

SUPREME COURT, APPELLATE DIVISION  
FIRST DEPARTMENT

**MARCH 24, 2016**

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Friedman, J.P., Saxe, Manzanet-Daniels, Feinman, Gische, JJ.

15293N- Index 314079/10  
15294N Lauren Appel Gottlieb,  
Plaintiff-Respondent,

-against-

Michael Gottlieb,  
Defendant-Appellant,

Heshy Gottlieb, et al.,  
Nonparty Appellants.

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Mallow, Konstam, Mazur, Bocketti & Nisonoff, P.C., New York  
(Madeleine Nisonoff of counsel), for appellants.

Bender Rosenthal & Richter LLP, New York (Karen B. Rosenthal of  
counsel), for respondent.

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Order, Supreme Court, New York County (Ellen Gesmer, J.),  
entered December 23, 2013, which, to the extent appealed from as  
limited by the briefs, granted plaintiff wife's motion for  
sanctions against defendant husband and granted plaintiff's  
motion to hold defendant's parents in contempt of court,  
modified, on the law and the facts, to deny plaintiff's motion  
insofar as she sought to sanction defendant for his delay in

paying his share of the neutral forensic evaluator's fees, to vacate the sanctions imposed on defendant for the delay (\$6,847.50 and \$79,530), and to vacate the fines imposed on defendant's parents for their contempt of court in the amounts of \$156,704.94 and \$28,135.35, representing the legal fees plaintiff incurred in conducting the visitation trial and preparing an addendum to the posttrial memorandum, and otherwise affirmed, without costs. Appeal from judgment of divorce, same court and Justice, entered May 12, 2014, dismissed, without costs, as abandoned.

This case involves tragic circumstances that disrupted and eventually destroyed the parties' marriage. The parties, who were married in 2005, have one child, a daughter born in 2007. In 2008, defendant, then age 28, suffered a stroke from an undetected brain aneurysm. He was in a coma for several weeks and underwent four brain surgeries. He emerged partially paralyzed and uses a wheelchair. Although he resides in a nursing home, and suffers from some vision, memory and speech impairments, he has never claimed in this action that he is incapable of making independent decisions. In fact, in connection with a prior custody action, the Family Court considered but declined to appoint a guardian ad litem for

defendant.<sup>1</sup>

The primary dispute in this divorce proceeding is visitation. The parties previously stipulated that plaintiff would have primary custody of the child, and defendant withdrew his special proceeding to enjoin plaintiff from obtaining a religious divorce before a Beth Din. We hold that the trial court abused its discretion in sanctioning defendant for failing to comply with its June 12, 2012 order directing him to pay his share of the neutral custody forensic evaluator's fees. We hold, however, that by filing and continuing a special proceeding to enjoin proceedings before the Beth Din of America, defendant engaged in frivolous litigation. We also deem defendant's Notice of Appeal to include his parents because they have "a united and inseverable interest in the judgment's subject matter, which itself permits no inconsistent application among the parties" (*Hecht v City of New York*, 60 NY2d 57, 62 [1983]). Moreover, on rare occasions, in granting relief to an appealing party, the

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<sup>1</sup>Defendant filed a custody petition in the Bronx Family Court in October 2009. The Special Referee appointed Pierre Javier, an attorney from the article 81 panel, to assess the husband's mental capacity and ability to assist his counsel in his representation and make a recommendation whether a guardian ad litem should be appointed. Attorney Javier recommended that no such appointment was needed.

nonappealing party may also benefit (see *Cover v Cohen*, 61 NY2d 261, 277-278 [1984]), particularly where, as here, the issues are hopelessly entangled (see *Citnalta Constr. Corp. v Caristo Assoc. Elec. Contr.*, 244 AD2d 252, 254 [1st Dept 1997]). Upon doing so and in consideration of the merits, we affirm the trial court's finding of contempt in connection with defendant's parents' failure to comply with trial subpoenas and court orders directing them to produce documents for trial. The fine appropriately included an award of legal fees incurred by plaintiff in making a contempt motion. However, we vacate the part of the fine representing legal fees incurred for preparation of a posttrial memorandum as well as for the visitation trial itself.

With respect to sanctions attributable to defendant's failure to pay his share of the forensic evaluator's fees in time for the originally scheduled trial, defendant claimed he could not afford the expense. The trial court rejected the proffered excuse because defendant's parents were paying most of his other litigation fees. Defendant's parents, however, were under no legal or contractual obligation to pay the forensic evaluator's fees. Therefore, it is immaterial whether or not they could have done so. The trial court made no finding that defendant's expressed inability to individually pay the forensic evaluator's

fees was untrue. The parties initially agreed that the forensic evaluator's fees would be paid from monies in escrow resulting from the sale of the former marital residence. There is no evidence that defendant, who is disabled and unable to work, had other monies available to him from which to pay the forensic evaluator's trial retainer and other fees. When the court notified both sides that the trial would not take place until the forensic evaluator's fees were paid in full, defendant offered to have these fees deducted from his remaining share of the escrowed funds. That option was rejected by the court and the trial was adjourned. Ultimately, the remaining amount of defendant's share of the forensic evaluator's fees and the trial retainer were paid from the proceeds of the sale of the marital home, as he had initially proposed months earlier. Defendant's conduct does not meet the definition of frivolous conduct (22 NYCRR 130-1.1[c]), and to the extent the sanctions awarded by the trial court were attributable to the late payment of the forensic evaluator's fees, including the fees imposed for plaintiff's second preparation for a visitation trial, they should be vacated.

Defendant's commencement of a special proceeding against plaintiff and the Beth Din for a permanent stay of an arbitration hearing on the religious divorce was frivolous within the meaning

of the Part 130 rules because the action had no legal or factual merit (22 NYCRR 130-1.1[c]). Plaintiff was proceeding before the Beth Din for a religious divorce based upon a binding arbitration agreement (BAA) she claimed had been signed by the parties prior to their marriage and years before defendant's stroke. Instead of examining the BAA when he was notified by the Beth Din of the hearing, defendant immediately claimed it was a forgery, largely based on his recollection that he was not in Jamaica Estates (Queens County) on November 29, 2004, the date on which the BAA was executed. Defendant seized upon certain scrivener's errors in the BAA to bolster his forgery claim, ignoring sworn attestations by two witnesses who saw him sign the BAA, the notarization, and his ability to identify the physical signature as his own, even though he had no specific memory of its execution. It was not until one year later, at his deposition, that defendant finally acknowledged the signature was his, essentially conceding that his claim of forgery had absolutely no merit. Even then defendant delayed withdrawing his petition, waiting until the very day of the hearing to do so. By failing to fully investigate whether this claim had any legal or factual basis, defendant forced plaintiff to expend unnecessary legal fees in opposing the meritless petition. This required

plaintiff's counsel to conduct discovery, including defendant's deposition, and also prepare for an unnecessary trial, that never went forward.

Even if, as defendant now claims, his parents actually manipulated him into bringing the summary proceeding and were the driving force behind it, ultimately it was defendant's decision to pursue those baseless claims for over a year (see *Levy v Carol Mgt Corp.*, 260 AD2d 27 [1st Dept 1999]). Notwithstanding that defendant has serious health and cognitive issues, no claim was made by defendant, his attorneys, or even his parents that he was in need of a guardian ad litem, or any other substitute decision maker, because he was unable to defend or prosecute his claims (CPLR 1201 et seq.). In fact, as noted, in the prior custody proceeding, the court found he was not in need of a guardian ad litem. There is no indication that defendant was incapable of making decisions regarding the proceedings or unaware of its implications. Consequently, the trial court correctly held defendant responsible for his own frivolous conduct.

The trial court properly awarded plaintiff legal fees incurred to defend the special proceeding as the appropriate sanction amount (22 NYCRR 130-1.1[a]). No hearing was required to determine the amount of the fees, because the parties

stipulated in writing that the issue of counsel fees could be decided upon written submissions.

With respect to the trial court's holding defendant's parents in contempt, we uphold the trial court's finding that defendant's parents were in contempt of trial subpoenas and court orders when they failed to provide documents at trial. Despite serving each parent with subpoenas over four months in advance of trial, requiring them to testify and produce at trial records and documents necessary for plaintiff's case, defendant's parents appeared for trial without many of the records and documents demanded, including communications between the parents and defendant's lawyers. Neither defendant nor his parents brought a written motion to quash those subpoenas. It was not until trial that defendant's parents asserted, for the first time, a blunderbuss attorney-client privilege and made an oral application to quash the subpoenas. In asserting the privilege, no privilege log itemizing documents being withheld was produced. Nor were the withheld documents offered for in camera inspection. Although the trial court rejected the oral application as untimely, it nevertheless considered the privilege arguments based on the merits. The trial court decided that the privilege did not belong to defendant's parents (who were not clients of

defendant's counsel) and that defendant had waived the privilege by including his parents in his communications with counsel. The trial court then repeatedly ordered defendant's parents to comply with the subpoenas, but they refused, forcing plaintiff to bring a motion to hold them in contempt. That motion was deferred for decision after trial. After the visitation trial was complete, defendant's parents finally provided the withheld documents, thereby purging their contempt. As a result of the belated production, plaintiff incurred additional legal fees in connection with bringing a contempt motion.

The record supports the trial court's determination that the parents were actually aware of, and disobeyed, a clear and unequivocal court directive, thereby prejudicing plaintiff's rights, justifying the finding of civil contempt (see Judiciary Law § 753[A][3]; *McCain v Dinkins*, 84 NY2d 216, 226 [1994]; *Matter of McCormick v Axelrod*, 59 NY2d 574, 583 [1983]). The motion to quash was properly denied by the court as untimely. But even if, as defendant now argues, the orders underlying the contempt were not correct, defendant's parents were still obligated to comply. An order that is jurisdictionally valid and not stayed during the relevant time can form the basis for contempt, even if the order is erroneously made (see *New York*

*City Coalition to End Lead Poisoning v Giuliani*, 248 AD2d 120, 121 [1st Dept 1998]; *Seril v Belnord Tenants Assn.*, 139 AD2d 401, 401 [1st Dept 1988]). Clearly noncompliance prejudiced plaintiff because she incurred unnecessary legal fees in having to bring a contempt motion.

Legal fees that constitute actual loss or injury as a result of a contempt are routinely awarded as part of the fine (Judiciary Law § 773, see *Bell v White*, 112 AD3d 1104 [3d Dept 2013], *lv dismissed* 23 NY3d 984 [2014]). These may include the legal fees incurred in bringing the contempt motion (see *Glanzman v Fischman*, 143 AD2d 880, 881 [2d Dept 1988], *lv dismissed* 74 NY2d 792 [1989]).

The trial court properly included plaintiff's legal fees for bringing a contempt motion as part of the fine. The trial court, however, improperly included as part of the contempt fine both the legal fees incurred to prepare the posttrial memorandum and those incurred in connection with the trial itself. There was no basis for the court to conclude that such legal fees constituted an actual loss or injury related to the contempt as a means of compensating plaintiff, rather than punishing defendant's parents, for the wrong (see *State of New York v Unique Ideas*, 44 NY2d 345, 349 [1978]). The posttrial memorandum addressed the

significance of the documents after they were actually produced. Had defendant's parents timely produced the documents, legal time taken to review and argue the significance of the documents in the context of the parties' dispute would still have been necessary.

With respect to including the legal fees associated with the visitation trial as part of the contempt fine, the trial court based its decision on a belatedly produced email dated December 27, 2012 from defendant's parents to defendant's attorney. The email indicated that the defendant had told his parents he did not want any visitation with his daughter. The trial court concluded that if the email had been produced sooner "there would have been no visitation trial."

The broad-based conclusion that no visitation trial would have been necessary, or as the dissent hypothesizes, sharply curtailed by the production of this email and other correspondence, is simply speculation. In fact, some of the important issues involved how to best rehabilitate defendant's strained relationship with his young daughter. The natural right to visitation is a joint right of the noncustodial parent and the child (*Resnick v Zoldan*, 134 AD2d 246, 247 [2d Dept 1987] [internal citation omitted]). Consequently, "[i]t is presumed

that parental visitation is in the best interest of the child, absent proof that such visitation would be harmful" (*Matter of Wise v Del Toro*, 122 AD2d 714, 714 [1st Dept 1986]). The primary dispute between the parties was the extent to which the parties' young daughter would have access to her father and under what circumstances, given defendant's disabilities and his living arrangement. It was never contemplated, even by plaintiff, that their daughter would cease to have contact with her father. Defendant steadfastly maintained throughout these proceedings that he wanted access to his daughter, and although the forensic evaluator testified that there should be reduction in the frequency and duration of the child's visits with her father, she did not recommend wholesale termination of visits. Therefore, even if defendant's parents had timely produced these documents, access and supervised visits would still have been an issue. The fact that defendant, who was competent, actually proceeded with a trial is irrefutable proof that a trial was necessary. Had defendant not wanted visitation with his daughter, he could have simply withdrawn his request for access and the fact that he did not do so is of greater significance than the email and other documents his parents did not turn over. Given these circumstances and this extremely complicated family dynamic,

there was no basis for the trial court to have broadly concluded that no visitation trial was necessary based upon the production of this lone email, or any other documents defendant's parents failed to provide.

All concur except Manzanet-Daniels, J. who  
dissents in part in a memorandum as follows:

MANZANET-DANIELS, J. (dissenting in part)

I agree with the majority that the court did not abuse its discretion in awarding sanctions to the wife based on the husband's frivolous conduct in bringing a special proceeding to stay an arbitration to which he had admittedly consented. I would also uphold the award of sanctions based on the husband's failure to pay his share of the forensic evaluator's fee.

I disagree with the majority to the extent it purports to vacate in part the award of sanctions imposed on the paternal grandparents. Because the paternal grandparents failed to file a notice of appeal within the prescribed time, their appeal of the contempt sanction is not properly before this Court. There is no basis for finding that the parties had a "united and inseverable interest in the judgment's subject matter" so as to give this Court authority to vacate the award (*Hecht v City of New York*, 60 NY2d 57, 62 [1983]). A civil contempt sanction is designed to indemnify an aggrieved party for his or her actual losses based on the contemnor's misconduct. The sanction in any event was warranted based upon the grandparents' admitted defiance of subpoenas and withholding of information which might have drastically curtailed, if not averted, an extended trial on the husband's visitation schedule. There was more than ample support

for the trial court's finding that "the [p]aternal [g]randparents orchestrated the litigation between the [f]ather and the [m]other from the beginning, with the purpose of intimidating the [m]other," and "willfully interfered with [the child's] development of a positive and loving relationship with her [f]ather." I would accordingly affirm the order appealed from.

*Background*

The parties were married on January 2, 2005. They have one daughter, born on April 20, 2007.

The husband suffered a brain aneurysm on October 5, 2008, and thereafter remained in a coma for several weeks. The wife lived in a rented room at Columbia Presbyterian so that she might tend to the husband while he remained hospitalized. During this time, the wife's family assumed the responsibility of caring for the daughter.

On November 5, 2008, the wife signed the husband out of the hospital and had him admitted to a rehabilitation hospital for treatment of his traumatic brain injury. The wife visited the husband daily, accompanied him to therapy, and learned how to care for him. On alternate weekends, she stayed at a dorm room at the rehabilitation facility, and the wife's family cared for the daughter. On the weekends she did not stay there, she

brought the daughter to see the husband.

On February 18, 2009, the wife had the husband transferred to a facility in Queens. The wife moved with the child to her parents' home in Queens in order to be closer to the husband. Although the daughter was frequently hesitant to be near her father, the wife nonetheless attempted to make her comfortable, sitting close to the husband with the child on her lap during visits.

It was during this time that the wife began having disagreements with the husband's family about his care and treatment. When the husband was permitted to leave the facility on weekends, starting in April 2009, he would spend alternate weekends with the wife and child in Queens, and with his parents in New Jersey.

The wife began looking for a home near the rehabilitation facility that she could modify to accommodate the husband's physical needs. Tensions between the wife and the grandparents increased. The husband yelled at the wife and accused her of not acting in his best interests. He informed her that he wanted his mother, and not the wife, to be in charge of decision-making regarding his care. On June 24, 2009, the wife learned from a social worker that the husband's parents were planning on moving

him to another facility without her knowledge.

The paternal grandparents had the husband transferred to a facility near their home in Edison, New Jersey, without informing the wife. For two months, the paternal grandparents refused to inform the wife where they had taken the husband, and the husband made no effort to contact the daughter.

*The Bronx County Divorce and Custody Action*

In October, 2009, the wife commenced a proceeding in Family Court in the Bronx seeking legal and residential custody of the daughter.

Referee Guarino appointed Pierre Janvier, Esq., a mental hygiene attorney and member of the article 81 panel, to assess the husband's mental capacity. Mr. Janvier deemed the husband "fully capable of understanding and assisting his lawyer in a Family Court proceeding," stating as follows:

"[The husband's] memory after his accident is not the same as it was before . . . but anything prior to the accident he remembers very well. We spoke about his relationship with his wife and the type of relationship that they had and how close it was prior to the accident and he talked about how close his relationship is with his child. Overall -- and he's an educated man. And overall, we were able to speak at length about many things. And he resembles nothing like the persons I have had to ask for guardians for. And I can assure -- I'm sure that he's able

to communicate with his lawyer and tell her what he wants. In fact, he understood that he cannot possibly be the caretaker of the child, so that it's not a custody issue for him. We spoke in effect that he understands as far as his part of the case, it's really a visitation issue, so he fully understood that. . . . And [the husband] is doing extremely well. . . . He's like a model patient. And my sense is his doctors are amazed of his recovery. He talks about going back to the hospital where he was cared for and how shocked everyone is to see how much of a recovery that he's had. And given all of that, I believe that he's fully capable of understanding and assisting his lawyer in a Family Court proceeding."

Mr. Janvier's assessment of the husband's mental state was never challenged. On April 21, 2010, the Bronx Family Court issued an order on consent awarding the wife sole custody, with visitation to the husband "as the parents agree."

#### *The Special Proceeding*

The husband, through his attorneys, made clear to the wife that he would not give her a Jewish divorce, or "get," unless the wife agreed to the visitation schedule he was demanding. The wife commenced the process of enforcing her right to a get under the arbitration agreement the parties had signed through the Beth Din of America prior to their marriage.

On March 16, 2010, the husband commenced a special proceeding in New York County seeking to stay the arbitration on

the ground that he "did not sign the alleged [a]rbitration [a]greement," that he "may not be legally competent to participate in such a hearing," and that he was "not physically able to participate in such a hearing at this time."

The wife filed a notice of cross motion to compel arbitration, and for sanctions against the husband for counsel fees incurred in defending the proceeding. She attached affirmations from three witnesses who affirmed that they had personally observed the husband sign the arbitration agreement.

At the husband's deposition, on October 11, 2011, he responded in the affirmative to the question, "Does that appear to be your signature [on the arbitration agreement]?" Nonetheless, he did not withdraw his petition to stay the arbitration for weeks, well aware that the wife's counsel was preparing for trial in the interim, incurring further unnecessary attorneys' fees. The husband did not execute a stipulation withdrawing the petition until November 7, 2011, just as trial was to commence on the matrimonial action.

The matrimonial action was settled by stipulation dated March 5, 2012. The issue of sanctions was reserved for submission and determination at the conclusion of the case. The wife incurred approximately \$68,587.50 in counsel fees in

connection with the special proceeding.

*The Access Trial*

On April 15, 2011, the court appointed Dr. April Kuchuk to conduct a forensic evaluation of the parties and the child. Her report, which was largely favorable to the wife, confirmed that the wife was willing to facilitate an appropriate relationship between the husband and the daughter and had consistently demonstrated her ability to act in the child's best interests.

The husband failed to pay his share of the forensic evaluator's fee or trial retainer, resulting in a postponement of the visitation trial from June 2012 to dates in October and November 2012. The court's June 12, 2012 order expressly noted that the "trial w[ill] be adjourned in light of the [h]usband's failure to pay Dr. Kuchuk his share of her past due fees and her retainer," noting "[i]t is also critical that the [h]usband pay Dr. Kuckuk far enough in advance of the scheduled trial dates that Dr. Kuchuk can arrange her schedule . . . and that the parties can prepare for trial in an orderly way." The court directed the husband to pay the evaluator \$6,562.50 on or before October 1, 2012.

The husband claimed not to be able to pay the fee even though the paternal grandparents had paid the husband's

attorneys' fees throughout the litigation. The court eventually permitted the husband to pay his share of Dr. Kuchuk's fees from his share of the escrowed proceeds from the sale of the former marital residence rather than to delay the trial further.

Trial over an appropriate visitation schedule did not commence until December 10, 2012. At trial, the husband failed to undermine Dr. Kuchuk's findings or to present any expert testimony challenging her recommendations. The wife incurred approximately \$79,530 in counsel fees attributable to the delay of the access schedule trial, and approximately \$156,704.94 for the conduct of the trial.

#### *The Trial Subpoenas*

On or about August 23, 2012, the wife served subpoenas on the paternal grandparents seeking the production of specific documentation relevant to the custody issues in the matrimonial matter, including, inter alia, all communications between the paternal grandparents and the husband's law firm.

The paternal grandparents produced the retainer agreement and billing records but no further documents. Neither the paternal grandparents nor the husband made a motion to quash the subpoenas until January 8, 2013, the fourth day of the trial, over 4½ months after the subpoenas had been served. The court

denied the oral application and directed the paternal grandparents to produce the documents. The paternal grandparents still failed to comply with the subpoenas, even though they acknowledged having responsive documents in their possession. The visitation trial concluded on January 9, 2013.

The wife filed a posttrial motion seeking a finding of contempt against the paternal grandparents and sanctions in the form of counsel fees. At oral argument, the court granted the paternal grandparents one additional week to cure their default. Although they produced some additional documents, they failed to produce the remaining documents until April 2013.

On December 16, 2013, the court issued an order denying the application to quash the subpoenas as untimely.

The wife incurred approximately \$28,675 in counsel fees relating to the contempt motion, and an additional \$28,135.35 for addendum to the posttrial memorandum necessitated by the grandparents' failure to comply with the subpoenas.

#### *Discussion*

##### *Award of Sanctions Against the Husband*

The award of sanctions against the husband was predicated on two specific instances of frivolous conduct (see 22 NYCRR 130-1.1): the commencement of the special proceeding pursuant to

article 75 to stay the arbitration proceeding before the Beth Din of America, and the failure to timely pay the fee for the forensic evaluator, resulting in delay of the visitation trial. Because the court acted within its discretion in imposing sanctions based on the specified instances of misconduct, I would not disturb the award.

The husband sought to stay the arbitration on the grounds that he (1) did not sign the binding arbitration agreement (BAA); (2) was not legally competent to participate in any hearing required by the BAA; (3) was unable to physically participate in the hearing. All of these ground were without evidentiary foundation.

On April 21, 2010, the husband was found to be "fully capable of understanding and assisting his lawyer in the Family Court proceeding." This assessment was never challenged.

On October 11, 2011, the husband's deposition was taken in connection with the matrimonial proceedings. The husband was able to travel from a care facility in South Plainfield, New Jersey, to the offices of the wife's attorneys in New York City, and was able to give testimony for over two hours, belying the claim that he was physically unable to travel or to attend the arbitration hearing. The husband also testified that he traveled

to his parents' summer house upstate on the weekends and for holidays.

The husband acknowledged under oath that his signature appeared on the BAA at issue in the proceeding. After being directed to prepare for trial, the husband submitted a letter to the court stating that he intended to withdraw his petition. However, he did not execute a stipulation officially withdrawing the petition until the actual day of trial. His delays caused the wife to prepare for trial and to incur legal fees, anticipating that the husband might fail to withdraw the petition. The court properly found the husband's conduct to be sanctionable based on the delays occasioned by the failure to withdraw the petition from April 2010, when the husband was deemed to be competent, until the day of trial. I accordingly agree with the majority's decision to uphold the award of \$68,587.50 in counsel fees incurred by the mother in connection with the special proceeding.<sup>1</sup>

I would find, however, that the court was also within its

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<sup>1</sup>A member of the majority advanced a position on sanctions in a prior case that appears to be inconsistent with the position the majority takes here (see *Matter of Kover*, 134 AD3d 64, 94-131 [1st Dept 2015, Saxe, J., dissenting]).

discretion in awarding sanctions based on the husband's failure to comply with the court order to pay his share of the forensic expert's fee. The failure to pay the expert had the indisputable effect of delaying the trial since the trial could not go forward without the forensic expert and the forensic expert would have to be paid in order to testify. The court properly determined that the husband's purported inability to pay \$6,562.50 to comply with the court order was not credible and was undertaken to "delay or prolong the resolution of the litigation." The fine, like the legal fees associated with the special proceeding, was ordered to be paid from the husband's share of the escrowed proceeds from the sale of the parties' home.

#### *Contempt Finding Against the Paternal Grandparents*

The grandparents admittedly failed to file a notice of appeal from the order finding them in contempt. An appellate court cannot grant relief to a nonappealing party unless doing so is necessary to afford complete relief to the appealing party (see *Hecht v City of New York*, 60 NY2d at 62). The majority's invocation of *Hecht* notwithstanding, they cannot and do not even purport to justify bringing this case within the narrow exception set forth in *Hecht*. "[A]n appellate court's reversal or modification of a judgment as to an appealing party will not

inure to the benefit of a nonappealing coparty, unless the judgment was rendered against parties having a united and inseverable interest in the judgment's subject matter, which itself permits no inconsistent application among the parties" (*id.* at 61-62). That is manifestly not the case here. Stating that the parties have "a united and inseverable interest in the judgment's subject matter," as the majority does, with no explication or justification for how it arrives at this extraordinary conclusion, does not transform the grandparents into appealing parties when they failed to file a notice of appeal. Further, the position taken by the majority on the merits, *i.e.*, upholding some sanctions against the husband, noting that he was found to be "fully capable of understanding and assisting his lawyer in a Family Court proceeding," is inconsistent with the argument that the grandparents functioned as the husband's *de facto* guardian so as to be considered united in interest with him. The majority cannot have it both ways.

The contempt sanction is predicated upon the conduct of the grandparents in defying nonparty subpoenas, and was levied against them alone, not jointly against them and the husband. Moreover, the husband's lawyers, in declining to accept service of subpoenas directed to the grandparents, made clear that they

represented the husband only and not the grandparents. There is simply no basis for finding that they were united in interest so as to dispense with the fundamental jurisdictional requisite of filing a notice of appeal.

The court in any event properly found the paternal grandparents in contempt for failing to comply with a judicial subpoena and court order directing them to produce documents in their possession (see Judiciary Law § 753[A][5]). The grandparents admitted that notwithstanding actual notice of the court's order, they failed to produce documents in defiance of the subpoenas and the court's January 8, 2013 order. The documents, including emails in which they alluded to the fact that the father did not want visitation with the child, were highly relevant to the issues before the court.

Although the production of the email or other documents might not have averted a trial altogether, there is no question that the wife was prejudiced by their withholding. By seeking documents relating to communications between the paternal grandparents and the husband's counsel, the wife was attempting to establish a pattern of manipulation that acted to the child's detriment and thereby rendered them inappropriate persons to supervise visits between the husband and his daughter. The

documents helped to corroborate the wife's theory of the case. The failure to produce the documents for trial defeated, impaired, impeded and prejudiced the rights or remedies of the wife. I agree with the majority that the trial court appropriately awarded the wife the costs of bringing the contempt motion. I would also award the costs of preparing a posttrial memorandum to address the belatedly produced documents. These legal fees were incurred as a direct result of the grandparents' contempt of the subpoenas.

I would also find that the trial court acted within its discretion in adjudging the grandparents in contempt and requiring that they reimburse the wife for the costs of defending the access trial. It cannot be denied that the trial would have been severely curtailed, if not rendered unnecessary, by the production of the relevant documents. The documents were not limited to the email cited by the majority, wherein the grandfather stated, "Please do not let them know how much [the husband] is against seeing [the child] at all," but includes others reflective of the overwhelming rancor of the grandparents toward the wife and the husband's ambivalence and seeming lack of interest in seeing his own daughter. As noted by the trial court, the paternal grandparents "instructed the [h]usband's

attorneys . . . to take actions, or not take actions, that delayed the custody trial, caused the [m]other to incur unnecessary counsel fees fighting these tactics, and, most importantly, were contrary to [the child's] best interests because they had a negative impact on her relationship with her [f]ather."

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

ENTERED: MARCH 24, 2016

  
CLERK



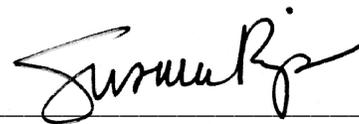
the time an issue about the juror's impartiality arose, defendant still had the opportunity to exercise two unused peremptories, and since the jury had not yet been sworn, CPL 270.15(4) does not apply to defendant's claim.

By failing to object, by making only generalized objections, and by failing to request further relief after objections were sustained, defendant failed to preserve his challenges to the prosecutor's summation (see *People v Balls*, 69 NY2d 641 [1986]), and we decline to review them in the interest of justice. As an alternative holding, we find no basis for reversal. The comments at issue were generally based on reasonable inferences drawn from the evidence and were fair responses to defense counsel's summation (see *People v Overlee*, 236 AD2d 133 [1st Dept 1997], *lv denied* 91 NY2d 976 [1998]; *People v D'Alessandro*, 184 AD2d 114, 118-119 [1st Dept 1992], *lv denied* 81 NY2d 884 [1993]).

Defendant's argument that he was entitled to a financial hardship hearing pursuant to CPL 420.40 regarding the mandatory surcharge is unavailing (see *People v Jones*, 115 AD3d 490 [1st Dept 2014], *affd* \_\_ NY3d \_\_, 2016 NY Slip Op 01208 [2016]).

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

ENTERED: MARCH 24, 2016

A handwritten signature in black ink, appearing to read "Susan R. Jones", written over a horizontal line.

CLERK



supported by a preponderance of the evidence (see Executive Law § 259-i[3][f][viii]; *Matter of Miller v Russi*, 225 AD2d 368 [1st Dept 1996]). There exists no basis to disturb the credibility determinations made by the Administrative Law Judge (see *Matter of Berenhaus v Ward*, 70 NY2d 436, 443-444 [1987]).

However, the imposition of an assessment that amounted to the full balance of petitioner's underlying sentence constituted an abuse of discretion. We find that the maximum penalty for petitioner's parole violation that can be sustained on this record is reincarceration for a period no greater than 38 months, and we remit to respondent for imposition, in its discretion, of a new penalty consistent with this decision (see *Rob Tess Rest. Corp. v New York State Liq. Auth.*, 49 NY2d 874 [1980]).

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

ENTERED: MARCH 24, 2016

A handwritten signature in black ink, appearing to read 'Susan R. [unclear]', written over a horizontal line.

CLERK



Defendant moved to set aside the verdict pursuant to CPL 330.30(3) based on this disclosure. The motion court, without ordering a hearing, found it was not until two weeks after the verdict was rendered that the claims against the sergeant were substantiated and the whole District Attorney's office was put on notice of the significance of the investigation. With regard to the officer, the court found the information was not substantiated until four months after the verdict.

Defendant argues that the court erred in denying his CPL 330.30 motion seeking a new suppression hearing and trial, that the information pertaining to the sergeant and officer constituted newly discovered evidence, and also that the prosecution's failure to disclose this evidence was a *Brady* violation. Without a hearing, we cannot determine what the assigned prosecutor and the District Attorney's office knew about the veracity of the perjury complaint prior to the conclusion of defendant's trial (see generally *People v Wright*, 86 NY2d 591 [1995]). Defendant's car stop and the stops investigated by the District Attorney's office occurred during the same time period, in the same part of Manhattan, and allegedly under similar circumstances. Although the trial court found that, at the time of defendant's trial, the People were not aware of the

investigation into either of the officers, we cannot discern on the existing record the basis for the court's factual finding. However, in another place in the decision, the motion court notes that in December 2008, long before the trial was held, an Assistant District Attorney in the Official Corruption Unit was assigned to investigate the claim against the sergeant. At a hearing, defendant can explore what information, if any, was shared between the corruption unit and the assigned prosecutor before defendant's trial and whether, prior to the date referenced by the motion court, the People had specific information that the sergeant and the officer had engaged in misconduct which they should have disclosed (*see generally People v Baxley*, 84 NY2d 208 [1994]). The hearing also can help clarify whether the District Attorney's investigation of the alleged perjury extended in any way, to the stop of defendant.

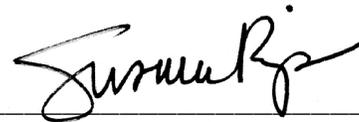
Although the People argue that there was no reasonable probability that the outcome would have been different if the information was available, we are not deciding this issue until a hearing is made to further explore the facts. We have considered

the People's procedural arguments and find them unavailing.

In light of this determination, we do not reach defendant's remaining contentions at this time.

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

ENTERED: MARCH 24, 2016

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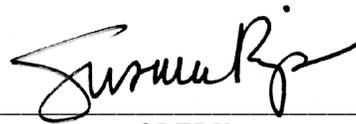
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convicted of an enumerated sexually violent offense, and the court lacked discretion to do otherwise (see *People v Bullock*, 125 AD3d 1 [1st Dept 2014], *lv denied* 24 NY3d 915 [2015]). We decline to revisit our holding in *Bullock*. Defendant's due process arguments are similarly unpreserved and unavailing.

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

ENTERED: MARCH 24, 2016

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CLERK

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

578           Boubacar Drame, et al.,  
                  Plaintiffs-Respondents,

Index 301883/08

-against-

Ambulette P.R.N., Inc., et al.,  
Defendants-Appellants.

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Dwyer & Taglia, New York (Gary J. Dwyer of counsel), for appellants.

Macaluso & Fafinski, P.C., Bronx (Donna A. Fafinski of counsel), for respondents.

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Order, Supreme Court, Bronx County (Larry S. Schachner, J.), entered on or about September 24, 2015, which, to the extent appealed from as limited from the briefs, denied defendants' motion to preclude the testimony of plaintiffs' neurologist, or in the alternative, to allow defendants to conduct a neurological exam and further orthopedic exam, unanimously reversed, on the law and the facts and in the exercise of discretion, without costs, and the motion granted to the extent indicated.

In view of plaintiffs' noncompliance with 22 NYCRR 202.17, we believe the trial court improvidently exercised its discretion

insofar as it denied defendants' motion for a further physical examination by Dr. Frazier and a neurologist of the injured plaintiff. Such further examinations shall take place within 30 days if this order.

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

ENTERED: MARCH 24, 2016

A handwritten signature in black ink, appearing to read "Susan R. [unclear]", written over a horizontal line.

CLERK

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

579           In re Chigusa Hosono D.,  
                  Petitioner-Respondent,

-against-

          Jason George D.,  
          Respondent-Appellant.

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Daniel R. Katz, New York, for appellant.

Andrew J. Baer, New York, for respondent.

George E. Reed, Jr., White Plains, attorney for the child.

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Order of protection, Family Court, New York County (Marva A. Burnett, Referee), entered on or about November 21, 2014, which, upon a fact-finding determination that respondent committed the family offenses of assault in the second degree, harassment in the second degree and disorderly conduct in the second degree, directed respondent to stay away from petitioner for a period of two years, unanimously modified, on the law and the facts, to vacate the findings of assault in the second degree and disorderly conduct in the second degree, and otherwise affirmed, without costs.

The Referee erred in determining that respondent's actions constituted the family offense of assault in the second degree, because there is no evidence in the record that he caused

petitioner to suffer a serious physical injury (see Penal Law § 120.05[1], Penal Law § 10.00 [10]; and see *People v Snipes*, 112 AD2d 810, 811 [1st Dept 1985]). Nor does the record establish that respondent caused petitioner to suffer physical injury which would support a finding of assault in the third degree (see Penal Law §§ 120.00[1]; 10.00[9]).

The Referee also erred in determining that respondent's actions constituted the family offense of disorderly conduct in the second degree, since such an offense is not enumerated as a family offense as defined by Family Court Act § 812(1). Nor did respondent's actions constitute the enumerated family offense of disorderly conduct, inasmuch as a preponderance of the record evidence does not support an inference that, during either of the incidents described by petitioner in her testimony, respondent intended to cause a public inconvenience, annoyance or alarm, or that his conduct in the private residence recklessly created such a risk (see *Matter of Cassie v Cassie*, 109 AD3d 337, 340-344 [2d Dept 2013]; *Matter of Janice M. v Terrance J.*, 96 AD3d 482 [1st Dept 2012]).

However, a preponderance of the evidence supports the finding that respondent's actions during both incidents constituted the family offense of harassment in the second

degree, since his conduct evinced an intent to harass, annoy or alarm petitioner (see Family Ct Act § 832). Petitioner testified that during one incident, respondent grabbed her by the neck, dragged her into the kitchen, pushed her to the wall, called her an obscene name, and threatened to punch her in the face (see *McGuffog v Ginsberg*, 266 AD2d 136 [1st Dept 1999]). She testified that during the second incident, respondent hit her on the top of her head with his fist (see *Matter of Sheureka L. v Sidney S.*, 100 AD3d 547 [1st Dept 2012], *lv denied* 20 NY3d 858 [2013]). The Referee's credibility determinations are supported by the record, and there is no basis to disturb them (see *Matter of Lisa S. v William V.*, 95 AD3d 666 [1st Dep 2012]). The issuance of a two-year order of protection was appropriate "because it will likely be helpful in eradicating the root of the family disturbance" (*Matter of Oksoon K. v Young K.*, 115 AD3d 486, 487 [1st Dept 2014], *lv denied* 24 NY3d 902 [2014]).

Respondent has not preserved his contention that the Referee should have dismissed the petition because it violated his right to due process by failing to delineate a sufficiently narrow time frame for the alleged offenses (see *Matter of Erica D. [Maria D.]*, 80 AD3d 423, 424 [1st Dept 2011], *lv denied* 16 NY3d 708 [2011]; *Matter of Tiffany A.*, 295 AD2d 288, 289 [1st Dept 2002]).

If this Court were to review the issue in the interest of justice, we would find that the petition sufficiently identified places and times when the alleged family offenses were committed (see *Matter of Little v Renz*, 90 AD3d 757, 757-758 [2d Dept 2011]).

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

ENTERED: MARCH 24, 2016

A handwritten signature in black ink, appearing to read "Susan R. Jones", written over a horizontal line.

CLERK

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

580-

Index 101428/13

581 Richard E. Winkler,  
Plaintiff-Appellant,

-against-

Joe Sherman, also known as Joeseeph  
Daniel Sherman, also known as Joseph  
Sherman,  
Defendant-Respondent,

New York State Legislature,  
Defendant.

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Richard E. Winkler, appellant pro se.

Melito & Adolfsen P.C., New York (Dawn Mikulastik Gagliardi of  
counsel), for respondent.

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Order, Supreme Court, New York County (Milton A. Tingling,  
J.), entered December 19, 2014, which granted defendant Sherman's  
motion to dismiss the complaint for failure to state a claim, and  
order, same court (Robert D. Kalish, J.), entered May 29, 2015,  
which, to the extent appealable, denied plaintiff's motion to  
renew, unanimously affirmed, without costs.

A statute is presumed constitutional and that presumption  
can only be overcome by proof persuasive beyond a reasonable  
doubt (*Hotel Dorset Co. v Trust for Cultural Resources of City of*  
*N.Y.*, 46 NY2d 358, 370 [1978]; *Local Govt. Assistance Corp v*

*Sales Tax Asset Receivable Corp.*, 2 NY3d 524, 535 [2004]). The court properly determined that plaintiff failed to demonstrate that Family Court Act § 517 was unconstitutional to the extent that it placed a limitation on the time when a child could seek a paternity test, given the state's legitimate interest in securing support for a child from those legally responsible. The limitations period is not arbitrary and capricious in that by age 21, a parent may not be legally responsible for support. Moreover, plaintiff, well over 21 years of age, was not seeking support from defendant.

Plaintiff also failed to provide binding legal authority for his claim that he had a constitutional right to know the identity of his biological father, given the strong presumption that his mother's husband, who was listed on his birth certificate, is his father.

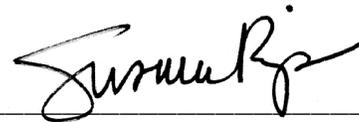
The court properly denied plaintiff's motion to renew the December 19, 2014 decision in that plaintiff failed to present new facts not offered on the prior motion that would change the prior determination (*Pullman v Silverman*, 125 AD3d 562, 563 [1st Dept 2015]; see *Drillings v Beth Israel Med. Ctr.*, 200 AD2d 381

[1st Dept 1994]).

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: MARCH 24, 2016

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"professional" (see *Leather v United States Trust Co. of N.Y.*, 279 AD2d 311, 311-312 [1st Dept 2001]). Thus, any duty owed by the Eureka defendants to render financial advisory services to plaintiff in a competent manner must arise out of a contract. Indeed, the complaint alleges that plaintiff "retained" the Eureka defendants and that Eureka "agreed to act as [his] financial advisor" (emphasis added).<sup>1</sup> However, "claims based on negligent or grossly negligent performance of a contract are not cognizable" (*Kordower-Zetlin v Home Depot U.S.A., Inc.*, 134 AD3d 556, 557 [1st Dept 2015] [internal quotation marks omitted]).

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

ENTERED: MARCH 24, 2016

  
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<sup>1</sup> The parties dispute whether such a contract would have to be in writing. We need not resolve that dispute, since plaintiff is not suing for breach of contract.



People's position.

When the People announced ready on various occasions, they had sufficient evidence to proceed with at least a minimal prima facie case. To establish a violation of Vehicle and Traffic Law § 1192(2-a)(a), one of the two intoxicated driving charges of which defendant was convicted, there must be breathalyzer test results showing that a defendant had the statutory minimum blood alcohol content at the relevant time (see *People v Mertz*, 68 NY2d 136, 139 [1986]). Breathalyzer test results may be admitted only if the People lay the proper foundation by presenting "evidence from which the trier of fact could reasonably conclude ... that the testing device was in proper working order at the time the test was administered to the defendant" (*People v Freeland*, 68 NY2d 699, 700 [1986]).

Defendant argues that the People's statements of readiness, made over the course of roughly 20 months when the case was pending, were illusory because the People did not obtain and produce a calibration report to establish operability of the breathalyzer device until the day of trial. It is not the calibration report, but proof of the operability of the breathalyzer, that is necessary to lay a prima facie foundation for admission of the breathalyzer test results. Here, the People

represented that they intended to establish operability through the testimony of a police witness, who would, in addition, bring the calibration report to court. Therefore, the People's delay in obtaining and producing the calibration report, ultimately provided to defense counsel just before trial, was at most a failure to comply with a discovery request, which does not render their prior statements of readiness illusory (see *People v Wright*, 50 AD3d 429 [1st Dept 2008], *lv denied* 10 NY3d 966 [2008]; see also *People v Anderson*, 66 NY2d 529, 543 [1985]).

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

ENTERED: MARCH 24, 2016

A handwritten signature in black ink, appearing to read "Susan R. [unclear]", written over a horizontal line.

CLERK

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

584 Stacy Sonkin,  
Plaintiff-Respondent,

Index 304447/09

-against-

Paul Sonkin,  
Defendant-Appellant.

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Paul F. Condzal, New York, for appellant.

The Isaacs Firm PLLC, New York (Randi S. Isaacs of counsel), for  
respondent.

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Order, Supreme Court, New York County (Lori S. Sattler, J.),  
entered on or about March 17, 2015, which, to the extent appealed  
from as limited by the briefs, denied defendant husband's motion  
for a downward modification of his maintenance and child support  
obligations, and granted plaintiff wife's cross motion for a wage  
garnishment in accordance with CPLR 5242, and for counsel fees,  
unanimously affirmed, without costs.

Defendant failed to demonstrate the extreme hardship  
necessary to obtain modification of the maintenance obligations  
contained in the parties' stipulation of settlement, which was  
incorporated but not merged into the parties' divorce judgment  
(see Domestic Relations Law § 236[B][9][b][1]; *Sheila C. v Donald  
C.*, 5 AD3d 123 [1st Dept 2004]). Nor did he demonstrate a

substantial, unanticipated and unreasonable change in his circumstances to warrant a reduction in the child support obligations contained in the stipulation (*Gordon v Gordon*, 82 AD3d 509, 509 [1st Dept 2011]; see Domestic Relations Law § 236[B][9][b][2][i]). Defendant failed to fully disclose his assets and income, and he failed to show how he purportedly dissipated his assets since the time of his prior motion for a downward modification. A hearing was not required, since defendant failed to raise a genuine question of fact (*Gordon*, 82 AD3d at 509).

Given defendant's failure to pay maintenance and child support in breach of the stipulation, as well as his failure to express any intention to comply with those obligations, the motion court properly determined that plaintiff is entitled to collect arrears via a wage deduction order pursuant to CPLR 5242 and to use the Support Collection Unit to collect all child support and maintenance due under the judgment of divorce.

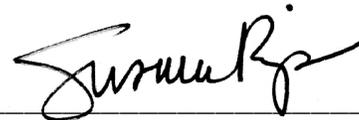
The motion court providently exercised its discretion in awarding counsel fees, which were reasonable under the circumstances (see *DeCabrera v Cabrera-Rosete*, 70 NY2d 879, 881 [1987]; *Morken v Morken*, 292 AD2d 431 [2d Dept 2002]). Pursuant to the terms of the stipulation, plaintiff is entitled to counsel

fees, given defendant's breach and his multiple, unsuccessful attempts to void or rescind the support provisions contained in the stipulation.

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: MARCH 24, 2016

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CLERK



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

587 In re Rolando L.,

A Person Alleged to  
be a Juvenile Delinquent,  
Appellant.

- - - - -

Presentment Agency

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Tamara A. Steckler, The Legal Aid Society, New York (Raymond E. Rogers of counsel), for appellant.

Zachary W. Carter, Corporation Counsel, New York (Diana Lawless of counsel), for presentment agency.

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Order, Family Court, Bronx County (Peter J. Passidomo, J.), entered on or about June 9, 2014, which adjudicated appellant a juvenile delinquent upon a fact-finding determination that he committed acts that, if committed by an adult, would constitute the crimes of criminal sexual act in the first degree, sexual abuse in the first and third degrees and sexual misconduct, and placed him on probation for a period of 15 months, unanimously affirmed, with costs.

The court providently exercised its discretion in precluding cross-examination of the victim regarding an allegation of sexual abuse he made against another person. The other complaint did not have a significant probative relation to the charges against appellant, and there was no factual showing of any likelihood

that the allegations in the prior complaint were false (see *People v Mandel*, 48 NY2d 952, 953 [1979], cert denied 446 US 949 [1980]).

The court's finding 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]). There is no basis for disturbing the court's determinations concerning credibility, including its evaluation of inconsistencies in testimony.

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

ENTERED: MARCH 24, 2016

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CLERK



(*id.*). Moreover, plaintiffs' response to interrogatories did not refute the assertion that the price was \$55,000, rather than \$45,000 as plaintiffs contend. As such, there was no issue of fact as to the price, and the claims arising from the agreement for the production and purchase of the jewelry should have been dismissed, because plaintiffs admittedly did not pay \$55,000.

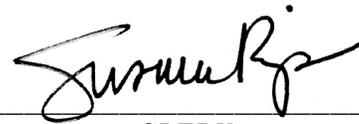
Plaintiffs contend that the parties had a so-called joint venture agreement to sell certain of defendants' jewelry at the Palm Beach Art Show, and that as such, the agreement did not need to be in writing, and offer only sworn testimony in support of its existence. However, the agreement, as described by plaintiffs in their interrogatory responses, had no provision for the sharing of losses, and therefore was not one for a joint venture (see *Richbell Info. Servs. v Jupiter Partners*, 309 AD2d 288, 298 [1st Dept 2003]). The statute of frauds (General Obligations Law § 5-701[a][10]) renders unenforceable, absent a

writing, such an agreement for a commission or to act in negotiating a sale.

We agree with the motion court that sanctions were not warranted.

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

ENTERED: MARCH 24, 2016

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

589            Israel Discount Bank of New York,            Index 651135/14  
              etc., et al.,  
              Plaintiff-Appellant,

-against-

EisnerAmper LLP,  
Defendant-Respondent.

---

Otterbourg P.C., New York (Richard G. Haddad of counsel), for  
appellant.

Winston & Strawn LLP, Chicago, IL (Linda T. Coberly of the bar of  
the State of Illinois, admitted pro hac vice of counsel), for  
respondent.

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Order, Supreme Court, New York County (Shirley Werner  
Kornreich, J.), entered November 14, 2014, which granted  
defendant's motion pursuant to CPLR 3211 to dismiss the complaint  
with prejudice, unanimously affirmed, with costs.

Plaintiff, a lender to asset-based lender nonparty Oak Rock  
Financial, LLC, alleges fraud against defendant, Oak Rock's  
accountant, based on defendant's failure to discover that Oak  
Rock's founder and manager was manipulating Oak Rock's loans  
receivable. However, the complaint fails to allege that the  
opinion was "based on grounds so flimsy as to lead to the  
conclusion that there was no genuine belief in its truth" or that  
the opinion amounted to "a reckless misstatement" for which

defendant could be held liable for fraud (see *State St. Trust Co. v Ernst*, 278 NY 104, 111-112 [1938], citing *Ultramares Corp. v Touche*, 255 NY 170 [1931])). At most, the complaint alleges negligence, which, in the absence of privity or some words or action by defendant directed to plaintiff, does not lie (see *Credit Alliance Corp. v Arthur Andersen & Co.*, 65 NY2d 536, 551 [1985]; *Houbigant, Inc. v Deloitte & Touche*, 303 Ad2d 92 [1st Dept 2003])). None of the alleged "red flags" pleaded in the complaint creates an inference that defendant "had notice of particular circumstances raising doubts as to the veracity" of the information provided to it by Oak Rock regarding Oak Rock's accounts receivable (*Foothill Capital Corp. v Grant Thornton, L.L.P.*, 276 AD2d 437, 437 [1st Dept 2000])).

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

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

ENTERED: MARCH 24, 2016

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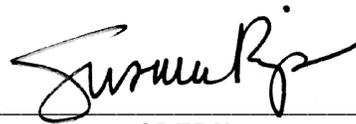
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*People v Danielson*, 9 NY3d 342, 348-349 [2007]). There is no basis for disturbing the court's credibility determinations, including its resolution of inconsistencies.

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

ENTERED: MARCH 24, 2016

A handwritten signature in black ink, appearing to read "Susan R. Jones", written over a horizontal line.

CLERK

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

591 Virginia Cruz-Guzman,  
Plaintiff-Appellant,

Index 24485/13E

-against-

2380-2386 Grand Ave, LLC,  
Defendant-Respondent,

Prana Holding Company, LLC,  
Defendant.

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Sim & Record, LLP, Bayside (Sang J. Sim of counsel), for  
appellant.

Law Office of Lori D. Fishman, Tarrytown (D. Bradford Sessa of  
counsel), for respondent.

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Order, Supreme Court, Bronx County (Betty Owen Stinson, J.),  
entered on or about September 8, 2014, which, in an action for  
personal injuries, granted the motion of defendant 2380-2386  
Grand Ave., LLC to dismiss the complaint pursuant to CPLR  
3211(a)(8), and denied plaintiff's cross motion for leave to  
extend her time to serve a summons and complaint upon said  
defendant pursuant to CPLR 306-b, unanimously reversed, on the  
law, without costs, defendant's motion denied, and plaintiff's  
cross motion granted to the extent of ordering a traverse  
hearing.

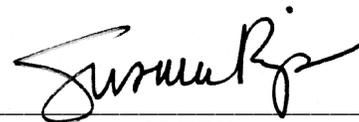
A traverse hearing is warranted in light of the parties'

conflicting affidavits as to whether the individual served with the summons and complaint pursuant to CPLR 311-a was authorized to accept service on behalf of defendant limited liability company (see *Dunn v Pallet*, 42 AD3d 807, 808-809 [3d Dept 2007]).

Plaintiff's submissions fail to establish a basis to grant her an extension of time to re-serve defendant under CPLR 306-b. The record demonstrates that plaintiff has not diligently prosecuted her negligence claim, the statute of limitations has expired, the merits of plaintiff's claim are not established, and her injury allegations are vague (see e.g. *Johnson v Concourse Vil., Inc.*, 69 AD3d 410, 411 [1st Dept 2010], *lv denied* 15 NY3d 707 [2010]; compare *Frank v Garcia*, 84 AD3d 654 [1st Dept 2011]).

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

ENTERED: MARCH 24, 2016



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CLERK

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

592-

Index 650078/11

593            Sotheby's International Realty,  
                 Inc.,  
                 Plaintiff-Respondent,

-against-

Donald Deutsch, et al.,  
Defendants-Appellants.

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Judd Burstein, P.C., New York (Judd Burstein of counsel), for appellants.

Kelley Drye & Warren LLP, New York (Geoffrey W. Castello and Nainesh Ramjee of counsel), for respondent.

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Judgment, Supreme Court, New York County (Charles E. Ramos, J.), entered November 24, 2014, after a nonjury trial, in favor of plaintiff in the total sum of \$1,657,319.45, unanimously affirmed, with costs. Appeal from order, same court and Justice, entered October 23, 2014, unanimously dismissed, without costs, as subsumed in the appeal from the judgment.

In this action for damages arising from a claimed breach of contract relating to the sale of two of defendants' properties in East Hampton, New York, we find no basis to disturb the trial court's findings, based largely on credibility determinations, that there was an express agreement or at least an implied agreement to pay plaintiff a commission of 4% (see *Joseph P. Day*

*Realty Corp. v Chera*, 308 AD2d 148, 149, 153 [1st Dept 2003]).

Plaintiff's broker (1) told defendant Deutsch that the buyer was interested in the property; (2) personally showed the buyer, his wife, and his decorator the property; (3) discussed the potential purchase price with the buyer at the property; (4) continued to keep Deutsch abreast of the buyer's interest; (5) sent the buyer, at his and Deutsch's request, information on comparable properties; and (6) sought Deutsch's permission to put the buyer in touch with Deutsch's counsel for zoning information on the property. It was therefore not against the weight of the evidence for the trial court to conclude that the broker was the procuring cause of the purchase, or, even if he was unable to prove that he was the procuring cause of Marks's purchase, that defendants terminated his activities "in bad faith and as a mere device to escape the payment of the commission" (*SPRE Realty, Ltd. v Dienst*, 119 AD3d 93, 100 [1st Dept 2014] [internal quotation marks omitted]).

Even if there was a compromise, and the parties substituted the amount of \$150,000 as the new commission, as contended by the defendants (see *Wyckoff v Searle Holdings Inc.*, 111 AD3d 546, 546-547 [1st Dept 2013]), the trial court correctly found that defendants negated that agreement when they failed to make

payment. Thus, the trial court's credibility findings that the parties reached an agreement for a 4% commission, which itself was less than the customary rate in the area, should not be disturbed (see *Matter of Metropolitan Transp. Auth.*, 86 AD3d 314, 320 [1st Dept 2011]).

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

ENTERED: MARCH 24, 2016

  
CLERK



remark that could be viewed as a lay opinion that the stabbing was unjustified, this was not in response to any interrogation, and it was still not testimonial (see *People v Long*, 34 Misc 3d 151[A], 2012 NY Slip Op 50300[U], \*2 [App Term, 9th & 10th Jud Dists 2012] [911 caller's unsolicited opinion that dangerous driver was drunk found not testimonial]). Instead, we find that any error in admitting a lay opinion was of an evidentiary, nonconstitutional nature and that it was harmless (see *People v Crimmins*, 36 NY2d 230 [1975]).

With regard to a 911 call by a second nontestifying declarant, which raises similar issues, we note that the court ultimately struck the entire call from the record, and the jury is presumed to have disregarded it. In any event, we similarly find that this call was nontestimonial notwithstanding the presence of remarks bearing on the issue of justification, and that any error was both nonconstitutional and harmless.

Defendant did not preserve his claim that the court provided an inadequate remedy when the prosecutor improperly impeached defendant with statements made by trial counsel at arraignment that were not actually attributable to defendant, and we decline to review it in the interest of justice. Defense counsel expressly agreed to the curative instructions given by the court

in its main and supplemental charges, and requested no further relief. Therefore, these curative actions "must be deemed to have corrected the error to the defendant's satisfaction" (*People v Heide*, 84 NY2d 943, 944 [1994]; see also *People v Whalen*, 59 NY2d 273, 280 [1983]). As an alternative holding, we find that the curative instructions, taken together, were sufficient to direct the jury not to consider the offending cross-examination, as well as to avoid any violation of the advocate-witness rule or defendant's right to conflict-free representation (see *People v Ortiz*, 26 NY3d 430 [2015]).

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

ENTERED: MARCH 24, 2016

  
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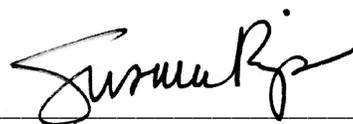
Action of 1965, reauthorized as the No Child Left Behind Act (NCLB) of 2001 (20 USC § 6301 *et seq.*) (see *Matter of Thomas v New York City Dept. of Educ.*, 103 AD3d 495 [2013]).

Petitioner, a member of MCSM's School Leadership Team (SLT), lacks standing to challenge the results of DOE's investigation of his allegations, brought pursuant to the "No Child Left Behind Written Complaint and Appeal Procedures" adopted by the New York State Education Department (see *New York State Assn. of Nurse Anesthetists v Novello*, 2 NY3d 207, 211 [2004]; *Matter of Posner v Rockefeller*, 26 NY2d 970 [1970]). Petitioner's status as a complainant who initiated an administrative investigation, does not provide him with standing for a private right of action to challenge the agency's determination, absent a demonstration that he suffered actual injury (see *Sassower v Commission on Jud. Conduct of State of N.Y.*, 289 AD2d 119 [1st Dept 2001], *lv denied*

99 NY2d 504 [2002]). Moreover, petitioner does not “fall within the zone of interests . . . sought to be promoted or protected” by Education Law § 2590-h or the NCLB (see *Novello*, 2 NY3d at 211).

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

ENTERED: MARCH 24, 2016

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CLERK

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

597 In re Sherman Walker,  
Petitioner-Appellant,

Index 401392/12

-against-

F.O.I.L. Appeals Officer and  
Assistant District Attorney,  
Susan C. Roque, of The New York  
County District Attorney's Office,  
Respondent-Respondent.

---

Sherman Walker, appellant pro se.

Cyrus R. Vance, Jr., District Attorney, New York (Sheila L.  
Bautista of counsel), for respondent.

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Judgment, Supreme Court, New York County (Donna M. Mills,  
J.), entered September 18, 2012, denying the petition to compel  
respondent to disclose documents requested by petitioner pursuant  
to the Freedom of Information Law (FOIL), and dismissing the  
proceeding brought pursuant to CPLR article 78, unanimously  
affirmed, without costs.

The court properly found that the proceeding is time-barred.  
Petitioner's 2012 FOIL request was duplicative of his 1992 FOIL  
request seeking essentially the same materials pertaining to the  
same criminal case, notwithstanding that the prior request was  
more detailed than the instant request (*see Matter of Garcia v  
Division of State Police*, 302 AD2d 755, 756 [3d Dept 2003]). The

four-month statute of limitations to commence an article 78 proceeding (see CPLR 217[1]) expired long before petitioner commenced this proceeding in 2012, since the instant FOIL request did not extend or toll petitioner's time to bring this proceeding challenging the 1993 denial of his administrative appeal from the denial of his 1992 request (see *Matter of Andrade v New York City Police Dept.*, 106 AD3d 520 [1st Dept 2013]; *Matter of Kelly v New York City Police Dept.*, 286 AD2d 581 [1st Dept 2001]).

Petitioner's remaining arguments are unavailing.

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

ENTERED: MARCH 24, 2016

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CLERK



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

599N Shirley Parker,  
Plaintiff-Appellant,

Index 103629/11

-against-

Bonitas Youth Services, Inc.,  
Defendant-Respondent.

---

Law Office of Certain & Zilberg, PLLC, New York (Michael Zilberg of counsel), for appellant.

Kelley Drye & Warren LLP, New York (Sean R. Flanagan of counsel), for respondent.

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Order, Supreme Court, New York County (Doris Ling-Cohan, J.), entered December 2, 2014, which granted defendant's motion pursuant to CPLR 317 to vacate a default judgment entered against it, unanimously affirmed, without costs.

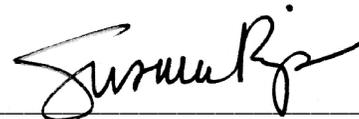
Defendant established that "[it] did not personally receive notice of the summons in time to defend and has a meritorious defense" (CPLR 317; see *Eugene Di Lorenzo, Inc. v A.C. Dutton Lbr. Co.*, 67 NY2d 138, 141-142 [1986]).

Defendant established that it had a meritorious defense to the action by submitting an affidavit by its president and founder outlining in detail the routine safety practices defendant used when operating a sump pump and hose to remove

flood water from its basement - thereby doing more than merely "generally vouching for the well-maintained condition of the premises" (*Zapater v 2540 Assoc.*, 250 AD2d 508, 508 [1st Dept 1998]; see *Peacock v Kalikow*, 239 AD2d 188, 190 [1st Dept 1997]).

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

ENTERED: MARCH 24, 2016

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CLERK

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

600 In re State of New York, ex rel.,  
[M-46] Samuel L. Buoscio,  
Petitioner,

Index 46/16

-against-

Hon. T.R. Kennedy, etc., et al.,  
Respondents.

---

Samuel L. Buoscio, petitioner pro se.

John W. McConnell, Office of Court Administration, New York  
(Sharon Kerby of counsel), for respondents.

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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.

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

ENTERED: MARCH 24, 2016



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CLERK



the arrestee was intoxicated, the reliability of the tests and whether the officer utilized the proper protocols in administering the tests were not in issue. Instead, the video was admitted solely to show how defendant appeared on the night of his arrest.

Similarly, the court properly exercised its discretion in denying defendant's request for a missing witness charge as to the officer who administered the coordination tests. Given the testimony of the arresting officer concerning objective indicia of defendant's intoxication, without reference to defendant's test performance, the second officer had no material, noncumulative testimony to offer. Accordingly, a missing witness charge was not warranted (*see generally People v Gonzalez*, 68 NY2d 424, 427 [1986]).

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

ENTERED: MARCH 24, 2016

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CLERK

Mazzarelli, J.P., Manzanet-Daniels, Kapnick, Webber, JJ.

602-

Index 103117/10

603-

604 Charito Nepomuceno,  
Plaintiff-Appellant,

-against-

The City of New York, et al.,  
Defendants,

Beth Israel Medical Center,  
Defendant-Respondent.

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Scott Baron & Associates, P.C., Howard Beach (W. Bradford Bernadt of counsel), for appellant.

Carroll McNulty & Kull, LLC, New York (Frank J. Wenick of counsel), for respondent.

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Judgment, Supreme Court, New York County (Geoffrey D. Wright, J.), entered August 12, 2015, dismissing the complaint against defendant Beth Israel Medical Center (BIMC), and bringing up for review an order, entered March 24, 2015 as amended July 9, 2015, (same court and Justice), which granted BIMC renewal of its motion for summary judgment dismissing the complaint, and upon renewal, dismissed the complaint, unanimously affirmed, without costs. Appeal from the orders, unanimously dismissed, without costs, as subsumed in the appeal from the judgment.

Plaintiff alleges that on June 6, 2009, at approximately

6:30 a.m., she was walking on the sidewalk on 1st Avenue between 16th Street and 17th Street in front of and near the entrance of BIMC when she slipped and fell on a piece of fruit. BIMC was plaintiff's employer when the accident occurred.

Supreme Court properly dismissed the complaint. Plaintiff could not proceed with her tort claims, because she failed to sustain her burden of establishing the unavailability of workers' compensation benefits or insurance (see *Jack Hammer Assoc. v Delmy Prods.*, 118 AD2d 441, 442 [1st Dept 1986], citing *O'Rourke v Long*, 41 NY2d 219, 226 [1976]). There was no surprise or prejudice to plaintiff, because BIMC pleaded that workers' compensation was her sole remedy as an affirmative defense in its answer and in its 2011 motion to dismiss, which was made approximately five months before the two-year statute of limitations imposed by Workers' Compensation Law § 28 expired.

Even if this Court were to examine the merits, we would find that BIMC is entitled to summary dismissal of the complaint because it met its burden to show that it did not cause or create the alleged condition. Plaintiff's theory of liability is that the fruit came from a fruit stand that was operating near the entrance to the hospital, but plaintiff did not know how the fruit came to be on the sidewalk. BIMC established that it

lacked actual notice of the alleged condition; its witness testified that he was responsible for the subject area, but was not aware of any complaints or accidents happening at that location prior to the subject incident (*see Gomez v J.C. Penny Corp., Inc.*, 113 AD3d 571, 571 [1st Dept 2014]).

In addition, plaintiff's testimony demonstrates that the fruit was not on the sidewalk long enough to establish that BIMC had constructive notice that it was there. Indeed, plaintiff testified that when she first passed the location, there was nothing blocking her view and that she did not see the fruit on the ground before she fell. Plaintiff also testified that approximately one minute had elapsed between the time she had successfully walked through the accident location to go to her vehicle and the time she returned to the fruit stand and that the accident happened during her return trip to the fruit stand, which indicates that the condition was created only moments before the accident, through no fault and with no knowledge of BIMC (*see Luzinski v Kenvic Assoc.*, 242 AD2d 246, 246-247 [1st Dept 1997]).

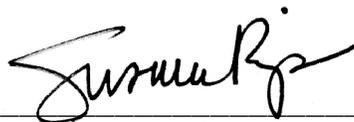
Contrary to plaintiff's contention, Supreme Court properly granted BIMC's motion to renew, because it was based upon new facts not offered in its 2011 motion for summary judgment (*see*

*Puello v City of New York*, 118 AD3d 492 [1st Dept 2014]).

We have considered plaintiff's other arguments and find them to be unavailing.

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

ENTERED: MARCH 24, 2016

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Mazzarelli, J.P., Manzanet-Daniels, Kapnick, Webber, JJ.

605           In re Antonio Dwayne G.,  
                  Petitioner-Appellant,

-against-

          Ericka Monte E.,  
                  Respondent-Respondent.

---

Carol L. Kahn, New York, for appellant.

Law Offices of Randall S. Carmel, Syosset (Randall S. Carmel of  
counsel), for respondent.

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

---

Order, Family Court, New York County (Carol J. Goldstein,  
Referee), entered on or about September 9, 2014, which granted,  
without a hearing, the attorney for the child's motion to dismiss  
petitioner father's petition to modify an order of custody,  
unanimously affirmed, without costs.

Family Court exercised its discretion in a provident manner  
in declining to hold a hearing before dismissing the father's  
petition to modify the existing custody arrangement. As this  
Court noted on a prior appeal regarding the denial of a petition  
by the father to modify the 2004 order of custody, "A court is  
not required to conduct a hearing whenever a party moves for a  
change in custody especially where, as here, the claims are

speculative and frivolous" (96 AD3d 697, 697 [1st Dept 2012] [internal quotation marks omitted]). Notably, the father even acknowledges that he failed to make the required evidentiary showing to warrant a hearing.

The Referee was not required to meet with the child in camera, and it was proper for the attorney for the child to inform the court of her client's position (see *Matter of Alfredo J.T. v Jodi D.*, 120 AD3d 1138 [1st Dept 2014]; 22 NYCRR 7.2). Nor has the father demonstrated that he received ineffective assistance of counsel (see *Matter of Devonte M.T. [Leroy T.]*, 79 AD3d 1818 [4th Dept 2010]).

The father's remaining arguments are not properly before this Court, as they are being raised for the first time on appeal and are based on matters dehors the record.

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

ENTERED: MARCH 24, 2016

  
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Management Corp. (collectively the Owners) are the owner and managing agent, respectively, of the building in which plaintiff allegedly tripped and fell. The Owners and NYE entered into a full service maintenance contract that required NYE to, among other things, maintain the elevators in a safe condition, and to ensure that the elevators were level. The contract also required NYE to defend and indemnify the Owners against any liability claims arising out of the performance of the contract.

After NYE refused to defend and indemnify the Owners, the Owners moved for summary judgment pursuant to the indemnification provision. That motion was denied, and this Court affirmed, finding that there had been "no showing that NYE was negligent or that [the Owners] were not negligent," and thus that "any order requiring NYE to defend is premature" (*Ezzard v One E. Riv. Place Realty Co., LLC*, 80 AD3d 515, 515 [1st Dept 2011]).

Subsequently, the motion court granted the Owners' motion for summary judgment dismissing the complaint against them, but denied NYE's motion for leave to file an untimely motion for summary judgment. On appeal, this Court modified the order to the extent of considering NYE's untimely motion and, upon consideration, dismissing the complaint against NYE except for plaintiff's *res ipsa loquitur* claim (see *Ezzard v One E. Riv.*

*Place Realty Co., LLC*, 129 AD3d 159 [1st Dept 2015] [*Ezzard II*]).

After *Ezzard II*, the Owners renewed their motion for summary judgment on their cross claim for contractual indemnification against NYE. One week after the Owners made their motion, NYE settled the action with plaintiff.

The motion court erred in denying the motion to renew, since this Court's determination in *Ezzard II*, finding no negligence on behalf of the Owners, constituted "new facts not offered on the prior motion" or a "change in the law" that could change the motion court's prior determination (see CPLR 2221[e][2]).

Upon renewal, the Owners are entitled to summary judgment on their contractual indemnification cross claim against NYE. The indemnification clause does not run afoul of General Obligations Law § 5-322.1(1), because it does not purport to indemnify the Owners for their own negligence (*Linarello v City Univ. of N.Y.*, 6 AD3d 192, 193 [1st Dept 2004]).

The indemnity clause does not require a finding of negligence or fault on NYE's part (see *DiPerna v American Broadcasting Cos.*, 200 AD2d 267, 269-270 [1st Dept 1994]). Moreover, since the Owners established that plaintiff's claim arose out of NYE's work, the indemnification provision is

triggered (see *Barnes v New York City Hous. Auth.*, 43 AD3d 842, 844-845 [2d Dept 2007], *lv dismissed* 9 NY3d 1002 [2007]).

Pursuant to the indemnification agreement, NYE is required to indemnify the Owners for the costs, including reasonable attorneys' fees, they incurred in defending against plaintiff's claims (see *Hooper Assoc. v AGS Computers*, 74 NY2d 487, 494 [1989]). Because the amount of those costs and fees cannot be determined on this record, the matter is remanded for that determination (see *Fuller-Mosley v Union Theol. Seminary*, 47 AD3d 487, 488 [1st Dept 2008]).

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

ENTERED: MARCH 24, 2016

  
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Mazzarelli, J.P., Manzanet-Daniels, Kapnick, Webber, JJ.

607 Natara Matias, Index 151424/13  
Plaintiff-Appellant,

-against-

New York and Presbyterian Hospital,  
et al.,  
Defendants-Respondents.

---

Akin Law Group PLLC, New York (Garima Vir of counsel), for  
appellant.

Epstein, Becker & Green, P.C., New York (John F. Fullerton III of  
counsel), for respondents.

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Order, Supreme Court, New York County (Nancy M. Bannon, J.),  
entered September 30, 2014, which, insofar as appealed from,  
granted defendants' motion for summary judgment dismissing the  
complaint, unanimously affirmed, without costs.

Plaintiff has failed to produce any evidence that defendants  
were motivated by discriminatory animus in subjecting her to  
adverse treatment, including repeated suspensions, an essential  
element of her claims for national-origin-based employment  
discrimination under the New York State and City Human Rights  
Laws (*see Askin v Department of Educ. of the City of N.Y.*, 110  
AD3d 621 [1st Dept 2013]; *Bennett v Health Mgt. Sys., Inc.*, 92  
AD3d 29, 46 [1st Dept 2011], *lv denied* 18 NY3d 811 [2012]). The

absence of any evidence of discriminatory animus is equally fatal to any claim of mixed motive (see *Bennett* at 40).

There is no evidence that plaintiff ever engaged in any "protected activity" for purposes of her retaliation claims (*Fruchtman v City of New York*, 129 AD3d 500, 501 [1st Dept 2015]).

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

ENTERED: MARCH 24, 2016

  
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Mazzarelli, J.P., Manzanet-Daniels, Kapnick, Webber, JJ.

609- Ind. 2555/13  
609A The People of the State of New York, Dkt. 28978/14  
Respondent,

-against-

Leonard Franks,  
Defendant-Appellant.

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Seymour W. James, Jr., The Legal Aid Society, New York (Joanne Legano Ross of counsel), for appellant.

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Judgments, Supreme Court, Bronx County (Joseph Dawson, J.),  
rendered on or about July 29, 2014, unanimously affirmed.

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

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

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

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

ENTERED: MARCH 24, 2016

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CLERK

Mazzarelli, J.P., Manzanet-Daniels, Kapnick, Webber, JJ.

610            In re Van Wagner Communications,            Index 100085/14  
                 LLC,  
                 Petitioner-Respondent,

-against-

Board of Standards and Appeals of  
the City of New York,  
Respondent-Appellant.

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Zachary W. Carter, Corporation Counsel, New York (Mackenzie  
Fillow of counsel), for appellant.

Akerman LLP, New York (Richard G. Leland of counsel), for  
respondent.

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Judgment, Supreme Court, New York County (Eileen A. Rakower,  
J.), entered July 25, 2014, granting the petition brought  
pursuant to CPLR article 78 to annul a resolution of respondent  
Board of Standards and Appeals of the City of New York, dated  
December 17, 2013, which denied the application of petitioner to  
register a wall sign as a nonconforming advertising sign,  
unanimously affirmed, without costs.

The determination that an "art installation" that was  
displayed between 1979 and 1989 on the 4,500 square-foot wall  
sign, now owned by petitioner, was not an "advertising sign"  
within the meaning of New York City Zoning Resolution § 12-10,  
and therefore that the legal nonconforming advertising sign use

of the sign was discontinued pursuant to Zoning Resolution § 52-61, involved "a pure legal question that does not mandate deference to the BSA" (*Matter of Toys "R" Us v Silva*, 89 NY2d 411, 419 [1996]). Although the installation might not have comported with conventional notions of what constitutes advertising, the court correctly found that it met Zoning Resolution § 12-10's definition of "advertising sign," as a sign that "directs attention to a business, profession, commodity, service or entertainment conducted, sold, or offered elsewhere than upon the same zoning lot." The installation directed attention to the artist, who, inter alia, sold off the installation in pieces when it was dismantled, 10 years after it first appeared. Accordingly, because the wall sign maintained its character as an advertising sign, the nonconforming use was not extinguished.

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

ENTERED: MARCH 24, 2016

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judgment as to the cause of action for false arrest and the demand for punitive damages, and otherwise affirmed, without costs.

Duane Reade established prima facie that none of its employees were involved in the decision to arrest plaintiffs (see *Celnick v Freitag*, 242 AD2d 436 [1st Dept 1997]). Although the names are redacted in the New York Police Department file, the details surrounding the incident demonstrate that the individuals listed on the arresting officer's complaint worksheet and referenced in the officer's deposition supporting the indictment were an employee of defendant Sottile Security Co. and a patron of Duane Reade, not an employee of Duane Reade. In opposition, plaintiffs failed to raise an issue of fact.

Duane Reade established that, contrary to plaintiffs' contention, the shift leader and de facto manager on the evening at issue were not "superior officers" - i.e., employees with "a high level of general managerial authority in relation to the nature and operation of [Duane Reade's] business" - whose conduct could be equated with Duane Reade's so as to provide a basis for imposing punitive damages on Duane Reade (see *Loughry v Lincoln First Bank, N.A.*, 67 NY2d 369, 380-381 [1986]).

As to the malicious prosecution claim, Duane Reade failed to

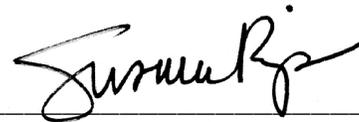
establish prima facie that it did not participate in the continuation of the prosecution of plaintiffs and that there was no actual malice (see *Smith-Hunter v Harvey*, 95 NY2d 191, 195 [2000]). Duane Reade failed to show that the incomplete surveillance videotape that it provided to the District Attorney's Office was a result of either the condition of the original recording device or mere mistake, as opposed to intentional editing in such a way as to permit the inference of actual malice (compare *Ramos v City of New York*, 285 AD2d 284, 301 [1st Dept 2001] [malice inferred where city agency suppressed exculpatory evidence], with *Akande v City of New York*, 275 AD2d 671 [1st Dept 2000] [no malice inferred where field test by United States Customs falsely identified package as containing heroin]). As Duane Reade failed to make a prima facie showing, we need not reach the sufficiency of plaintiffs' opposition (see

*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851 [1985]).

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

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

ENTERED: MARCH 24, 2016

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CLERK

Mazzarelli, J.P., Manzanet-Daniels, Kapnick, Webber, JJ.

612            In re D'Andre R.,  
  
                 A Person Alleged to  
                 be a Juvenile Delinquent,  
                 Appellant.  
                 - - - - -  
                 Presentment Agency

---

Bruce A. Young, New York, for appellant.

Zachary W. Carter, Corporation Counsel, New York (Julie Steiner  
of counsel), for presentment agency.

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Order of disposition, Family Court, Bronx County (Karen I. Lupuloff, J.), entered on or about October 28, 2014, as amended on or about November 6, 2014, which adjudicated appellant a juvenile delinquent upon his admission that he committed an act that, if committed by an adult, would constitute the crime of sexual abuse in the third degree, and placed him in the custody of the New York City Administration for Children's Services for a period of 12 months, unanimously affirmed, without costs.

The petition was legally sufficient. The child victim's unsworn statement was fully supported by sworn depositions from two adults. Defendant's arguments concerning the "swearability" of the victim and the sufficiency or voluntariness of appellant's admission are unpreserved and we decline to review them in the

interest of justice. As an alternative holding, we reject them on the merits.

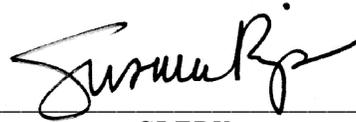
To the extent that appellant is challenging his placement, that issue is moot because the placement has been completed. While appellant's challenge to his adjudication as a juvenile delinquent is not moot, all of his arguments for alternative dispositions, including an adjournment in contemplation of dismissal, which he improperly requests for the first time in his reply brief, are unpreserved and we decline to review them in the interest of justice. As an alternative holding, we find that the court properly exercised its discretion by adjudicating appellant a juvenile delinquent and ordering placement for a period of 12 months, which was the least restrictive dispositional alternative consistent with appellant's needs and the community's need for protection (see *Matter of Katherine W.*, 62 NY2d 947 [1984]), in light of, among other things, the seriousness of appellant's sex offenses against his much younger brother, and the opinions of two clinical psychologists.

The court's use of a "crossover" procedure, allowing for the

sharing of records between this proceeding and a related neglect proceeding, did not cause appellant any prejudice. Any conflict of interest was promptly avoided through the assignment of new counsel.

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

ENTERED: MARCH 24, 2016

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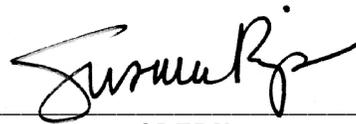
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disturbing the court's credibility determinations, including its evaluation of minor inconsistencies in the testimony of the victim and arresting officer.

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

ENTERED: MARCH 24, 2016

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prejudgment interest in matrimonial actions (CPLR 5001[a]). However, since post-decision interest is mandatory (CPLR 5002), defendant is entitled to post-decision interest on the maintenance arrears portion of the modified divorce judgment at the statutory rate, from the date on which the modified divorce judgment was entered, i.e., January 8, 2014 (*id.*).

Supreme Court providently exercised its discretion in denying defendant's motion for attorneys' fees.

The remainder of the issues raised by defendant are not preserved for review since they were not raised before Supreme Court. Moreover, those issues raised by defendant that were decided by this Court in a prior appeal in this case are barred under the doctrine of law of the case (*see Board of Mgrs. of the 25 Charles St. Condominium v Seligson*, 106 AD3d 130, 135 [1st Dept 2013]).

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discussed with counsel. As an alternative holding, we find that the court properly denied defendant's suppression motion.

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ENTERED: MARCH 24, 2016

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proceeding for nonpayment of rent, plaintiff/respondent (Abrams) seeks damages for personal injuries allegedly sustained as a result of a toxic fumes entering his apartment. Abrams alleges that the fumes emanated from DriTac 6200, an adhesive being used by defendant Fernandez Floors to lay down floor tiles, in an adjacent apartment. At the time, the building was owned by defendant KBF Related Amsterdam Partners, L.P. and managed by defendant Related Management Company, L.P., s/h/a Related L.P.

Defendants established prima facie that plaintiff's cause of action has no merit by submitting, inter alia, expert affidavits stating that multiple chemical sensitivity (MCS) is not a scientifically or medically recognized condition, that a causal connection between MCS and chemical exposure has not been accepted in the scientific community, and that Abrams's level of exposure to chemicals in DriTac 6200 could not have caused his claimed illness (*see Parker v Mobil Oil Corp.*, 7 NY3d 434, 448 [2006]; *Spierer v Bloomingdale's*, 43 AD3d 664 [1st Dept 2007], *lv denied* 10 NY3d 705 [2008]; *Oppenheim v United Charities of N.Y.*, 266 AD2d 116 [1st Dept 1999]).

In opposition, Abrams failed to raise an issue of fact. Absent any excuse for noncompliance, his failure to identify his experts during discovery, as required by defendants' demand,

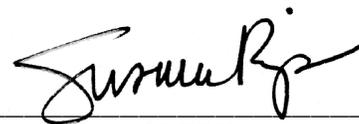
warrants rejection of the experts' affidavits (see CPLR 3101[d][1][i]; *Garcia v City of New York*, 98 AD3d 857, 858 [1st Dept 2012]). In any event, the experts' opinions lacked probative value since they failed to state that the toxin to which Abrams was allegedly exposed was "capable of causing the particular illness (general causation) and that [Abrams] was exposed to sufficient levels of the toxin to cause the illness (specific causation)" (*Parker v Mobil Oil Corp.*, 7 NY3d at 448).

We are advised that Abrams's appeal from the part of the order that granted petitioner's motion for summary judgment in the nonpayment proceeding has been rendered moot by the involved parties' settlement of the rent arrears issues.

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

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him the grinder to complete his assigned task, it did not have a grinding disk or a guard attached, but instead, had a saw blade with large teeth for cutting wood. We are constrained by recent precedent to find that it is irrelevant whether the modified grinder was functionally equivalent to a power-driven saw in determining whether it falls within 12 NYCRR 23-1.12(c), since the plain language of that section indicates that it is applicable to "[e]very portable, power-driven, hand-operated saw," not grinders (see *Sovulj v Procida Realty and Constr. Corp. of N.Y.*, 129 AD3d 414 [1st Dept 2015] We note, however, that, according to the briefs submitted in *Conforti v Bovis Lend Lease LMB, Inc.*, 37 AD3d 235 [1st Dept 2007]), the case on which *Sovulj* relies, the grinder at issue in *Conforti* was not altered to be the functional equivalent of a power saw.

Plaintiff's allegation, made for the first time on appeal, that Seadyck violated 12 NYCRR 23-1.5(c)(3), is not properly before this Court (see e.g. *Miller v Savarino Constr. Corp.*, 103 AD3d 1137 [4th Dept 2013]; *Cody v Garman*, 266 AD2d 850, 851 [4th Dept 1999]). However, to the extent plaintiff failed to seek

leave of the court to amend his bill of particulars to allege such a violation, he should be granted an opportunity to do so, as there is no prejudice to defendant (see *Sahdala v New York City Health & Hosps. Corp.*, 251 AD2d 70 [1st Dept 1998]).

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Mazzarelli, J.P., Manzanet-Daniels, Kapnick, Webber, JJ.

619- Index 652479/14  
619A-  
619B Steven L. Wittels,

Petitioner-Respondent,

-against-

David W. Sanford, et al.,  
Respondents-Appellants.

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Kaye Scholer LLP, New York (James M. Catterson of counsel), for appellants.

Cowan, Liebowitz & Latman, P.C., New York (J. Christopher Jensen of counsel), for respondent.

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Judgment, Supreme Court, New York County (Geoffrey D.S. Wright, J.), entered February 3, 2015, confirming an arbitration award in petitioner's favor, and bringing up for review an order, same court and Justice, entered December 5, 2014, which granted petitioner's motion to confirm the award and denied respondents' cross petition to vacate the award, unanimously affirmed, without costs. Order, same court and Justice, entered March 26, 2015, which granted petitioner's motion to strike certain portions of the cross petition, unanimously reversed, on the law without costs, and the motion denied. Appeal from order entered December 5, 2014, unanimously dismissed, without costs, as subsumed in the appeal from the aforesaid judgment.

Supreme Court applied the correct standard of review in upholding the arbitrators' decision, and we see no basis for vacating that decision (see CPLR 7511[b]; *Matter of Sims v Siegelson*, 246 AD2d 374 [1st Dept 1998]). The arbitrators did not exceed their power (CPLR 7511[b][iii]). Their determination that petitioner, a partner in the now dissolved law firm Sanford Wittels & Heisler, LLP, was entitled to an accounting and distribution of his partnership interest, even if he violated the Rules of Professional Conduct, did not violate public policy by intruding on the court's authority to discipline attorneys for ethical misconduct (see *Matter of New York City Tr. Auth. v Transport Workers' Union of Am., Local 100, AFL-CIO*, 6 NY3d 332 [2005]; *Bidermann Indus. Licensing v Avmar N.V.*, 173 AD2d 401, 402 [1st Dept 1991]). The arbitrators noted that any determination whether petitioner violated ethical rules was "unnecessary" to their determination and that it would be "inappropriate" to discuss in detail the conduct that was the subject of confidential disciplinary proceedings then pending before the Disciplinary Committee (and since dismissed) (see *Hackett v Milbank, Tweed, Hadley & McCloy*, 86 NY2d 146 [1995]; *Matter of Silagi [Guazzo, Perelson, Rushfield & Guazzo]*, 146 AD2d 555 [1st Dept 1989]).

Nor did the award itself violate public policy. Even attorneys who have been disbarred or suspended are entitled to an accounting of fees for services rendered to other clients before their disbarment or suspension (see 22 NYCRR 603.13[b]; 691.10[b]; *Padilla v Sansivieri*, 31 AD3d 64 [1st Dept 2006]; *Posner v Messinger*, 197 AD2d 508 [2d Dept 1993], *lv dismissed* 82 NY2d 920 [1994]). Thus, an attorney whose conduct might have raised concerns for respondents but who was not at the time, and ultimately was never, disbarred or suspended, is entitled to his distributive share of his partnership interest. Moreover, as the arbitrators noted, petitioner's conduct, which led to the dissolution of the original partnership and the creation of the reconstituted firm without petitioner as a partner, had no apparent adverse financial impact on the reconstituted firm.

The arbitrators did not exceed any limit on their authority specifically enumerated in the arbitration agreement, and in any event correctly applied the faithless servant doctrine in denying respondents' counterclaim for disgorgement of compensation paid to Wittels (see *Visual Arts Found., Inc. v Egnasko*, 91 AD3d 578, 579 [1st Dept 2012]; *Frame v Maynard*, 83 AD3d 599, 604 [1st Dept 2011]). They correctly reasoned that to the extent earlier payments made to Wittels could be construed as compensation, that

compensation was earned on cases litigated and fees earned before any alleged unethical conduct occurred, or involved general services or expenses for matters not limited to the allegedly unethical representation, and was untainted by the alleged misconduct.

Supreme Court erred in granting petitioner's motion to strike portions of respondents' already sealed cross petition to vacate the arbitration award as scandalous or prejudicial (CPLR 3024[b]). The stricken portions were relevant to the underlying arbitration, since they involved petitioner's conduct in representing a client, and were relevant to respondents' denial of an accounting and their disgorgement counterclaim, among other things (*New York City Health & Hosps. Corp. v St. Barnabas Community Health*, 22 AD3d 391 [1st Dept 2005]; see also *Soumayah v Minnelli*, 41 AD3d 390, 392-393 [1st Dept 2007]). Moreover, the

motion was granted belatedly, post-judgment, and, thus, after both the arbitrators and the court had considered the material.

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sentence, including the denial of youthful offender treatment,  
excessive to the extent indicated. In light of this  
determination, we find it unnecessary to reach any other issues.

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ENTERED: MARCH 24, 2016

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Mazzarelli, J.P., Manzanet-Daniels, Kapnick, Webber, JJ.

621 Douglas Berlin, etc., Index 152263/15  
Plaintiff-Respondent,

-against-

Thomas Jakobson, et al.,  
Defendants-Appellants.

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Emery Celli Brinckerhoff & Abady LLP, New York (Zoe A. Salzman of  
counsel), for appellants.

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

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Order, Supreme Court, New York County (Debra A. James, J.),  
entered December 8, 2015, which, to the extent appealed from,  
denied defendants' motion to dismiss the complaint in its  
entirety, unanimously modified, on the law, to dismiss the third  
cause of action insofar as asserted on behalf of 27-37  
Management, to dismiss that part of the fourth cause of action as  
asserted on behalf of 27-37 Management for unjust enrichment, and  
to dismiss the fifth cause of action as to 27-37 Management, and  
otherwise affirmed, without costs.

The claim for breach of fiduciary duty, which described the  
relationship among the various companies and the role of  
defendants and identified a number of specific acts of  
misconduct, was pleaded with sufficient particularity (*see Gall v*

*Summit, Rovins & Feldesman*, 222 AD2d 225, 226 [1st Dept 1995], *lv dismissed* 88 NY2d 919 [1996]; CPLR 3016 [b]). However, plaintiff's failure to identify any damages sustained by 27-37 Management requires dismissal of the fiduciary duty and unjust enrichment claims asserted on its behalf (see *Coleman v Fox Horan & Camerini*, 274 AD2d 308, 309 [1st Dept 2000], *lv denied* 95 NY2d 767 [2000]; *Georgia Malone & Co., Inc. v Rieder*, 19 NY3d 511, 516 [2012]). The dismissal of the fiduciary claim as to 27-37 Management also warrants dismissal of the accounting claim as to that defendant.

While defendants assert certain releases as a bar to the fiduciary duty claims asserted on behalf of Waverly Properties and 27-37 Management for the first time on appeal, we can consider the argument because it cannot be avoided, turns on a question of law, and can be resolved on the face of the record (*Rojas-Wassil v Villalona*, 114 AD3d 517, 517 [1st Dept 2014]).

However, given the narrow construction to be given a release, we conclude that these claims are not barred by the releases (see *Lexington Ins. Co. v Combustion Eng'g*, 264 AD2d 319, 322 [1st Dept 1999]).

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ENTERED: MARCH 24, 2016

  
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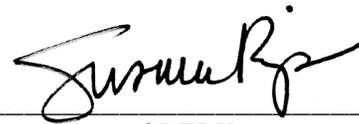


to each of these explanations by saying that he understood, and he signed a written waiver. Accordingly, the record demonstrates the he knowingly, voluntarily, and intelligently waived his right to appeal (see *People v Lopez*, 6 NY3d 248, 256-257 [2006]).

This waiver forecloses review of defendant's suppression and excessive sentence claims. As an alternative holding, we also reject them on the merits.

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Petitioner failed to provide documentation that the apartment was her primary residence and that she was a co-tenant with her grandmother during the period commencing two years prior to the tenant's demise. The documentation petitioner provided related either to an earlier period, when she acknowledged she did not live in the apartment, or to the period after the death of the tenant. The court properly rejected petitioner's contention that the income affidavits alone were sufficient to make the requisite showing (see *Matter of Hochhauser v City of N.Y. Dept. of Hous. Preserv. & Dev.*, 48 AD3d 288 [1st Dept 2008]; *Matter of Pietropolo v New York City Dept. of Hous. Preserv. & Dev.*, 39 AD3d 406, 407 [1st Dept 2007]).

Contrary to petitioner's contention, respondent's determination did not conflict with *Matter of Murphy v New York State Div. of Hous. & Community Renewal* (21 NY3d 649 [2013]). In *Murphy*, unlike here, the applicant provided "ample evidence" in support of his succession application reflecting residence in the

apartment during the qualifying period (*id.* at 655).

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

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*Am. Ins. Co.*, 89 AD3d 622, 626 [1st Dept 2011]; *Performance Comercial Importadora E Exportadora Ltda v Sewa Intl. Fashions Pvt. Ltd.*, 79 AD3d 673, 673-674 [1st Dept 2010]). Rosado's deposition testimony three years after this admission, in which he asserted that he was struck from behind by a truck that fled the scene, is insufficient to overcome the admission. The owner and driver of the truck were never sued in the underlying action, even as a John Doe, and Rosado did not seek uninsured motorist benefits from petitioner with regard to the truck until shortly after his deposition testimony. Further, the only other evidence regarding the truck indicates that the truck did not strike Rosado's vehicle. Under these circumstances, the motion court properly adhered to its original determination granting petitioner's application to permanently stay arbitration of respondent's uninsured motorist claim.

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ENTERED: MARCH 24, 2016



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

723 Michael I. Knopf, et al., Index 113227/09  
Plaintiffs-Appellants,

-against-

Michael Hayden Sanford, et al.,  
Defendants-Respondents.

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Berry Law PLLC, New York (Eric W. Berry of counsel), and Gary Greenberg, New York, for appellants.

Dechert, LLP, New York (James M. McGuire of counsel), for respondents.

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Order, Supreme Court, New York County (Richard F. Braun, J.), entered July 23, 2015, which, inter alia, denied plaintiffs' motion to direct the Clerk to enter judgment on certain claims, or in the alternative for a prejudgment attachment, unanimously modified, on the law, to the extent of 1) remanding the matter to the motion court for a hearing on whether to grant a prejudgment attachment, and 2) directing that, pending the determination after a hearing, defendant Pursuit Holdings, LLC is prohibited from transferring, or further diminishing, impairing or encumbering the properties it acquired with real estate loans from plaintiffs, including but not limited to the property located at 10 Bedford St., New York, New York, as well as any proceeds derived from the sale of such properties prior to the

date of this order, and otherwise affirmed, without costs.

The motion court correctly determined that a damages inquest was required. However, the motion court should have held a hearing on plaintiffs' application for an attachment under CPLR 6201(3). Plaintiffs are correct that Pursuit's ex post facto qualification to do business in the state did not per se defeat its motion for an attachment under CPLR 6201(1) (see *Elton Leather Corp. v First Gen. Resources Co.*, 138 AD2d 132, 135-136 [1st Dept 1988]). In the proceedings below, there was enough evidence of defendants' attempts to encumber assets to warrant a hearing as to whether an attachment should be granted. (see *VisionChina Media, Inc. v Shareholder Representative Servs., LLC*, 109 AD3d 49 [1st Dept 2013]).

We have considered the remaining arguments and find them unavailing.

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