SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

APRIL 13, 2017

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Tom, J.P., Mazzarelli, Andrias, Manzanet-Daniels, Gesmer, JJ.

1298 Coast to Coast Energy, Inc., et al.,
Plaintiffs-Appellants,

Margaret M. Spencer, et al.,
Plaintiffs,

-against-

Mark Gasarch, et al.,
Defendants-Respondents.

John and Jane Does 1-100,
Defendants.

Index 651670/10

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The Law Offices of Edward J. Boyle, Manhasset (Edward J. Boyle of counsel), for appellants.

Law Offices of Mark Gasarch, New York (Mark Gasarch of counsel), for Mark Gasarch and Petro-Suisse Limited, respondents.

Engelhardt Law, New York (David Engelhardt of counsel), for John Wampler, respondent.

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Order, Supreme Court, New York County (Eileen Bransten, J.), entered July 24, 2014, which, to the extent appealed from as limited by the briefs, granted defendant John Wampler's motion to dismiss the third amended complaint in its entirety, on jurisdictional grounds, and granted the motion of defendants Mark

Gasarch and Petro-Suisse Limited to dismiss plaintiffs' causes of action for breach of fiduciary duty, breach of the covenant of good faith and fair dealing, unjust enrichment, and plaintiffs' demand for punitive damages, and dismissed the fraud cause of action only insofar as asserted by plaintiffs Mark Gonsalves and the Coast to Coast plaintiffs, affirmed, without costs.

Pursuant to CPLR 302(a)(1) a New York court may exercise personal jurisdiction over a nondomiciliary if the nondomiciliary has purposefully transacted business within the state and there is "a substantial relationship between the transaction and the claim asserted" (*Paterno v Laser Spine Inst.*, 24 NY3d 370, 376 [2014] [internal quotation marks omitted]). "Purposeful activities are volitional acts by which the non-domiciliary avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws" (*id.* [internal quotation marks omitted]). "More than limited contacts are required for purposeful activities sufficient to establish that the non-domiciliary transacted business in New York" (*id.*).

On a motion to dismiss pursuant to CPLR 3211(a)(8), the plaintiff has the burden of presenting sufficient evidence, through affidavits and relevant documents, to demonstrate

jurisdiction (*see Fischbarg v Doucet*, 9 NY3d 375, 381 n5 [2007]; *Copp v Ramirez*, 62 AD3d 23, 28 [1st Dept 2009], *lv denied* 12 NY3d 711 [2009]). Here, plaintiffs failed to carry their burden in pleading purposeful activities in New York by defendant John Wampler, allegedly a resident of Switzerland and Texas, sufficient to establish long-arm jurisdiction pursuant to CPLR 302(a)(1).

The dissent would hold that in the third amended complaint plaintiffs adequately pleaded jurisdiction under CPLR 302(a)(1) based on allegations that Wampler "transacted" business in New York through his agents, defendants Mark Gasarch and Petro-Suisse Limited (PSNY).

To establish that a defendant acted through an agent, a plaintiff must "convince the court that [the New York actors] engaged in purposeful activities in this State in relation to [the] transaction for the benefit of and with the knowledge and consent of [the defendant] and that [the defendant] exercised some control over [the New York actors]" (*Kreutter v McFadden Oil Corp.*, 71 NY2d 460, 467 [1988]). "[T]]o make a prima facie showing of control, 'a plaintiff's allegations must sufficiently detail the defendant's conduct so as to persuade a court that the defendant was a primary actor' in the specific matter in question; control cannot be shown based merely upon a defendant's

title or position within the corporation, or upon conclusory allegations that the defendant controls the corporation" (*Northern Val. Partners, LLC v Jenkins*, 23 Misc 3d 1112(A), ***4 [Sup Ct, New York County 2009] *quoting Karabu Corp. v Gitner,* 16 F Supp 2d 319, 324 [SD NY 1998]; *see also Polansky v Gelrod*, 20 AD3d 663, 664 [3d Dept 2005]).

The dissent contends that the third amended complaint satisfies these principles by virtue of plaintiff's allegations that Wampler was in daily communication with PSNY concerning the subject oil exploration partnerships and drilling operations, that Wampler instructed Gasarch concerning distributions and "routinely" directed him to transfer funds, and that Gasarch acted for the benefit of and with the knowledge and consent of Wampler, who exercised "some control." However, Wampler's status as a principal of PSNY does not in and of itself confer jurisdiction. Plaintiffs failed to allege facts demonstrating that Wampler controlled Gasarch and PSNY's activities sufficient to support New York jurisdiction, and plaintiff's vague, conclusory and unsubstantiated allegations do not suffice to establish long arm jurisdiction (*see Cotia (USA) Ltd. v Lynn Steel Corp.*, 134 AD3d 483, 484 [1st Dept 2015] ["Plaintiff has offered nothing but conclusory assertions to support long-arm

jurisdiction under CPLR 302 (a)(1)"]; *Polansky v Gelrod*, 20 AD3d at 664 ["plaintiff offers only the conclusory allegation that Gelrod was their agent, with no supporting evidentiary facts establishing control").

The allegations that Gasarch only accessed PSNY's New York bank accounts at Wampler's direction were previously asserted upon information and belief in the second amended complaint, and plaintiffs offered no new facts or explanation for the change in the third amended complaint. Although plaintiffs added an allegation that "according to bank records, Wampler would routinely direct Gasarch to withdraw investor funds from PSNY," they provided no details regarding any such bank records or how they might reflect Wampler's involvement, and did not attach the bank records as an exhibit to their complaint.

The allegation that Wampler was in daily communication with PSNY concerning the oil exploration partnerships and drilling operations is conclusory, and plaintiff failed to proffer any specific facts to demonstrate how or when Wampler participated in preparing the Private Placement Memoranda for the investments. Similarly, the allegation that Gasarch acted for benefit of and with knowledge and consent of Wampler, who exercised "some control" contains no detail as to what statements were made, when they were made, what contract they were made in regards to, and

whether or not the alleged misrepresentations were relied upon in such a way that would imply liability.

The dissent also cites plaintiffs' allegations that Wampler personally solicited plaintiffs' investment in the funds during several visits to New York in 2006 and 2007. However, "the transitory presence of a corporate official" does not support jurisdiction (*see Fischbarg v Doucet*, 9 NY3d at 380) and plaintiffs do not explain how Wampler engaged in any tortious or actionable misconduct at these meetings that would subject him to jurisdiction in New York. There is no indication when the first two meetings took place, other than providing the year; there is no detail as to where the first meeting took place; it is not clear which drilling projects the meetings pertained to; and the allegations of Wampler's alleged misrepresentations are provided in only very general terms (*see Mahtani v C. Ramon*, 168 AD2d 371 [1st Dept 1990]). It is not alleged that Wampler negotiated with a party, and the center of gravity of the contract was in Trinidad and Tobago.[1]

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[1]As the dissent observes, the Court of Appeals concluded in *Fischbarg* that defendants' retention and subsequent communications with plaintiff in New York established a continuing attorney-client relationship in this state and thereby constituted the transaction of business under CPLR 302(a)(1). However, in *Fischbarg* the record established that defendants called Fischbarg, a New York attorney, in order to represent them in an action in Oregon, entered into a retainer agreement, and

Plaintiff-appellant Mark Gonsalves has not pleaded his reliance on the alleged misrepresentations, or injury, sufficient to support a claim for fraud, as he did not allege that he invested in the partnerships at issue (*see Lama Holding Co. v Smith Barney*, 88 NY2d 413, 421 [1996]). The Coast to Coast entities have not stated a claim for fraud, because they, too, have not alleged injury (*id.*).

The causes of action for breach of fiduciary duty, unjust enrichment, and breach of the implied covenant of good faith and fair dealing were properly dismissed as duplicative of the breach of contract cause of action, which was sustained as against the defendants other than Wampler (*Feld v Apple Bank for Sav.*, 116 AD3d 549, 551 [1st Dept 2014], *lv denied* 23 NY3d 908 [2014]; *Ellington v Sony/ATV Music Publ. LLC*, 85 AD3d 438, 439 [1st Dept 2011]).

Plaintiffs have not alleged that defendants acted with the requisite "high degree of moral turpitude" to support their

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participated in that relationship via telephone calls, faxes and e-mails over many months. Thus, the Court found that defendants purposefully projected themselves into New York. In contrast, here plaintiffs rely on conclusory allegations and have not demonstrated that Wampler engaged in sustained and substantial business with plaintiffs in New York.

demand for punitive damages (*Hoeffner v Orrick, Herrington & Sutcliffe LLP*, 85 AD3d 457, 458 [1st Dept 2011] [internal quotation marks omitted]).

We have considered the parties' remaining arguments and find them unavailing.

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

MANZANET-DANIELS, J. (dissenting in part)

I disagree with the majority that the motion court properly dismissed the complaint in its entirety against defendant Wampler on jurisdictional grounds. In my view, plaintiff has sufficiently alleged that Wampler is subject to long-arm jurisdiction under CPLR 302(a)(1).

"[A] court may exercise personal jurisdiction over any non-domiciliary . . . who in person or through an agent . . . transacts any business within the state or contracts anywhere to supply goods or services in the state" (CPLR 302[a][1]). "[P]roof of one transaction in New York is sufficient to invoke jurisdiction, even though the defendant never enters New York, so long as the defendant's activities here were purposeful and there is a substantial relationship between the transaction and the claim asserted" (*Deutsche Bank Sec., Inc. v Montana Bd. of Invs.*, 7 NY3d 65, 71 [2006], *cert denied* 549 US 1095 [2006]; *Kreutter v McFadden Oil Corp.*, 71 NY2d 460, 467 [1988]).

The third amended complaint sufficiently alleges that Wampler "transacted" business through his New York agents PSNY and Gasarch. Plaintiffs allege that Wampler was in daily communication with PSNY's New York office concerning the subject oil exploration partnerships and the drilling operations of affiliated overseas entities. Plaintiffs allege that Wampler

instructed Gasarch concerning account distributions and "routinely" directed Gasarch to withdraw investor funds from PSNY and transfer them to defendants' personal accounts. PSNY and Gasarch acted "for the benefit of and with the knowledge and consent of [the] defendant[] and that [defendant] exercised some control over [the agent] in the matter" so as to subject Wampler to jurisdiction under the long-arm statute (*Kreutter*, 71 NY2d at 467).

The majority maintains that plaintiffs' allegations are conclusory and unsubstantiated. However, the majority fails to meaningfully distinguish the allegations in this case from those found to be sufficient in other cases involving the transaction of business through an agent within the meaning of the long-arm statute (*see e.g. Kreutter*, 71 NY2d 460 [Texas defendants which marketed oil investments through New York corporate agent transacted business within the meaning of the long-arm statute]; *Holmes v First Meridian Planning Corp.*, 155 AD2d 813 [3d Dept 1989] [Florida mortgage company transacted business through New York corporate agent alleged to have falsely represented the value of certain condominiums where the New York agent received commissions from the Florida company and solicited business for it by advising the plaintiffs of the availability of obtaining a mortgage from the Florida company]).

Wampler's argument that he is not an alter-ego of PSNY, while relevant to the issue of substantive liability, is not relevant to the issue of whether he transacted business through an agent so as to subject him to personal jurisdiction *(see Kreutter* at 469-470).

Further, plaintiffs allege that Wampler himself personally solicited plaintiffs' investment in the funds during several visits to New York in 2006 and 2007. Gonsalves alleges that Wampler met with him in New York in 2006 "to describe the oil wells to be drilled in Trinidad – while knowing that no such wells would ever be drilled." During this meeting, Wampler "pointed to the past 'success' of the drilling programs since 2003, the number of wells drilled, the amount of production, and the revenues earned as evidence of the program's viability and robustness." These representations were allegedly "false and deliberately contrived by Wampler" to induce Gonsalves and potential investors to invest in the Trinidad operations.

Gonsalves alleges that Wampler met with him in 2007 at PSNY's New York offices, to "describ[e] the quick profit from" Coast to Coast Energy, which Gonsalves and Wampler formed in 2005, as well as "the continued supply of new investors, and the time needed for fund raising [sic] to continue."

Plaintiffs also allege that Wampler and Gasarch met Russack

at PSNY's New York offices in May 2005 "for the purpose of selling an interest in a drilling rig to Russack, as part of [the] oil equipment scheme." Wampler allegedly "pointed to the prior successes of the oil exploration partnerships as evidence of the viability and legitimacy of the oil equipment investment, while knowing that such evidence was completely fabricated and false."

Plaintiffs sufficiently allege that Wampler "transacted business" within the meaning of the long-arm statute (*see e.g. Corporate Campaign v Local 7837, United Paperworkers Intl. Union*, 265 AD2d 274 [1st Dept 1999] [daily communication, together with twelve trips to New York by the defendant's representatives, subjected the defendant to long-arm jurisdiction]; *Urfirer v S.B. Builders, LLC,* 95 AD3d 1616, 1618 [3d Dept 2012] [allegations that the defendant extensively communicated with subcontractors electronically and via telephone and traveled to New York to supervise the project sufficient to withstand motion to dismiss]; *Stardust Dance Prods., Ltd. v Cruise Groups Intl., Inc.*, 63 AD3d 1262 [3d Dept 2009] [attendance at two meetings in 2007, during which the defendant was alleged to have solicited travelers for dance cruises by displaying promotional materials and responding to inquiries, raised a question concerning whether the defendant had transacted business within the meaning of the statute]).

While the oil exploration partnerships may have been located in the Caribbean, the complaint alleges that Wampler met with investors in New York for the purposes of soliciting their participation in the venture, and to sell interests in a drilling rig as part of the alleged scheme. I would accordingly reverse the order appealed to the extent it dismissed the claims against Wampler.

The cases upon which the majority relies in finding otherwise are wholly inapposite, involving the failure to allege the requisite nexus between the transaction and the defendant's activities (*see Mahtani v C. Ramon*, 168 AD2d 371 [1st Dept 1990] ["[v]ague references by plaintiff to discussions had in New York which could have taken place either before or long after the transaction complained of fail to demonstrate purposeful activity by the defendants in this State that was undertaken in connection with the transactions at issue"]), or an isolated shipment of goods to an out-of-state defendant who then failed to pay, the "classic instance in which personal jurisdiction is found *not* to exist" (*Cotia (USA) Ltd. v Lynn Steel Corp.*, 134 AD2d 483 [1st Dept 2015] [internal quotation marks and citations omitted]). In *Fischbarg v Doucet* (9 NY3d 375 [2007]), another case cited by the majority, the Court of Appeals held that the retention of a New

York attorney by a California plaintiff for purposes of litigating a case in Oregon did in fact constitute the transaction of business within the meaning of the long-arm statute (*id.*).

The Decision and Order of this Court entered herein on January 26, 2017 is hereby recalled and vacated (*see* M-958 decided simultaneously herewith).

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

ENTERED: APRIL 13, 2017

CLERK

Renwick, J.P., Mazzarelli, Moskowitz, Gische, Gesmer, JJ.

1626 Fan-Dorf Properties, Inc., et al., Index 113094/10
Plaintiffs-Appellants,

-against-

Classic Brownstones Unlimited, LLC, et al.,
Defendants-Respondents,

15 West 129th Street Corp.,
Defendant,

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Law Office of Craig K. Tyson, New York (Craig K. Tyson of counsel), for appellants.

Herrick Feinstein LLP, New York (Arthur G. Jakoby of counsel), for Classic Brownstone Unlimited, LLC, respondent.

Ganfer & Shore, LLP, New York (Mark A. Berman and Virginia K. Trunkes of counsel), for Cathay Bank, respondent.

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Order, Supreme Court, New York County (Manuel J. Mendez, J.), entered August 7, 2015, which denied plaintiffs' motion for leave to renew defendant Cathay Bank's CPLR 3211(a)(3) motion to dismiss the complaint for lack of capacity to sue, unanimously reversed, on the law, without costs, the motion to renew granted, and, upon renewal, the motion to dismiss denied.

In 1974, plaintiff Fan-Dorf Properties, Inc. (Fan-Dorf) acquired title to the property located at 15 West 129th Street. In 1993, Fan-Dorf was dissolved by proclamation of the Secretary of State for failure to pay New York State franchise taxes,

pursuant to Tax Law § 203-a. In 1999, its owner, Randolph Adamson, passed away. In October 2000, a deed was recorded transferring the property to defendant 15 West 129th Street Corp. (15 West). Between 2001 and 2006, the property was transferred several times, with defendant Classic Brownstones Unlimited, LLC (Classic) being the most recent owner. Defendant Cathay Bank holds two mortgages totaling about $900,000, pursuant to mortgage loans to Classic. Fan-Dorf and plaintiff Michael Adamson as administrator of Randolph Adamson's estate claim that the October 2000 deed transferring the property was forged.

Thus, in October 2010, plaintiffs commenced this action against 15 West and Classic, seeking to quiet title to the property. In October 2014, they amended the complaint to add Cathay Bank as a defendant. In December 2014, Cathay Bank moved to dismiss the complaint as against it under CPLR 3211(a)(3), contending that Fan-Dorf lacked capacity to maintain the action because it had been dissolved as of 1993. By order entered on or about March 13, 2015, the motion court granted the motion. However, three days later, Fan-Dorf received from the Department of Taxation and Finance a "Consent to Reinstatement" and "Certificate of Consent," pursuant to Tax Law § 203-a(7). Based on this, plaintiffs moved for renewal under CPLR 2221(e), arguing that the Consent to Reinstatement revived the corporation as if

the dissolution had never occurred and, therefore, Fan-Dorf had capacity to maintain the present action.

Plaintiffs are entitled to renewal. The Consent to Reinstatement constitutes new facts unavailable at the time of the initial motion (*see* CPLR 2221[e][2], [3]).

Although we have rejected interpretations of Tax Law § 203-a(7) that would result in extensions of limitation periods (*see e.g. Matter of Lewis v Schwartz*, 119 AD2d 116, 119-121 [1st Dept 1986]), those decisions are irrelevant here because of the Court of Appeals' decision in *Faison v Lewis* (25 NY3d 220 [2015]). In *Faison*, the Court of Appeals held unequivocally that a forged deed, such as plaintiff claims exists here, is void ab initio, and is not subject to the statute of limitations. The *Faison* decision changed the law when it eliminated the statute of limitations, in effect modifying our decision in a previous appeal in this case (*Fan-Dorf Props., Inc. v Classic Brownstones Unlimited, LLC*, 103 AD3d 589 [1st Dept 2013]).

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

The Decision and Order of this Court entered herein on August 25, 2016 is hereby recalled and vacated (*see* M-4455 decided simultaneously herewith).

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

ENTERED: APRIL 13, 2017

CLERK

Sweeny, J.P., Acosta, Mazzarelli, Manzanet-Daniels, Webber, JJ.

3056 Ennigier Rivera, Index 306435/14
Plaintiff-Respondent,

-against-

MD. LR. Bhuiyan, et al.,
Defendants-Appellants.

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Gallo Vitucci Klar, LLP, New York (Kimberly A. Ricciardi of counsel), for appellants.

Sanocki, Newman & Turret, LLP, New York (David B. Turret of counsel), for respondent.

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Order, Supreme Court, Bronx County (Howard H. Sherman, J.), entered March 25, 2016, which, to the extent appealed from, denied defendants' motion to dismiss the amended complaint's negligent hiring, retention and supervision claim, unanimously affirmed, without costs.

This is an action to recover damages for personal injuries allegedly sustained after a collision between a motor vehicle operated by defendant Rivera and a motorcycle operated by plaintiff. The amended complaint and the bill of particulars when considered together state a claim for negligent hiring, retention and supervision, because it is alleged that defendants MD. LR. Bhuiyan (Bhuiyan) and/or Park West Executive Services, Inc. (Park West) knew or should have known that defendant Rivera was not competent to safely operate a motor vehicle if they had

conducted an investigation into her driving history (*see Sheila C. v Povich*, 11 AD3d 120, 129-130 [1st Dept 2004]). Although Bhuiyan and Park West initially denied in the answer that defendant Rivera was operating the vehicle within the scope of her employment when the accident happened, in their reply affirmation, they concede the issue. However, inasmuch as plaintiff claims that Bhuiyan and Park West negligently and recklessly hired, retained and supervised defendant Rivera, this claim may be treated, in effect, as a demand for punitive damages (*see Quiroz v Zottola*, 96 AD3d 1035, 1037 [2d Dept 2012]), bringing the claim within the exception to the rule that generally, a claim for negligent hiring may not stand when liability is premised upon respondeat superior (*id.*).

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

ENTERED: APRIL 13, 2017

CLERK

Friedman, J.P., Richter, Mazzarelli, Feinman, Gische, JJ.

3686 The People of the State of New York, Ind. 5530/12
Respondent,

-against-

Hamadou Barry,
Defendant-Appellant.

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Seymour W. James, Jr., The Legal Aid Society, New York (Arthur H. Hopkirk of counsel), for appellant.

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

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Judgment, Supreme Court, New York County (Ronald A. Zweibel, J.), rendered April 11, 2013, convicting defendant, upon his plea of guilty, of attempted robbery in the third degree, and sentencing him to a term of six months, unanimously affirmed.

Defendant has not established that the narrow exception to the preservation requirement applies to his *Peque* claim (*see People v Peque*, 22 NY3d 168, 182-183 [2013], *cert denied* 574 US __, 135 S Ct 90 [2014]). Defendant was informed of his potential deportation by a notice of immigration consequences that the People served upon him, in the presence of his attorney and a suitable interpreter, several months before the guilty plea (*see e.g. People v Diakite*, 135 AD3d 533 [1st Dept 2016], *lv denied* 27 NY3d 1131 [2016]), giving defendant the opportunity to raise the issue, and rendering his claim unpreserved. We decline to review

his claim in the interest of justice. In any event, we find it highly unlikely, given the terms and circumstances of the plea, that defendant could make the requisite showing of prejudice under *Peque* (22 NY3d 198-201) if granted a hearing.

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

ENTERED: APRIL 13, 2017

CLERK

Friedman, J.P., Richter, Mazzarelli, Feinman, Gische, JJ.

3687 Lina T. Duran Cardona, Index 305886/14
Plaintiff-Respondent,

-against-

Ellen E. Fiorentina,
Defendant-Appellant.

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Katz & Associates, Brooklyn (Arthur R. Simuro of counsel), for appellant.

Mitchell Dranow, Sea Cliff, for respondent.

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Order, Supreme Court, Bronx County (Norma Ruiz, J.), entered on or about February 11, 2016, which denied defendant's motion for summary judgment dismissing the complaint, unanimously reversed, on the law, without costs, and the motion granted. The Clerk is directed to enter judgment accordingly.

Defendant established entitlement to judgment as a matter of law by showing that she had a green light in her favor before and after she entered the intersection, and that plaintiff made a left turn into the path of defendant's oncoming vehicle, causing the collision (*see Abboud v Pawelec*, 141 AD3d 438 [1st Dept 2016]; *Griffin v Pennoyer*, 49 AD3d 341 [1st Dept 2008]; Vehicle and Traffic Law § 1141). In opposition, plaintiff failed to raise a triable issue of fact. Despite having seen defendant's vehicle approaching when it was 6 to 7 car lengths from the

intersection, plaintiff began her left turn in front of defendant's vehicle. It was allegedly not until plaintiff began her turn that she noticed that defendant's vehicle was traveling at a high rate of speed. Such speculative assertions do not warrant denial of the motion (*see Guerrero v Milla*, 135 AD3d 635 [1st Dept 2016]; *Cadeau v Gregorio*, 104 AD3d 464 [1st Dept 2013]).

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

ENTERED: APRIL 13, 2017

CLERK

Friedman, J.P., Richter, Mazzarelli, Gische, JJ.

3688-
3689 In re Qualiayah J., and Another.,

Children Under the Age of Eighteen Years, etc.,

Taneka J.,
Respondent-Appellant,

Administration for Children's Services,
Petitioner-Respondent.

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Richard L. Herzfeld, P.C., New York (Richard L. Herzfeld of counsel), for appellant.

Zachary W. Carter, Corporation Counsel, New York (Jonathan A. Popolow of counsel), for respondent.

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

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Order, Family Court, New York County (Clark V. Richardson, J.), entered on or about July 9, 2015, which, after a hearing, found that respondent mother neglected the subject children, unanimously affirmed, without costs. Appeal from dispositional order, same Court and Justice, entered on or about March 4, 2016, which placed the children in the custody of the Commissioner of Social Services until the next scheduled permanency hearing, unanimously dismissed, without costs, as academic.

The mother's regular, long-term drug use while the children were in her care constituted prima facie evidence of neglect, and

she failed to rebut the statutory presumption by showing that she was participating in treatment (Family Ct Act § 1046[a][iii]). In fact, the evidence affirmatively showed that the mother had refused all of the agency's referrals and maintained that she was not addicted to marijuana. The Family Court properly determined that the mother had neglected the children on account of her drug use (*Matter of Nadia S. [Ron S.]*, 138 AD3d 526, 527 [1st Dept 2016] [child neglected due to father's "admitted use of marijuana almost every day and his refusal to seek treatment"]). The deplorable and unsanitary condition of the mother's apartment lends further support to the Family Court's neglect finding (*Matter of Ze'Nya G.*, 126 AD3d 566 [1st Dept 2015]).

The mother's appeal from the dispositional order is dismissed as academic. The order was superseded by a permanency hearing order, from which no appeal was taken (*Matter of Skye C. [Monica S.]*, 127 AD3d 603, 604 [1st Dept 2015]). In any event, the mother's objection to the visitation terms of the

dispositional order are without merit, as the order does not grant the children an unconditional "veto" power over her visitation, but simply directed the agency to schedule visits if and when either the children or the mother requested them.

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

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

ENTERED: APRIL 13, 2017

CLERK

Friedman, J.P., Richter, Mazzarelli, Feinman, Gische, JJ.

3690 Gloria Stern, Index 108672/11
Plaintiff-Respondent,

-against-

Starwood Hotels and Resorts Worldwide, Inc.,
Defendant-Appellant.

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Mauro Lilling Naparty, LLP, Woodbury (Gregory A. Cascino of counsel), for appellant.

Alexander J. Wulwick, New York, for respondent.

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Order, Supreme Court, New York County (Richard F. Braun, J.), entered on or about October 6, 2016, which, to the extent appealed from as limited by the briefs, denied as premature defendant's motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

Plaintiff alleges that she suffered injuries when she tripped over a defective walkway at the Four Points by Sheraton Ann Arbor Hotel in Michigan, which was owned by ZLC Inc., a Michigan corporation unrelated to defendant Starwood Hotels and Resorts Worldwide, Inc. (Starwood) (*see Stern v Four Points by Sheraton Ann Arbor Hotel*, 133 AD3d 514 [1st Dept 2015]). ZLC operated the hotel using the "Four Points by Sheraton" name pursuant to a license agreement with nonparty The Sheraton

Corporation, which is identified in that agreement as "an indirect, wholly-owned subsidiary" of Starwood.

In support of its motion for summary judgment, Starwood demonstrated that it did not own or control the hotel, and that, under the terms of the license agreement with Sheraton, ZLC was an independent contractor and was responsible for the day-to-day operations of the hotel. Under these circumstances, even if Starwood were a party to the license (or franchise) agreement, the mere existence of a franchise relationship would not provide a basis for the imposition of vicarious liability against Starwood for the negligence of the franchisee, ZLC (*see Martinez v Higher Powered Pizza, Inc.*, 43 AD3d 670 [1st Dept 2007]; *Schoenwandt v Jamfro Corp.*, 261 AD2d 117 [1st Dept 1999]).

However, in opposition, plaintiff submitted evidence that Starwood's reservations website holds the hotel out to the public as a Starwood property, and that plaintiff relied on the representations on Starwood's website in choosing to book a room at the hotel. This evidence of public representations and reliance may support a finding of apparent or ostensible agency, which may serve as a basis for imposing vicarious liability

against Starwood (*Fogel v Hertz Intl.*, 141 AD2d 375 [1st Dept 1988]; *see also Taylor v Point at Saranac Lake, Inc.*, 135 AD3d 1147, 1148-1149 [3d Dept 2016]; *Friedler v Palyompis*, 12 AD3d 637, 638 [2d Dept 2004]). Although the license agreement required ZLC to disclose that it was an "independent legal entity operating under license" from Sheraton and to place "notices of independent ownership" on the premises, Starwood did not provide any evidence that ZLC complied with those requirements.

Accordingly, the motion court properly found that the motion for summary judgment was premature, since plaintiff is entitled to discovery of matter exclusively within Starwood's control concerning issues relating to its possible agency relationship with the hotel, including its reservations system and advertising (CPLR 3212[f]; *see Ross v Stuart Intl.*, 275 AD2d 650, 651 [1st Dept 2000]).

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

ENTERED: APRIL 13, 2017

CLERK

Friedman, J.P., Richter, Mazzarelli, Feinman, Gische, JJ.

3691 William Swezey, Index 158793/14
Plaintiff-Appellant,

-against-

Michael C. Fina Co., Inc., et al.,
Defendants-Respondents.

Hernstadt Atlas PLLC, Brooklyn (Edward Hernstadt of counsel), for appellant.

Jackson Lewis P.C., Melville (David S. Greenhaus of counsel), for respondents.

Order, Supreme Court, New York County (Robert R. Reed, J.), entered June 15, 2016, which, to the extent appealed from, granted defendants' motion to dismiss the complaint to the extent of dismissing the first, second, fourth and fifth causes of action, unanimously affirmed, without costs.

Plaintiff, a former at-will sales representative for defendants, commenced this action for breach of an oral contract and related claims based on an alleged promise, by defendants, to pay plaintiff commissions past his termination. The motion court properly dismissed the breach of contract and related claims because the purported oral agreement is unenforceable under the

statute of frauds (*see e.g. Guterman v RGA Accessories*, 196 AD2d 785 [1st Dept 1993]; *Bennett v Atomic Prods. Corp.*, 74 AD3d 1003, 1005 [2d Dept 2010]).

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: APRIL 13, 2017

CLERK

Friedman, J.P., Richter, Mazzarelli, Feinman, Gische, JJ.

3692 The People of the State of New York, Ind. 4297/02
Respondent,

-against-

Jose Colon,
Defendant-Appellant.

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

Darcel D. Clark, District Attorney, Bronx (Meaghan L. Powers of counsel), for respondent.

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Order, Supreme Court, Bronx County (Alberto Lorenzo, J.), entered November 19, 2014, adjudicating defendant a level three predicate sex offender under the Sex Offender Registration Act (Correction Law art 6-C), unanimously affirmed, without costs.

The court providently exercised its discretion when it declined to grant a downward departure (*see People v Gillotti*, 23 NY3d 841 [2014]). The mitigating factors cited by defendant were

adequately taken into account by the risk assessment instrument, and were in any event outweighed by the extreme seriousness of the underlying sex crimes, as well as defendant's extensive record of sexual recidivism.

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

ENTERED: APRIL 13, 2017

CLERK

Friedman, J.P., Richter, Mazzarelli, Feinman, Gische, JJ.

3693 Cara Associates, L.L.C., et al.,
Plaintiffs-Respondents,

-against-

Howard P. Milstein, et al.,
Defendants-Appellants.

Index 651726/15

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Stroock & Stroock & Lavan LLP, New York (Charles G. Moerdler of counsel), for appellants.

Nixon Peabody LLP, New York (Adam B. Gilbert of counsel), for respondents.

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Order and judgment (one paper), Supreme Court, New York County (Jeffrey K. Oing, J.), entered May 6, 2016, which denied defendants' motion to dismiss the complaint, granted plaintiffs' application to convert defendants' dismissal motion to one for summary judgment and to conform the pleadings to the proof, granted plaintiffs' motion for summary judgment, and declared, inter alia, that plaintiffs had the authority to remove Howard P. Milstein from his partnership management position and appoint a new manager by majority vote, and that a majority vote of the partners had authorized Michael L. Nelson and Ivan G. Goodstein to assume management of the business of the partnerships, unanimously modified, on the law and the facts, to the extent of amending the judgment to strike the reference to this Court's

April 12, 2016 order and to substitute a reference to this Court's June 30, 2016 order in place thereof, and otherwise affirmed, without costs.

Entry of the order and judgment was a ministerial act, and the dispositive order underlying the judgment, entered October 13, 2015, was previously reviewed by this Court upon defendants' appeal therefrom, and decided adversely to defendants (*see* 140 AD3d 657 [1st Dept 2016], *lv dismissed* 27 NY3d 1181 [2016]), rendering the instant appeal improper, as it is not taken from a nonfinal judgment or order (*see* CPLR 5501[a][1]; *Miller v New York Univ.*, 104 AD3d 451 [1st Dept 2013]). The Court's prior resolution of the issues raised on this appeal constitutes law of the case (*see Prime Income Asset Mgt., Inc. v American Real Estate Holdings L.P.*, 82 AD3d 550 [1st Dept 2011], *lv denied* 17 NY3d 705 [2011]), and defendants' time to seek reargument from the prior order of this Court has expired (*see* Rules of App Div, 1st Dept [22 NYCRR] § 600.14[a]).

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

ENTERED: APRIL 13, 2017

CLERK

Friedman, J.P., Richter, Mazzarelli, Feinman, Gische, JJ.

3694 The People of the State of New York, Ind. 3174/13
Respondent,

-against-

Eric Santana,
Defendant-Appellant.

_____

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

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

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An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Melissa Jackson, J.), rendered October 8, 2015,

Said appeal having been argued by counsel for the respective parties, due deliberation having been had thereon, and finding the sentence not excessive,

It is unanimously ordered that the judgment so appealed from be and the same is hereby affirmed.

ENTERED: APRIL 13, 2017

CLERK

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

Friedman, J.P., Richter, Mazzarelli, Feinman, Gische, JJ.

3695 Ann Jennings-Purnell, M.D., Index 110344/06
Plaintiff-Appellant,

-against-

Richard W. Donner,
Defendant-Respondent.

_____

William R. Bronner, Brooklyn, for appellant.

L'Abbate, Balkan, Colavita & Contini, L.L.P., Garden City (Kimberly Johnson Glenn of counsel), for respondent.

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Order, Supreme Court, New York County (Robert D. Kalish, J.), entered August 12, 2016, which granted defendant's motion for summary judgment dismissing the complaint, and denied plaintiff's cross motion for summary judgment in her favor as to liability, unanimously affirmed, without costs.

Plaintiff alleges that her son and his friend, Adams, an attorney, caused her to engage in a real estate transaction that resulted in her paying roughly half a million dollars more than she agreed to pay, and that defendant, who was Adams's associate, notarized four documents at the closing, including the mortgage. More than a year after the closing, plaintiff received the closing documents and then alleged that her son's name had been fraudulently added to the deed and other closing documents

without her knowledge or consent. She alleged that defendant committed notarial misconduct under Executive Law § 135.

In opposition to defendant's motion for summary judgment, plaintiff admitted that her signatures on the notarized documents were genuine, but claimed that they were not willingly and knowingly made. She also denied that her son had executed and initialed the mortgage. She asserted that defendant "knowingly enabled an unconscionable transaction" and "did more than turn a blind eye to what was evidently going on."

Defendant met his prima facie burden of showing that he did not commit any notarial misconduct in the performance of his powers, i.e, taking acknowledgments of plaintiff's and her son's signatures (Executive Law § 135; *see Bogensky v Rosenberg*, 202 Misc 652, 652 [Sup Ct, Suffolk County 1952]). Plaintiff's testimony that she remembered signing only two of the four documents is not sufficient to overcome the presumption of due execution (*see Genger v Arie Genger 1995 Life Ins. Trust*, 84 AD3d 471, 471-472 [1st Dept 2011]). Her unsupported testimony that her son did not sign or initial the mortgage at the closing is similarly insufficient (*Osborne v Zornberg*, 16 AD3d 643, 644 [2d Dept 2005]).

Although plaintiff claimed that the documents did not reflect the terms of her oral agreement, the acknowledgment "is

the verification of the fact of execution but not of the contents of the instrument" (*Pitts v Abrams*, 129 NYS2d 216, 217 [App Term, 1st Dept 1954]; see *Matter of Bristol v Buck*, 201 AD 100 [3d Dept 1922], *affd* 234 NY 504 [1922]). New York law does not impose a duty upon a notary public to ascertain whether a signature is "willingly and knowingly" made. Nor did defendant have a duty, as a notary, to halt the closing (*see generally Purdy v Public Adm'r of County of Westchester*, 72 NY2d 1, 8 [1988]).

We have considered the remaining arguments and find them unavailing.

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

ENTERED: APRIL 13, 2017

CLERK

Friedman, J.P., Richter, Mazzarelli, Feinman, Gische, JJ.

3699 Patrick O'Leary, Ph.D, et al., Index 109902/11
Plaintiffs-Respondents, 590050/13
590112/14

-against-

S&A Electrical Contracting Corp., et al.,
Defendants-Appellants.

- - - - -

S&A Electrical Contracting Corp.,
Third-Party Plaintiff-Appellant,

-against-

Nygard International Partnership, et al.,
Third-Party Defendants-Appellants.

- - - - -

1435 Broadway, LLC,
Second Third-Party Plaintiff-Appellant,

-against-

Nygard International Partnership, et al.,
Second Third-Party Defendants-Appellants.

_____

Carman Callahan & Ingham, LLP, Farmingdale (Peter F. Breheny of counsel), for S & A Electrical Contracting Corp., appellant.

Martin Clearwater & Bell LLP, New York (Barbara D. Goldberg of counsel), for 1435 Broadway, LLC, appellant.

Marshall Dennehey Warner Coleman & Goggin, P.C., New York (Thomas G. Vaughan of counsel), for Nygard International Partnership and Nygard NY Retail, LLC, appellants.

Trief & Olk, New York (Barbara E. Olk of counsel), for respondents.

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Order, Supreme Court, New York County (Manuel J. Mendez, J.), entered January 14, 2016, which, to the extent appealed from as limited by the briefs, granted plaintiffs' motion for partial summary judgment on the issue of liability on the Labor Law § 241(6) claim; denied defendant/second third-party plaintiff 1435 Broadway, LLC's (Owner) motion insofar as it sought summary judgment dismissing the Labor Law § 241(6) claim, and summary judgment on its contractual indemnification claims against third-party defendants and second third-party defendants (Nygard); denied Nygard's motion for summary judgment dismissing the amended complaint, the third-party complaint and the second third-party complaint; and denied as untimely defendant/third-party plaintiff S&A Electrical Contracting Corp.'s (S&A) motion for summary judgment; unanimously modified, on the law, to grant Owner's motion for summary judgment on its contractual indemnification claim against third-party defendant/second-third party defendant Nygard International Partnership, and to grant Nygard's motion to the extent of dismissing all claims against third-party defendant/second-third party defendant Nygard NY Retail, LLC, and otherwise affirmed, without costs.

Plaintiff Patrick O'Leary sustained injuries when he was shocked by temporary electrical wiring laid on the floor of

Owner's building while overseeing renovation work performed by his employer, Nygard International Partnership (Nygard International). Nygard International, a Canadian apparel manufacturing company, had leased the building from Owner to serve as its New York headquarters. Nygard International's principal had directed plaintiff, a Canadian citizen who resided in Manitoba, to oversee the construction work.

Given the Manitoba's Workers Compensation Board's assignment to plaintiff of the board's right to pursue claims against negligent third parties, both Manitoba and New York now permit plaintiff to bring the present action against Owner and S&A and, in the absence of any conflict between the laws of the two jurisdictions with respect to plaintiff's ability to maintain this action, no choice-of-law analysis is required in that regard (*J. Aron & Co. v Chown*, 231 AD2d 426 [1st Dept 1996]). To the extent, if any, Manitoba law, unlike New York law, might prohibit the third-party claims asserted by defendants (both domiciled in New York) against Manitoba-domiciliary Nygard, plaintiff's employer, the availability of a third-party claim against plaintiff's employer is governed by the law of the place of injury — here, New York — "where the local law of each litigant's domicile favors that party, and the action is pending in one of

those jurisdictions" (*Cooney v Osgood Mach.*, 81 NY2d 66, 76 [1993]). The application of New York law on this issue is appropriate because this state, where the accident occurred, "is the place with which both [defendants and Nygard] have voluntarily associated themselves" (*id.* at 77), and "comports with the reasonable expectations of [these] parties in conducting their business affairs" (*id.* at 78).

The motion court correctly granted plaintiff partial summary judgment on the issue of liability on the Labor Law § 241(6) claim, and denied Owner's motion for summary judgment dismissing the claim. Plaintiff was engaged in "construction" work at the time of the incident (Labor Law § 241[6]), and Owner's attempt to isolate the activities in which plaintiff was involved at the moment of the incident ignores the general context of the work (*see Prats v Port Auth. of N.Y. & N.J.*, 100 NY2d 878, 882 [2003]). Further, the record established a violation of 12 NYCRR 23-1.13(b)(4), which requires that workers who may come into contact with an electric power circuit be protected against electric shock "by de-energizing the circuit and grounding it or by guarding such circuit by effective insulation or other means." That plaintiff was electrically shocked, as confirmed by another Nygard International employee, demonstrated that the circuit was not de-energized, grounded, or guarded by effective insulation.

Plaintiff also established that the violation of the provision was a result of negligence (*see Rizzuto v L.A. Wenger Contr. Co.*, 91 NY2d 343, 349-350 [1998]). Owner's contention that an issue of fact exists as to plaintiff's comparative negligence is unavailing. Plaintiff testified that he had objected to having the temporary lighting work performed in the manner that it was done, and that Nygard International's principal overruled him. The principal's insistence that plaintiff perform the temporary wiring work, despite plaintiff's objections, established negligence by Nygard, for which Owner is vicariously liable (*see Velasquez v 795 Columbus LLC*, 103 AD3d 541, 542 [1st Dept 2013]). Issues of fact as to whether the injuries were caused by the electrical shock relates to the issue of damages, not liability (*see generally McCochran v Giustino*, 26 AD2d 539, 539 [1st Dept 1966]). Nevertheless, given the unchallenged dismissal of the common-law negligence claim, and the fact that Owner's liability on the Labor Law § 241(6) claim is purely vicarious, Owner is entitled to summary judgment on its contractual indemnification claim against Nygard International (*see Nazario v 222 Broadway, LLC*, 135 AD3d 506, 510 [1st Dept 2016], *mod on other grounds* 28 NY3d 1054 [2016]).

The motion court providently exercised its discretion in denying S&A's motion as untimely. Contrary to S&A's contention,

the preliminary conference order and the court's Part Rules are not in conflict, and S&A has not demonstrated good cause for the delay in making the motion (*see Fine v One Bryant Park, LLC*, 84 AD3d 436, 437 [1st Dept 2011]; *Doe v Madison Third Bldg. Cos., LLC*, 121 AD3d 631 [1st Dept 2014]).

Nygard NY Retail, LLC (LLC) is entitled to dismissal of all claims against it, as none of the parties have submitted any evidence refuting Nygard's proof that the LLC was incorporated a year after the incident.

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

ENTERED: APRIL 13, 2017

CLERK

Friedman, J.P., Richter, Mazzarelli, Feinman, Gische, JJ.

3700 The People of the State of New York, Ind. 2491N/14
Respondent,

-against-

Waskar Hernandez also known as
Oscar Hernandez, etc.,
Defendant-Appellant.

_____

Feldman and Feldman, Uniondale (Steven A. Feldman of counsel), for appellant.

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

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Judgment, Supreme Court, New York County (Michael R. Sonberg, J.), rendered December 1, 2015, convicting defendant, upon his plea of guilty, of criminal sale of a controlled substance in the third degree, and sentencing him to a term of one year, unanimously affirmed.

Merely requesting a more lenient sentence failed to preserve defendant's current claims that his postplea arrest did not constitute a violation of the plea agreement, that he substantially complied with the agreement, that the court should have inquired into the validity of the new arrest, or that the

plea should have been vacated (*see People v Pollard*, 132 AD3d 554 [1st Dept 2015], *lv denied* 26 NY3d 1111 [2016]), and we decline to review them in the interest of justice. As an alternative holding, we also reject them on the merits.

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

ENTERED: APRIL 13, 2017

CLERK

Friedman, J.P., Richter, Mazzarelli, Feinman, Gische, JJ.

3701 Nader & Sons, LLC, et al., Index 650942/14
Plaintiffs-Respondents,

-against-

Hazak Associates LLC,
Defendant-Appellant.

_____

Law Offices of David Yerushalmi, P.C., Brooklyn (David Yerushalmi of counsel), for appellant.

Seyfarth Shaw LLP, New York (Jeremy A. Cohen of counsel), for respondents.

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Order and judgment (one paper), Supreme Court, New York County (O. Peter Sherwood, J.), entered September 24, 2015, which denied defendant's motion to dismiss the complaint (which was converted to a motion for summary judgment), granted plaintiffs' cross motion for summary judgment, and declared that defendant defaulted on its obligation under the terms of an operating agreement to make a true-up distribution to plaintiffs as assignees of Beshmada LLC under the terms of a partial settlement agreement, and that the assignment to plaintiffs of personal guaranties given by two nonparty individuals regarding defendant's obligation to make the true-up distribution was valid, unanimously modified, on the law, to vacate the declaration that the assignment of the guaranties was valid and that plaintiffs are assignees under the terms of the partial

settlement agreement, and to declare that the assignment under the partial settlement agreement was unauthorized, null and void, and otherwise affirmed, without costs.

The IAS court erred in concluding that defendant was judicially estopped from challenging plaintiffs' standing. Defendant's privies argued in a separate action that, based on the mandatory forum selection clause in the operating agreement, the issue of whether there was a default under the true-up provision had to be decided in New York. Contrary to the IAS court's conclusion, this statement did not mean that defendant's privies or defendant had waived any defense to an action brought by plaintiff in New York. Accordingly, the statements made in the other action were not contradicted by defendant's position with respect to standing here, and thus defendant is not judicially estopped from challenging plaintiff's standing in this action (*see Becerril v City of N.Y. Dept. of Health & Mental Hygiene*, 110 AD3d 517, 519 [1st Dept 2013], *lv denied* 23 NY3d 905 [2014]). Nevertheless, as assignees of guaranties of performance under the operating agreement, plaintiffs had standing to litigate whether a default under that agreement had occurred, as such a default is a defense against plaintiffs' exercise of their own rights under the guaranties (*see NTL Capital, LLC v Right Track Rec., LLC*, 73 AD3d 410, 411 [1st Dept 2010]).

The IAS court correctly determined that the prior declaratory judgment action does not preclude this action, since the prior action considered and declared as to an assignment not at issue here (*see Jefferson Towers v Public Serv. Mut. Ins. Co.*, 195 AD2d 311, 313 [1993]).

Under the plain language of the operating agreement, the notice and cure provisions do not apply to the alleged default by defendant. Accordingly, defendant's argument that there was no default because it never received notice and an opportunity to cure is unavailing, and the IAS court correctly granted plaintiff summary judgment declaring that there was a default.

The entire assignment in the partial settlement agreement is null and void. The operating agreement bars an assignment of Behsmada's "Interest" without defendant's consent, and plaintiff knew that defendant never consented to the assignment in the partial settlement agreement. We have considered plaintiff's arguments regarding the assignment, including that the assignment of the true-up provision should be considered as a separate, severable assignment, and find them unavailing (*see Matter of Wilson*, 50 NY2d 59, 65-66 [1980]).

Because neither the complaint nor the moving papers sought a declaration as to the validity of the assignment of the

guaranties, and because that issue involves different questions and rights than at issue here, it was error for the IAS court to grant that relief sua sponte (*see WFR Assoc. v Memorial Hosp.*, 14 AD3d 840, 841-842 [3d Dept 2005]).

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

ENTERED: APRIL 13, 2017

CLERK

Friedman, J.P., Richter, Mazzarelli, Feinman, Gische, JJ.

3702 The People of the State of New York, Ind. 756/12
Respondent,

-against-

Jose Pimentel,
Defendant-Appellant.

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

Cyrus R. Vance, Jr., District Attorney, New York (Beth Fisch Cohen of counsel), for respondent.

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Judgment, Supreme Court, New York County (Thomas Farber, J.), rendered March 25, 2014, convicting defendant, upon his plea of guilty, of attempted criminal possession of a weapon in the first degree as a crime of terrorism, and sentencing him, as a second felony offender, to a term of 16 years, unanimously affirmed.

Although defendant made a valid waiver of his right to appeal (*see People v Ramos*, 7 NY3d 737 [2006]), we find that his challenges to the statute defining "a crime of terrorism" (Penal Law § 490.25[1]) are within the category of claims that are "unwaivable as part of a plea bargain," and thus survive the appeal waiver (*People v Muniz*, 91 NY2d 570, 574 [1998]; *see also People v Lee*, 58 NY2d 491, 494 [1983]). While we find that all

of defendant's claims were preserved by way of motion practice, we reject them on the merits.

Defendant has not met his burden of showing a "clear and unambiguous" congressional intent to preempt state legislation in the field of counterterrorism (*People v Kozlowski*, 47 AD3d 111, 117-118 [1st Dept 2007], *affd* 11 NY3d 223 [2008], *cert denied* 556 US 1282 [2009]). The statute is not expressly preempted by 18 USC § 2338, which states that federal district courts have exclusive jurisdiction over actions brought under 18 USC part I, chapter 113B. Although Penal Law § 490.25(1) uses language substantially identical to the federal definition of "domestic terrorism" (18 USC § 2331[5]), the Penal Law provision is a separate statute limited to the commission of enumerated state offenses.

Defendant also fails to establish implied federal preemption of state counterterrorism laws. Since a local community will typically be the most directly affected by a terrorist attack there (*see United Auto., Aircraft & Agr. Implement Workers of America v Wisconsin Employment Relations Bd.*, 351 US 266, 274-275 [1956]), the "federal interest" in counterterrorism is not "so dominant" as to "preclude" local enforcement of state laws against attempts to commit terrorist attacks (*Arizona v United States*, 567 US 387, __, 132 S Ct 2492, 2501 [2012]). Moreover,

Congress has not enacted "a framework of regulation so pervasive" as to leave "no room for the States to supplement it" (*id.*). This is evident from the strong federal policy of cooperating with state and local governments to combat terrorism (*see e.g.* 42 USC § 3796h[b][4]).

The statute is not unconstitutionally vague in proscribing the "intent to intimidate or coerce a *civilian population*" (Penal Law § 490.25[1] [emphasis added]), in light of the Court of Appeals' construction of the emphasized phrase in *People v Morales* (20 NY3d 240, 247-249 [2012]). Defendant's arguments that the statute is unconstitutionally vague in using the phrase "unit of government" among other terms are likewise unpersuasive (*see People v Stuart*, 100 NY2d 412, 420-22 [2003]; *see also Holder v Humanitarian Law Project*, 561 US 1, 20-21 [2010]).

We also reject defendant's challenges to the statute under the Free Speech Clause of the First Amendment and article I, § 8 of the New York Constitution. We are unpersuaded by defendant's argument that the statute amounts to an impermissible content-based restriction of speech by increasing the felony level and sentencing range imposed on those who commit an enumerated criminal offense with the "intent to intimidate or coerce a civilian population, influence the policy of a unit of government by intimidation or coercion, or affect the conduct of a unit of

government by murder, assassination or kidnapping" (Penal Law § 490.25[1]). Such heightened punishment for defendant's admitted intent of, among other things, influencing the United States government's foreign policy by building and possessing a pipe bomb does not infringe his right to free speech (*see Wisconsin v Mitchell*, 508 US 476, 479 [1993]). Moreover, defendant's argument that the statute is overbroad in chilling political speech is unavailing, since any overbreadth is not "substantial . . . in relation to the statute's plainly legitimate sweep" (*Broadrick v Oklahoma*, 413 US 601, 615 [1973]) of prohibiting criminal conduct perpetrated with an intent commonly associated with terrorism (*see Wisconsin v Mitchell*, 508 US at 488-489).

Defendant's valid waiver of his right to appeal forecloses his excessive sentence claim. Regardless of whether defendant validly waived his right to appeal, we perceive no basis for reducing the sentence.

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

ENTERED: APRIL 13, 2017

CLERK

Friedman, J.P., Richter, Mazzarelli, Feinman, Gische, JJ.

3703-
3703A In re Kasey Rene'e R., also known as Kasey R., etc., and Others,

Dependent Children Under the Age of Eighteen Years, etc.,

Katherine Rene'e E., also known as Katherine Renee E., etc.,
Respondent-Appellant,

Lutheran Social Services of New York,
Petitioner-Respondent.

_____

Geoffrey P. Berman, Larchmont, for appellant.

Carrieri & Carrieri, P.C., Mineola (Ralph R. Carrieri of counsel), for respondent.

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

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Orders of fact-finding and disposition (one paper for each child), Family Court, Bronx County (Carol Sherman, J.), entered on or about April 23, 2015, which, to the extent appealed from as limited by the briefs, determined, after a hearing, that respondent mother had permanently neglected the subject children, terminated the mother's parental rights, and committed custody and guardianship of the children to petitioner agency and the Commissioner of Social Services for the purpose of adoption, unanimously affirmed, without costs.

The finding of permanent neglect is supported by clear and convincing evidence that despite the agency's diligent efforts to encourage and strengthen the parental relationship, the mother failed to plan for the children's future (*see* Social Services Law § 384-b[7][a]). The agency made diligent efforts by, among other things, referring the mother for various parenting programs and mental health services, as well as by scheduling and facilitating visitation with the children (*see id.* § 384-b[7][f]; *see also Matter of Marissa Tiffany C-W. [Faith W.]*, 125 AD3d 512, 512 [1st Dept 2015]). Despite these efforts, and despite engaging in numerous services, the mother had not altered or improved her parenting methods (*see* Social Services Law § 384-b[7][c]). Among other things, the mother continued to speak to the children in a threatening and aggressive manner and used inappropriate physical punishment with them, despite being counseled about her behavior (*see Matter of Cameron W. [Lakeisha E.W.]*, 139 AD3d 494, 494 [1st Dept 2016]).

A preponderance of the evidence supports the determination that termination of the mother's parental rights is in the best interest of the children (*Matter of Star Leslie W.*, 63 NY2d 136, 147-148 [1984]). A suspended judgment is not appropriate, given the mother's lack of insight into her behavior and the special needs of the children, and given the fact that the children's

needs are being met in their foster home, where they have resided since 2010 (*see Matter of Julianna Victoria S. [Benny William W.]*, 89 AD3d 490, 491 [1st Dept 2011], *lv denied* 18 NY3d 805 [2012]).

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

ENTERED: APRIL 13, 2017

CLERK

Friedman, J.P., Richter, Mazzarelli, Feinman, Gische, JJ.

3704 The People of the State of New York, Dkt. 53291C/09
Respondent,

-against-

Hugo Garcia,
Defendant-Appellant.

_____

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

Darcel D. Clark, District Attorney, Bronx (Ramandeep Singh of counsel), for respondent.

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Judgment, Supreme Court, Bronx County (Robert A. Sackett, J.), rendered August 25, 2011, convicting defendant, after a nonjury trial, of attempted assault in the third degree, attempted criminal possession of a weapon in the fourth degree, menacing in the third degree, and harassment in the second degree, and sentencing him to one year of probation, unanimously affirmed.

The court's verdict, rejecting defendant's justification defense, was not against the weight of the evidence. There is no basis for disturbing the court's credibility determinations,

including its evaluation of the possible biases of witnesses. Although defendant's testimony was supported by that of several witnesses, it is the quality of the testimony that controls, not the number of witnesses who testify.

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

ENTERED: APRIL 13, 2017

CLERK

Friedman, J.P., Richter, Mazzarelli, Feinman, Gische, JJ.

3708N Walker Reyes, Index 301441/14
Plaintiff-Respondent,

-against-

Lexington 79th Corp, et al.,
Defendants-Appellants.

_____

Wood Smith Henning & Berman LLP, New York (Nancy Quinn Koba of counsel), for appellants.

_____

Order, Supreme Court, Bronx County (Laura G. Douglas, J.), entered June 10, 2015, which to the extent appealed from as limited by the brief, denied defendants' motion to compel discovery of plaintiff's medical, psychological, psychiatric, and academic records, and income tax returns, unanimously modified, on the law, to grant the motion to the extent of requiring plaintiff to provide authorizations for production of his medical, psychological, and psychiatric records, for the period beginning five years before the accident, and otherwise affirmed, without costs.

The material and necessary standard is to be interpreted liberally to require disclosure of any facts bearing on the controversy which will assist preparation for trial by sharpening the issues and reducing prolixity (*see Allen v Crowell-Collier Publ. Co*, 21 NY2d 403, 406 [1968]).

Plaintiff alleged that he sustained numerous physical and psychological injuries, including depression, from the accident, and that they permanently impacted his ability to work. Defendants are entitled to disclosure of his entire medical history, including any psychological or psychiatric records, because his overall health directly bears on how many years he realistically could have continued to work had no accident occurred (*see Velez v Daar,* 41 AD3d 164, 166 [1st Dept 2007]).

However, defendant failed to demonstrate that plaintiff's school records and tax returns were relevant and material (*see Monica W. v Milevoi,* 252 AD2d 260, 262 [1st Dept 1999]; *Nanbar Realty Corp. v Pater Realty Co.,* 242 AD2d 208, 209-210 [1st Dept 1997]).

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

ENTERED: APRIL 13, 2017

CLERK

Friedman, J.P., Richter, Mazzarelli, Feinman, Gische, JJ.

3709N American Express Centurion, Index 108987/08
Plaintiff-Respondent,

-against-

Hubert Pototschnig,
Defendant-Appellant.

_____

Hubert Pototschnig, appellant pro se.

_____

Order, Supreme Court, New York County (Kathryn E. Freed, J.), entered October 15, 2015, which denied defendant's motion to vacate a default judgment, unanimously reversed, on the law and the facts, the motion granted, the judgment vacated, and the complaint dismissed without prejudice.

In view of plaintiff's counsel's advice to this Court that plaintiff is not opposing this appeal, we reverse and grant defendant the requested relief.

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

ENTERED: APRIL 13, 2017

CLERK

Friedman, J.P., Richter, Mazzarelli, Feinman, Gische, JJ.

3710N In re Feysher C., an Infant, by Her Mother and Natural Guardian, Evelyn G., Petitioner-Respondent, Index 260814/15

-against-

New York City Housing Authority, Respondent-Appellant,

City of New York, et al., Respondents.

_____

Wilson, Elser, Moskowitz, Edelman & Dicker LLP, New York (Patrick J. Lawless of counsel), for appellant.

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Order, Supreme Court, Bronx County (Mitchell J. Danziger, J.), entered November 19, 2015, which, inter alia, granted the petition for leave to serve a late notice of claim upon respondent New York City Housing Authority, unanimously reversed, on the law and the facts, without costs, the petition denied, and the proceeding as against the Housing Authority dismissed.

Petitioner failed to establish any of the relevant statutory factors that would warrant leave to serve a late notice of claim (General Municipal Law § 50-e[5]; *Matter of Kelley v New York City Health & Hosps. Corp.*, 76 AD3d 824 [1st Dept 2010]). Petitioner's service of a notice of claim on the City of New York does not excuse her failure to serve the Housing Authority within

the statutory period (*see Arias v New York City Hous. Auth.*, 40 AD3d 298 [1st Dept 2007]). The actual knowledge of the facts constituting the claim, acquired by the City of New York, through the notice of claim and General Municipal Law § 50-h hearing, cannot be imputed onto the Housing Authority (*see Seif v City of New York*, 218 AD2d 595, 596 [1st Dept 1995]). Furthermore, there has been no showing that a defense on the merits would not be prejudiced by the over 10-month delay in service (*see Casale v City of New York*, 95 AD3d 744, 745 [1st Dept 2012]).

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

ENTERED: APRIL 13, 2017

CLERK

Acosta, J.P., Renwick, Manzanet-Daniels, Kapnick, Webber, JJ.

3711 The People of the State of New York, Respondent, Ind. 724/13

-against-

Keith Stokes, Defendant-Appellant.

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

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

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Judgment, Supreme Court, New York County (Juan M. Merchan, J.), rendered May 1, 2014, convicting defendant, after a jury trial, of murder in the second degree and robbery in the first and second degrees, and sentencing him, as a persistent violent felony offender, to concurrent terms of 25 years to life, unanimously affirmed.

The court providently exercised its discretion in denying defendant's request for new counsel, which was made on the eve of trial, and in the context of a meritless request for a last-minute adjournment. Defendant "failed to proffer specific allegations of a seemingly serious request that would require the court to engage in a minimal inquiry" (*see People v Porto*, 16 NY3d 93, 100 [2010] [internal quotation marks omitted]). Defendant, through counsel, expressed only a generalized

complaint about the quality of counsel's representation, and this complaint did not require further inquiry under all the circumstances.

The court provided a meaningful response (*see generally People v Steinberg*, 79 NY2d 673, 684-85 [1992]) to the portion of a note from the deliberating jury that asked a legal question in a form that, in the context of the case, was too abstract to answer. In essence, the court told the jury that its question was unanswerable as written, and it invited the jury to ask a more specific question if it needed additional guidance. The court had just responded to another portion of the same note by reinstructing the jury on the elements of the crimes and the concept of accessorial liability. That instruction tended to provide guidance on the issue that appeared to have prompted the jury's abstract question, and the jury did not see fit to ask a clarifying question as the court had suggested. Accordingly, we find no prejudice to defendant.

The trial court providently denied defendant's severance motion, because the defenses of defendant and his codefendant were not in "irreconcilable conflict," and there was no significant danger that "the conflict alone would lead the jury to infer defendant's guilt" (*People v Mahboubian*, 74 NY2d 174, 184 [1989]). Neither defendant acted as a second prosecutor

regarding the other defendant, and in their cross-examination of witnesses and summations, neither defendant developed the inconsistency in their defenses to a point where it created prejudice.

Defendant did not preserve his claim that the court should have questioned a juror who reported to a court officer a concern about residing near a location mentioned in testimony, and we decline to review it in the interest of justice. As an alternative holding, we also reject it on the merits. Furthermore, there was no mode of proceedings error, because the court officer did not perform any judicial function, but "simply supplied information upon which the court made its own determination" (*People v Singletary*, 66 AD3d 564, 566 [1st Dept 2009], *lv denied* 13 NY3d 941 [2010]; *see also People v Kelly*, 5 NY3d 116 [2005]). The court was not obligated to personally speak with the juror, because, based on the information relayed by the officer, this was "an obviously trivial matter where the court, the attorneys, and defendant all agree[d] that there [was]

no possibility that the juror's impartiality could be affected and that there [was] no reason to question the juror" (*People v Buford*, 69 NY2d 290, 299 n 4).

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

ENTERED: APRIL 13, 2017

CLERK

Acosta, J.P., Renwick, Manzanet-Daniels, Kapnick, Webber, JJ.

3712- Index 653101/14
3713-
3714 PD Cargo, CA,
Plaintiff-Appellant,

-against-

Paten International SA,
Defendant-Respondent,

Lacteos CDS, etc., et al,
Defendants.

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Law Office of Joshua Kamens, Pawling (Joshua Kamens of counsel), for appellant.

Fox Rothschild LLP, New York (Barri Frankfurter of counsel), for respondent.

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Order, Supreme Court, New York County (Cynthia S. Kern, J.), entered September 10, 2015, which, among other things, granted defendant Paten International SA's (Paten) motion to dismiss the complaint as against it for lack of personal jurisdiction and vacated an order of attachment, unanimously reversed, on the law, without costs, the motion to dismiss denied with leave to renew upon completion of discovery on the jurisdictional issue, the complaint reinstated as against Paten, and the order of attachment reinstated. Appeal from order, same court and Justice, entered on or about December 4, 2015, which denied

plaintiff's motion to renew, and appeal from order, same court and Justice, entered August 8, 2016, which, to the extent appealed from as limited by the briefs, denied plaintiff's second motion to renew, unanimously dismissed, without costs, as academic.

Plaintiff's allegations that Paten used a correspondent account in New York to run a "blue dollar" currency exchange operation, and that defendant vendor Lacteos CDS directed plaintiff's funds to Paten's account because Lacteos CDS is a customer of the blue dollar operation, made out a sufficient start in demonstrating personal jurisdiction under CPLR 302(a)(1). Accordingly, plaintiff is entitled to jurisdictional discovery (*see Licci v Lebanese Can. Bank, SAL*, 20 NY3d 327 [2012]; *American BankNote Corp. v Daniele*, 45 AD3d 338, 340 [1st Dept 2007]; *see also* CPLR 3211[d]).

We decline to reach plaintiff's argument under CPLR 302(a)(2), because it was raised for the first time on renewal

(*see Nassau County v Metropolitan Transp. Auth.*, 99 AD3d 617, 619 [1st Dept 2012], *lv dismissed in part and denied in part* 21 NY3d 921 [2013]).

Because we reinstate the action, the order of attachment should also be reinstated.

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

ENTERED: APRIL 13, 2017

CLERK

Acosta, J.P., Renwick, Manzanet-Daniels, Kapnick, Webber, JJ.

3715 In re D. B.-P.,

A Person Alleged to be a
Juvenile Delinquent,

Appellant.
- - - - -
Presentment Agency

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Tamara A. Steckler, The Legal Aid Society, New York (Judith Stern of counsel), for appellant.

Zachary W. Carter, Corporation Counsel, New York (Daniel Matza-Brown of counsel), for presentment agency.

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Order, Family Court, Bronx County (Peter J. Passidomo, J.), entered on or about July 6, 2015, 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 attempted gang assault in the first degree, attempted assault in the first and second degrees, assault in the second and third degrees, criminal possession of a weapon in the fourth degree, menacing in the second degree, and also committed the act of unlawful possession of a weapon by a person under 16, and placed him on probation for a period of 18 months, unanimously affirmed, without costs.

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 identification and credibility. Although only one of three witnesses was able to make an identification, that identification was reliable, and the surrounding circumstances tended to corroborate it.

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

ENTERED: APRIL 13, 2017

CLERK

Acosta, J.P., Renwick, Manzanet-Daniels, Webber, JJ.

3716 In re Jacqueline Bethea, Index 401055/14
Petitioner,

-against-

Sheila J. Poole, etc.,
Respondent.

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Jacqueline Bethea, petitioner pro se.

Eric T. Schneiderman, Attorney General, New York (Oren L. Zeve of counsel), for respondent.

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Determination of respondent, dated April 18, 2014, which, upon findings that petitioner had committed maltreatment of a child and that such maltreatment is relevant and reasonably related to child-care employment, adoption of a child, or the provision of foster care, denied the petitioner's request that the indicated report against her be amended to unfounded and sealed, unanimously confirmed, the petition denied, and the proceeding brought pursuant to CPLR article 78 (transferred to this Court by order of the Supreme Court, New York County [Peter H. Moulton, J.], entered on or about January 30, 2015), dismissed, without costs.

The determination is supported by substantial evidence (*see Matter of Consolidated Edison Co. of N.Y. v New York State Div. of Human Rights*, 77 NY2d 411, 417 [1991]) showing that petitioner, a foster parent to the child, had maltreated the child by poking the child with her fist and verbally abusing the child (*see Matter of Justin A. [Derek C.]*, 133 AD3d 1106, 1107-1108 [3d Dept 2015], *lv denied* 27 NY3d 904 [2016]). The Administrative Law Judge (ALJ) providently found that because of the child's post-traumatic stress disorder and mild mental retardation, petitioner's actions put the child at risk of emotional impairment (*see Nicholson v Scoppetta*, 3 NY3d 357, 370 [2004]; *see also* 18 NYCRR 432.1[b][1]).

Petitioner's remaining contentions, to the extent preserved for our review, are unavailing.

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

ENTERED: APRIL 13, 2017

CLERK

Acosta, J.P., Renwick, Manzanet-Daniels, Kapnick, Webber, JJ.

3717 The People of the State of New York, Respondent, Ind. 4892N/11

-against-

Damon Flagg, Defendant-Appellant.

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

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

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Judgment, Supreme Court, New York County (Carol Berkman, J.), rendered November 14, 2012, convicting defendant, after a jury trial, of criminal possession of a weapon in the second and fourth degrees and criminal possession of a controlled substance in the fourth degree, and sentencing him, as a second felony drug offender, to an aggregate term of eight years, unanimously affirmed.

The court properly denied defendant's motion to suppress statements he made before receiving *Miranda* warnings. When, in response to an officer's pedigree question as to his address, defendant acknowledged he resided in the apartment where he was arrested and where the contraband at issue was found, warnings were not required because this routine administrative question, which was part of a series of standard booking questions such as

name, address, and so forth, was not designed to elicit an incriminating response (*see Pennsylvania v Muniz*, 496 US 582, 601-602 [1990]; *People v Rodney*, 85 NY2d 289, 292-294 [1995]; *People v Watts*, 309 AD2d 628 [1st Dept 2003], *lv denied* 1 NY3d 582 [2003]), even if the answer was reasonably likely to be incriminating (*see People v Alleyne*, 34 AD3d 367 [1st Dept 2006], *lv denied* 8 NY3d 918 [2007], *cert denied* 552 US 878 [2007]). The People also met their burden of proving that defendant's other pre-*Miranda* statements were spontaneous and not the product of any questioning or its equivalent, and there is nothing to cast doubt on the statements' spontaneity. Defendant's claim that even if the statements were otherwise spontaneous, they were the product of the allegedly inadmissible pedigree statement is unpreserved, and we decline to review it in the interest of justice. As an alternative holding, we find that the spontaneous statements were admissible irrespective of the admissibility of the pedigree statement.

The verdict was based on legally sufficient evidence and was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). There is no basis for disturbing the jury's credibility determinations. When viewed as a whole, the

evidence, including, among other things, defendant's undisputedly admissible post-*Miranda* admissions, amply connected him with all of the contraband at issue. We have considered and rejected defendant's remaining arguments on the sufficiency and weight of the evidence.

Defendant's challenges to the prosecutor's summation are entirely unpreserved because defendant failed to object, made only unspecified generalized objections or failed to complain that the court's curative actions were inadequate (*see People v Romero*, 7 NY3d 911, 912 [2006]), and we decline to review them in the interest of justice. As an alternative holding, we find no basis for reversal (*see People v Overlee*, 236 AD2d 133 [1st Dept 1997], *lv denied* 91 NY2d 976 [1992]; *People v D'Alessandro*, 184 AD2d 114, 118-119 [1st Dept 1992], *lv denied* 81 NY2d 884 [1993]).

Based on our in camera review of the minutes of the hearing conducted pursuant to *People v Darden* (34 NY2d 177 [1974]), we

find that there was probable cause for the issuance of the search warrant and that there was no violation of *Brady v Maryland* (373 US 83 [1963]).

We perceive no basis for reducing the sentence.

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

ENTERED: APRIL 13, 2017

CLERK

Acosta, J.P., Renwick, Manzanet-Daniels, Kapnick, Webber, JJ.

3718 Peter Casanas, et al., Index 101057/12
Plaintiffs-Respondents,

-against-

The Carlei Group, LLC, et al.,
Defendants-Appellants.

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Rosenberg & Estis, P.C., New York (Alexander Lycoyannis of counsel), for appellants.

Profeta & Eisenstein, New York (Jethro M. Eisenstein of counsel), for respondents.

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Order, Supreme Court, New York County (David B. Cohen, J.), entered March 15, 2016, which, to the extent appealed from as limited by the briefs, denied defendants' motion to strike the complaint pursuant to CPLR 3126 and to declare that plaintiffs do not have a valid lease for the subject premises, unanimously affirmed, with costs.

The motion court providently exercised its discretion in denying defendants' motion for an order striking the complaint, since such a drastic sanction is generally warranted "only upon a clear showing that the party's conduct was willful and contumacious" (*CEMD El. Corp. v Metrotech LLC I*, 141 AD3d 451, 453 [1st Dept 2016]; *see Perez v New York City Tr. Auth.*, 73 AD3d 529 [1st Dept 2010]). Here, the record does not clearly support defendants' contentions that plaintiffs submitted a "phony"

version of their lease, that they wilfully delayed in disclosing various versions of the lease, or that their deposition testimony about when the landlord's principals executed the lease was knowingly false.

Concerning the delay in providing complete document disclosure, plaintiff Peter Casanas averred that the original lease had always been kept in a file in plaintiffs' home office, but that all of their papers were thrown into boxes and moved to a storage unit after there was a fire in the building while they were away. Peter's brother, defendant Richard Casanas, does not dispute that the fire occurred or that he had access to plaintiffs' apartment in the days following the fire. In light of the reasonable excuse provided by plaintiffs concerning the disarray of their papers, and their showing that they repeatedly searched for relevant documents and produced them when found, there is no indication of bad faith warranting the imposition of sanctions (*see Cespedes v Mike & Jac Trucking Corp.*, 305 AD2d 222 [1st Dept 2003]).

The record also fails to establish that plaintiffs' testimony concerning the timing of the execution of the lease, 23 years after the event occurred, was intentionally incorrect. To

the contrary, plaintiffs had no reason to be dishonest on the issue, since it is not dispositive of their claim. Defendants' arguments raise issues of credibility that would be more appropriately addressed at trial.

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

ENTERED: APRIL 13, 2017

CLERK

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

3719 The People of the State of New York, Respondent, Ind. 2289N/13

-against-

Reinaldo Santiago, Defendant-Appellant.

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Law Office of Aaron M. Goldsmith, P.C., New York (Aaron M. Goldsmith of counsel), for appellant

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

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Judgment, Supreme Court, New York County (Ruth Pickholz, J.), rendered May 21, 2015, convicting defendant, after a jury trial, of conspiracy in the second degree and two counts of criminal sale of a controlled substance in the first degree, and sentencing him to an aggregate term of eight years, unanimously affirmed.

The verdict was supported by legally sufficient evidence and was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). There was ample evidence, including intercepted communications, demonstrating that defendant was part of the drug trafficking operation at issue, and satisfying all the elements of the sale and conspiracy charges.

Defendant, who objected on different grounds from those raised on appeal, has not preserved his present arguments relating to a detective's expert testimony concerning the interpretation of coded drug-related conversations, and we decline to review them in the interest of justice. As an alternative holding, we find no basis for reversal (*see e.g. People v Ramirez*, 33 AD3d 460 [1st Dept 2006], *lv denied* 7 NY3d 928 [2006]). *People v Singleton*, 270 AD2d 190, 190 [1st Dept 2000], *lv denied* 95 NY2d 858 [2000])

The court providently exercised its discretion in denying, without a hearing, defendant's CPL 330.30(3) motion to set aside the verdict on the ground of newly discovered evidence (which defendant denominated a "mistrial" motion). The evidence revealed after the verdict merely constituted impeachment material that had little or no significance in the context of the case, and fell far short of the statutory standard of creating a "probability" (*id.*) of a more favorable verdict.

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

ENTERED: APRIL 13, 2017

CLERK

Acosta, J.P., Renwick, Manzanet-Daniels, Kapnick, Webber, JJ.

3720 In re Nafissatou D.,
Petitioner-Respondent,

-against-

Ibrahima B.,
Respondent-Appellant.

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Dora M. Lassinger, East Rockaway, for appellant.

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Order, Family Court, Bronx County (Llinet Rosado, J.), entered on or about July 29, 2015, which, upon a fact-finding determination that respondent had committed the family offenses of menacing in the second degree, disorderly conduct, and harassment in the second degree, granted the petition for a two-year order of protection against respondent, unanimously modified, on the law, to vacate the finding of menacing in the second degree, and otherwise affirmed, without costs.

Family Court properly granted the petition for an order of protection against respondent, petitioner's former husband, because petitioner established the family offense of harassment in the second degree "by a fair preponderance of the evidence" (Family Ct Act §§ 832, 812[1]). Petitioner's testimony that respondent threatened to kill her and followed her to try to discover where she lived, which was confidential, was sufficient to support findings that respondent, "with intent to harass,

annoy or alarm" petitioner, attempted or threatened to subject her to physical contact, or followed her "in or about a public place" (Penal Law § 240.26[1], [2]). Petitioner's testimony was consistent and Family Court providently exercised its discretion in crediting it (*see Matter of Everett C. v Oneida P.*, 61 AD3d 489, 489 [1st Dept 2009]).

Disorderly conduct was established, because there was evidence that respondent intended to cause, or recklessly created a risk of causing, "public inconvenience, annoyance, or alarm" (Penal Law § 240.20; *Matter of Cassie v Cassie*, 109 AD3d 337, 344 [2d Dept 2013]; *Matter of Rebecca M.T. v Trina J.M.*, 134 AD3d 551, 552 [1st Dept 2015]). Petitioner did not, however, meet her burden of establishing, by a fair preponderance of the evidence, the family offenses of menacing in the second degree. Menacing in the second degree was not established, because, in pertinent part, petitioner did not allege that respondent displayed a

weapon or what appeared to be a weapon (*see* Penal Law § 120.14[1]), and petitioner did not demonstrate a "course of conduct" to place her in reasonable fear of physical injury (*id.* § 120.14[2]).

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

ENTERED: APRIL 13, 2017

CLERK

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

3721 In re Van Dorn Holdings, LLC, Index 161136/15
Petitioner-Appellant,

-against-

152 W. 58th Owners Corp., et al.,
Respondents-Respondents.

_____

Borah, Goldstein, Altschuler, Nahins & Goidel, P.C., New York (Virginia K. Trunkes and Craig M. Notte of counsel), for appellant.

Tarter Krinsky & Drogin LLP, New York (Linda Singer Roth of counsel), for respondents.

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Order and judgment (one paper), Supreme Court, New York County (Kathryn E. Freed, J.), entered on or about August 22, 2016, which insofar as appealed from as limited by the briefs, in this proceeding pursuant to RPAPL 881, ordered petitioner to pay respondent David Fallarino a monthly license fee of $2,000 from February through September 2016, ordered petitioner to pay a $500 penalty for each day beyond the term of the license that its work is not completed, and awarded respondents attorneys' and engineers' fees, unanimously modified, on the facts and in the exercise of discretion, to vacate, with leave to renew, the $500 penalty for each day beyond the license term that petitioner fails to complete its work, or to seek such other available

relief as respondent deems appropriate, and otherwise affirmed, without costs.

RPAPL 881 provides:

> "When an owner or lessee seeks to make improvements or repairs to real property so situated that such improvements or repairs cannot be made by the owner or lessee without entering the premises of an adjoining owner or his lessee, and permission so to enter has been refused, the owner or lessee seeking to make such improvements or repairs may commence a special proceeding for a license so to enter pursuant to article four of the civil practice law and rules. The petition and affidavits, if any, shall state the facts making such entry necessary and the date or dates on which entry is sought. Such license shall be granted by the court in an appropriate case upon such terms as justice requires. The licensee shall be liable to the adjoining owner or his lessee for actual damages occurring as a result of the entry."

"Although the determination of whether to award a license fee is discretionary, in that RPAPL 881 provides that a 'license shall be granted by the court in an appropriate case *upon such terms as justice requires*,' the grant of licenses pursuant to RPAPL 881 often warrants the award of contemporaneous license fees" (*DDG Warren LLC v Assouline Ritz 1, LLC*, 138 AD3d 539, 540 [1st Dept 2016] [emphasis in original] [parenthetical omitted]). This is because "'the respondent to an 881 petition has not sought out the intrusion and does not derive any benefit from it . . . . Equity requires that the owner compelled to grant access should

not have to bear any costs resulting from the access'" (*id.* at 540, quoting *Matter of North 7-8 Invs., LLC v Newgarden*, 43 Misc 3d 623, 628 [Sup Ct, Kings County 2014]).

Here, Supreme Court did not abuse its discretion in requiring petitioner to pay respondent Fallarino a license fee where the necessary repairs to petitioner's building will deprive Fallarino of the use of a portion of his property. Notwithstanding that petitioner's intrusion was for the purpose of repairs, as opposed to new or elective construction, Fallarino should not have to bear the loss uncompensated (*id.*). Supreme Court also did not abuse its discretion in granting respondents attorneys' and engineers' fees. "A property owner compelled to grant a license should not be put in a position of either having to incur the costs of a design professional to ensure petitioner's work will not endanger his property, or having to grant access without being able to conduct a meaningful review of petitioner's plans" (*Matter of North 7-8 Invs.*, 43 Misc 3d at 630).

However, we modify so much of the order as imposed a $500 daily penalty on petitioner for each day beyond the license term that work is not completed, to instead allow respondents, if the work is not completed within the license period, to move for a determination of the proper amount of any penalty, or increase or

continuation of the licensing fee, or any other relief available to them (*see Snyder v 122 E. 78th St. NY LLC*, 2014 NY Slip Op 32940[U] [Sup Ct, New York County 2014] [awarding monthly license fee of $3,000 "to be substantially increased if the work is not completed within four months"]).

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

ENTERED: APRIL 13, 2017

CLERK

Acosta, J.P., Renwick, Manzanet-Daniels, Kapnick, Webber, JJ.

3722 James McLaughlan, Index 102005/12
Plaintiff-Appellant-Respondent,

-against-

BR Guest, Inc., et al.,
Defendants-Respondents-Appellants,

SPH Restaurant Enterprises, Inc.,
et al.,
Defendants.

- - - - -

[And a Third-Party Action]

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Law Offices of John O'Gara, New York (John O'Gara of counsel), for appellant-respondent.

Mischel & Horn, P.C., New York (Naomi M. Taub of counsel), for respondents-appellants.

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Order, Supreme Court, New York County (Manuel J. Mendez, J.), entered January 22, 2016, which, inter alia, granted that part of the motion for summary judgment dismissing the complaint and all cross claims as against defendants BR Guest, Inc., B.R. Guest, LLC, B.R. Guest Holdings, LLC, 675 Hudson, LLC, and 675 Hudson Vault, LLC (collectively BR Guest), and denied that part of the motion for summary judgment dismissing the complaint as against defendant Hall Hanson, unanimously modified, on the law, to the extent of dismissing the complaint and all cross claims as against Hanson, and otherwise affirmed, without costs. The Clerk is directed to enter judgment accordingly.

In this action where plaintiff alleges that he was assaulted by defendant James DiPaola on the sidewalk in front of BR Guest's bar, Supreme Court properly granted BR Guest's motion for summary judgment on the issue of whether it is vicariously liable for plaintiff's injuries. The record establishes that DiPaola, a security guard, was an independent contractor when the incident occurred (*see McCann v Varrick Group LLC*, 84 AD3d 591 [1st Dept 2011]). The evidence shows that DiPaola was not on BR Guest's payroll, did not receive health insurance or other fringe benefits, and that BR Guest contracted for his services as a security guard from defendant Presidium, LLC (*see Meyer v Kumi*, 82 AD3d 514 [1st Dept 2011]).

The record reveals nothing more than general supervisory control, which cannot form the basis for imposing liability against BR Guest or Hanson, who was the vice president of BR Guest Inc., for plaintiff's injuries sustained as a result of DiPaola's assault (*see Duhe v Midence*, 48 AD3d 244 [1st Dept 2008], *lv denied* 11 NY3d 706 [2008]). The fact that BR Guest decided the number of security guards needed on a particular night and where on the premises the guards should be posted at any given time, and gave them instructions relating to the manner in which they performed their work does not render the security

guards working at the premises special employees (*see e.g. Vargas v Beer Garden, Inc.*, 15 AD3d 277 [1st Dept 2005], *lv denied* 4 NY3d 710 [2005]). Moreover, the individual in charge of security of all BR Guest's locations testified that he could not fire a security guard because they did not work for him, and that he would speak with Presidium when necessary to report that BR Guest was not happy with a particular guard.

BR Guest and Hanson may also not be held liable for plaintiff's injuries pursuant to the nondelegable duty exception to keep the bar safe, because minimal security precautions were taken to protect those patronizing the premises from foreseeable criminal acts of third parties by contracting with Presidium to have its security guards maintain order. There is also no evidence of any indicators of an escalating situation between plaintiff and DiPaola such that it could be said that BR Guest and Hanson were aware of the disturbance or that BR Guest's managers could have anticipated it because it is undisputed that the entire incident lasted no more than several minutes (*see Languilli v Argonaut Rest. & Diner*, 232 AD2d 375 [2d Dept 1996]).

Contrary to plaintiff's contention, BR Guest and Hanson are entitled to summary judgment even though it appears that they violated Administrative Code of City of NY § 27-525.1(e) by not

obtaining proof that DiPaola was a registered security guard as required by General Business Law § 89-g and keeping a record of it, because such negligence was not a proximate cause of the incident since it could have occurred in the same manner if they were in compliance with the statute (*see e.g. Sheehan v City of New York*, 40 NY2d 496, 503 [1976]).

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

ENTERED: APRIL 13, 2017

CLERK

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

3723 In re London Terrace Gardens L.P., Index 101546/13
Petitioner-Appellant,

-against-

New York State Division of Housing
and Community Renewal, et al.,
Respondents-Respondents.

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Borah, Goldstein, Altschuler, Nahins & Goidel, P.C., New York (Paul N. Gruber of counsel), for appellant.

Adam H. Schuman, New York (Sandra A. Joseph and Mark F. Palomino of counsel), for New York State Division of Housing and Community Renewal, respondent.

Law Office of Jay Stuart Dankberg, New York (Jay Stuart Dankberg of counsel), for Amy Eichenwald Golding and Kenneth Blake Golding, respondents.

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Judgment, Supreme Court, New York County (Margaret A. Chan, J.), entered December 3, 2014, denying the petition seeking to annul a determination of respondent New York State Division of Housing and Community Renewal (DHCR), dated September 30, 2013, which denied petitioner owner's petition for administrative review (PAR) of a rent overcharge determination, and dismissing the proceeding brought pursuant to CPLR article 78, unanimously affirmed, without costs.

The determination is rationally based in the record, and not "arbitrary and capricious" (CPLR 7803[3]; *see Matter of Partnership 92 LP & Bldg. Mgt. Co., Inc. v State of N.Y. Div. of Hous. & Community Renewal*, 46 AD3d 425, 428 [1st Dept 2007], *affd* 11 NY3d 859 [2008]). DHCR providently exercised its discretion in declining to accept a late-proffered invoice at the PAR stage, especially given the lack of an explanation for the delay (*see* 9 NYCRR 2527.5[d]; 2529.6; *Matter of Dworman v New York State Div. of Hous. & Community Renewal*, 94 NY2d 359, 374 [1999]).

DHCR's assessment of interest on overcharge amounts — including periods in which the tenant respondents paid the excessive rent into escrow, rather than to the owner — was consistent with the statutory purposes of discouraging overcharges and encouraging prompt repayment of overcharge amounts (*see* Administrative Code of City of NY § 26-516[a]; 9 NYCRR 2526.1[a][1]; *Mohassel v Fenwick*, 5 NY3d 44, 52 [2005]; *Matter of 10th St. Assoc. LLC v New York State Div. of Hous. & Community Renewal*, 34 Misc 3d 1240[A], 2012 NY Slip Op 50484[U], *5 [Sup Ct, NY County 2012], *affd* 110 AD3d 605 [1st Dept 2013]).

In determining the date of the last vacancy for purposes of computing the longevity increase, DHCR properly relied on the

date of the earliest registered rent for the prior tenant (*see Matter of Hawthorne Gardens v State of New York Div. of Hous. & Community Renewal*, 4 AD3d 135, 136 [1st Dept 2004]).

Petitioner was afforded adequate due process throughout the proceedings (*see Matter of Beck-Nichols v Bianco*, 20 NY3d 540, 559 [2013]; *Matter of Griffin v City of New York*, 127 AD3d 412, 412 [1st Dept 2015], *appeal dismissed and lv denied* 25 NY3d 1191 [2015]; 9 NYCRR 2527.5[j]).

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

ENTERED: APRIL 13, 2017

CLERK

Acosta, J.P., Renwick, Manzanet-Daniels, Kapnick, Webber, JJ.

3726 Heartland Brewery, Inc., Index 650144/14
Plaintiff-Appellant-Respondent,

-against-

Nova Casualty Company,
Defendant-Respondent-Appellant.

_____

Lerner, Arnold & Winston, LLP, New York (Johnathan C. Lerner of counsel), for appellant-respondent.

Robinson & Cole, LLP, New York (Michael R. Kuehn of counsel), for respondent-appellant.

_____

Order, Supreme Court, New York County (Barry R. Ostrager, J.), entered September 7, 2016, which denied plaintiff's motion for summary judgment declaring that defendant Nova Casualty Company was obligated to provide Heartland with coverage under the policy, and denied Nova's cross motion for summary judgment declaring that Nova was under no obligation to provide Heartland with coverage under the policy, unanimously affirmed, without costs.

Defendant Nova Casualty Company provided plaintiff Heartland Brewery, Inc. with property and casualty coverage for several of its premises throughout New York City. The policy provided for limited coverage for flooding, but specifically excluded "loss or damage to property located in Flood Zones A or V as defined by the Federal Emergency Management Agency (FEMA)." During

Superstorm Sandy, plaintiff's premises located at 93 South Street sustained substantial flood damage. When plaintiff presented its claim to defendant, defendant declined coverage because the premises was located in FEMA Zone AE, which defendant asserts is a subzone of Zone A. Plaintiff challenges this interpretation, claiming that Zone AE is not a subzone or part of Zone A, but rather is separately defined under FEMA's regulations (44 CFR § 59.1, *et seq.*).

The question of whether the terms of a contract, such as an insurance policy, are ambiguous is a question of law for the courts to determine. The contract language is to be read in light of common speech and interpreted "according to the reasonable expectations and purposes of ordinary business[]people when making ordinary business contracts" (*DMP Contr. Corp. v Essex Ins. Co.*, 76 AD3d 844, 845 [1st Dept 2010]).

When it comes to exclusions from coverage, the exclusion "must be specific and clear in order to be enforced" (*Seaboard Sur. Co. v Gillette Co.*, 64 NY2d 304, 311 [1984]) and ambiguities in exclusions are to be construed "most strongly" against the insurer (*Guachichulca v Laszlo N. Tauber & Assoc., LLC*, 37 AD3d 760, 761 [2d Dept 2007]). As this Court has recognized, there are circumstances where extrinsic evidence may be admitted prior to an exclusion being strictly construed against an insurer

(*Southwest Mar. & Gen. Ins. Co. v Preferred Contrs. Ins. Co.*, 143 AD3d 577 [1st Dept 2016]), and "[w]here [] ambiguous words are to be construed in the light of extrinsic evidence or the surrounding circumstances, the meaning of such words may become a question of fact for the jury" (*American Surety Co. of N.Y. v National Fire Ins. Co. of Hartford*, 25 AD2d 734, 734 [1st Dept 1966]).

Here, the language of FEMA's flood zone regulations raises an issue of fact rendering the insurance policy's exclusion of flood coverage ambiguous (*see Sylvania Gardens Apts. v Legion Ins. Co.*, 2001 WL 1807780, *2, 2001 Phila. Ct. Com. Pl. LEXIS 67, *6 [Phila Ct. Common Pleas 2001]).

We have considered the remaining arguments and find them unavailing.

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

ENTERED: APRIL 13, 2017

CLERK

Acosta, J.P., Renwick, Manzanet-Daniels, Kapnick, Webber, JJ.

3727 The People of the State of New York, SCI 324/15
Respondent,

-against-

Felipe Rodas also know as
Felepe Rodas,
Defendant-Appellant.

_____

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

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

_____

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Richard M. Weinberg, J.), rendered April 9, 2015,

Said appeal having been argued by counsel for the respective parties, due deliberation having been had thereon, and finding the sentence not excessive,

It is unanimously ordered that the judgment so appealed from be and the same is hereby affirmed.

ENTERED: APRIL 13, 2017

CLERK

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

Acosta, J.P., Renwick, Manzanet-Daniels, Kapnick, Webber, JJ.

3728 In re New York State Division of Human Rights, et al.,
Petitioners,

-against-

SUV Production, Inc.,
Respondent.

Index 452332/15

_____

Caroline J. Downey, Bronx (Toni Ann Hollifield of counsel), for New York State Division of Human Rights, petitioner.

_____

Application pursuant to Executive Law § 298 to enforce petitioner New York State Division of Human Rights' (DHR) order, dated December 19, 2008, which, upon finding that the complaints of petitioners Rafael Perez and Leopoldo Rivera for employment discrimination and hostile work environment in violation of the New York State Human Rights Law had been proven, awarded Perez three months of back pay in the amount of $7,098, awarded Rivera three months of back pay in the amount of $3,816, and awarded each complainant $5,000 for mental anguish and humiliation (transferred to this Court by order of Supreme Court, New York County [Geoffrey D. Wright, J.], entered August 21, 2015), unanimously confirmed, without costs.

DHR's findings are supported by substantial evidence (*see generally 300 Gramatan Ave. Assoc. v State Div. of Human Rights*, 45 NY2d 176 [1978]). The hearing testimony amply demonstrated that respondent discriminated against Perez and Rivera on account of their national origin and subjected them to a hostile work environment.

The awards of back pay and compensatory damages for mental anguish are proper under the circumstances presented (*see* Executive Law § 297[4][c][ii], [iii]; *Matter of Mize v State Div. of Human Rights*, 33 NY2d 53, 56 [1973]; *Matter of New York State Div. of Human Rights v Neighborhood Youth & Family Servs.*, 102 AD3d 491 [1st Dept 2013]).

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

ENTERED: APRIL 13, 2017

CLERK

Andrias, J.P., Kapnick, Webber, Kahn, JJ.

3729 IGS Realty Co., L.P., Index 603561/09
Plaintiff-Respondent,

-against-

James H. Brady,
Defendant-Appellant.

_____

James H. Brady, appellant pro se.

Goldsmith & Fass, New York (Robert N. Fass of counsel), for respondent.

_____

Order, Supreme Court, New York County (Barry R. Ostrager, J.), entered on or about August 25, 2015, which, to the extent appealed from as limited by the briefs, denied the branch of defendant's motion that sought to set aside the jury verdict in plaintiff's favor and to award judgment in his favor or order a new trial, unanimously affirmed, without costs.

The motion court properly denied defendant's posttrial motion (*see* CPLR 4404). Defendant failed to preserve for appellate review his challenges regarding the jury charges and the verdict sheet interrogatories, because at trial he never objected to the charges or to the verdict sheet (*Ganaj v New York City Health & Hosps. Corp.*, 130 AD3d 536 [1st Dept 2015]; CPLR 4110-b, 4111[b]).

The jury's verdict was not against the weight of the evidence (*Killon v Parrotta*, 28 NY3d 101, 107 [2016]). Nor was the verdict against public policy. The leases entered into by defendant's corporations were not illegal contracts (*see McConnell v Commonwealth Pictures Corp.*, 7 NY2d 465, 469 [1960]). Plaintiff did not lease the premises for an illegal use, nor were the leases procured through any criminal acts (*id.*).

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: APRIL 13, 2017

CLERK

Acosta, J.P., Renwick, Manzanet-Daniels, Kapnick, Webber, JJ.

3730 The People of the State of New York Ind. 1585/12
Respondent,

-against-

Shanequa Mascall,
Defendant-Appellant.

_____

Seymour W. James, Jr., The Legal Aid Society, New York (Elizabeth L. Isaacs of counsel), for appellant.

Cyrus R. Vance, Jr., District Attorney, New York (Ellen Stanfield Friedman of counsel), for respondent.

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Judgment, Supreme Court, New York County (Renee A. White, J. at suppression hearing; Laura A. Ward, J. at jury trial and sentencing), rendered March 4, 2013, convicting defendant of criminal possession of a forged instrument in the second degree, and sentencing her to a term of 90 days concurrent with 5 years' probation, unanimously affirmed.

Defendant's statement regarding her place of employment, which was incriminating under the circumstances of the case, should have been suppressed. While employment-related questions may fall under the pedigree exception to the requirement of *Miranda* warnings, we do not find that exception applicable to the facts presented (*see People v Rodney*, 85 NY2d 289, 293 [1995]). The officer had already finished pedigree paperwork at the front desk of the police station when she asked defendant the

employment question, which was reasonably likely to elicit an incriminating response, during a separate, case-related conversation in the cell area. Nevertheless, the error was harmless, given the overwhelming evidence of guilt (*People v Crimmins*, 36 NY2d 230, 237 [1975]).

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

ENTERED: APRIL 13, 2017

CLERK

Acosta, J.P., Renwick, Manzanet-Daniels, Kapnick, Webber, JJ.

3731N In re George Washington Bridge Bus Station Development Venture, LLC,
Petitioner-Respondent,

-against-

Associated Specialty Contracting, Inc.,
Respondent-Appellant.

- - - - -

The Port Authority of New York and New Jersey,
Amicus Curiae.

Index 150549/16

_____

Tesser & Cohen, New York (Matthew W. Lakind of counsel), for appellant.

Zetlin & DeChiara LLP, New York (Jamiee L. Nardiello of counsel), for respondent.

Brian P. Hodgkinson, New York, for amicus curiae.

_____

Order, Supreme Court, New York County (Nancy M. Bannon, J.), entered on or about August 8, 2016, which granted the petition to discharge respondent's mechanic's lien on the subject property, unanimously affirmed, without costs.

The court correctly granted the petition to discharge the mechanic's lien filed by respondent. It is well-settled that a private mechanic's lien may not attach to privately-leased, but

publicly-owned, land (*see Matter of Paerdegat Boat & Racquet Club v Zarrelli*, 57 NY2d 966, 968 [1982], *revg on concurring in part, dissenting in part op of Hopkins, J.*, 83 AD2d 444, 452 [2d Dept 1981]; *Avon Elec. Supplies v Voltaic Elec. Co.*, 203 AD2d 404, 405 [2d Dept 1994]; *T.N.T. Coatings v County of Nassau*, 114 AD2d 1027, 1028 [2d Dept 1985], *lv denied* 67 NY2d 608 [1986]). Since the Port Authority of New York and New Jersey (Port Authority), the owner of the subject property, is a "public corporation" within the contemplation of the Lien Law, the George Washington Bridge Bus Station constituted a "public improvement" within the meaning of the Lien Law, despite petitioner's private leasehold interest in the property (Lien Law § 2[8]; General Construction Law § 66[1], [4]; *see Matter of World Trade Ctr. Bombing Litig.*, 93 NY2d 1, 10 [1999]; *Matter of Carland Constr. Co. v Infilco Degremont*, 152 AD2d 694, 695 [2d Dept 1989]).

Respondent's reliance on the exception to the general rule, provided by Lien Law § 2(7), is misplaced, inasmuch as that section applies only to property owned by Industrial Development

Agencies, which the Port Authority is not (*see Davidson Pipe Supply Co. v Wyoming County Indus. Dev. Agency*, 85 NY2d 281, 287 [1995]; *Matter of PMNC v Brothers Insulation Co.*, 266 AD2d 293, 294 [2d Dept 1999]).

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

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

ENTERED: APRIL 13, 2017

CLERK

Acosta, J.P., Renwick, Manzanet-Daniels, Kapnick, Webber, JJ.

3732N Dolores S. Suarez, Index 155825/13
Plaintiff-Respondent, 595832/15

-against-

Shapiro Family Realty Associates, LLC,
et al.,
Defendants-Appellants,

Duane Reade, Inc.
Defendant-Respondent.

- - - - -

Shapiro Family Realty Associates, LLC,
et al.,
Third-Party Plaintiffs-Appellants,

-against-

Sato Construction Co., Inc. doing business
as Flag Waterproofing & Restoration Company,
et al.,
Third-Party Defendants.

_____

Mischel & Horn, P.C., New York (Scott T. Horn of counsel), for appellants.

The Rosato Law Firm, P.C., New York (Paul A. Marber of counsel), for Dolores S. Suarez, respondent.

Gruvman, Giordano & Glaws, LLP, New York (Charles T. Glaws of counsel), for Duane Reade, Inc., respondent.

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Order, Supreme Court, New York County (Joan M. Kenney, J.), entered September 30, 2016, which denied the motion of defendants Shapiro Family Realty Associates, LLC, Kern 90, LLC and Rose Associates, Inc. to strike plaintiff's note of issue, to compel defendant Duane Reade, Inc. to comply with discovery, and to

compel third-party defendants, Sato Construction Co., Inc. and Production Contracting Co., to produce witnesses for depositions, unanimously modified, on the law and the facts, and Shapiro's motion granted to the extent that Duane Reade is directed to provide a copy of contracts relative to sidewalk repairs performed on the sidewalk abutting its leased premises forthwith, to produce John Yodice and Tim Weiss for depositions within 60 days of the date of this order, and to provide the last known address of Mark Bander, and otherwise affirmed, without costs.

Under the circumstances, where plaintiff's certificate of readiness contained no incorrect material representations, the court properly refused to vacate the note of issue (*cf.* 22 NYCRR 202.21[e]). However, as plaintiff acknowledged in the note of issue and certificate of readiness, discovery was still outstanding. Plaintiff's argument that Shapiro's affirmation of good faith failed to comply with 22 NYCRR 202.7 is unavailing, since the record demonstrates that Shapiro repeatedly attempted to obtain discovery and depositions from Duane Reade, but to no avail. "Under the unique circumstances of this case," any further attempt to resolve the dispute non-judicially would have been futile (*see Carrasquillo v Netsloh Realty Corp.*, 279 AD2d 334, 334 [1st Dept 2001]).

It is noted that granting Shapiro's discovery request as to Duane Reade will not prejudice plaintiff, since the matter remains on the trial calendar (*see May v Am. Red Cross*, 282 AD2d 285 [1st Dept 2001]).

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

ENTERED: APRIL 13, 2017

CLERK

Andrias, J.P., Moskowitz, Kapnick, Webber, Kahn, JJ.

2699 The People of the State of New York, SCID 99045/15
Respondent,

-against-

Frederick Diaz,
Defendant-Appellant.

_____

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

Darcel D. Clark, District Attorney, Bronx (Andrew J. Zapata of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (Raymond L. Bruce, J.), entered November 4, 2015, reversed, on the law, without costs, and defendant's adjudication as a sex offender annulled.

Opinion by Andrias, J.P. All concur.

Order filed.

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

Richard T. Andrias, J.P.
Karla Moskowitz
Barbara R. Kapnick
Troy K. Webber
Marcy L. Kahn, JJ.

2699
SCID 99045/15

_____x

The People of the State of New York,
Respondent,

-against-

Frederick Diaz,
Defendant-Appellant.

_____x

Defendant appeals from the order of the Supreme Court, Bronx County (Raymond L. Bruce, J.), entered November 4, 2015, which adjudicated him a level three sex offender pursuant to the Sex Offender Registration Act (Correction Law art 6-C).

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

Darcel D. Clark, District Attorney, Bronx (Andrew J. Zapata and Nancy Killian of counsel), for respondent.

ANDRIAS, J.P.

Pursuant to Correction Law § 168-a(2)(d)(ii), defendant was required to register as a sex offender in New York based on his conviction in Virginia of murder in the first degree of a victim under 15 years of age, even though the crime did not involve any sexual motivation or conduct. For the reasons discussed below, we find that Correction Law § 168-a(2)(d)(ii), as applied under the specific facts of this case, violates defendant's substantive due process rights under the Federal and New York State Constitutions (US Const, Amend XIV, § 1; NY Const, art I, § 6), and that his adjudication as a sex offender in New York should be annulled.

On December 22, 1989, defendant, then 19, shot and killed his 13-year-old half sister after she threw out his stash of drugs and reprimanded him about his drug dealing. On May 23, 1990, defendant was convicted in Virginia, upon his plea of guilty, of first degree murder (Va Code Ann § 18.2-32) and using a firearm in the commission of a felony (*id.* § 18.2-53.1), and sentenced to an aggregate term of 40 years.

On April 13, 2015, defendant was paroled. Although the underlying offenses did not have any sexual component, defendant was required to register in Virginia under its Sex Offender and Crimes Against Minors Registry Act (Va Code Ann § 9.1-900 *et*

seq.) solely because his half sister was under 15 years of age when he murdered her (*id.* § 9.1-902[A][D]).

Days after his release, defendant moved to the Bronx to live with his father and brother. Defendant's sister, her husband and their son resided in the same apartment building and defendant also had numerous other relatives in New York.

Defendant's murder conviction would not have required registration had the crime had been committed in New York. However, the Board of Examiners of Sex Offenders (Board) required him to register pursuant to Correction Law § 168-a(2)(d)(ii), which mandates registration for those convicted of "a felony in any other jurisdiction for which the offender is required to register as *a sex offender* in the jurisdiction in which the conviction occurred" (emphasis added).

The Board prepared a risk assessment instrument assessing 75 points for defendant. While this would warrant a presumptive risk level two classification, pursuant to the Sex Offender Registration Act (SORA) Risk Assessment Guidelines and Commentary, the Board recommended an automatic override to level three because defendant "inflicted death to the victim." After a hearing, the SORA court found clear and convincing evidence to assess 65 points (presumptively level one) and to impose the automatic override to level three.

The Board's determination that defendant's out-of-state conviction requires registration is reviewable in this risk level proceeding (*see People v Liden*, 19 NY3d 271 [2012]). Because there is no fundamental constitutional right to be free from being stigmatized or branded a sex offender or from having one's reputation impaired, a "rational basis" test (as opposed to "strict scrutiny") is the correct level of review for defendant's claim that Correction Law § 168-a(2)(d)(ii), as applied, violates his substantive due process rights (*see People v Knox*, 12 NY3d 60, 68-69 [2009], *cert denied* [2009]). Thus, we must consider whether requiring defendant to register as a sex offender in New York, based on a conviction of a crime that did not have any sexual component but which required registration in Virginia under a broader statute that covers both sex crimes and crimes against minors, is rationally related to the achievement of some conceivable, legitimate, governmental purpose (*id.*).

When SORA was enacted, registration was required only for out-of-state felony convictions with the same essential elements as New York crimes requiring registration (*see* L 1995, ch 192, § 2). In 1999, the legislature added section 168-a(2)(d)(ii) (*see* L 1999, ch 453) to require registration for out-of-state sex offender felonies that have no New York equivalent (*see Matter of Kasckarow v Board of Examiners of Sex Offenders of State of N.Y.*,

33 Misc 3d 1028, 1035 [Sup Ct, Kings County 2011], *affd* 106 AD3d 915 [2d Dept 2013], *affd* 25 NY3d 1039 [2015]). "There are two elements to th[e] subsection: first, the underlying offense must be a felony; second, the offender must be required to register as a *sex offender* in the other jurisdiction as a result of that conviction" (*People v Kennedy*, 7 NY3d 87, 91 [2006] [emphasis added]).

The People argue that a rational basis underlies the application of section 168-a(2)(d)(ii) to defendant because (i) "[b]y amending the Correction Law to include this provision, the Legislature could have been attempting to prevent New York from becoming a haven for sex offenders escaping registration in foreign jurisdictions by simply moving here," and (ii) "[t]he Virginia legislature could have been concerned with the prevalence of a sexual motivation or component to the murder of children under the age of fifteen." However, defendant's murder of his half sister did not have a sexual component and, most significantly, the New York Legislature has not seen fit to include the murder of a victim under 15 years of age as a crime that, in and of itself, would require registration as a sex offender if committed in New York. Although defendant is required to register in Virginia, the Virginia statute and registry is broader, covering both sex offenses and crimes

against minors, and there is no persuasive evidence in the record correlating the murder of a victim under 15 with the propensity to commit sexual offenses. Under these particular circumstances, requiring defendant to register as a sex offender is not rationally related to the protection of the public from sex offenders, or to any other legitimate governmental purpose, and the application of section 168-a(2)(d)(ii) to defendant violates his rights to substantive due process.

In 1994, Congress passed the Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Act (JWA) (former 42 USC § 14071 *et seq.*), which required states to adopt registration and community-notification provisions overseeing sex offenders or risk losing federal funds. Although the JWA required registration for "a person who is convicted of a criminal offense against a victim who is a minor" (former 42 USC § 14071[a][1][A]), it defined that term as including

> "any criminal offense in a range of offenses specified by State law which is comparable to or exceeds the following range of offenses: (i) kidnapping of a minor, except by a parent; (ii) false imprisonment of a minor, except by a parent; (iii) criminal sexual conduct toward a minor; (iv) solicitation of a minor to engage in sexual conduct; (v) use of a minor in a sexual performance; (vi) solicitation of a minor to practice prostitution; (vii) any conduct that by its nature is a sexual offense against a minor; (viii) production or distribution of child pornography . . . ." (former 42

USC § 14071[a][3][A][i-viii]).[1]

In 1995, New York enacted SORA (Correction Law § 168 *et seq.*, as added by L 1995, ch 192, § 2). Section 1 of the Act, entitled "Legislative purpose or findings" states, among other things, that

> "[t]he system of registering sex offenders is a proper exercise of the state's police power regulating present and ongoing conduct. Registration will provide law enforcement with additional information critical to preventing sexual victimization and to resolving incidents involving sexual abuse and exploitation promptly. It will allow them to alert the public when necessary for the continued protection of the community.
>
> * * *

[1]The JWA was superseded, effective July 27, 2009, by the Adam Walsh Child Protection and Safety Act of 2006 (42 USC § 16901 *et seq.*), which included the Sex Offender Registration and Notification Act (SORNA) (42 USC §§ 16901-16962). SORNA defines "sex offender" as an individual who was convicted of a "sex offense" (42 USC § 16911[1]). It defines "sex offense" as including both (i) a criminal offense that has an element involving a sexual act or sexual contact with another; and (ii) a criminal offense that is a "specified offense against a minor" (42 USC § 16911[5][A]). The term "specified offense against a minor" is defined to mean "an offense against a minor that involves any of the following: (A) An offense (unless committed by a parent or guardian) involving kidnapping. (B) An offense (unless committed by a parent or guardian) involving false imprisonment. (C) Solicitation to engage in sexual conduct. (D) Use in a sexual performance. (E) Solicitation to practice prostitution. (F) Video voyeurism as described in section 1801 of Title 18 [18 USC § 1801]. (G) Possession, production, or distribution of child pornography. (H) Criminal sexual conduct involving a minor, or the use of the Internet to facilitate or attempt such conduct. (I) Any conduct that by its nature is a sex offense against a minor" (42 USC § 16911[7]).

> "Therefore, this state's policy, which will bring the state into compliance with the federal crime control act . . . , is to assist local law enforcement agencies' efforts to protect their communities by requiring sex offenders to register and to authorize the release of necessary and relevant information about certain sex offenders to the public as provided in this act." (L 1995, ch 192, § 1).

Thus, "[t]he primary government interest underlying SORA is protecting vulnerable populations[,] and in some instances the public, from potential harm posed by sex offenders" (*People v Alemany*, 13 NY3d 424, 430 [2009] [internal quotation marks omitted] [alteration in original]; *see also People v Mingo*, 12 NY3d 563, 574 [2009] [the purpose underlying SORA is "to protect the public from sex offenders"]).

In Virginia, the stated purpose of the Sex Offender and Crimes Against Minors Registry Act is "to assist the efforts of law-enforcement agencies and others to protect their communities and families from repeat sex offenders *and to protect children from becoming victims of criminal offenders* by helping to prevent such individuals from being allowed to work directly with children" (Va Code Ann § 9.1-900 [emphasis added]). To fulfill this broad purpose, the Act creates a registry that requires registration with the Virginia State Police by those convicted of certain sex-related crimes (against both minors and adults) *and* certain other nonsexual crimes targeted against minors, or those

otherwise physically helpless or mentally incapacitated *(see id.* § 9.1-902).

More particularly, as is relevant to defendant, the offenses subject to registration include "[m]urder" (*id.* § 9.1-902[A][3]), defined as "a violation of, attempted violation of, or conspiracy to violate § 18.2-31 or § 18.2-32 where the victim is (i) under 15 years of age . . . ." (*id.* § 9.1-902[D]).[2] By including murder where the victim is under the age of 15 as a crime requiring registration, despite the lack of a sexual component, Virginia chose to exceed the range of offenses set forth in the JWA. In contrast, those convicted of murdering a juvenile under the age of 15 in New York are not required to register as sex offenders under SORA on that basis alone.

Against this legislative background, even under a highly deferential rational basis scrutiny, the connection between defendant's crime and the legislative purpose behind SORA is too

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[2]Section 18.2-32 of the Virginia Code Annotated, under which defendant was convicted, provides that

> "[m]urder, other than capital murder, by poison, lying in wait, imprisonment, starving, or by any willful, deliberate, and premeditated killing, or in the commission of, or attempt to commit, arson, rape, forcible sodomy, inanimate or animate object sexual penetration, robbery, burglary or abduction, except as provided in § 18.2-31, is murder of the first degree, punishable as a Class 2 felony."

attenuated to support finding a legitimate governmental interest in applying Correction Law § 168-a(2)(d)(ii) to defendant. The record does not establish a correlation between the murder of a victim under 15 years of age and the propensity to commit sexual offenses. Thus, the legislative purpose of protecting the public from sex offenders is not served by requiring defendant to register as a sex offender in New York pursuant to section 168-a(2)(d)(ii) solely because he is obligated to do so under a broader Virginia statute, which designates the murder of a person under the age of 15, without a sexual component, as an offense subject to registration in a registry that encompasses both sex crimes and crimes against minors.

Requiring such individuals to register as sex offenders in New York also diminishes the registry's usefulness by including offenders who bear no meaningful relationship to SORA's legislative purpose. There is no evidence to suggest that one who commits homicide of a minor in Virginia is more likely to commit a sex offense than one who commits homicide of a minor in New York. The statute also fails to consider the harm caused to the individual who is forced to register, even though he or she has committed a crime that has no sexual component. Being labeled as a sex offender does far more than impose a stigma to one's reputation. It often results in the offender being

subjected to social ostracism and abuse, and impedes the person's ability to access schooling, employment, housing, and many other areas.

The People's reliance on *Knox* (12 NY3d 60) is misplaced. In *Knox*, three defendants challenged the constitutionality of SORA as applied to them because SORA required them to register as sex offenders even though, in their particular cases, the crimes they committed, kidnapping and unlawful imprisonment, did not have a sexual component (*id.* at 64). While the defendants did "not dispute that they [had] committed crimes [that] warrant[ed] finding them a danger to the public, and specifically to children," they argued that being labeled as sex offenders was false and misleading (*id.* at 66).

Applying the rational basis test, the Court of Appeals held that requiring the defendants to register as sex offenders under Correction Law § 168-a(2)(a)(i), which requires registration for persons convicted in New York of unlawful imprisonment and kidnapping where the victim is less than 17 years old and the offender is not the victim's parent, did not violate their constitutional rights (*id.* at 67). Relying on statistics that "in [forty-six percent] of the nonfamily abductions studied, the perpetrator had sexually assaulted the child" (*id.* at 68), the Court found that even though there was no sexual motive or

conduct in the specific cases before it, the legislature could have rationally found that kidnapping and unlawful imprisonment of children are often sexually motivated (*id.* at 68-69). The Court also noted that the legislative history of the JWA shows that Congress intentionally included kidnapping and unlawful imprisonment of a minor as crimes subject to registration, recognizing the link between the abduction of a child and the risk of sexual abuse (*id.* at 67-68).

In contrast to the crimes of kidnapping and false imprisonment before the Court in *Knox*, the JWA did not include the murder of a child under the age of 15, without a sexual component, as a crime subject to registration. Nor has the New York State Legislature elected to include that crime, if committed in New York, as an offense requiring registration under SORA, despite including a registration requirement for certain other crimes against minors where a sexual motivation exists. Again, while registration was required in Virginia, it was under a broader statute and registry that covers both sex offenses and crimes against minors. Of great significance, unlike *Knox*, where the Court of Appeals noted studies showing a strong correlation between child kidnapping and sex offenses (12 NY3d at 68), no similar statistical correlation has been established between child homicide and sex offenses in the record before us.

In arguing otherwise, the People rely on a bulletin issued in 2001 by the Office of Juvenile Justice and Delinquency Prevention (OJJDP), entitled "Homicides of Children and Youth," which, according to the People, shows that children in *middle childhood* are at risk of sexual homicides. However, the bulletin divides minors into three categories — namely, young children (age 5 and younger), middle childhood (ages 6 to 11) — and teenagers (ages l2 to l7), and states that they should be analyzed separately because they differ on a number of dimensions. Here, defendant's victim was 13 and falls in the teenager category, in which most homicides involve male victims killed by male offenders using firearms, not the middle childhood category on which the People rely. In any event, the bulletin explains as follows:

> "Homicides of children in middle childhood also appear to stem from a variety of other motives. For example, children of this age are at risk of sexual homicides. Some sex offenders are attracted to children in this age range and sometimes murder children to hide their crimes. A significant number of homicides of children ages 6 to l1 are negligent gun homicides, in which youth and/or other family members wield or misuse firearms that they believe to be harmless or unloaded. Children in middle childhood are also killed in the course of crimes such as robberies or carjackings, in which children are unintended victims. Family members sometimes murder children of this age in the course of arson attacks or whole-family suicide-homicides. The diversity of homicides of children of this age group makes them difficult to typify" (OJJDP, Juvenile

Justice Bulletin, *Homicides of Children and Youth* at 8 [Oct. 2001]).

Thus, unlike *Knox*, the bulletin does not support the conclusion that the murder of a victim under the age of 15 is often, as opposed to occasionally, motivated by sexual intentions. The other study cited by the People, Case Management for Missing Children Homicide Investigation, focuses on abducted children who are subsequently murdered, for which the likelihood of a sexual component has been clearly established.

Insofar as the People contend that defendant's mislabeling argument should have been raised in Virginia, there is no mislabeling in Virginia because the statute there itself covers both sex offenses and crimes against minors, as compared to New York's, which only covers sex offenders. Insofar as the People argue that New York has an interest in including Virginia offenders on the New York registry to prevent the state from becoming a haven for sex offenders from foreign jurisdictions, defendant did not murder his half sister in the course of committing, or to cover up, a sex crime. Therefore, reliance on *Matter of Dewine v State of N.Y. Bd. of Examiners of Sex Offenders* (89 AD3d 88, 92-93 [4th Dept 2011]) is misplaced because there the offender had committed sex crimes in Wyoming that were the equivalent in New York State of sexual abuse in the

first and second degree (*id.* at 90). Furthermore, the record establishes that defendant moved to New York because he had numerous family members in the state with whom he maintained a relationship, many of whom submitted letters of support in the SORA proceeding.

In light of our determination annulling the adjudication of defendant as a sex offender, we need not consider defendant's argument that his risk level should be reduced to level one.

Accordingly, the order of the Supreme Court, Bronx County (Raymond L. Bruce, J.), entered November 4, 2015, which adjudicated defendant a level three sex offender pursuant to SORA (Correction Law art 6-C), should be reversed, on the law, without costs, and defendant's adjudication as a sex offender annulled.

All concur.

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

ENTERED: APRIL 13, 2017

CLERK