis for finding that a joint employment relationship existed between defendant Archdiocese on the one hand and defendants ArchCare and Mary

Manning Walsh Nursing Home Co. (the nursing home) on the other (*see Sanchez v Brown, Harris, Stevens*, 234 AD2d 170 [1st Dept 1996], citing *State Div. of Human Rights v GTE Corp.*, 109 AD2d 1082 [4th Dept 1985]).

Additionally, plaintiff's allegations were insufficient to support imposition of liability upon the Archdiocese under the single-employer theory. The single-employer doctrine and the four factor test used in its application were originally created by the NLRB to determine whether two intertwined entities should be treated as a single employer in the labor dispute context, and subsequently upheld by the U.S. Supreme Court (*see Cook v Arrowsmith Shelburne, Inc.*, 69 F3d 1235, 1240 [2nd Cir 1995]). The Second Circuit adopted the doctrine for the purpose of determining whether a parent company can be considered an employer for the purpose of employment discrimination liability (*id.* at 1241). While the four factor test analyzes (1) interrelation of operations, (2) centralized control of labor operations, (3) common management, and (4) common ownership, the primary focus is on the second factor of centralized control of labor operations (*see Herman v Blockbuster Entertainment Group*, 18 F Supp 2d 304, 309 [SDNY 1998]). Centralized control of labor operations requires some showing of a central human resources

department (*id.*) Here plaintiff fails to plead that the Archdiocese provided any human resources services for the nursing home, and plaintiff's allegations that church personnel regularly work at the nursing home, without more, do not suffice to show the Archdiocese controlled the Nursing Home Defendants's labor operations (*see id.*).

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

ENTERED: JUNE 28, 2016

DEPUTY CLERK

Friedman, J.P., Andrias, Saxe, Richter, Kahn, JJ.

1608-
1609 Index 157384/15

Ann Marie Pusterla,
Plaintiff-Respondent,

-against-

Manipal Education Americas, LLC, et al.,
Defendants,

American University of Antigua College of Medicine,
Defendant-Appellant.

_____

Sills Cummis & Gross P.C., New York (Jessica R. Brand of counsel), for appellant.

The Dweck Law Firm, LLP, New York (H. P. Sean Dweck of counsel), for respondent.

_____

Order, Supreme Court, New York County (Geoffrey D. Wright, J.), entered October 26, 2015, which, insofar appealed from as limited by the briefs, granted plaintiff's cross motion for sanctions, unanimously reversed, on the law and the facts and in the exercise of discretion, without costs, and the cross motion denied. Appeal from order, same court and Justice, entered January 26, 2016, which, insofar as appealed from as limited by the briefs, upon reargument, adhered to the prior decision, unanimously dismissed, without costs, as academic.

In its 2015 order, the motion court failed to satisfy the

requirements of 22 NYCRR 130-1.2. The court "did not set forth the conduct it found to be frivolous, and provided no reason whatsoever for its decision to impose legal fees and costs" (*Gordon Group Invs., LLC v Kugler*, 127 AD3d 592, 595 [1st Dept 2015]).

It is true that the 2016 order specifies that the court sanctioned defendant American University of Antigua College of Medicine (AUA) because it allegedly made two motions without submitting an affidavit from a person with knowledge and that this conduct was frivolous pursuant to 22 NYCRR 130-1.1(c)(2) (delay). However, the court was mistaken inasmuch as AUA did submit an affidavit from a person with knowledge on its motion to dismiss, albeit in reply instead of with its moving papers. The mere fact that the affidavit was submitted in reply instead of with the moving papers did not render AUA's conduct frivolous

(*see generally Sakow v Columbia Bagel, Inc.*, 32 AD3d 689, 690 [1st Dept 2006]).

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

ENTERED: JUNE 28, 2016

DEPUTY CLERK

Friedman, J.P., Andrias, Saxe, Richter, Kahn, JJ.

1613 Israel Gutierrez Bautista, Index 401795/12
Plaintiff-Respondent,

-against-

Grand Ambulette Service, Inc.,
Defendant,

Claudio Sanchez, Jr.,
Defendant-Respondent,

United Parcel Service, Inc., et al.,
Defendants-Appellants.

_____

Ansa Assuncao, LLP, White Plains (Stephen P. McLaughlin of counsel), for appellants.

Sullivan Papain Block McGrath & Cannavo P.C., New York (Stephen C. Glasser of counsel), for Israel Gutierrez Bautista, respondent.

Lewis Brisbois Bisgaard & Smith LLP, New York (Nicholas P. Hurzeler of counsel), for Claudio Sanchez, Jr., respondent.

_____

Order, Supreme Court, New York County (Arlene P. Bluth, J.), entered March 7, 2016, which, to the extent appealed from, denied the motion of defendants United Parcel Service, Inc., and Gilbert Soto-Mayor (collectively UPS defendants) for summary judgment dismissing the complaint as against them, unanimously affirmed, without costs.

Plaintiff bicyclist sustained significant injuries when an ambulette owned by defendant Grand Ambulette Service, Inc. and

operated by defendant Sanchez struck plaintiff as it made a left-hand turn. The UPS defendants' truck was parked in the left-hand lane as it waited for a space at a loading dock to become open and the location of the UPS defendants' parked truck required Sanchez to maneuver around the UPS truck to make a turn from the middle lane of traffic. Following the accident, the UPS defendants' vehicle was issued a parking ticket.

The UPS defendants moved for summary judgment dismissing the complaint as against them, arguing, inter alia, that even assuming that the UPS driver was negligent in parking the truck in the manner that he did, Sanchez's illegal left turn from the middle lane of traffic was the proximate cause of the accident.

The motion court properly denied the motion. "[O]wners of improperly parked cars may be held liable to plaintiffs injured by negligent drivers of other vehicles, depending on the determinations by the trier of fact of the issues of foreseeability and proximate cause" (*O'Connor v Pecoraro*, 141 AD2d 443, 445 [1st Dept 1988]). Here, the UPS defendants were issued a ticket for a parking violation (*see* 34 RCNY 4-07[b][1]; 4-08; *Murray-Davis v Rapid Armored Corp.*, 300 AD2d 96 [1st Dept 2002] and, while it was the ambulette that struck plaintiff, it is well established that there can be more than one cause of an

accident (*see e.g. Nakasato v 331 W. 51st Corp.*, 124 AD3d 522, 524 [1st Dept 2015]; *White v Diaz*, 49 AD3d 134, 138 [1st Dept 2008]).

We have considered the remaining arguments and find them unavailing.

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

ENTERED: JUNE 28, 2016

DEPUTY CLERK

Friedman, J.P., Andrias, Saxe, Richter, Kahn, JJ.

1615 The People of the State of New York, Ind. 4088/12
Respondent,

-against-

Jeffrey Lashley,
Defendant-Appellant.

_____

Seymour W. James, Jr., The Legal Aid Society, New York (Heidi Bota of counsel), for appellant.

Cyrus R. Vance, Jr., District Attorney, New York (Andrew E. Seewald of counsel), for respondent.

_____

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Richard Carruthers, J.), rendered March 26, 2014,

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.

ENTERED: JUNE 28, 2016

DEPUTY CLERK

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

Friedman, J.P., Andrias, Saxe, Richter, Kahn, JJ.

1616 NRES Holdings, LLC, Index 652365/15
Plaintiff-Respondent,

-against-

Almanac Realty Securities VI, LP,
Defendant-Appellant.

_____

Forman & Shapiro LLP, New York (Robert W. Forman of counsel), for appellant.

Seward & Kissel LLP, New York (Dale C. Christensen, Jr. of counsel), for respondent.

_____

Order, Supreme Court, New York County (Jeffrey K. Oing, J.), entered January 26, 2016, which, to the extent appealed from, denied defendant's motion to dismiss the breach of contract cause of action, unanimously affirmed, without costs.

The complaint sufficiently alleges the existence of a contract based on the credit agreement and amendments to it, pursuant to which the parties agreed that plaintiff would pay a 25% prepayment penalty on advances borrowed from defendant and a $3.8 million unused commitment fee representing 25% of the remaining funds that plaintiff had initially agreed to borrow but later opted not to borrow from defendant.

Defendant failed to present documentary evidence that either flatly contradicts these allegations so as to warrant dismissal

pursuant to CPLR 3211(a)(7) (*see David v Hack*, 97 AD3d 437 [1st Dept 2012]) or conclusively establishes a defense as a matter of law so as to warrant dismissal pursuant to CPLR 3211(a)(1) (*see Leon v Martinez*, 84 NY2d 83, 88 [1994]). The payoff letter, signed by the parties, assesses a 25% prepayment penalty on the total "Unpaid Principal" of advances borrowed by plaintiff, but it does not reveal the underlying calculations. To ascertain that the $3.8 million was included in the total "Unpaid Principal," and treated as an advance, it is necessary to review schedules to amendments to the credit agreements; yet neither those nor any other documents cited by defendant conclusively state that the parties agreed to treat the $3.8 million as an advance, rather than a one-time fee, or otherwise to subject it to a 25% penalty. Accordingly, the fact that plaintiff signed the payoff letter and other documents is not dispositive of this

motion to dismiss (*see 235 E. 4th St., LLC v Dime Sav. Bank of Williamsburgh*, 65 AD3d 976 [1st Dept 2009]).

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

ENTERED: JUNE 28, 2016

DEPUTY CLERK

Friedman, J.P., Andrias, Saxe, Richter, Kahn, JJ.

1617 Masoud Rejaee, Index 101717/09
Plaintiff-Respondent,

-against-

Costco Price Club,
Defendant-Appellant.

_____

Gallagher, Walker, Bianco & Plastaras, LLP, Mineola (Dominic Bianco of counsel), for appellant.

Melucci, Celauro & Sklar, LLP, Garden City (Daniel Melucci of counsel), for respondent.

_____

Order, Supreme Court, New York County (Joan A. Madden, J.), entered July 1, 2015, which, insofar as appealed from, denied the motion of defendant Costco Price Club (Costco) for summary judgment dismissing the complaint, unanimously reversed, on the law, without costs, and the motion granted. The Clerk is directed to enter judgment accordingly.

Plaintiff alleges that after shopping at Costco for at least 20 minutes, one of the wheels of his shopping cart fell off. According to plaintiff, he was injured when he tried to keep the cart from falling over.

Costco established its entitlement to judgment as a matter of law by submitting, inter alia, plaintiff's testimony that he noticed nothing wrong with the cart when he began using it, until

one of its wheels began to wobble 10 minutes later. Accordingly, Costco showed that the defect was not visible and apparent, and did not exist for a sufficient amount of time for it to discover and remedy it (*see Gordon v American Museum of Natural History*, 67 NY2d 836, 837 [1986]; *Cataldo v Waldbaum, Inc.*, 244 AD2d 446 [2d Dept 1997]).

In opposition, plaintiff failed to raise a triable issue of fact. Contrary to the motion court's finding, plaintiff did not testify that he told a Costco employee of the wheel after it began to wobble, but only that he asked an employee if he could use the employee's cart. Plaintiff's wife also testified that neither she nor plaintiff ever informed any Costco employee of a problem with the cart.

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

ENTERED: JUNE 28, 2016

DEPUTY CLERK

Friedman, J.P., Andrias, Saxe, Richter, Kahn, JJ.

1618N David Moyal, Suing Individually and on Behalf of Circle Press, Inc., Plaintiff, Index 157850/14

-against-

Joseph Sullo, Defendant-Appellant,

Robert Malta, et al., Defendants-Respondents,

Circle Press, Inc., Nominal Defendant.

_____

Trachtenberg Rodes & Friedberg, LLP, New York (Leonard A. Rodes of counsel), for appellant.

Catafago Fini LLP, New York (Jacques Catafago of counsel), for respondents.

_____

Order, Supreme Court, New York County (Jeffrey K. Oing, J.), entered February 1, 2016, which granted the motion of defendants Robert Malta and GMD 444 LLC to disqualify Trachtenberg, Rodes & Friedberg LLP (Trachtenberg) from representing defendant Joseph Sullo, unanimously affirmed, with costs.

The motion court providently exercised its discretion by disqualifying Trachtenberg (*see generally Ferolito v Vultaggio*, 99 AD3d 19, 27 [1st Dept 2012]). The former joint representation of Malta and Sullo and the present litigation are substantially

related and the interests of Malta and Sullo are materially adverse in this action (*see Tekni-Plex, Inc. v Meyner & Landis*, 89 NY2d 123, 130-131 [1996]; *Matter of Strasser*, 129 AD3d 457 [1st Dept 2015]; Rules of Professional Conduct [22 NYCRR 1200.0] rule 1.9). The conflicts waiver contained in the engagement letter was insufficient to show that Malta knowingly waived any objection to Trachtenberg's continued representation of Sullo in this matter (*cf. St. Barnabas Hosp. v New York City Health & Hosps. Corp.*, 7 AD3d 83, 90-92 [1st Dept 2004]).

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

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

ENTERED: JUNE 28, 2016

DEPUTY CLERK

Friedman, J.P., Andrias, Saxe, Richter, Kahn, JJ.

1619N- Index 154511/13
1619NA P & S 95th Street Associates, LLC,
Plaintiff-Respondent,

-against-

Nilde Realty, et al.,
Defendants,

Phillipos Restaurant, Inc., doing
business as The Barking Dog, et al.,
Defendants-Appellants.

_____

Law Office of Daniel Friedman, Brooklyn (Daniel Friedman of counsel), for appellants.

Jeffrey A. Oppenheim, New York, for respondent.

_____

Order, Supreme Court, New York County (Peter H. Moulton, J.), entered August 11, 2015, which, to the extent appealable, denied appellants' motion to vacate the court's March 13, 2014 order, unanimously affirmed, with costs. Appeal from so much of the August 2015 order as purports to be from the denial of appellants' motion to renew, unanimously dismissed, without costs, as taken from the denial of reargument.

The lower court properly denied appellants' motion to renew, as appellants' purported "new facts" are not new facts, but rather new legal arguments. Accordingly, appellants' motion is more accurately characterized as a motion to reargue, and no

appeal lies from the court's denial of a motion to reargue (*see Forbes v Giacomo*, 130 AD3d 428 [1st Dept 2015], *lv dismissed in part, denied in part* 26 NY3d 1047 [2015]; *Federal Ins. Co. v Manufacturers Hanover Trust Co.*, 157 AD2d 460, 460 [1st Dept 1990]).

With respect to appellants' motion to vacate pursuant to CPLR 5015(a)(1), even if the motion were timely, appellants failed to demonstrate a reasonable excuse (*Northern Source, LLC v Kousouros*, 106 AD3d 571, 572 [1st Dept 2013]; *Chelsea Antoinette A. [Anna S.]*, 88 AD3d 627 [1st Dept 2011]).

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

ENTERED: JUNE 28, 2016

DEPUTY CLERK

Friedman, J.P., Saxe, Richter, Kahn, JJ.

1620N Country-Wide Ins. Co., Index 652429/15
Petitioner-Respondent,

-against-

TC Acupuncture, P.C., as assignee
of Oneal Alexander,
Respondent-Appellant.

_____

Tsirelman Law Firm PLLC, Brooklyn (Stefan Belinfanti of counsel), for appellant.

Jaffe & Koumourdas, LLP, New York (Jean H. Kang of counsel), for respondent.

_____

Order, Supreme Court, New York County (Geoffrey D. Wright, J.), entered October 23, 2015, which granted petitioner's motion to vacate a master arbitrator's award in favor of respondent, unanimously reversed, on the law, without costs, the motion denied, and the award confirmed. The Clerk is directed to enter judgment accordingly.

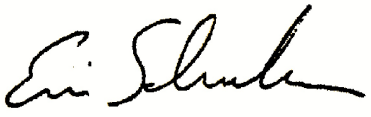
Respondent commenced an arbitration against petitioner insurance company for reimbursement of bills for alleged health care services rendered by respondent to Alexander Oneal. Petitioner, relying on *State Farm Mut. Auto Ins. Co. v Mallela* (4 NY3d 313 [2005]), asserted that it could withhold payment because respondent was fraudulently incorporated. After a hearing, an

arbitrator awarded respondent full reimbursement, and found that petitioner failed to meet its burden of providing clear and convincing evidence showing that respondent was fraudulently incorporated. On appeal, the master arbitrator affirmed the arbitration award and rejected petitioner's argument that its burden of proof on its *Mallela* defense should have been preponderance of the evidence.

Supreme Court erred in vacating the master arbitrator's award on the ground that the master arbitrator mistakenly applied the wrong burden of proof to petitioner's *Mallela* defense. Even assuming, without deciding, that the master arbitrator applied the wrong burden of proof, the award is not subject to vacatur on that ground (*Matter of New York State Correctional Officers & Police Benevolent Assn. v State of New York*, 94 NY2d 321, 326 [1999]). Nor is there any other basis for vacating the award (*see id.*; *see also* CPLR 7511[b][1]).

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

ENTERED: JUNE 28, 2016



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