SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

SEPTEMBER 26, 2017

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Acosta, P.J., Richter, Webber, Kahn, JJ.

4341-
4342N Index 155587/14

Daniel Venture, et al.,
Plaintiffs-Appellants,

-against-

Preferred Mutual Insurance Company,
Defendant-Respondent.

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Law Offices of Eric Dinnocenzo, New York (Eric Dinnocenzo of counsel), for appellants.

Dodge & Monroy, P.C., Lake Success (Mark Scopinich of counsel), for respondent.

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Order, Supreme Court, New York County (Robert R. Reed, J.), entered December 29, 2016, which denied plaintiffs' motion to renew their motion for production of certain documents, and to depose and disqualify defendant's counsel, unanimously reversed, on the law and facts, without costs, the motion to renew granted, and the matter remanded to Supreme Court for a hearing in which counsel for plaintiffs and defendant will be permitted to probe the issue of whether Peter Dodge, Esq. served as an investigator, solely as an attorney, or in some type of hybrid role, including examining Dodge under oath, and for the court to make a

determination as to Dodge's role, supported by factual findings, and reconsider plaintiffs' motion based on its findings. Appeal from order, same court and Justice, entered January 21, 2016, unanimously dismissed, without costs, as academic in view of the foregoing.

Defendant Preferred Mutual Insurance Company issued a homeowner insurance policy to plaintiffs, providing $325,000 in coverage for their property located at 38 Morton Hill Road, Roscoe, New York, for the period from January 8, 2013 through January 8, 2014. The policy also provided $227,500 in personal property coverage.

On or about November 17, 2013, there was a fire, which completely destroyed the house and all of plaintiffs' property. Plaintiffs allege that they provided defendant timely notice of the fire and of their claim under the policy, including sworn proof of loss. Plaintiff Daniel Venture provided defendant with a good faith valuation of the property loss, based on his best estimate as a lay person.

Plaintiffs claim that during the investigation into the fire, defendant and its attorney attempted to develop incriminating evidence against them and their sons, in an effort to avoid defendant's obligations under the policy and to subject plaintiffs to criminal prosecution.

In a letter dated February 14, 2014, from defendant's attorney, Peter Dodge of the law firm Dodge & Monroy, to defendant's employees, Michael McGuire and Wendy Bodie, Dodge conveyed his evaluation and analysis report of the testimony of plaintiffs' sons, Ivan Venture and Paris Venture. Dodge discussed testimony that a white Jeep, possibly belonging to the Ventures, was seen backed up to the property on November 17, 2013 (the date of the fire). He concluded that "[t]his testimony will serve to establish not only material misrepresentations on behalf of Daniel Venture, Ivan Venture and Paris Venture, but also that someone from the family was located on the premises on November 17, 2013." Dodge referenced the legal standard for arson and stated as follows:

> "We note that Mr. Venture was significantly in arrears for over four years on the mortgage to the property in question. Daniel Venture also over estimated [sic] the value of the home at $394,000.00. He estimated that he owes $160,000.00. The statement of loss from Focus Investigations indicates that the actual cash value of the home was $184,275.00. The appraisal amounted between $109,000 and $137,000.00. We believe that it is highly suspicious that Mr. Venture did not go back to check on the property until one week later. It is also highly suspicious that he did not contact any investigative agencies about the fire until two weeks later. We note that the Ventures all have internal alibis as to where everyone was on November 17, 2013. However, all of the alibis are within the family except for a family friend named Martin Rabovich. We note that the investigative agency from Delaware County has indicated in their report that the fire is suspicious and that an intentional setting of the fire has not

> been ruled out. Our expert, Joseph Myers, opines that the fire was incendiary, through to the process of deduction."

By letter dated February 28, 2014, defendant denied coverage under the policy, citing provisions of the policy which render it void in the case of misrepresentation, concealment, or fraud, and which exclude coverage for "intentional acts." Defendant concluded, based on its investigation, that "the fire was incendiary in origin and intentionally set by you [plaintiffs] or someone on your behalf at your direction. Further, during the course of the investigation, you engaged in fraudulent conduct, swore falsely with respect to the claim and willfully concealed and misrepresented material facts." The letter sets forth in detail the testimony and evidence supporting defendant's determination.

In their complaint, plaintiffs assert causes of action for breach of contract and "bad faith insurance denial." Plaintiffs served discovery demands seeking the entire claims file relating to the policy, as well as all reports, memos, communications, and other documents generated by any person or entity performing the investigation on defendant's behalf, and any such documents showing that the fire was incendiary and that plaintiffs or their children had any involvement with causing the fire.

In response to the request for the claims file, defendant

redacted certain documents due to "privilege," and withheld on the basis of attorney-client privilege all correspondence between defendant and the Dodge law firm. The internal coverage opinion letter authored by Dodge had not been produced, and defendant did not provide them with a privilege log.

Accordingly, by notice of motion dated April 10, 2015, plaintiffs moved: (1) for defendant to produce an unredacted version of the coverage memorandum, and other documents withheld on the basis of privilege, for in camera review; (2) for leave to issue a subpoena for a deposition, and production of documents for review, in camera, of attorney Peter Dodge and Dodge & Monroy; and (3) to disqualify Dodge & Monroy from representing defendant.

The court directed defendant to produce the withheld documents, as well as a privilege log for review in camera. After conducting an in camera review of the documents in question, the court denied plaintiffs' motion. In a one paragraph order without any factual findings, the court determined that the withheld or redacted documents were subject to attorney client privilege, constituted attorney work product, were prepared in anticipation of litigation, or related only to the setting of reserves. The court further held that plaintiffs had not met their burden of showing any need for a deposition or

production of documents from, or any basis for disqualification of, defendant's counsel.

Plaintiffs assert that their June 21, 2016 deposition of Michael McGuire, who worked within defendant's Special Investigation Unit, revealed that attorney Peter Dodge played a more significant role in the claims investigation and denial than previously understood. Plaintiffs also discovered through McGuire's deposition that it was Dodge who first suggested that the claim be denied, and that he drafted the denial letter.

By notice of motion dated September 21, 2016, plaintiffs moved pursuant to CPLR 2221(e) to renew their prior motion, specifically seeking production of all documents concerning the insurance claim and investigation, including all draft disclaimer letters, an unredacted coverage opinion, all examination under oath (EUO) summaries, all documents previously produced in camera, and communications with plaintiffs' neighbor, Dan Baldo, and other witnesses. Plaintiffs also renewed their request that Dodge & Monroy be disqualified, and for leave to issue a subpoena for Peter Dodge's deposition and for a copy of his case file. Plaintiffs also sought a stay of discovery pending a decision on their motion. The court denied plaintiffs' motion, holding that

they had failed to set forth any new facts or evidence.[1]

"[T]he CPLR establishes three categories of protected materials, also supported by policy considerations: privileged matter, absolutely immune from discovery (CPLR 3101[b]); attorney's work product, also absolutely immune (CPLR 3101[c]); and trial preparation materials, which are subject to disclosure only on a showing of substantial need and undue hardship in obtaining the substantial equivalent of the materials by other means CPLR 3101 [d][2]" (*Spectrum Sys. Intl. Corp. v Chemical Bank*, 78 NY2d 371, 376-377 [1991]). "[I]n order for attorney-client communications to be privileged, the document must be primarily or predominantly a communication of a legal character" (*Brooklyn Union Gas Co. v American Home Assur. Co.*, 23 AD3d 190, 191 [1st Dept 2005]). "[T]he burden of establishing any right to protection is on the party asserting it; the protection claimed must be narrowly construed; and its application must be consistent with the purposes underlying the immunity" (*Spectrum Sys. Intl. Corp. v Chemical Bank*, 78 NY2d at 377; *Brooklyn Union*

[1]By order of this Court, discovery was stayed. This Court denied plaintiffs' application for production of the in camera documents, without prejudice to plaintiffs seeking defendant's submission of documents, under seal, as a supplemental record on appeal (2016 NY Slip Op 95895 [u] [1st Dept 2016]). By separate order, the stay was continued, and defendant was directed to produce the in camera documents, under seal, in a supplemental record (2017 NY Slip Op 62997 [u][1st Dept 2017]).

Gas Co., 23 AD3d at 191).

"Reports of insurance investigators or adjusters, prepared during the processing of a claim, are discoverable as made in the regular course of the insurance company's business" (*Brooklyn Union Gas*, 23 AD3d at 190). "Furthermore, attorney work product applies only to documents prepared by counsel acting as such, and to materials uniquely the product of a lawyer's learning and professional skills, such as those reflecting an attorney's legal research, analysis, conclusions, legal theory or strategy" (*id.* at 190-191). "Documents prepared in the ordinary course of an insurance company's investigation to determine whether to accept or reject coverage and to evaluate the extent of a claimant's loss are not privileged and are, therefore, discoverable. In addition, such documents do not become privileged merely because an investigation was conducted by an attorney" (*id.* at 191 [internal quotation marks omitted]; *National Union Fire Ins. Co. of Pittsburgh, Pennsylvania v TransCanada Energy USA, Inc.*, 119 AD3d 492, 493 [1st Dept 2014], *lv dismissed* 24 NY3d 990 [2014]).

On appeal, plaintiffs contend that Dodge was not acting in a legal capacity and, rather, performed the function of a claims investigator. Defendant claims that the investigation was solely performed by McGuire, and that Dodge's role consisted of conducting EUOs and providing legal advice based thereon. It

also states that all of the information requested by plaintiffs in their motion to renew was already provided to the court as part of the in camera review and, in that sense, was not new.

Based on the record before us, we cannot determine Dodge's true role in this matter. Accordingly, this matter is remanded in accordance with the decretal paragraph.

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

ENTERED: SEPTEMBER 26, 2017

CLERK

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

4424 All Craft Fabricators, Inc., et al., Index 156897/13
Plaintiffs-Appellants,

-against-

ATC Associates, Inc., et al.,
Defendants,

International Paper Company, et al.,
Defendants-Respondents.

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Cullen and Dykman LLP, New York (Timothy J. Flanagan of counsel), for appellants.

Forman Watkins & Krutz LLP, Lake Success (Thomas M. Toman, Jr. of counsel), for International Paper Company, respondent.

Riley Safer Holmes & Cancila LLP, New York (Joshua D. Lee of counsel), for Owens-Illinois, Inc., respondent.

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Order, Supreme Court, New York County (Manuel J. Mendez, J.), entered January 31, 2017, which granted the motion of defendant International Paper Company (IP) for summary judgment dismissing plaintiff's products liability claims as against it, granted the motion of defendant Owens-Illinois, Inc. (Owens) for summary judgment dismissing plaintiffs' products liability claims and common-law negligence claim as against it, and sua sponte dismissed the remainder of plaintiffs' claims against IP and Owens, unanimously reversed, on the law, with costs, the motions denied, and the claims reinstated.

Contrary to defendants' argument, this Court's ruling in *Hockler v William Powell Co.* (129 AD3d 463 [1st Dept 2015]) does not require dismissal of the claims against IP and Owens. Here, the re-sizing of wood laminate doors with asbestos-containing cores resulted in the incidental release of asbestos dust into plaintiffs' facilities (*see e.g. Matter of New York City Asbestos Litig. [Dummitt]*, 27 NY3d 765 [2016]). In any event, IP and Owens both failed to make out their prima facie burdens as movants (*see generally Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]), inasmuch as no testimony, either expert or lay, was proffered regarding the foreseeability that the doors, and thus their core, would be cut for their use as paneling.

To the extent that the order sua sponte dismissed the complaint, that portion of the order is not appealable as of right (*see* CPLR 5701[a][2]; *Sholes v Meagher*, 100 NY2d 333, 335 [2003]). However, given the extraordinary nature of the sua sponte relief, that is, dismissal of the complaint, we nostra sponte deem the notice of appeal from that portion of the order

to be a motion for leave to appeal, grant such leave (*see* CPLR 5701[c]; *Ray v Lee Chen*, 148 AD3d 568 [1st Dept 2017]; *Serradilla v Lords Corp.*, 12 AD3d 279, 280 [1st Dept 2004]), and reverse the order for the reasons stated above.

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

ENTERED: SEPTEMBER 26, 2017

CLERK

Friedman, J.P., Renwick, Andrias, Moskowitz, Gesmer, JJ.

4439 Juliette Fairley, Index 102474/12
Plaintiff-Appellant,

-against-

Kevin Craig West doing business as
Mo Betta Films, et al.,
Defendants-Respondents.

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Juliette Fairley, appellant pro se.

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Appeal from order, Supreme Court, New York County (Kathryn Freed, J.), entered October 15, 2015, which, sua sponte, dismissed the action, unanimously dismissed, without costs.

An order issued sua sponte is not appealable as of right (*see* CPLR 5701[a][2]; *Sholes v Meagher*, 100 NY2d 333, 335 [2003]). Plaintiff's remedy is to move to vacate the court's order, should her claims have merit.

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

ENTERED: SEPTEMBER 26, 2017

CLERK

Sweeny, J.P., Renwick, Kapnick, Kern, Moulton, JJ.

4469 In re Amaya A. and Another,

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

Brenda P.-H.,
Respondent-Appellant,

Elizabeth R.,
Petitioner,

Sheltering Arms Children and Family Services,
Petitioner-Respondent.

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Neal D. Futerfas, White Plains, for appellant.

Marion C. Perry, Bronx, 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 (Susan K. Knipps, J.), entered on or about June 13, 2016, which, after a consolidated dispositional and custody hearing, terminated respondent mother's parental rights upon a fact-finding determination of severe abuse and transferred custody and guardianship of the subject children to petitioner agency and the Administration for Children Services for the purpose of adoption, and denied and dismissed petitioner maternal grandmother's petition for custody, unanimously affirmed, without costs.

The evidence supports the Family Court's determination that

it would not have been in the children's best interests to grant the grandmother's custody petition and uproot the children from their pre-adoptive foster home, where they have spent the majority of their lives and developed a close bond with their foster mother, whom they call "mommy" (*see Matter of Karin R. [Delinda R.]*, 146 AD3d 526, 527-528 [1st Dept 2017], *lv denied* 29 NY3d 903 [2017]). The mother's contention that, rather than terminating her rights, the court should have issued a suspended judgment is unpreserved, and, in any event, without merit under these circumstances, where the children lived in a stable pre-adoptive foster home and had not seen the mother in years (*see Matter of Darryl Clayton T. [Adele L.]*, 95 AD3d 562, 563 [1st Dept 2012]).

The mother's argument that the lengthy proceedings violated her due process rights is unpreserved, and, in any event, without merit, as the hearing commenced in April 2016, approximately one month after the petitions to terminate the mother's parental rights were amended, and a decision was issued in June 2016. The mother's further contention that the court heard inadmissible

hearsay evidence is also unpreserved, and likewise, without merit. The court, sua sponte, corrected an evidentiary ruling regarding hearsay, and the mother fails to specify what evidence relied upon by the court in its decision was inadmissible.

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

ENTERED: SEPTEMBER 26, 2017

CLERK

Sweeny, J.P., Renwick, Kapnick, Kern, Moulton, JJ.

4470-
4471 Index 654411/16

Anato Opportunity Fund I, LP,
Plaintiff-Appellant,

-against-

Wells Fargo Bank, N.A., et al.,
Defendants-Respondents.

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Pashman Stein Walder Hayden, P.C., Purchase (David N. Cinotti and Brendan M. Walsh of counsel), for appellant.

Alston & Byrd LLP, Atlanta, GA (Christopher A. Riley of the bar of the State of Georgia and the State of Florida, admitted pro hac vice, of counsel), for Wells Fargo Bank, N.A., respondent.

Mayer Brown, LLP, New York (Jean-Marie L. Atamian of counsel), for HSBC Bank USA, National Association, respondent.

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Orders, Supreme Court, New York County (Eileen Bransten, J.), entered April 12, 2017, which, to the extent appealed from as limited by the briefs, granted defendant Wells Fargo Bank's motion to dismiss the breach of contract cause of action as against it and defendant HSBC Bank's motion to dismiss the breach of fiduciary duty cause of action as against it, unanimously affirmed, without costs.

The breach of contract claim against defendant Wells Fargo, the securities administrator, is barred by the no-action clause in the pooling and servicing agreement governing the residential mortgage-backed securitization trust in which plaintiff invested.

The clause applies to "any" claims "with respect to" the agreement, and expressly excludes any exceptions, which distinguishes the agreement from instruments that allow claims for nonpayment notwithstanding such clauses (*see e.g. Cruden v Bank of N.Y.*, 957 F2d 961, 968 [2d Cir 1992]). The clause is not unenforceable as violative of public policy, given its salutary purpose of preventing undue expense to certificate holders and inconvenience to the investment vehicle in general (*see Ellington Credit Fund, Ltd. v Select Portfolio Servicing, Inc.*, 837 F Supp 2d 163, 184 [SD NY 2011]). Nor is it unconscionable.

The breach of fiduciary duty cause of action against defendant HSBC, the trustee, fails to allege either the breach of any duty not imposed by the pooling and servicing agreement or, in nonconclusory fashion, a conflict of interest. Contrary to plaintiff's contention, post-default fiduciary duties never arose, since the complaint fails to allege an event of default; default is defined in the governing agreement as the failure to make advances or the failure to make deposits into a reserve fund, not the failure to make payment. Because plaintiff's letter to defendants giving notice of nonpayment would not have remedied this deficiency in the complaint, the motion court providently exercised its discretion in refusing to consider the

letter, and it would be similarly futile to do so at this juncture (*see Triad Intl. Corp. v Cameron Indus., Inc.*, 122 AD3d 531 [1st Dept 2014]).

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

ENTERED: SEPTEMBER 26, 2017

CLERK

Sweeny, J.P., Renwick, Kapnick, Kern, Moulton, JJ.

4472 Lindsey Green, Index 301184/12
Plaintiff-Respondent,

-against-

Megan Zarella, et al.,
Defendants-Appellants.

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Zachary W. Carter, Corporation Counsel, New York (Fay Ng of counsel), for appellants.

Edelman, Krasin & Jaye, PLLC, Westbury (Kara M. Rosen of counsel), for respondent.

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Order, Supreme Court, Bronx County (Mitchell J. Danziger, J.), entered October 19, 2015, which denied defendants' 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 dismissing the complaint.

Defendants demonstrated that defendant police officer was engaged in an "emergency operation" within the meaning of Vehicle and Traffic Law § 1104, by submitting evidence that the officer was responding to a radio call about a "man with a gun" when her police vehicle struck plaintiff (*see Criscione v City of New York*, 97 NY2d 152 [2001]; VTL §§ 114-b, 101). Defendants' evidence also showed that the officer was engaged in conduct privileged under the statute at the time of the accident, since her vehicle straddled and then crossed the double yellow lines,

in disregard of regulations "governing directions of movement" (VTL § 1104[b][4]). Accordingly, defendants demonstrated that the officer's conduct is to be assessed under the statute's "reckless disregard" standard (VTL § 1104[e]; *Frezzell v City of New York*, 24 NY3d 213, 217 [2014], *affg* 105 AD3d 620 [1st Dept 2013]; *Kabir v County of Monroe*, 16 NY3d 217, 220 [2011]; *Asante v Asante*, 135 AD3d 562 [1st Dept 2016]).

Defendants further demonstrated that the officer did not operate the police vehicle in reckless disregard for the safety of others (*see* VTL § 1104[e]; *Kabir*, 16 NY3d 217; *Saarinen v Kerr*, 84 NY2d 494 [1994]). The officer testified that traffic warranted moving her vehicle left and operating it on the double yellow lines to avoid the stopped vehicles to her right and ahead of her. The officer had no duty to engage her sirens or lights, as she was operating a police vehicle, and her failure to do so was not evidence of recklessness (*see* VTL § 1104[c]; *Frezzell*, 105 AD3d at 621). Moreover, the officer testified that she attempted to avoid plaintiff, who was standing on the double yellow lines, by swerving behind her, an assertion that plaintiff supported with her own testimony (*see Asante*, 135 AD3d at 562).

In opposition, plaintiff failed to present evidence showing that there was no emergency, and failed to raise an issue of fact as to whether the officer acted in reckless disregard for the safety of others.

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

ENTERED: SEPTEMBER 26, 2017

CLERK

Sweeny, J.P., Renwick, Kapnick, Kern, Moulton, JJ.

4473-
4474 Towers Food Service, Inc.,
Plaintiff-Appellant,

-against-

New York City Health and Hospitals Corporation, etc.,
Defendant-Respondent.

Index 652174/14

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Eiseman Levine Lehrhaupt & Kakoyiannis, P.C., New York (Peter Reiser of counsel), for appellant.

Zachary W. Carter, Corporation Counsel, New York (MacKenzie Fillow of counsel), for respondent.

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Order, Supreme Court, New York County (Ellen M. Coin, J.), entered November 30, 2015, which granted the motion of defendant New York City Health and Hospitals Corporation, acting on behalf of Bellevue Hospital Center (HHC), to dismiss the complaint, and order, same court and Justice, entered September 28, 2016, which, upon renewal and reargument adhered to the original determination, unanimously reversed, on the law, without costs, and defendant's motion denied.

The motion court correctly found that HHC was not estopped from asserting the six-month contractual limitations period as there was no misconduct on the part of HHC that prevented Towers from timely commencing this action. On June 3, 2013, HHC

provided notice to Towers that as of June 16, 2013, Bellevue would remove and store Towers's non-capital improvements. HHC added that it "cannot make payment" to Towers because many items on the documentation provided appeared to be non-reimbursable, and an itemized list of all property that Towers intended to remove, in addition to a list of capital improvements, was required. Towers did not respond for five months, at which time HHC denied it access to the premises. At that point, it cannot be said that "the agreement, representations or conduct" of HHC caused Towers to delay bringing a known cause of action (*Robinson v City of New York*, 24 AD2d 260, 263 [1st Dept 1965] [citations omitted]).

However, for pleading purposes, Towers has sufficiently alleged that the contractual limitations period was restarted pursuant to General Obligations Law § 17-101. HHC's written responses, which acknowledged its review of Towers' submissions, requested additional documentation, and stated, among other things, that "[i]f you can get me some quick replies on these, I will have my finance team calculate the depreciation and my legal department will finalize a reply," acknowledged HHC's contractual obligation to pay Towers for the value of capital improvements if

the agreement was terminated without cause (*see* General Obligations Law § 17-101; *Hakim v Hakim*, 99 AD3d 498, 501 [1st Dept 2012]; *see also Planet Constr. Corp. v Board of Educ. of City of N.Y.*, 7 NY2d 381, 384 [1960]; *Faulkner v Arista Records LLC*, 797 F Supp 2d 299, 312 [SD NY 2011]; *Lew Morris Demolition Co. v Board of Educ. of City of N.Y.*, 40 NY2d 516, 521 [1976]).

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

ENTERED: SEPTEMBER 26, 2017

CLERK

Sweeny, J.P., Renwick, Kapnick, Kern, Moulton, JJ.

4476 U.S. Bank National Association, etc.,
Plaintiff-Respondent,

-against-

Thakoordai Brjimohan, etc., et al.,
Defendants-Appellants,

New York City Parking Violations Bureau, et al.,
Defendants.

Index 380793/13

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Joseph A. Altman, P.C., Bronx (Joseph A. Altman of counsel), for appellants.

Knuckles Komosinski & Manfro, LLP, Elmsford (Mark Golab of counsel), for respondents.

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Order, Supreme Court, Bronx County (Kenneth L. Thompson, Jr., J.), entered on or about June 10, 2016, which, to the extent appealed from as limited by the briefs, granted plaintiff's motion for summary judgment against defendants-appellants and denied defendants-appellants' cross motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

Defendants Brjimohan and Khan executed a mortgage and corresponding note in connection with a residential property located in Bronx County. Plaintiff established a prima facie right to foreclose on the property by producing the note, the mortgage securing the note, and evidence of nonpayment (*see ING*

Real Estate Fin. (USA) LLC v Park Ave. Hotel Acquisition, LLC, 89 AD3d 506 [1st Dept 2011]; *JPMCC 2007-CIBC19 Bronx Apts., LLC v Fordham Fulton LLC*, 84 AD3d 613 [1st Dept 2011]). Plaintiff also established standing (*see Kondaur Capital Corp. v McCary*, 115 AD3d 649 [2d Dept 2014]), by providing prima facie evidence it was the holder of the underlying note at the time this action was commenced on July 17, 2013 (*see B & H Florida Notes LLC v Ashkenazi*, 149 AD3d 401 [1st Dept 2017]; *U.S. Bank N.A. v Askew*, 138 AD3d 402, 402 [1st Dept 2016]).

Plaintiff submitted affidavits of Angela Farmer, the Vice President of Rushmore Loan Management Services LLC, plaintiff's loan servicer and attorney in fact, who attested that, on April 1, 2013, the original note was physically delivered to Rushmore, in its capacity as servicer and attorney in fact for plaintiff, and that Rushmore had retained the note ever since. As delivery occurred before the July 17, 2013 commencement date, this was sufficient to show plaintiff had physical possession of the note prior to commencement of this action (*see Aurora Loan Servs., LLC v Taylor*, 25 NY3d 355 [2015]; *Wilmington Trust Co. v Walker*, 149 AD3d 409 [1st Dept 2017]; *Bank of NY Mellon Trust Co. NA v Sachar*, 95 AD3d 695 [1st Dept 2012]). Since physical delivery of the note before commencement of the foreclosure action is sufficient to transfer the obligation, and the mortgage passes

with the debt as an inseparable incident, defendants' arguments regarding the validity of the mortgage assignment are insufficient to raise a triable issue of fact in opposition (*see Aurora Loan Servs.*, 25 NY3d 355 ; *US Bank, N.A. v Collymore,* 68 AD3d 752 [2d Dept 2009]).

In addition, Farmer's affidavits, based on her personal knowledge of Rushmore's mailing procedures, described Rushmore's standard business practices with regard to sending RPAPL § 1304 90-day notices and mortgage default letters to borrowers and she affirmed, based on her personal knowledge, that the notices had been sent to defendants to their mortgage notice address in compliance with the requirements of RPAPL § 1304 and the subject mortgage. As to the RPAPL § 1304 notice, plaintiff also submitted a copy of the certified mail receipt from the US Post Office. Plaintiff thereby tendered sufficient evidence to demonstrate the absence of material issues as to its strict compliance with RPAPL § 1304 and the notice provisions of the

subject mortgage, and this evidence created a rebuttable presumption that defendants actually received these notices.

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

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

ENTERED: SEPTEMBER 26, 2017

CLERK

Sweeny, J.P., Renwick, Kapnick, Kern, Moulton, JJ.

4477 Stephanie Karounos, Index 306594/13
Plaintiff-Respondent,

-against-

Athanasios Doulalas, et al.,
Defendants-Appellants.

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Picciano & Scahill, P.C., Bethpage (Andrea E. Ferrucci of counsel), for appellants.

Ephrem J. Wertenteil, New York, for respondent.

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Order, Supreme Court, Bronx County (Julia I. Rodriguez, J.), entered May 17, 2016, which, to the extent appealed from as limited by the briefs, denied defendants' motion for summary judgment dismissing the complaint on the threshold issue of serious injury within the meaning of Insurance Law § 5102(d), unanimously modified, on the law, to grant the motion as to the claims based on alleged injuries involving the right shoulder, right knee, and bilateral carpal tunnel syndrome, and otherwise affirmed, without costs.

Plaintiff alleges that, as the result of a motor vehicle accident that occurred on May 27, 2011, she suffered injuries to her cervical and lumbar spine, right shoulder, both wrists, and right knee. Plaintiff was involved in a previous accident in 2008 and a subsequent accident in 2012, which both involved

claims of injury to her cervical and lumbar spine.

Defendants failed to meet their prima facie burden of establishing that plaintiff did not suffer any new or exacerbated injuries to her cervical and lumbar spine as a result of the 2011 accident. In support of their motion for summary judgment, defendants submitted the reports of an orthopedist and neurologist who opined that plaintiff suffered sprains to her cervical and lumbar spine as a result of the 2011 accident, which were "superimposed" on prior injuries, and that those injuries had resolved. However, their opinions that plaintiff's neck and back injuries had resolved were contradicted by their own findings of significant limitations in range of motion of plaintiff's cervical and lumbar spine (*see Santos v New York City Tr. Auth.*, 99 AD3d 550 [1st Dept 2012]; *Feaster v Boulabat*, 77 AD3d 440, 440 [1st Dept 2010]). To the extent defendants' experts meant to attribute these limitations and injuries to preexisting conditions or to the subsequent 2012 accident, they did not do so clearly or unequivocally (*see Reyes v Diaz*, 82 AD3d 484, 484 [1st Dept 2011]). Further, their references to degenerative disc disease lacked a factual basis since neither physician reviewed the MRI films or cited any medical records evidencing degenerative disc disease in the spine (*see McCree v Sam Trans Corp.*, 82 AD3d 601, 601 [1st Dept 2011]; *Frias v James*,

69 AD3d 466, 467 [1st Dept 2010]).

Although both of defendants' experts noted that they had reviewed reports of MRIs performed after the 2008 accident, which showed preexisting disc bulges and herniations in the cervical and lumbar spine, they did not compare those reports to the reports of MRIs performed after the 2011 accident to demonstrate an absence of new injuries. Nor did defendants' physicians address plaintiff's claim that the 2011 accident aggravated or exacerbated her preexisting conditions (*see Sanchez v Steele*, 149 AD3d 458, 458 [1st Dept 2017]; *Becerril v Sol Cab Corp.*, 50 AD3d 261, 261-262 [1st Dept 2008]).

Since defendants did not meet their prima facie burden, the burden did not shift to plaintiff and defendants' motion for summary judgment was properly denied as to the cervical and lumbar spine claims, without the need to consider plaintiff's showing in opposition (*see Johnson v Salaj*, 130 AD3d 502, 503 [1st Dept 2015]).

However, as to plaintiff's remaining claims, defendants met their prima facie burden by showing the absence of limitations in range of motion and normal test results upon examination. In particular, plaintiff's injured shoulder had range of motion nearly identical to the uninjured shoulder, and negative results on tests of function (*see Stevens v Bolton*, 135 AD3d 647, 647-648

[1st Dept 2016]; *Camilo v Villa Livery Corp.*, 118 AD3d 586, 586 [1st Dept 2014]). The minor, limited range of motion in the knee did not constitute a serious injury (*see Aflalo v Alvarez*, 140 AD3d 434, 435 [1st Dept 2016]), and defendants' orthopedist found normal range of motion in the wrists, and Phalen's test and Tinel's sign were negative (*Santos v Traylor-Pagan*, 152 AD3d 406 [1st Dept 2017]; *see Jacobs v Slaght*, 47 AD3d 679 [2d Dept 2008]). Plaintiff failed to submit any medical evidence to raise an issue of fact as to these claims.

If plaintiff establishes a serious injury to her cervical or lumbar spine at trial, she will be entitled to recover damages for any other injuries caused by the accident, even those that do not meet the serious injury threshold (*Rubin v SMS Taxi Corp.*, 71 AD3d 548 [1st Dept 2010]).

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

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

ENTERED: SEPTEMBER 26, 2017

CLERK

Sweeny, J.P., Renwick, Kapnick, Kern, Moulton, JJ.

4478 Randall Fein, etc., Index 110902/10
Plaintiff-Appellant,

-against-

Neil L. Cook,
Defendant,

Asphalt Green, Inc.,
Defendant-Respondent.

_____

Clyde & Co., New York (Jeffrey J. Ellis of counsel), for appellant.

Rutherford & Christie, LLP, New York (Michael C. Becker of counsel), for respondent.

_____

Order, Supreme Court, New York County (Richard F. Braun, J.), entered August 22, 2016, which granted defendant Asphalt Green, Inc.'s (AGI) motion for summary judgment, to the extent of dismissing the amended complaint as against it, unanimously affirmed, without costs.

Decedent died from injuries sustained when, while in the middle of a crosswalk in Central Park, he was struck by a bike ridden by defendant Neil Cook, a bicyclist and coach employed by AGI, which operates, among other things, a fitness facility on the Upper East Side.

The motion court correctly determined that AGI could not be held vicariously liable for Cook's alleged negligence, as Cook

was acting outside the scope of his employment. At the time of the accident, Cook was engaged in a weekend bicycle ride, in a public park, using a bicycle that he purchased and equipped, was alone and was not coaching anyone, and was not acting in furtherance of any duties owed to AGI (*see Riviello v Waldron*, 47 NY2d 297 [1979]; *Weimer v Food Merchants*, 284 AD2d 190 [1st Dept 2001]).

Cook's unsupported belief, as set forth in an affirmative defense, that his bicycle riding had a work component to it, and his unsworn Response to the Notice to Admit (*see* CPLR 3123[a]), which improperly sought admissions as to employment status, a contested issue central to the action (*see Berg v Flower Fifth Ave. Hosp.*, 102 AD2d 760 [1st Dept 1984]), do not create triable issues of fact as to whether Cook was acting in the scope of employment. Unlike in *Aycardi v Robinson* (128 AD3d 541 [1st Dept 2015]), relied upon by plaintiff, there is no indication that AGI was exercising any control over Cook at the time of the accident (*see Lundberg v State of New York*, 25 NY2d 467 [1969]).

The motion court correctly dismissed plaintiff's direct negligence claim against AGI. There is no evidence that AGI knew or should have known of Cook's alleged propensity to dangerously ride his bicycle in Central Park, an element necessary to support the claim for negligent hiring and retention (*see White v Hampton*

Mgt. Co. L.L.C., 35 AD3d 243, 244 [1st Dept 2006]), and plaintiff's conclusory allegations of deficient training are insufficient to defeat summary judgment (*see Richardson v New York Univ.*, 202 AD2d 295, 296-297 [1st Dept 1994]).

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

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

ENTERED: SEPTEMBER 26, 2017

CLERK

Sweeny, J.P., Renwick, Kapnick, Kern, Moulton, JJ.

4479 The People of the State of New York, Ind. 960/13
Respondent,

-against-

Juan Martinez,
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 (Alan Gadlin 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 (Jill Konviser, J.), rendered July 7, 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: SEPTEMBER 26, 2017

CLERK

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

Sweeny, J.P., Renwick, Kapnick, Kern, Moulton, JJ.

4480 The People of the State of New York, Ind. 964/99
Respondent,

-against-

Tong Khuu,
Defendant-Appellant.

_____

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

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

_____

Order, Supreme Court, New York County (Michael J. Obus, J.), entered on or about May 23, 2016, which adjudicated defendant a level three sexually violent offender pursuant to the Sex Offender Registration Act (Correction Law art 6-C), unanimously affirmed, without costs.

We find no basis for 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, or were outweighed by the seriousness of the underlying sex crime.

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

ENTERED: SEPTEMBER 26, 2017

CLERK

Sweeny, J.P., Renwick, Kapnick, Kern, Moulton, JJ.

4481 William Schaefer, et al., Index 113074/11
Plaintiffs-Respondents,

-against-

Tishman Construction Corporation,
et al.,
Defendants,

Petrocelli Electric Co., Inc.,
Defendant-Appellant.

- - - - -

[And Third-Party Actions]

_____

Smith Mazure Director Wilkins Young & Yagerman, P.C., New York (Marcia K. Raicus of counsel), for appellant.

Salenger, Sack, Kimmel & Bavaro, LLP, Woodbury (Beth S. Gereg of counsel), for respondents.

_____

Order, Supreme Court, New York County (Debra A. James, J.), entered March 18, 2016, which denied the motion of defendant Petrocelli Electric Co., Inc. (Petrocelli) for summary judgment dismissing the complaint and all common-law cross claims and counterclaims as against it, unanimously modified, on the law, and the motion granted to the extent of dismissing plaintiffs' Labor Law § 240(1) claim as against Petrocelli, and otherwise affirmed, without costs.

While the testimony of defendant Weill Cornell Medical College's construction safety manager that Petrocelli was working on the B-3 level at the time of plaintiff's accident may have

been hearsay, he further testified that Petrocelli, along with another electrical contractor, remained on the job site around the time of plaintiff's accident, raising issues of fact as to whether it left the job site by the time of plaintiff's accident. Furthermore, to the extent Petrocelli remained on the job site and the dangerous condition arose from work delegated to it, which it was in a position to control, it was an agent of the owner and/or general contractor subject to liability under Labor Law § 241(6) (*Nascimento v Bridgehampton Constr. Corp.*, 86 AD3d 189, 192-194 [1st Dept 2011]; *see Russin v Louis N. Picciano & Son*, 54 NY2d 311, 318 [1981]).

Plaintiffs concede that no viable Labor Law § 240(1) exists, and, thus, Supreme Court's order is modified accordingly.

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

ENTERED: SEPTEMBER 26, 2017

CLERK

Sweeny, J.P., Renwick, Kapnick, Kern, Moulton, JJ.

4482 The People of the State of New York, Ind. 1660/02
Respondent,

-against-

Roland Johnson,
Defendant-Appellant.

_____

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

Cyrus R. Vance, Jr., District Attorney, New York (Amanda K. Regan of counsel), for respondent.

_____

Order, Supreme Court, New York County (Patricia M. Nuñez, J.), entered on or about June 16, 2016, which adjudicated defendant a level three sexually violent offender pursuant to the Sex Offender Registration Act (Correction Law art 6-C), unanimously affirmed, without costs.

The court providently exercised its discretion in declining to grant a downward departure (*see People v Gillotti*, 23 NY3d 841, 861 [2014]). The mitigating factors cited by defendant were

adequately taken into account by the risk assessment instrument or were outweighed by the egregiousness of the underlying offense and defendant's extensive criminal record.

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

ENTERED: SEPTEMBER 26, 2017

CLERK

Sweeny, J.P., Renwick, Kapnick, Kern, Moulton, JJ.

4483- Ind. 3977/13
4483A The People of the State of New York, 1575/14
Respondent,

-against-

Louis Richards,
Defendant-Appellant.

_____

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

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

_____

An appeal having been taken to this Court by the above-named appellant from judgments of the Supreme Court, New York County (Neil Ross, J.), rendered August 24, 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 judgments so appealed from be and the same are hereby affirmed.

ENTERED: SEPTEMBER 26, 2017

CLERK

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

Sweeny, J.P., Renwick, Kapnick, Kern, Moulton, JJ.

4485-
4486 The People of the State of New York,
Respondent,

-against-

Lawrence E. Penn III,
Defendant-Appellant.

Ind. 73/14

_____

Perkins Coie LLP, New York (Jalina J. Hudson of counsel), for appellant.

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

_____

Judgment, Supreme Court, New York County (Laura A. Ward, J.), rendered April 21, 2015, convicting defendant, upon his plea of guilty, of grand larceny in the first degree and falsifying business records in the first degree, and sentencing him to concurrent terms of two to six years, and order, same court and Justice, entered on or about July 11, 2016, which denied defendant's CPL 440.10 motion to vacate the judgment, unanimously affirmed.

By pleading guilty, defendant automatically forfeited appellate review of his claim that he was an owner of the stolen property and thus could not be guilty of larceny (*see People v Plunkett*, 19 NY3d 400 [2010]; *see also People v Levin*, 57 NY2d 1008 [1982]; *People v Mendez*, 25 AD3d 346 [1st Dept 2006]). In

any event, the record before us establishes that, unlike the situation in *People v Zinke* (76 NY2d 8 [1990]), defendant adopted a form of business organization whereby he held no ownership interest in the stolen money at the time of the theft.

Defendant received effective assistance of counsel (*see People v Benevento*, 91 NY2d 708, 713-714 [1998]; *People v Ford*, 86 NY2d 397, 404 [1995]; *see also Strickland v Washington*, 466 US 668 [1984]). As indicated, it would have been unavailing for counsel to litigate the issue of whether defendant was an owner of the stolen property. Defendant's remaining claims of ineffective assistance are without merit.

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

ENTERED: SEPTEMBER 26, 2017

CLERK

Sweeny, J.P., Renwick, Kapnick, Kern, Moulton, JJ.

4488 The People of the State of New York, Respondent, Ind. 868/13

-against-

Duany Disla, Defendant-Appellant.

_____

Robert S. Dean, Center for Appellate Litigation, New York (Mark W. Zeno of counsel), for appellant.

_____

Judgment, Supreme Court, New York County (Maxwell Wiley, J.), rendered May 14, 2014, unanimously affirmed.

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

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

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

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

ENTERED: SEPTEMBER 26, 2017

CLERK

Sweeny, J.P., Renwick, Kapnick, Kern, Moulton, JJ.

4489 In re Gloria A. T. S. E.,

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

Adrian D. E.,
Respondent-Appellant,

Good Shepherd Services,
Petitioner-Respondent.

_____

Geoffrey P. Berman, Larchmont, for appellant.

Law Offices of James M. Abramson, PLLC, New York (Rachel Ambats of counsel), for respondent.

Tamara A. Steckler, The Legal Aid Society, New York (Riti P. Singh of counsel), attorney for the child.

_____

Order, Family Court, New York County (Jane Pearl, J.), entered on or about August 30, 2016, which, upon a fact-finding determination that respondent father had abandoned the subject child, terminated the father's parental rights, and transferred custody and guardianship of the child to petitioner agency and the Commissioner of Social Services for the purpose of adoption, unanimously affirmed, without costs.

The finding of abandonment is supported by clear and convincing evidence that the father failed to communicate with the child, the foster mother, or petitioner for the six-month period immediately prior to the filing of the petition, and that

he was not prevented or discouraged from doing so by petitioner (*see* Social Services Law § 384-b[4][b], [5][a]; *Matter of Annette B.*, 4 NY3d 509, 513 [2005]). Family Court correctly found that the father's explanation that he was aggrieved by the Administration for Children's Services' conduct in removing the child without informing him was insufficient to justify his failure to communicate with the child for more than four years (*see Matter of Madeline S.*, 3 AD3d 13, 19-20 [1st Dept 2003]). Petitioner was not required to demonstrate diligent efforts to encourage the father to meet his parental responsibilities (*see* Social Services Law § 384-b[5][b]; *Matter of Gabrielle HH.*, 1 NY3d 549, 550 [2003]).

A preponderance of the evidence supports Family Court's determination that termination of the father's parental rights was in the best interests of the child, given that the father admittedly had no contact with the child since 2012, and that the

child was thriving in the foster home and had a strong bond with the foster mother, who wanted to adopt her (*see Matter of Star Leslie W.*, 63 NY2d 136, 147-148 [1984]).

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

ENTERED: SEPTEMBER 26, 2017

CLERK

Sweeny, J.P., Renwick, Kapnick, Kern, Moulton, JJ.

4490 The People of the State of New York, Respondent, Ind. 3580/12

-against-

Frank Herrera, Defendant-Appellant.

_____

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

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

_____

Judgment, Supreme Court, New York County (Michael R. Sonberg, J. at suppression hearing; Jill Konviser, J. at plea and sentencing), rendered September 16, 2014, convicting defendant of robbery in the third degree, and sentencing him to a term of two to six years, unanimously affirmed.

The court properly denied defendant's motion to suppress the statement he made to a detective. Although defendant had previously invoked his right to counsel, the record supports the hearing court's finding that the statement was spontaneous and not the product of interrogation or its functional equivalent. The detective's only involvement in the case was to maintain custody of defendant while he was in a holding cell after his arrest by other officers. This detective merely attended to defendant's needs and engaged him in innocuous social

conversation that was unrelated to the case and that defendant had initiated. As soon as defendant blurted out an admission, the detective terminated the conversation. None of the detective's conduct was reasonably likely to elicit an incriminating statement (*see People v Rivers*, 56 NY2d 476, 480 [1982]; *People v Lynes*, 49 NY2d 286, 294-295 [1980]).

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

ENTERED: SEPTEMBER 26, 2017

CLERK

Sweeny, J.P., Renwick, Kapnick, Kern, Moulton, JJ.

4492 In re Herbert Levy, O.P. 111/17
[M-3838] Petitioner,

-against-

Hon. Barbara Jaffee, et al.,
Respondents.

_____

Herbert Levy, petitioner pro se.

John W. McConnell, New York (Pedro Morales of counsel), for respondents.

_____

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

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

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

ENTERED: SEPTEMBER 26, 2017

CLERK

Friedman, J.P., Richter, Moskowitz, Gesmer, JJ.

4494 Benjamin Lozano, Index 24019/14
Plaintiff-Respondent,

-against-

New York City Housing Authority,
Defendant-Appellant.

_____

Herzfeld & Rubin, P.C., New York (Sharyn Rootenberg of counsel), for appellant.

The Feinsilver Law Group, P.C., Brooklyn (H. Jonathan Rubinstein of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (Barry Salman, J.), entered January 22, 2016, which denied defendant the New York City Housing Authority's (NYCHA) CPLR 3211 and 3212 motion seeking to dismiss the complaint, granted plaintiff Bengamin Lozano's cross motion for leave to file a late notice of claim, and deemed the notice timely served nunc pro tunc, unanimously reversed, on the law, without costs, the motion granted, and the cross motion denied. The Clerk is directed to enter judgment accordingly in favor of NYCHA.

The motion court lacked discretion to grant plaintiff leave to file a late notice of claim, as he failed to move for that relief before the one year and 90-day statute of limitations expired (*see Pierson v City of New York*, 56 NY2d 950, 954-955 [1982]; *Matter of Carpenter v New York City Hous. Auth.*, 146 AD3d

674 [1st Dept 2017], *lv denied* 29 NY3d 911 [2017]).

Contrary to plaintiff's contention, defendant should not be estopped from asserting a statute of limitations defense simply because it engaged in litigation including conducting a 50-h hearing regarding plaintiff's claim, and did not raise plaintiff's failure to properly serve a timely notice of claim as an affirmative defense in its answer (*see Martinez v City of New York*, 104 AD3d 407, 408 [1st Dept 2013]; *Singleton v City of New York*, 55 AD3d 447 [1st Dept 2008]).

Plaintiff failed to preserve his contention that the savings provision of General Municipal Law § 50-e(3)(c) should be applied due to the fact that he allegedly timely served a notice of claim dated September 6, 2014, via regular mail, because he never raised that argument in his cross motion for leave to file a late notice of claim, and he cannot do so for the first time on appeal (*see Islam v City of New York*, 111 AD3d 493, 493 [1st Dept 2013]; *Harper v City of New York*, 92 AD3d 505, 505 [1st Dept 2012]). However, if we were to review the issue, we would find that plaintiff cannot demonstrate that the savings provision of General Municipal Law § 50-e(3)(c) applies because he failed to submit an affidavit of service or any other proof of mail service that establishes that the September 6, 2013 notice of claim was

actually served by regular mail to NYCHA (*see Lapsley-Cockett v Metropolitan Tr. Auth.*, 143 AD3d 558 [1st Dept 2016]; *Person v New York City Hous. Auth.*, 129 AD3d 595, 596 [1st Dept 2015]).

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

ENTERED: SEPTEMBER 26, 2017

CLERK

Friedman, J.P., Richter, Moskowitz, Gesmer, JJ.

4495 In re Monwara G.,
Petitioner-Respondent,

-against-

Abdul G.,
Respondent-Appellant.

_____

Dora M. Lassinger, East Rockaway, for appellant.

Kenneth M. Tuccillo, Hastings on Hudson, for respondent.

_____

Order, Family Court, New York County (Gail A. Adams, Referee), entered on or about October 17, 2016, which, upon a fact-finding determination that respondent husband had committed a family offense, granted petitioner wife a four-year order of protection, unanimously modified, on the law and the facts, to add to the order of protection a finding that "aggravated circumstances exist, including violent and harassing behavior by respondent toward petitioner, which constitute an immediate and ongoing danger to petitioner," and otherwise affirmed, without costs.

A fair preponderance of the evidence supports the Family Court's determination that the husband had engaged in conduct warranting issuance of an order of protection (Family Ct Act § 832, 812[1]; *Matter of Everett C. v Oneida P.*, 61 AD3d 489, 489 [1st Dept 2009]). The court credited the wife's testimony, which

showed that the husband had engaged in a course of significant physical and sexual abuse over a 19-year period, which included hitting the wife, pulling her hair, and forcing her to engage in sex against her will, leaving her with bruises. The court observed that the wife could not bring herself to look at the husband during her testimony, and found that she "fear[ed] for her life." This evidence sufficiently supported the allegations in the petition that the husband had committed the family offenses of harassment in the first and second degree (Penal Law §§ 240.25, 240.26) and sexual abuse in the third degree (Penal Law § 130.55).

The wife's testimony, although lacking in detail concerning specific dates, supports a finding that the pattern of abusive conduct had continued within the year preceding the filing of the petition, and her testimony concerning more remote allegations is relevant (*see Matter of Opray v Fitzharris*, 84 AD3d 1092, 1093 [2d Dept 2011]). In any event, a family offense petition should not be dismissed "solely on the basis that the acts or events alleged are not relatively contemporaneous with the date of the petition" (Family Ct Act § 812[1]; *see also Matter of Barbagallo v Cotto-Donis*, 131 AD3d 1237, 1237 [2d Dept 2015], *lv dismissed* 26 NY3d 1057 [2015]).

The Family Court provided for an extended period of

protection beyond two years without setting forth any finding of aggravating circumstances, as required by Family Court Act § 842. However, we find that the record amply supports a determination that aggravating circumstances, as defined in Family Court Act § 827(a)(vii), exist, and therefore modify the order of protection to set forth this finding (*see Matter of Harry v Harry*, 85 AD3d 790 [2d Dept 2011]; *Matter of Leticia T. v Tomas V.*, 12 AD3d 170 [1st Dept 2004]).

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

ENTERED: SEPTEMBER 26, 2017

CLERK

Friedman, J.P., Richter, Moskowitz, Gesmer, JJ.

4496 American Guarantee & Liability Insurance Company,
Plaintiff-Appellant,

-against-

Illinois Union Insurance Company,
Defendant-Respondent,

NY A to Z Construction Group Inc.,
Defendant.

Index 652232/11

Coughlin Duffy LLP, New York (Steven D. Cantarutti of counsel), for appellant.

London Fischer LLP, New York (James Walsh of counsel), for respondent.

Order, Supreme Court, New York County (Jennifer G. Schecter, J.), entered on or about July 19, 2016, which granted defendant Illinois Union Insurance Company's motion for summary judgment dismissing the complaint as against it and denied plaintiff's cross motion for summary judgment declaring that Illinois is obligated to defend and indemnify defendant NY A to Z Construction Group Inc. in the underlying personal injury action, unanimously modified, on the law, to declare that Illinois is not obligated to defend and indemnify NY A to Z in the underlying personal injury action, and otherwise affirmed, without costs. The Clerk is directed to enter judgment accordingly.

The motion court correctly determined that NY A to Z failed

to give Illinois, its primary insurer, timely notice of the accident giving rise to the claim, thereby vitiating Illinois's obligation to provide coverage (*see e.g. Paramount Ins. Co. v Rosedale Gardens*, 293 AD2d 235 [1st Dept 2002]). NY A to Z's proffered reason for the delay in notification is unavailing (*see Tower Ins. Co. of N.Y. v Lin Hsin Long Co.*, 50 AD3d 305, 307 [1st Dept 2008]). However, rather than dismissing the complaint as against Illinois, the court should have declared in Illinois's favor (*Maurizzio v Lumbermens Mut. Cas. Co.*, 73 NY2d 951, 954 [1989]).

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

ENTERED: SEPTEMBER 26, 2017

CLERK

Friedman, J.P., Richter, Moskowitz, Gesmer, JJ.

4497 In re Adonna Lewis, Index 101657/15
Petitioner,

-against-

Dayton Beach Park #1 Corp., et al.,
Respondents.

_____

Law Office of Courtney K. Davy, LLP, New York (Courtney K. Davy of counsel), for petitioner.

Zachary W. Carter, Corporation Counsel, New York (Megan E. K. Montcalm of counsel), for New York City Department of Housing Preservation & Development, respondent.

_____

Determination of respondent New York City Department of Housing Preservation & Development, dated June 8, 2015, which issued a certificate of eviction upon a finding that the Mitchell-Lama apartment leased to petitioner was not her primary residence, unanimously confirmed, the petition denied, and the proceeding brought pursuant to CPLR article 78 (transferred to this Court by order of Supreme Court, New York County [Manuel J. Mendez, J.], entered on or about March 2, 2016), dismissed, without costs.

The determination that petitioner failed to maintain the apartment as her primary residence, as required by the rules applicable to Mitchell-Lama apartments (*see* 28 RCNY 3-02[n][4]), is supported by substantial evidence (*see generally 300 Gramatan*

Ave. Assoc. v State Div. of Human Rights, 45 NY2d 176, 180-182 [1978]). Such evidence includes petitioner's filing of documents with public agencies, including the Maryland Department of Motor Vehicles and the New York County Board of Elections, listing a different address, petitioner's possession of a Maryland driver's license and vehicle registration, and petitioner's admission that, for an unspecified period of time, she was a dual resident of New York and Maryland. In addition, the Hearing Officer found that petitioner's claim of primary residence was not credible (*see Matter of Cyril v New York City Dept. of Hous. Preserv. & Dev.*, 140 AD3d 632 [1st Dept 2016], *lv denied* 28 NY3d 913 [2017]; *Matter of Arroyo v Donovan*, 70 AD3d 517 [1st Dept 2010]; *Matter of Studley v New York City Dept. of Hous. Preserv. & Dev.*, 277 AD2d 101 [1st Dept 2000]).

Petitioner's request that, in the alternative, this Court grant her son, a nonparty to both the administrative proceeding and the instant proceeding, the right to claim succession rights, is not properly before this Court (*see Matter of King v New York City Hous. Auth.*, 118 AD3d 636 [1st Dept 2014]). In any event, "[f]amily members do not have the right to succeed the

tenant/cooperator in occupancy if the housing company terminates the tenancy of a tenant/cooperator for cause" (28 RCNY 3-02[p][4]).

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

ENTERED: SEPTEMBER 26, 2017

CLERK

Friedman, J.P., Richter, Moskowitz, Gesmer, JJ.

4498 The People of the State of New York, Respondent, Ind. 1541/12

-against-

Craig Whitefield, Defendant-Appellant.

_____

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

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

_____

Judgment, Supreme Court, Bronx County (Steven L. Barrett, J.), rendered April 6, 2015, convicting defendant, after a jury trial, of murder in the second degree, manslaughter in the first degree, three counts of robbery in the first degree, two counts of robbery in the second degree, and two counts of criminal possession of a weapon in the second degree, and sentencing him, as a second violent felony offender, to an aggregate term of 40 years to life, unanimously reversed, on the law, and the matter remanded for a new trial.

The court should have granted defendant's challenge for cause to a prospective juror, a police officer who stated on voir dire that he believed that the testimony of police witnesses would be accurate, except insofar as they were relaying inaccurate information provided by a victim or other witness.

Pressed by defense counsel on whether he thought it was possible for a police witness to lie, exaggerate, or be mistaken, the prospective juror allowed that there was "a little room" for this and stated that he "suppose[d]" it was possible.

"[A] prospective juror whose statements raise a serious doubt regarding the ability to be impartial must be excused unless the juror states unequivocally on the record that he or she can be fair and impartial" (*People v Chambers*, 97 NY2d 417, 419 [2002]). Bias expressed by a prospective juror is purged only when, in response to additional inquiry, the juror is able to "voice[] with conviction" that he or she will be able to render an impartial verdict based solely on the evidence and the court's instructions (*People v Blyden*, 55 NY2d 73, 78 [1982]). The link between the biased state of mind previously indicated by the prospective juror's statements and the assurance of the ability to render an impartial verdict "must be evident" (*People v Warrington*, 28 NY3d 1116, 1120 [2016]). "Where there remains any doubt in the wake of such statements, . . . the prospective jurors should be discharged for cause" (*Blyden*, 55 NY2d at 78).

The panelist clearly showed a predisposition to believe that police officers testify truthfully (*see People v Sanchez*, 60 AD3d 442 [1st Dept 2009], *lv denied* 12 NY3d 920 [2009]). Viewed as a whole, his responses to followup questions did not "expressly

state that his prior state of mind . . . [would] not influence his verdict" (*People v Biondo*, 41 NY2d 483, 485 [1977]).

Since we are ordering a new trial, we find it unnecessary to reach any other issues.

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

ENTERED: SEPTEMBER 26, 2017

CLERK

Friedman, J.P., Richter, Moskowitz, Gesmer, JJ.

4499 The People of the State of New York, Respondent, Ind. 570034/14

-against-

Rafael Rodriguez, Defendant-Appellant.

_____

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

Darcel D. Clark, District Attorney, Bronx (Paul A. Andersen of counsel), for respondent.

_____

Judgment, Supreme Court, Bronx County (Patricia Anne Williams, J.), rendered October 17, 2013, convicting defendant, after a nonjury trial, of attempted assault in the third degree, and sentencing him to a term of 75 days, unanimously affirmed.

The court properly exercised its discretion in admitting evidence of defendant's prior threatening acts against the victim. This evidence was relevant to the issues of motive and intent, and it provided background material relating to the acrimonious relationship between defendant and the victim and the events leading up to the incident in question (*see People v Leeson*, 12 NY3d 823, 827 [2009]; *People v Dorm*, 12 NY3d 16, 19 [2009]). Any prejudicial effect was outweighed by probative value. Moreover, the court at this nonjury trial is "presumed

capable of disregarding the prejudicial aspect of the evidence" (*People v Tong Khuu*, 293 AD2d 424, 425 [1st Dept 2002], *lv denied* 98 NY2d 714 [2002]).

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

ENTERED: SEPTEMBER 26, 2017

CLERK

Friedman, J.P., Richter, Moskowitz, Gesmer, JJ.

4500 Dannon C. Cardona, Index 304481/11
Plaintiff-Respondent,

-against-

New York City Housing Authority, et al.,
Defendants-Appellants.

_____

Smith Mazure Director Wilkins Young & Yagerman, P.C., New York (Marcia K. Raicus of counsel), for appellants.

The Perecman Firm, P.L.L.C., New York (David H. Perecman of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (Mary Ann Brigantti, J.), entered March 25, 2016, which granted plaintiff partial summary judgment as to liability on his Labor Law § 240(1) claim, unanimously affirmed, without costs.

Plaintiff made a prima facie showing that Labor Law § 240(1) was violated, and that the violation was a proximate cause of his injury (*see Barreto v Metropolitan Transp. Auth.*, 25 NY3d 426, 433 [2015]). He testified that onsite supervisors gave him a work assignment requiring him to work from the top of a sidewalk bridge, thereby exposing him to elevation-related risks covered under Labor Law § 240(1). He further stated that he was not provided with a ladder or any other safety device; was instructed to access the top of the bridge by climbing up its side; and

that, while attempting to do so, he lost his grip, slipped, and fell to the ground.

Defendants failed to raise a triable issue of fact concerning the statutory violation. Plaintiff's direct supervisor testified that he did not give plaintiff his work instructions on the morning of the accident, and that someone else could have. Thus, there is insufficient support for defendants' conclusory assertion that plaintiff was affirmatively instructed not to go up on the sidewalk bridge, and that his assignment was to pick up debris from the ground.

The unsworn Employer's Injury and Illness Report dated September 24, 2010 also fails to raise a triable issue of fact. Defendants' own witness denies preparing it or knowing the source of the information included in it, and there is no assertion or proof that it was prepared by anyone with personal knowledge of the relevant events (*see Rue v Stokes*, 191 AD2d 245, 246-247 [1st Dept 1993]).

Defendants' recalcitrant worker defense fails, since there is no indication that they instructed plaintiff to use a ladder or informed him that a ladder or other safety device was located at the sidewalk bridge (*see Valente v Lend Lease (US) Construction LMB, Inc.*, __ NY3d __ [2017] [2017 NY Slip Op 06400]); *cf. Cahill v Triborough Bridge & Tunnel Auth.*, 4 NY3d

35, 39-40 [2004] [issue of fact as to whether the plaintiff disregarded instructions to use safety device]; *Albino v 221-223 W. 82 Owners Corp.*, 142 AD3d 799, 800 [1st Dept 2016] [same]).

Defendants' contention that plaintiff fell from the sidewalk bridge as a result of his "carelessness" and "bad decisions," and because of his size, is unavailing. Any comparative negligence by plaintiff is not a defense to his Labor Law § 240(1) claim (*see Hill v Acies Group, LLC*, 122 AD3d 428, 429 [1st Dept 2014]; *Blake v Neighborhood Hous. Servs. of N.Y. City*, 1 NY3d 280, 289 [2003]).

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

ENTERED: SEPTEMBER 26, 2017

CLERK

Friedman, J.P., Richter, Moskowitz, Gesmer, JJ.

4501 CB Frontier LLC, Index 654339/16
Plaintiff-Respondent,

-against-

LStar Capital Finance II, Inc.,
Defendant-Appellant.

_____

Ingram Yuzek Gainen Carroll & Bertolotti, LLP, New York (Daniel L. Carroll of counsel), for appellant.

Mintz Levin Cohn Ferris Glovsky and Popeo, P.C., New York (Kevin N. Ainsworth of counsel), for respondent.

_____

Order, Supreme Court, New York County (Eileen Bransten, J.), entered February 7, 2017, which, in a declaratory judgment action, denied defendant's motion to dismiss the amended complaint, unanimously affirmed, with costs.

The motion court correctly found that defendant failed to conclusively establish a defense as a matter of law based on the mortgage that defendant held on plaintiff's properties and the accompanying UCC-1 statement. Plaintiff advanced a reasonable interpretation of the collateral provision in the mortgage and the nearly identical provision in the UCC-1 statement in maintaining that the portion of the FAR bonus awarded to it by the City of New York that had not yet been transferred or applied to plaintiff's properties could be transferred to another developer and was not subject to defendant's existing mortgage

lien. This was because, although the mortgage included "all" of defendant's rights "in any manner whatsoever" and "in any way," these inclusive terms were modified by the arguable limitation that they be "belonging, relating to or pertaining to the land." That the FAR bonus could be transferred to another developer supports plaintiff's argument that it was not an inherent element of ownership of the land and therefore was not collateral under the mortgage.

We have considered defendant's other contentions and find them unavailing.

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

ENTERED: SEPTEMBER 26, 2017

CLERK

Friedman, J.P., Richter, Moskowitz, Gesmer, JJ.

4502 The People of the State of New York, Ind. 2421/15
Respondent,

-against-

Bernard Garcia,
Defendant-Appellant.

_____

Seymour W. James, Jr., The Legal Aid Society, New York (Harold V. Ferguson, Jr. of counsel), for appellant.

Cyrus R. Vance, Jr., District Attorney, New York (Michael J. Yetter 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 (Gregory Carro, J.), rendered January 28, 2016,

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: SEPTEMBER 26, 2017

CLERK

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

Friedman, J.P., Richter, Moskowitz, Gesmer, JJ.

4503 The People of the State of New York, Ind. 4613/14
Respondent,

-against-

Tony Thames,
Defendant-Appellant.

_____

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

Cyrus R. Vance, Jr., District Attorney, New York (Alan Gadlin 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 (Gregory Carro, J.), rendered April 22, 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: SEPTEMBER 26, 2017

CLERK

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

Richter, J.P., Moskowitz, Gesmer, Singh, JJ.

4504-
4505 Index 652220/15

Harvey Keitel,
Plaintiff-Appellant,

-against-

E*TRADE Financial Corporation,
Defendant-Respondent.

_____

Bushell Sovak Ozer & Gulmi LLP, New York (Victor C. Bushell of counsel), for appellant.

Quinn Emanuel Urquhart & Sullivan, LLP, New York (Marc L. Greenwald of counsel), for respondent.

_____

Judgment, Supreme Court, New York County (Charles E. Ramos, J.), entered May 15, 2017, dismissing the complaint, unanimously affirmed, without costs. Appeal from order, same court and Justice, entered April 18, 2017, which granted defendant's motion to dismiss, unanimously dismissed, without costs, as subsumed in the appeal from the judgment.

Plaintiff, a well known actor, alleges that defendant, an online brokerage company, made a "firm and binding offer" to hire him for a celebrity spokesperson advertising campaign and then backed out of the deal. The complaint was correctly dismissed on the ground that no valid and binding contract was ever formed.

The term sheet relied upon by plaintiff states that it "sets forth the general intent of the parties to discuss in good faith

the terms and conditions" of the deal and that "neither party shall be bound until the parties execute a more formal written agreement," and therefore does not constitute an enforceable contract (*see e.g. Northern Stamping, Inc. v Monomoy Capital Partners, L.P.*, 129 AD3d 448, 449 [1st Dept 2015]; *Offit v Herman*, 132 AD3d 409 [1st Dept 2015]; *StarVest Partners II, L.P. v Emportal, Inc.*, 101 AD3d 610, 612-613 [1st Dept 2012]).

Plaintiff's allegations that his agent requested that any offer be "firm and binding," that defendant's agent acknowledged this request, that internal communications between defendant and its agents reveal an intention to make a firm offer, that the cover email transmitting the term sheet labeled the offer "firm and binding," and that defendant later offered a fee to "kill" the contract are not sufficient to negate or demonstrate a waiver of the provision that the parties would not be bound until they executed a formal written agreement (*see e.g. Amcan Holdings, Inc. v Canadian Imperial Bank of Commerce*, 70 AD3d 423, 424-425, 427 [1st Dept 2010], *lv denied* 15 NY3d 704 [2010]; *Naturopathic Labs. Intl., Inc. v SSL Ams., Inc.*, 18 AD3d 404, 405 [1st Dept 2005]). Morever, waiver of a contractual provision "should not be lightly presumed," "must be unmistakably manifested, and is not to be inferred from a doubtful or equivocal act" (*Ess & Vee Acoustical & Lathing Contrs. v Prato Verde, Inc.*, 268 AD2d 332

[1st Dept 2000] [internal quotation marks omitted]). Plaintiff's agent's demand for a firm offer and defendant's agent's acknowledgment of this request, before consulting with her client, prove nothing about what was ultimately agreed. Nor do defendant and its agents' internal communications preceding the offer, to which plaintiff was not privy, prove what was ultimately agreed.

Defendant's offer of a "kill" fee is not properly considered, since it is inadmissible as an offer of compromise under CPLR 4547. Plaintiff's contention that CPLR 4547 does not apply because the existence of a contract was not in dispute when the offer was made is unsupported by the record.

The cover email transmitting the term sheet, while it labeled the term sheet a "firm and binding offer," also noted that the offer was contingent on "coming to terms on scripts, compensation, etc." More importantly, it attached the term sheet itself. In light of the provision stating that the term sheet was not binding absent execution of a formal written agreement, plaintiff's reliance on the cover email was not reasonable.

To the extent plaintiff relies on *PMJ Capital Corp. v PAF Capital, LLC* (98 AD3d 429 [1st Dept 2012]), that reliance is misplaced. In *PMJ*, the agreement sought to be enforced did not contain any language requiring that it be fully executed;

although such language was included in the plaintiff's initial bid, it was not carried over to the formal loan sale agreement drafted by the parties (98 AD3d at 429, 431; *see also Emigrant Bank v UBS Real Estate Sec., Inc.*, 49 AD3d 382, 383-384 [1st Dept 2008]). Moreover, the plaintiff in *PMJ* actually executed the completed agreement and wired the defendant a deposit in accordance with its terms, which the defendant retained (98 AD3d at 429-430).

Because we find that no binding agreement existed, we need not reach plaintiff's other arguments.

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

ENTERED: SEPTEMBER 26, 2017

CLERK

Friedman, J.P., Richter, Moskowitz, Gesmer, JJ.

4506-
4507 Index 152832/16

Noam Baram, et al.,
Plaintiffs-Respondents,

-against-

Carl E. Person,
Defendant-Appellant.

- - - - -

Carl E. Person,
Third-Party Plaintiff-Appellant,

-against-

John Reilly, et al.,
Third-Party Defendants,

Edward S. Feldman, et al.,
Third-Party Defendants-Respondents.

_____

Carl E. Person, appellant pro se.

Feldman & Associates, PLLC, New York (Edward S. Feldman of counsel), for respondents.

_____

Order, Supreme Court, New York County (Shlomo Hagler, J.), entered on or about February 2, 2017, which denied defendant/third-party plaintiff's (defendant attorney) motion to dismiss the complaint; and order, same court and Justice, entered on or about February 2, 2017, which granted third-party defendants-respondents' motion to dismiss the third-party complaint, unanimously affirmed, without costs.

Plaintiffs alleged in their complaint that defendant

attorney was negligent in failing to timely file an underlying malpractice claim in arbitration as against plaintiffs' original attorneys, and that, as a result of such negligence, plaintiffs' late-filed arbitration claim for actual and ascertainable damages was permanently stayed (*see Herrick Feinstein LLP v Baram*, 132 AD3d 499 [1st Dept 2015]). These factual allegations, as supplemented by plaintiffs' papers in opposition to defendant attorney's dismissal motion, sufficiently alleged a legal malpractice claim (*see generally Leon v Martinez*, 84 NY2d 83, 87-88 [1994]; *see Brooks v Lewin*, 21 AD3d 731, 734 [1st Dept 2005], *lv denied* 6 NY3d 713 [2006]; *Escape Airports [USA], Inc. v Kent, Beatty & Gordon, LLP*, 79 AD3d 437 [1st Dept 2010]).

Defendant attorney's argument that plaintiffs' papers in opposition to his motion to dismiss lacked evidentiary value because the annexed affidavits were notarized by the third-party defendant attorney (Feldman) and Feldman only submitted affirmations rather than affidavits, is unavailing. Feldman was not a party to plaintiffs' action alleging malpractice, and as such, his submission of affirmations was appropriate, particularly since the causes of action in plaintiffs' action and the third-party action were distinct and independent of one another (*see* CPLR 2106). Also, Feldman did not have a direct, pecuniary interest in the malpractice action, and thus was

capable of acting as a notary in that action (*see* New York State, Department of State, Division of Licensing Services, *Notary Public License Law* at 7 [June 2016], http://www.dos.ny.gov/licensing/lawbooks/notary.pdf [accessed Aug. 28, 2017]).

The motion court correctly dismissed the third-party complaint, as the viability of its claims for, among other things, abuse of process, fraud on the court, and tortious interference with advantageous business relationships were wholly undermined by the submissions on the motions.

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

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

ENTERED: SEPTEMBER 26, 2017

CLERK

Friedman, J.P., Richter, Moskowitz, Gesmer, JJ.

4508 The People of the State of New York, Respondent, Ind. 5174/13

-against-

Giovanni Acevedo, Defendant-Appellant.

_____

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

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

_____

Judgment, Supreme Court, New York County (Daniel P. Conviser, J.), rendered January 6, 2015, convicting defendant, after a jury trial, of arson in the second degree and reckless endangerment in the second degree, and sentencing him to concurrent terms of five years and one year, unanimously modified, on the law, to the extent of vacating the second-degree arson conviction, and remanding for a new trial on that charge, and otherwise affirmed.

The court erred by denying defendant's request to instruct the jury on the lesser included offense of arson in the fourth degree. There was a reasonable view of the evidence that defendant was not guilty of second-degree arson, but was guilty of fourth-degree arson (*see generally People v Rivera*, 23 NY3d 112, 120 [2014]).

The relevant difference between these crimes in this case is that second-degree arson involves intentionally damaging a building by starting a fire, while fourth-degree arson involves *recklessly* damaging a building by *intentionally* starting a fire (*see* Penal Law §§ 150.05; 150.15). Viewed in the light most favorable to defendant, there was a reasonable view of the evidence that he did not intend to damage his apartment, or any other part of the building, by setting a fire to a video game console, and that his sole object in doing so was to kill himself through smoke inhalation. It cannot be said that the only interpretation of defendant's actions was that he intended to damage the building by fire. Although a natural and probable consequence of setting the fire was that the fire would damage the building, this did not conclusively establish such an intent, which was for the jury to decide (*see People v Fernandez*, 64 AD3d 307, 313-315 [1st Dept 2009], *appeal withdrawn* 13 NY3d 796 [2009]). On these facts, the jury could have found that, rather than actually intending to cause damage, defendant was "aware of and consciously disregard[ed] a substantial and unjustifiable risk that [damage would] occur" (Penal Law § 15.05[3]).

To the extent defendant's argument concerning a jury inquiry

is not rendered academic by this modification, we find that argument to be without merit. Accordingly, we find no basis upon which to vacate the remaining conviction.

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

ENTERED: SEPTEMBER 26, 2017

CLERK

Friedman, J.P., Richter, Moskowitz, Gesmer, JJ.

4509 In re Renarta La-narda S.,
Petitioner-Respondent,

-against-

Bevin M.,
Respondent-Appellant.

_____

Law Office of Lewis S. Calderon, Jamaica (Lewis S. Calderon of counsel), for appellant.

Zachary W. Carter, Corporation Counsel, New York (Qian Julie Wang of counsel), for respondent.

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

_____

Order, Family Court, New York County (Emily M. Olshanksy, J.), entered on or about December 15, 2016, which, following a hearing, adjudged respondent to be the father of the subject child, unanimously affirmed, without costs.

The Family Court properly found by clear and convincing evidence that it was in the child's best interests to equitably estop respondent from denying paternity (*Matter of Shondel J. v Mark D.*, 7 NY3d 320, 326-327 [2006]; Family Court Act § 418[a]). While respondent claimed to have harbored some doubts about whether he was the father shortly after the child's birth in 2009 and again three years later when the mother informed him that the child was not his, he continued to hold himself out to be the

father of the child, provided him with support and gave him gifts, and continued to live with the family, even marrying the mother in the interim (*id.*; *Matter of Jesus R.C. v. Karen J.O.*, 126 AD3d 445, 445-446 [1st Dept 2015], *lv denied* 25 NY3d 906 [2015]). Even after respondent left the family home at the end of 2014 he has maintained at least some contact with the child, who believes respondent to be his father. These facts amply support the court's equitable estoppel finding (*id.*).

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

ENTERED: SEPTEMBER 26, 2017

CLERK

Richter J.P., Moskowitz, Gesmer, Singh, JJ.

4510 Robert Sass, Index 155313/13
Plaintiff-Appellant,

-against-

Hewlett-Packard,
Defendant-Respondent.

_____

Kaiser Saurborn & Mair, P.C., New York (Daniel J. Kaiser of counsel), for appellant.

Cozen O'Connor, New York (Michael C. Schmidt of counsel), for respondent.

_____

Order, Supreme Court, New York County (Manuel J. Mendez, J.), entered August 24, 2016, which granted defendant's motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

Plaintiff has failed to point to any evidence to support an inference that he was terminated on account of his age (*see Bennett v Health Mgt. Sys., Inc.*, 92 AD3d 29, 35, 40-41 [1st Dept 2011], *lv denied* 18 NY3d 811 [2012]). Plaintiff points to no direct evidence of age-related bias, and he testified that he never heard of any remarks made about his age. His claim of age discrimination instead rests entirely on the allegation that he was replaced by a younger employee. The record does not state the age of the woman who allegedly replaced him, however, but instead contains only witnesses' "guess[es]" that she was in her

"mid-40s." Such "conjecture" as to an alleged replacement employee's age does not suffice to raise a triable issue of fact on a motion for summary judgment (*Grella v St. Francis Hosp.*, 149 AD3d 1046, 1049 [2d Dept 2017]; *see Soho Ctr. for Arts & Educ. v Church of St. Anthony of Padua*, 146 AD2d 407, 411 [1st Dept 1989]).

The record provides no basis to find that the alleged replacement was substantially younger than plaintiff, as required to support an inference of age discrimination in the absence of direct or statistical evidence (*see Melman v Montefiore Med. Ctr.*, 98 AD3d 107, 114-115 and n 2 [1st Dept 2012]; *Weit v Flaum*, 258 AD2d 286, 286-287 [1st Dept 1999]).

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

ENTERED: SEPTEMBER 26, 2017

CLERK

Friedman, J.P., Richter, Moskowitz, Gesmer, JJ.

4511 The People of the State of New York, Respondent, Ind. 3301/11

-against-

Pedro Flores, Defendant-Appellant.

_____

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

Cyrus R. Vance, Jr., District Attorney, New York (Sabrina Margret Bierer of counsel), for respondent.

_____

Judgment, Supreme Court, New York County (Ann M. Donnelly, J. at hearing and plea; Ellen Biben, J. at sentencing), rendered October 26, 2015, convicting defendant, of manslaughter in the first degree, and sentencing him to a term of 17 years, unanimously reversed, on the law, the plea vacated, the motion to suppress statements defendant made at a police station granted, and the matter remanded for further proceedings.

The court properly denied defendant's motion to suppress a statement made at the scene of the incident. *Miranda* warnings were not required, because there was neither interrogation nor custody. The police officer's inquiry about "what happened" was not interrogation, but was for investigatory purposes and was intended to clarify the situation, where there was a stabbing victim one floor below defendant's apartment, and defendant had a

wound on his arm and had blood on his boots (*see People v Valderas*, 7 AD3d 265, 265 [1st Dept 2004], *lv denied* 3 NY3d 649 [2004]). Furthermore, a reasonable innocent person in defendant's position would not have thought that he was in custody (*see People v Yukl*, 25 NY2d 585 [1969], *cert denied* 400 US 851 [1970]). The police did nothing to restrain defendant, and although at the time of the statement at issue, "[t]he police activity at the apartment was likely to have conveyed the impression that an investigation was in progress, . . . there was no indication that the police had decided to arrest anyone" (*People v Radellant*, 105 AD3d 556, 557 [1st Dept 2013], *lv denied* 22 NY3d 1090 [2014]).

However, we find that the People failed to establish that defendant made a knowing and intelligent waiver of his *Miranda* rights before giving oral and written statements to a detective at the precinct. In a videotaped statement to the prosecutor, made several hours after the statements to the detective, defendant said, "I cannot pay for a lawyer, why do I write yes or no." The prosecutor then said, "[D]o you understand if you can't, the Court will give you one?," to which defendant responded, "[S]o I put no." After the prosecutor reread the warnings defendant stated, "[Y]es, I need to have a lawyer . . . I cannot pay a lawyer." The prosecutor next asked, "[B]ut do you

understand that one will be provided if you cannot pay," and defendant again stated "yes, but I can't pay for a lawyer." Finally, the prosecutor told defendant, "[O]kay, so you can write 'yes' if you understand, and 'no' if you don't understand," and defendant said, "[Y]es, I do understand." Based on this exchange, the court correctly suppressed defendant's videotaped statement. Given defendant's failure to comprehend that he had the right to an attorney at the time of his statements if he could not afford one, it is evident that defendant's previous statement to the detective should also be suppressed (*see People v Adames*, 121 AD3d 507, 513-514 [1st Dept 2014]).

We find that the error was not harmless, because there is a reasonable possibility that it contributed to defendant's guilty plea (*see People v Wells*, 21 NY3d 716 [2013]).

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

ENTERED: SEPTEMBER 26, 2017

CLERK

Friedman, J.P., Richter, Moskowitz, Gesmer, JJ.

4512 Frank Kelly, et al., Index 152540/14
Plaintiffs-Respondents,

-against-

Roza 14W LLC, et al.,
Defendants-Appellants,

CRP/Capstone 14W, L.L.C., et al.,
Defendants.

_____

Mauro Lilling Naparty LLP, Woodbury (Anthony F. DeStefano of counsel), for appellants.

Sullivan Papain Block McGrath & Cannavo, P.C., New York (Stephen C. Glasser of counsel), for respondents.

_____

Order, Supreme Court, New York County (Joan M. Kenney, J.), entered January 18, 2017, which, to the extent appealed from, denied defendant Roza 14W LLC's motion for summary judgment dismissing the complaint as to it, unanimously reversed, on the law, without costs, and the motion granted. The Clerk is directed to enter judgment dismissing the complaint as against Roza 14W LLC.

Plaintiff Frank Kelly was allegedly injured when he slipped and fell on water on the marble floor in the lobby of Roza 14W's building. It was snowing lightly at the time of the accident and the floor had mats in various locations, but not in the area where plaintiff slipped.

Roza 14W made a prima facie showing that a reasonable cleaning routine was followed on the day of the accident (*see Baumann v Dawn Liqs., Inc.*, 148 AD3d 535, 537 [1st Dept 2017]; *Rosario v Prana Nine Props., LLC*, 143 AD3d 409 [1st Dept 2016]; *Pomahac v TrizecHahn 1065 Ave. of Ams., LLC*, 65 AD3d 462, 464 [1st Dept 2009]). Roza 14W submitted evidence that, in addition to the mats, wet floor warning signs were placed in the lobby, two porters were assigned to walk around the lobby to dry mop wet areas, and the area where plaintiff fell was found to be clean and dry 10 minutes before the fall.

Plaintiffs failed to submit evidence sufficient to raise a triable issue of fact. Roza 14W was not obligated to either continuously mop up moisture tracked onto its floors (*see Thomas v Boston Props.*, 76 AD3d 460, 461 [1st Dept 2010]) or to cover the entire floor with mats (*see Toner v National R.R. Passenger Corp.*, 71 AD3d 454 [1st Dept 2010]). In addition, the affidavit of plaintiffs' expert failed to cite any violation of an accepted

industry practice, standard, code, or regulation (*see Jones v City of New York*, 32 AD3d 706, 707 [1st Dept 2006]).

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

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

ENTERED: SEPTEMBER 26, 2017

CLERK

Friedman, J.P., Richter, Moskowitz, Gesmer, JJ.

4513 The People of the State of New York, Respondent, Ind. 2226/07

-against-

Carlos Sorias, Defendant-Appellant.

_____

Seymour W. James, Jr., The Legal Aid Society, New York (Laura Lieberman Cohen of counsel), for appellant.

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

_____

Order, Supreme Court, New York County (Melissa C. Jackson, J.), entered on or about December 4, 2014, which adjudicated defendant a level two sexually violent offender under the Sex Offender Registration Act (Correction Law art 6-C), unanimously affirmed, without costs.

The court properly assessed points under the risk factor for contact under clothing, based on clear and convincing evidence that defendant made sexual contact with one of the victims by reaching his hand under her dress and touching her genital area.

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 outweighed by the egregiousness of the underlying crimes.

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

ENTERED: SEPTEMBER 26, 2017

CLERK

Friedman, J.P., Richter, Moskowitz, Gesmer, JJ.

4516 The People of the State of New York, Respondent, Ind. 1924N/10

-against-

Anonymous, Defendant-Appellant.

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

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Judgment, Supreme Court, New York County (Daniel Conviser, J. at plea; Robert Stolz, J. at sentencing), rendered February 21, 2013, unanimously affirmed.

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

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

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

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

ENTERED: SEPTEMBER 26, 2017

CLERK

Friedman, J.P., Richter, Moskowitz, Gesmer, JJ.

4517N James J. Thomas, Index 152322/15
Plaintiff-Appellant,

-against-

Kane Construction Group Inc.,
et al.,
Defendants-Respondents,

Modell's Sporting Goods, Inc., et al.,
Defendants.

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Law Offices of Bruce E. Cohen & Associates, P.C., Melville (Bruce E. Cohen of counsel), for appellant.

Marshall Dennehey Warner Coleman & Goggin, Melville (Mark D. Wellman of counsel), for respondents.

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Order, Supreme Court, New York County (Joan M. Kenney, J.), entered April 28, 2017, which granted the motion of defendants Kane Construction Group Inc. and Southport 2013 LLC to change venue from New York County to Suffolk County, unanimously reversed, on the law, without costs, and the motion denied.

In seeking a change of venue to Suffolk County for the convenience of material witnesses (CPLR 510[3]), defendants' initial moving papers were deficient in not setting forth, inter alia, the names and addresses of witnesses who would be willing to testify, the nature and materiality of their anticipated testimony, and the manner in which they would be inconvenienced by a trial in New York County (*see Job v Subaru Leasing Corp.*, 30

AD3d 159 [1st Dept 2006]). Defendants' attempt to cure these deficiencies in their reply papers improperly raised new facts that were not responsive to plaintiff's opposition, and should not be considered (*id.; Marko v Culinary Inst. of Am.*, 245 AD2d 212 [1st Dept 1997]). In any event, the inconvenience of the two material witnesses identified in defendants' reply papers was not convincingly established, or sufficient to warrant the transfer of venue (*see e.g. Gissen v Boy Scouts of Am.*, 26 AD3d 289, 291 [1st Dept 2006]).

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

ENTERED: SEPTEMBER 26, 2017

CLERK

Friedman, J.P., Richter, Moskowitz, Gesmer, JJ.

4518 In re John Kojo Zi, O.P. 106/17
[M-3188] Petitioner, Ind. 1932/15

-against-

Hon. James Burke, etc., et al.,
Respondents.

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John Kojo Zi, petitioner pro se.

Eric T. Schneiderman, Attorney General, New York (Charles F. Sanders of counsel), for Hon. James Burke, respondent.

Cyrus R. Vance, Jr., District Attorney, New York (Carey W. Ng of counsel), for Hon. Cyrus R. Vance, Jr. and Carey Ng, respondents.

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

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

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

ENTERED: SEPTEMBER 26, 2017

CLERK

Friedman, J.P., Sweeny, Moskowitz, Gische, Kapnick, JJ.

3622 Carole Hamburg, M.D., Index 153572/12
Plaintiff-Appellant-Respondent,

-against-

New York University School of Medicine, et al.,
Defendants-Respondents-Appellants.

_____

Law Offices of Michael G. Berger, New York (Michael G. Berger of counsel), for appellant-respondent.

Zachary W. Carter, Corporation Counsel, New York (MacKenzie Fillow of counsel), for respondents-appellants.

_____

Order, Supreme Court, New York County (Eileen A. Rakower, J.), entered June 16, 2016, modified, on the law, to grant the motion with respect to the claim for breach of contract, and otherwise affirmed, without costs. The Clerk is directed to enter judgment in favor of defendants dismissing the complaint.

Opinion by Friedman, J. All concur.

Order filed.

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

David Friedman, J.P.
John W. Sweeny, Jr.
Karla Moskowitz
Judith J. Gische
Barbara R. Kapnick, JJ.

3622
Index 153572/12

_____x

Carole Hamburg, M.D.,
Plaintiff-Appellant-Respondent,

-against-

New York University School of Medicine,
et al.,
Defendants-Respondents-Appellants.

_____x

Cross appeals from the order of the Supreme Court, New York County (Eileen A. Rakower, J.), entered June 16, 2016, which, to the extent appealed from as limited by the briefs, granted defendants' motion for summary judgment to the extent of dismissing plaintiff's claim for age discrimination in violation of the New York City Human Rights Law, and denied the motion with respect to plaintiff's claim for breach of contract.

Law Offices of Michael G. Berger, New York (Michael G. Berger of counsel), for appellant-respondent.

Zachary W. Carter, Corporation Counsel, New York (MacKenzie Fillow and Pamela Seider Dolgow of counsel), for respondents-appellants.

FRIEDMAN, J.P.

In this action for age discrimination in violation of the New York City Human Rights Law (NYCHRL) (Administrative Code of City of NY § 8-107[1][a]) and for breach of contract, plaintiff, a former member of the radiology department of defendant medical school and hospital, challenges defendant's decision not to renew her employment at the expiration of the term of her last appointment. Although Supreme Court assumed (as do we) that plaintiff carried her "de minimis" burden of establishing a prima facie case of age discrimination (*see Bennett v Health Mgt. Sys., Inc.*, 92 AD3d 29, 38 [1st Dept 2011], *lv denied* 18 NY3d 811 [2012]), the court correctly determined that plaintiff, in response to defendant's evidence of legitimate, nondiscriminatory reasons for the challenged employment action, failed to present any evidence raising a triable issue as to whether bias against employees of her age played a role in that decision (*see id.*, 92 AD3d at 40).

As more fully discussed below, defendant established that the non-specialized section of the radiology department in which plaintiff worked, which produced no research, was phased out as part of a restructuring of the department, at a time of financial constraint, to achieve greater focus on the specialized, research-producing sections of the department. Defendant further

established that, as part of this restructuring, it retained three physicians from plaintiff's section, each of whom was of approximately the same age as plaintiff (60), and reassigned them to specialized departments. Plaintiff, however, was reasonably deemed to lack the specialized expertise and the proclivity for research that defendant deemed necessary to maintain its status as a top-tier academic radiology department. Not only did plaintiff fail to present any evidence casting doubt on this explanation, she failed to present any evidence, either direct or circumstantial, suggesting that bias against employees of her age was even a partial motive for the ending of her employment.

While we affirm the dismissal of the age discrimination claim, we modify to grant defendant summary judgment dismissing the claim for breach of contract, as well. As more fully discussed below, the faculty handbook setting forth the terms of plaintiff's employment, when construed as a whole, requires a year's notice of nonrenewal of employment only for faculty members (beyond their second year of service) holding tenure-eligible appointments. Since plaintiff admits that she was not eligible for tenure, her claim for breach of contract — based on defendant's having given her advance notice of eight months, rather than a full year, of the end of her employment — is legally insufficient as a matter of law.

Plaintiff Carole Hamburg, M.D., who was born in 1950, is a board-certified radiologist. In the summer of 2002, defendant New York University School of Medicine (NYU) hired plaintiff as an "Assistant Professor (Clinical) of Radiology" and as a member of the radiology department of NYU-affiliated hospitals.[1] As stated in NYU's letters offering the position to plaintiff, the appointment was for a one-year term that would be "renewable upon agreement of both parties," and was subject to the terms of the NYU faculty handbook and the hospital bylaws. Over the nine years following her initial appointment in 2002, NYU periodically renewed plaintiff's appointment. Each reappointment was for a defined period of one or two years.

It is undisputed that plaintiff's position at NYU was never eligible for academic tenure.[2] Stated otherwise, plaintiff's

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[1]The academic and hospital appointments were components of the same position. Although plaintiff has also named "New York University Langone Medical Center" as a defendant, NYU explains that this is not the name of a separate legal entity that can be sued.

[2]The 2008 NYU faculty handbook describes tenure at the institution as follows: "After expiration of the stipulated probationary periods [for tenure-eligible positions], full-time associate professors and professors [sic] are considered to have permanent or continuous tenure, and their services are to be terminated only for adequate cause, except in the case of retirement, or under extraordinary circumstances because of financial exigencies, or because of the discontinuance of a considerable part of the University, such as a college, school, or division or a department in a college, school, or division."

position at NYU was one that could never lead to tenure, no matter how many times she was reappointed. Plaintiff admits that she understood this at all relevant times.

Throughout her employment at NYU, plaintiff was assigned to the "General Diagnostic Radiology section" (hereinafter, general radiology) of NYU's radiology department. By her own account, plaintiff's primary responsibility in general radiology was "reading plain films" — X-rays without contrast — "[f]or any part of the body." As plaintiff stated at her deposition, "I was the designated plain film person." Notwithstanding her academic title, plaintiff did not conduct any research or publish any papers during her employment by NYU, nor did she teach or supervise medical students, residents or fellows. Her involvement in medical education at NYU was limited to informal "mentoring" of a handful of medical students and to interviewing medical school applicants.

In addition to general radiology, the NYU radiology department included several more specialized sections. Among the specialized sections of the department were sections respectively

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Regarding the purpose of tenure, the handbook states: "Academic tenure is a means to certain ends, specifically: (1) freedom of teaching and research; and (2) a sufficient degree of economic security to make the profession of teaching attractive to men and women of ability."

focusing on cardiac imaging, abdominal imaging, musculoskeletal imaging, thoracic (chest) imaging, neuroradiology, pediatric radiology, vascular interventional radiology, neuro-interventional radiology, and nuclear medicine. The specialized sections produced original research relevant to their respective practice areas, but general radiology — the section in which plaintiff worked — produced no research.

In November 2008, Dr. Michael Recht assumed the chair of NYU's radiology department. In discussions that began in 2009, Dr. Recht and his leadership team (which did not include plaintiff) identified as a departmental goal the maximization of the department's production of research, so as to maintain its standing as (in Dr. Recht's words) "one of the best academic radiology departments." The realization of this goal was complicated by the financial pressure under which the department was operating as the result of reductions in Medicare reimbursement rates for its clinical services. As Dr. Recht expressed it at his deposition: "Because we didn't have unlimited revenue, and in fact, our revenue for the exams that we were doing was shrinking, we needed to make very tough decisions to make sure we were set up correctly to thrive, survive and thrive [sic], in the future of radiology."

Given the goal of increasing the department's production of

research under conditions of financial constraint, Dr. Recht and his team began to consider (in Dr. Recht's words) "[w]hether . . . [a] section of general radiology was something . . . that an academic radiology department should have or not have." These deliberations resulted in Dr. Recht's determination that the general radiology section, because it was not producing any research, "was not appropriate for our department," and should be eliminated over time. As Dr. Recht explained, "My goal for the department was not to be a good general radiology department . . . [but] to be a sub-specialized academic radiology department at the cutting edge of radiology clinical care, education and research." Accordingly, it was decided that certain physicians in general radiology would be absorbed into the department's specialized sections, while the appointments of other physicians in the section would not be renewed as their terms expired. Ultimately, the work performed in general radiology would be absorbed by the department's specialized sections.

At the time Dr. Recht decided to phase out general radiology, 10 physicians (including plaintiff) were working in the section. In consultation with the heads of the specialized sections, Dr. Recht determined that three general radiology physicians had the appropriate experience and skills to be reassigned to the specialized sections. It is undisputed that

all three of these retained physicians — one of whom was assigned to thoracic imaging, the other two to abdominal imaging — were, like plaintiff, around 60 years of age in 2011. The appointments of six other physicians in general radiology — including plaintiff's — were not renewed as their respective terms ended. Of the six general radiology physicians whose appointments were not renewed as the section was phased out, one was in his late 30s or early 40s, two (including plaintiff) were around 60, one was in his late 60s, and the three others were 80 or older.[3]

Plaintiff's last appointment at NYU was for the 2010-2011 academic year. On May 3, 2011, Dr. Recht met with plaintiff in his office and informed her that NYU would not be renewing her contract, although, as a matter of courtesy, her employment would be extended until December 31, 2011. Dr. Recht testified that he told plaintiff at this meeting that her contract was not being renewed "because of the changes in the department . . . and that in order to be fair and give her as much time as possible, I was letting her know as early as I could, once the decision was made, so that she would have eight months to adjust to that and move

[3]It appears from the record that a tenth general radiology physician, the former head of the section, retired in January 2013, when he was in his late 70s. This physician's departure from NYU is not discussed by either party on this appeal, so we will not consider it in our analysis.

forward."[4] Plaintiff, in her affidavit, states that Dr. Recht told her at the meeting that the reason for the nonrenewal was that "the Radiology Department was placing greater emphasis on research and had to maintain revenue." Subsequently, by letter dated October 14, 2011, Dr. Recht confirmed to plaintiff in writing that, "[a]s discussed in our meeting of May 3, 2011, due to operational changes in the Department of Radiology, your contract is not being renewed effective December 31, 2011."[5]

At the end of her employment by NYU, plaintiff was working three days a week (although her position was classified as full time) at Gouverneur Health Care Service, where, as previously noted, she principally interpreted "plain film" X-rays.[6] After plaintiff left NYU at the end of 2011, the work she had been doing at Gouverneur was absorbed by Dr. Jodi Cohen, a member of

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[4]According to an affidavit submitted by Dr. Recht, "It is the practice in the [NYU] School of Medicine to provide three months' notice of non-renewal of non-tenure eligible faculty where practicable."

[5]At his deposition, Dr. Recht, in explanation of the five-month gap between the May 3 meeting and the October 14 letter, testified that, at that time, "when we didn't renew people's contracts, we gave them the option of resigning rather than sending them a formal letter if they felt that would be better for their future opportunities."

[6]At the relevant time, NYU provided certain medical staffing at Gouverneur and at Bellevue Hospital pursuant to an affiliation agreement with the New York City Health and Hospitals Corporation.

the musculoskeletal imaging section who had been at NYU since 2006. At his deposition, Dr. Recht estimated that Dr. Cohen, whose credentials included a fellowship in musculoskeletal radiology, was in her 40s.

In June 2012, plaintiff commenced this action against NYU, in which she asserts two causes of action, the first for age discrimination in violation of the NYCHRL and the second for breach of contract. After discovery was conducted, NYU moved for summary judgment dismissing the complaint. Supreme Court granted NYU summary judgment dismissing the cause of action for age discrimination, but denied the motion as to the breach of contract cause of action. Plaintiff and NYU each appeals from this order to the extent each is aggrieved thereby.

We turn first to the cause of action for age discrimination in violation of the NYCHRL. As this Court has held, a defense motion for summary judgment in an action brought under the NYCHRL must be analyzed under both the familiar framework of *McDonnell Douglas Corp. v Green* (411 US 792 [1973]) and under the newer "mixed motive" framework, which imposes a lesser burden on a plaintiff opposing such a motion. Summary judgment dismissing a claim under the NYCHRL should be granted only if "no jury could find defendant liable under any of the evidentiary routes — *McDonnell Douglas*, mixed motive, 'direct' evidence, or some

combination thereof" (*Bennett*, 92 AD3d at 45).

The *McDonnell Douglas* framework and the mixed motive framework diverge only after the plaintiff has established a prima facie case of discrimination (as more fully described below) and the defense has responded to that prima facie case by presenting admissible evidence of "legitimate, independent, and nondiscriminatory reasons to support its employment decision" (*Forrest v Jewish Guild for the Blind*, 3 NY3d 295, 305 [2004] [internal quotation marks omitted]). At that point, under *McDonnell Douglas*, the burden shifts to the plaintiff to produce evidence tending to "prove that the legitimate reasons proffered by the defendant were merely a pretext for discrimination" (*id.*).[7] By contrast, under the mixed motive analysis, the plaintiff may defeat the defendant's evidence of legitimate reasons for the challenged action by coming forward with evidence from which it could be found that "unlawful discrimination was one of the motivating factors, even if it was not the sole motivating factor, for [the] adverse employment decision" (*Melman v Montefiore Med. Ctr.*, 98 AD3d 107, 127 [1st Dept 2012]).

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[7]Of course, to withstand a summary judgment motion, a plaintiff is not required to prove pretext, but need only demonstrate the existence of a genuine and material disputed issue of fact as to whether the defendant's stated reasons for the adverse action were pretextual (*see Ferrante v American Lung Assn.*, 90 NY2d 623, 630 [1997]).

Combining the two approaches, where the plaintiff has made out a prima facie case of discrimination, he or she may defeat a defense summary judgment motion based on evidence of a legitimate, nondiscriminatory reason for the adverse action by coming forward either with evidence that "the [defendant's] stated reasons were false and that discrimination was the real reason" (*Forrest*, 3 NY3d at 305) or with evidence that "discrimination was one of the motivating factors for the defendant's conduct" (*Williams v New York City Hous. Auth.*, 61 AD3d 62, 78 n 27 [2009], *lv denied* 13 NY3d 702 [2009]).

As previously noted, the first step in both the *McDonnell Douglas* analysis and the mixed motive analysis is to determine whether plaintiff has met her burden of establishing a prima facie case of discrimination. "To meet this burden, plaintiff must show that (1) she is a member of a protected class; (2) she was qualified to hold her position; (3) she was terminated from employment or suffered an adverse employment action; and (4) the discharge or other adverse action occurred under circumstances giving rise to an inference of discrimination" (*Forrest*, 3 NY3d at 305).

Here, it is undisputed that plaintiff has established the first three elements of a prima facie case of discrimination (membership in a protected class, possession of qualifications

for the position, and having suffered an adverse employment action). Plaintiff argues that she has also satisfied the fourth element — a showing of circumstances giving rise to an inference of discrimination — in that, as she testified at her deposition, "the people [in general radiology] that were terminated in addition to me were all of a similar age and the person that sat at my desk after I left was in her late 30's [sic], early 40's [sic]."[8] While NYU does not concede that plaintiff has demonstrated circumstances giving rise to an inference of discrimination, it does not emphasize this point. Supreme Court, although it ultimately dismissed the claim under the NYCHRL, assumed that plaintiff had made out a prima facie case of

[8]As previously noted, one general radiology physician whose contract was not renewed, apparently at some point before the end of 2010, was in his late 30s or early 40s. While plaintiff alleges that she understood that the departure from NYU of this physician (to whom we will refer as FL) was related to a disciplinary issue, she admitted that she had no personal knowledge of the matter, and she has not presented any admissible evidence concerning the reason for FL's departure. However, Dr. Recht's testimony about the reason for FL's departure was not entirely clear. Dr. Recht testified that, contrary to plaintiff's understanding, FL's departure "was not related to a disciplinary event." At one point, Dr. Recht characterized FL's departure as a "dismissal," but, at another point, he characterized the departure as "his [FL's] decision not to renew his contract," suggesting that the departure was voluntary. Since Dr. Recht, the only witness with personal knowledge of this matter who addressed it in the record, arguably contradicted himself concerning the reason for FL's departure, we regard FL's departure as a neutral factor in deciding this appeal.

discrimination, a standard that is, after all, "de minimis" (*Bennett*, 92 AD3d at 38). Accordingly, we, like Supreme Court, assume for purposes of plaintiff's appeal that she has met her burden of establishing a prima facie case of discrimination.

The next step in the analysis, under both *McDonnell Douglas* and the mixed motive framework, is to determine whether NYU has come forward with evidence of "legitimate, independent, and nondiscriminatory reasons to support its employment decision" (*Forrest*, 3 NY3d at 305 [internal quotation marks omitted]). NYU has set forth, through admissible evidence, a legitimate and nondiscriminatory reason for its decision not to renew her appointment. Dr. Recht, the chairman of NYU's radiology department, testified that he decided to phase out the general radiology section in which plaintiff worked as part of a strategic shift of the department's resources to the research-producing specialized radiology sections. Dr. Recht testified that this restructuring was motivated by his view that a top-tier academic radiology department should focus on the production of original medical research and, in the face of decreasing revenues, could not afford to support a non-specialized general radiology section, the members of which did not conduct research. Three general radiology physicians who had specialized skills — all of whom were, like plaintiff, around 60 years old at the time

— were absorbed into the specialized sections. The appointments of those without such skills were not renewed.

Dr. Recht explained during his deposition that, as the chair of the radiology department, he was charged with determining how to use the limited revenue available to the department to maximize its potential and fulfill its mission of advancing medical science through the production of research. After numerous meetings with his leadership team, he concluded that the optimal use of the revenue from the department's clinical services was to employ radiologists with specialized skills who would produce research. At his deposition (as clarified in his subsequent affidavit correcting a transcription error), Dr. Recht summarized his reasoning as follows:

> "[Plaintiff] . . . and the other general radiologists, since we were eliminating the general radiology section, we were able to use that revenue [from reading film] to hire people in the appropriate subspecialty sections that would allow us to increase . . . our subspecialization as well as our research output."

Stated otherwise, while plaintiff's performance as an interpreter of plain film was satisfactory, retaining her would have diverted the radiology department's resources from the specialized, research-oriented direction that its management had selected. As Dr. Recht put it at the conclusion of his deposition, "If I use that revenue [from reading film] in Bucket A, I have less revenue

for Bucket B" — "Bucket A" being "general radiology" and "Bucket B" being "a subspecialty-trained radiologist who is doing academic work."

Upon NYU's submission of a legitimate, nondiscriminatory reason for its decision not to renew plaintiff's contract, the burden shifted back to plaintiff to come forward with evidence raising a triable issue as to whether, under *McDonnell Douglas*, NYU's explanation was a false pretext masking discriminatory intent (*see Forrest*, 3 NY3d at 305), or whether, under the mixed motive analysis, NYU's decision was motivated, at least in part, by discriminatory bias (*see Williams*, 61 AD3d at 78 n 27). Supreme Court correctly determined that plaintiff failed to carry this burden.[9]

Initially, we note that, as plaintiff essentially concedes, she has no direct evidence that the actions she challenges were

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[9]Contrary to plaintiff's contention, Supreme Court did not erroneously require her to prove her claim. Rather, the court appropriately required plaintiff to demonstrate the existence of an issue of fact that, if resolved in her favor, would prove her case, under either standard. Nor did the court inappropriately weigh the credibility of Dr. Recht's deposition testimony, which was the principal evidence on which NYU relied. Plaintiff cannot defeat a well-supported summary judgment motion, without identifying any evidence (either direct or circumstantial) from which it could rationally be inferred that bias played a role in the nonrenewal of her contract, merely by contending that she might persuade a jury not to believe Dr. Recht's testimony. If that were the case, no summary judgment motion could ever be granted in a discrimination case.

taken with discriminatory intent, nor does she have any evidence of bias against older employees on the part of the leadership of the NYU radiology department. Plaintiff admits that she does not recall Dr. Recht or any member of his leadership team ever writing or saying anything that could be interpreted as revealing, either intentionally or inadvertently, the existence of such bias (*cf. Ferrante*, 90 NY2d at 626 [the employer was not entitled to summary judgment where the plaintiff alleged that his supervisor "disparaged and humiliated (him) by calling him 'the old man'"]; *Krebaum v Capital One, N.A.*, 138 AD3d 528, 528 [1st Dept 2016] [same, where the plaintiff allegedly "endured repeated negative comments about his age from his manager"]). Indeed, plaintiff does not claim even to have heard second-hand reports or rumors of such comments. Accordingly, we turn to the circumstantial evidence on which plaintiff relies.

In arguing that the reasons given by NYU for the nonrenewal of her contract are pretextual — or, at a minimum, tainted by an admixture of bias against older employees — plaintiff relies heavily on the fact that, of the six general radiology physicians who were not reappointed as the section was phased out, five were 60 or older when advised that they would not be reappointed.[10]

[10]Again, we regard the nonrenewal of the contract of the sixth physician, the aforementioned FL, the younger section

This overlooks, however, that all three physicians in the section who were retained and reassigned were, like plaintiff, about 60 years old at the time. Absent evidence that younger physicians of equal or lesser qualifications than plaintiff's received more favorable treatment than she did, the retention of three physicians of essentially the same age as plaintiff completely negates any possible inference that the nonrenewal of plaintiff's contract was based, in whole or in part, on bias against people of her age cohort.

In this regard, entirely beside the point is plaintiff's argument that her qualifications for transfer to a specialized section, and her ability to perform research, were comparable to, or better than, those of the three physicians who were retained. Since it is undisputed that there was no significant age difference between plaintiff and any of the three retained physicians, no inference of invidious discriminatory intent may be drawn from NYU's choice to retain those three rather than plaintiff.[11] In the absence of any significant age difference among the four physicians in question, NYU's assessment that each

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member, as a neutral factor in deciding this appeal, as discussed in footnote 7 above.

[11]Plaintiff does not allege that NYU discriminated against her on any basis other than age.

of the three retained physicians was better suited than plaintiff to joining one of the radiology department's specialized sections was a business judgment not subject to judicial second-guessing (*see Forrest*, 3 NY3d at 312 [in a discrimination case, it was not "material whether defendants' contemporaneous assessment of plaintiff's . . . skills was justified"]; *Baldwin v Cablevision Sys. Corp.*, 65 AD3d 961, 966 [1st Dept 2009] [a court hearing a discrimination suit "should not sit as a super-personnel department that reexamines an entity's business decisions"] [internal quotation marks omitted], *lv denied* 14 NY3d 701 [2010]; *Bailey v New York Westchester Sq. Med. Ctr.*, 38 AD3d 119, 124 [1st Dept 2007] [in a discrimination case, an attack on the employer's business judgment "does not give rise to the inference that the employee's discharge was due to age discrimination"] [internal quotation marks omitted]).

Plaintiff argues further that an inference of age discrimination against her may be drawn from the fact that four other general radiology physicians, whose contracts were not renewed in connection with the elimination of the section, were, like plaintiff herself, members of the protected class of older workers. However, as previously noted, each of these four physicians was significantly older than plaintiff (again, one was in his late 60s, the other three were 80 or older). In view of

the retention of all of the general radiology physicians in plaintiff's age cohort, other than plaintiff herself, the nonrenewal of the contracts of the four significantly older physicians gives rise to no inference that the decision not to reappoint *plaintiff* was influenced by bias against employees of *her* age. Moreover, since plaintiff has presented no statistical data or analysis to show that the NYU radiology department declined to reappoint older physicians at a higher rate than younger physicians during the relevant period, the fact that plaintiff and four significantly older general radiology physicians were not reappointed (while three other physicians of plaintiff's own age were retained) provides no basis for a finding of a pattern of age discrimination (*see Melman*, 98 AD3d at 124-125).[12]

Also unavailing is plaintiff's argument that a discriminatory motive may be inferred from the fact that, after she left NYU, her functions at Gouverneur were assigned to a

[12]NYU directs our attention to record evidence that, during the period from December 31, 2010 through early 2015, of the nine radiology department physicians who were not reappointed, four were in their 40s, two were in their 60s (including plaintiff), and three were in their 80s. While the rates of reappointment for physicians of different ages during the period cannot be determined from this limited data set, the information certainly provides no support for plaintiff's theory that NYU discriminated in favor of younger physicians.

younger physician, Dr. Jodi Cohen, who, according to Dr. Recht's testimony, was in her 40s. To begin, Dr. Cohen was not hired to replace plaintiff; she had been working in the radiology department since 2006, and was a member of the musculoskeletal section, having completed a fellowship in that field. The thrust of plaintiff's argument appears to be that NYU, consistent with its stated goal of shifting the radiology department's resources to the specialized, research-producing sections, could just as well have reassigned plaintiff to the musculoskeletal section, rather than let her go and reassign her duties to Dr. Cohen, since plaintiff possessed sufficient credentials to participate in medical research (although she had never done so since joining NYU in 2002) and had practical experience in reading musculoskeletal images.[13] However, NYU was entitled, in the exercise of its academic judgment, to deem plaintiff's practical experience insufficient to warrant reassigning her to the musculoskeletal section, or any of the other specialized sections, and, after she left, to reassign her work to a member

[13]We note that plaintiff completed a fellowship in nuclear medicine early in her career, apparently more than 30 years before NYU determined not to reappoint her. Plaintiff does not, however, suggest that she should have been reassigned to the radiology department's nuclear medicine section, or that her fellowship credential otherwise should have been considered by NYU in determining whether to renew her contract in 2011.

of one of the specialized sections. Plaintiff has not offered any competent evidence to controvert the good faith of this exercise of NYU's academic judgment.[14]

Given the NYU radiology department's phasing out of general radiology, the work that had previously flowed to that section had to be redistributed to the specialized sections. No inference of discriminatory intent, whether as sole or partial motive, arises from the fact that, in one instance (and that is all that plaintiff has shown), the work previously done by an older employee (plaintiff), whose employment ended due to the elimination of her section in a restructuring, was redirected to a younger employee (Dr. Cohen) in one of the remaining sections. Certainly, no such inference can be drawn against the employer where, as here, it reasonably deemed the younger employee to

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[14]Dr. Recht testified: "[T]oday if you want to be considered an expert, you need to do a fellowship." Dr. Recht also testified: "If you're asking me do I think [plaintiff] was qualified to be a member of a top-level academic musculoskeletal radiology section, I would answer no." Plaintiff's self-serving but unsupported assertion in her affidavit that her clinical experience had given her "more extensive training in musculoskeletal radiology than any fellowship could provide" does not create a jury issue. Also unavailing is plaintiff's reliance on her testimony that NYU did not honor her requests to be assigned to duties other than reading plain film, such as interpreting ultrasound images. Dr. Recht testified that it was plaintiff's lack of interest in research and lack of relevant specialized credentials, rather than the type of images she was reading, that led to the decision not to reappoint her.

possess needed specialized expertise that the older employee lacked.[15]

Plaintiff also relies on announcements she received by email, in late 2010 and 2011, of the radiology department's hiring of a number of apparently younger physicians. Plaintiff overlooks, however, that each announcement states that the newly hired physician had completed a fellowship in a specialized area of radiology and, unlike plaintiff during her years with NYU, had developed defined areas of active research interest. Plaintiff does not dispute the accuracy of these statements. Thus, the hiring of these physicians was consistent with NYU's stated goal of shifting the department's focus to the research-producing specialized sections and, therefore, does not give rise to an inference of discriminatory intent.[16]

Plaintiff directs our attention to certain evidence in the

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[15]Plaintiff cites *Ashker v International Bus. Machs. Corp.* (168 AD2d 724 [3d Dept 1990]) for the proposition that, where an older employee's position has been eliminated, the redistribution of her work to a younger, preexisting employee can support a claim for age discrimination. In *Ashker*, however, the elimination of the plaintiff's position was not part of an overall restructuring of the enterprise, and the appeal was taken from a pre-discovery motion to dismiss (*see id.* at 726). Accordingly, *Ashker* is inapposite.

[16]Two of the announcements to which plaintiff draws attention concern the hiring of doctoral-level technology scientists, not physicians, and thus have no relevance at all to the analysis.

record that, she argues, put in question NYU's explanation that the nonrenewal of her contract was motivated by a desire to shift the radiology department's focus to research. Thus, plaintiff points to her testimony that, before the May 2011 meeting at which she was told that she would not be reappointed, neither Dr. Recht nor any other departmental leader had ever asked her to involve herself in research or had even discussed research with her. Plaintiff states that she was qualified to participate in research and, had she been told that she was expected to produce research, she would have done so. Dr. Recht testified, however, that "we don't assign research to people" and that "most of our staff members develop their own research direction" and "come up with their own research projects," which they carry out "independently." NYU could reasonably conclude, based on plaintiff's nonparticipation in research since she was hired in 2002, that research (in Dr. Recht's words) "wasn't what she was interested in doing," and that keeping her on staff would not help to meet the department's goal of increasing the quantity and quality of the research it produced.[17]

[17]Nor is NYU's explanation for not reappointing plaintiff undermined by its acquisition in 2011 of a Long Island outpatient imaging group. It appears that the group continued to function on Long Island after the acquisition, thereby increasing NYU's share of the market for radiology services in the metropolitan area. Thus, the acquisition of the group, even if it produced no

Plaintiff's remaining arguments concerning her age discrimination claim are also unavailing. That her salary and bonuses were not reduced before her employment ended does not contradict Dr. Recht's testimony that the radiology department's revenue was under pressure, due to reduced Medicare reimbursement rates, at the time. As Supreme Court observed, it was reasonable for the department to maintain the same level of compensation for plaintiff while her employment continued even as it undertook a restructuring to address the financial strains under which it was operating. Nor is it relevant that, after plaintiff left, the department continued to perform the same kind of clinical work that she had been doing, since, as Dr. Recht testified, it better served the department's goals to have that work performed by more specialized and research-oriented radiologists, whose research would then be supported by the revenue from the clinical work. Finally, that plaintiff was given five more months of notice of the end of her employment than was the department's usual practice does not, standing alone, support an inference that the decision not to reappoint her was motivated, in whole or in part,

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research (as plaintiff asserts), would have served to increase the revenue available to support research at NYU. In this regard, we emphasize that plaintiff has produced no evidence that NYU, during the relevant period, hired additional radiologists not engaged in research simply to handle NYU's preexisting stream of clinical work.

by bias against employees of her age.

In sum, "[p]laintiff failed to raise triable issues of fact as to whether [NYU's] proffered reasons for [its] decisions were pretextual or incomplete, given the absence of any evidence from which a reasonable jury could infer that [her age] played a role in [NYU's] decision" not to reappoint her to its faculty in the context of a departmental restructuring (*Uwoghiren v City of New York*, 148 AD3d 457, 457 [1st Dept 2017]). Stated otherwise, on this record, no triable issue exists as to whether the employer, in taking the challenged action, "was motivated at least in part by age discrimination" (*Spinello v Depository Trust & Clearing Corp.*, 147 AD3d 572, 572 [1st Dept 2017]). We recognize, of course, that, under the Local Civil Rights Restoration Act of 2005, the NYCHRL is to be "construed liberally" to accomplish its "uniquely broad and remedial purpose" (Administrative Code § 8-130[a]). This does not mean, however, that plaintiff may defeat NYU's evidentiary showing of legitimate and nondiscriminatory reasons for not reappointing her without "com[ing] forward with any evidence — either direct or circumstantial — from which it could rationally be inferred that age discrimination was a motivating factor, even in part, for [that decision]" (*Melman*, 98 AD3d at 128). Accordingly, we affirm the grant of summary judgment dismissing the age discrimination claim.

This brings us to the cause of action for breach of contract, as to which Supreme Court denied NYU's summary judgment motion. Plaintiff alleges that NYU breached her contract by providing her approximately eight months oral notice, and two months written notice, that her contract would not be renewed. Plaintiff asserts that her contract entitled her to 12 months prior written notice if her contract would not be renewed. In reply, NYU argues that plaintiff was not contractually entitled to any notice because her contract stated that her one year appointment would automatically terminate unless she received a notice of renewal, and further asserts that NYU's oral and written notice were delivered to plaintiff as a matter of professional courtesy. Plaintiff's employment agreement stated that her academic appointment as Assistant Professor (Clinical) of Radiology was governed by the NYU Faculty Handbook (the Handbook). Accordingly, the Handbook is the relevant contract. As to which sections of the Handbook apply to plaintiff's particular position, plaintiff's final reappointment letters specified that she would continue to hold the title of "Assistant Professor (Clinical) of Radiology," that she would be employed on a full-time basis, and that her appointment carried "[n]o tenure implications."

When analyzing an agreement, the "entire contract must be

reviewed and particular words should be considered, not as if isolated from the context, but in the light of the obligation as a whole and the intention of the parties as manifested thereby" (*Riverside S. Planning Corp. v CRP/Extell Riverside, L.P.*, 13 NY3d 398, 404 [2009] [internal quotation marks omitted]). Here, when the applicable contractual document — the Handbook — is viewed as a whole, we find that the provision requiring prior notice of intention not to reappoint a full-time faculty member (Title II, section XI, paragraph 2), on which plaintiff relies, unambiguously applies only to tenure-eligible faculty members.

The structure of the relevant portions of the Handbook is illustrated by the Handbook's table of contents, which is as follows, in relevant part (page numbers omitted):

"The Faculty"

"ACADEMIC FREEDOM AND TENURE"

"Title I:	Statement in Regard to Academic Freedom and Tenure"
"Title II:	Appointment and Notification of Appointment"
"Title III:	Rules Regulating Proceedings to Terminate for Cause the Service of a Tenured Member . . . ."
"Title IV:	General Disciplinary Regulations Applicable to Both Tenured and Non-Tenured Faculty Members"

"OTHER FACULTY POLICIES"

"Faculty Membership and Meetings"
"Faculty Titles"

In a note under the heading "The Faculty," the Handbook plainly indicates that, except where otherwise expressly provided (as in Title IV), the provisions under the heading "Academic Freedom and Tenure" apply only to tenured and tenure-eligible faculty. The note states in pertinent part:

> "(This part of the Faculty Handbook, The Faculty, begins under the heading Academic Freedom and Tenure with Titles I-IV of the University's *formal rules of tenure and related provisions*. It's followed on page 41 by Other Faculty Policies, with policies, procedures and conventions in the form of Bylaws, rules adopted by the Senate, and policy summaries. . . . [emphasis added])."

Thus, unless otherwise expressly provided, the provisions under the heading "Academic Freedom and Tenure" — including Title II's provision for notice of non-reappointment, on which plaintiff relies — apply only to tenured or tenure-eligible faculty members.[18] This conclusion is confirmed by a closer reading of Title II itself.

Title II comprises sections X (entitled "General Appointment

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[18]To reiterate, Title IV, dealing with discipline for violation of university rules, is expressly "Applicable to Both Tenured and Non-Tenured Faculty Members." That this includes faculty holding non-tenure track appointments is made plain by the first sentence of paragraph 1 of Title IV: "*Quite apart from any question of tenure or the termination for cause of the service of a faculty member with tenure*, all faculty members have an obligation to comply with the rules and regulations of the University and its schools, colleges, and departments" (emphasis added).

Procedures Affecting the Full-Time Tenure-Earning Ranks"), XI (entitled "Notification of Non-Tenured Faculty Members") and XII (entitled "Tenure Appointments"). Plaintiff concedes, as she must, that sections X and XII, by their terms and in their entirety, apply only to tenure-eligible faculty members. She argues, however, that part (but not all) of section XI applies to all non-tenured faculty members, whether or not they are tenure-eligible. To assess this argument, it is helpful to set forth section XI in pertinent part, with the language on which plaintiff relies italicized:

> "XI. Notification of Non-Tenured Faculty Members"
>
> > "1. [Notification; prospects] During his or her probationary period, each full-time assistant professor, associate professor, and professor shall be notified annually by the departmental head or chairperson, or by the dean in schools without departmental organization, of his or her prospect of being recommended by the department on the evidence then available for an appointment resulting in tenure. Where it is unlikely that tenure will be achieved, such notification shall be in writing [footnote omitted].
> >
> > "*2. [Notification; no reappointment] Notice of intention not to reappoint a full-time assistant professor*, associate professor, or professor *shall be sent to the individual affected according to*

the following schedule:

a) Not later than March 1 of the first year of academic service, if the appointment is to be terminated on August 31.

b) Not later than December 15 of the second year of academic service, if the appointment is to be terminated on August 31.

c) In all other cases, not later than August 31, if the appointment is to be terminated on the following August 31, or not later than one year before the termination of the appointment."

Plaintiff does not dispute that paragraph 1 of section XI, by its terms, applies only to tenure-eligible faculty members.[19] She argues, however, that there is at least an ambiguity as to whether paragraph 2 of section XI, requiring advance notice of an intention not to reappoint, applies to faculty members ineligible for tenure, since paragraph 2 does not contain language expressly limiting its application to tenure-eligible faculty. Based on this reasoning, plaintiff contends that, because she was well

[19]Indeed, if section 1 were construed otherwise, it would make no sense, since its sole provision is a requirement that a faculty member to whom it applies be given annual notification of "his or her prospect of being recommended . . . for an appointment resulting in tenure."

beyond her second year of service when NYU determined not to reappoint her, she was entitled, under subparagraph c of paragraph 2 of section XI, to one year's notice that she would not be reappointed — or that whether she had such a right is at least a triable issue of fact. We are not persuaded by this argument.

As previously noted, plaintiff's proposed interpretation of the Handbook runs afoul of the Court of Appeals' admonition to avoid manufacturing artificial ambiguities by isolating a particular clause in a vacuum while ignoring the context and structure of the contract as a whole (*see Riverside S. Planning Corp. v CRP/Extell Riverside, L.P.*, 13 NY3d at 404; *see also Beal Sav. Bank v Sommer*, 8 NY3d 318, 324 [2007] ["a contract should be read as whole, and every part will be interpreted with reference to the whole"] [internal quotation marks omitted]). A review of the structure and context of the Handbook as a whole makes it clear that paragraph 2 of section XI, like the preceding paragraph 1, applies only to probationary tenure-track employees. Title II, of which section XI is a part, is included in the portion of the Handbook entitled "Academic Freedom and Tenure," which, as noted, applies only to tenured and tenure-eligible faculty members except where otherwise expressly provided. The preceding and following titles, Title I and Title III, explicitly

set forth procedures relevant only to tenured and tenure-eligible faculty. Further, as previously discussed, the sections of Title II that immediately precede and follow section XI (sections X and XII), apply, by their terms, only to tenure-eligible faculty (dealing, respectively, with tenure-eligible appointments generally and appointments resulting in tenure). Finally, as also previously discussed, section XI itself contains only two paragraphs, the first of which, paragraph 1 (requiring annual notification of the prospect of achieving tenure), on its face can apply only to tenure-eligible faculty. Accordingly, the structure and context of the Handbook makes it clear that the title of section XI ("Notification of Non-Tenured Faculty Members") refers to probationary tenure-track faculty, and, similarly, that the notice requirements of paragraph 2 of section XI apply only to probationary tenure-track faculty members (*see Bijan Designor For Men v Fireman's Fund Ins. Co.*, 264 AD2d 48, 52 [1st Dept 2000] ["Words considered in isolation may have many and diverse meanings. In a written document the word obtains its meaning from the sentence, the sentence from the paragraph, and the latter from the whole document"], *lv denied* 96 NY2d 707 [2001]).

Further, plaintiff's proposed reading of paragraph 2 of section XI would create an impermissible conflict with another

provision of the Handbook that expressly applies to her (*see National Conversion Corp. v Cedar Bldg. Corp.*, 23 NY2d 621, 625 [1969] ["All parts of an agreement are to be reconciled, if possible, in order to avoid inconsistency"]). This is Bylaw 73 ("Non-Tenure Positions"), which appears in the section of the Handbook entitled "Other Faculty Policies," under the heading "Faculty Titles" (*see* the portion of the table of contents set forth above). Bylaw 73 provides in pertinent part:

> "Instruction or research service shall be without tenure implications of any kind, regardless of rank or title, if rendered in *a part-time capacity, or in a temporary position*, or in a program having a subsidy of limited duration. Appointment to a non-tenure position shall be for a definite period of time, not exceeding one academic year unless otherwise specified, and *shall automatically terminate at the close of that period unless there is an official notice of renewal. Non-tenure positions include the following* . . ." (emphasis added).

After the word "following," Bylaw 73 sets forth a bullet-point list of non-tenured positions. The fourth bullet-point lists the following titles: "clinical professor, clinical associate professor, clinical assistant professor[.]" At the end of this line, a footnote is appended, which states: "*In the School of Medicine*, these designations denote part-time status. *For full-time service appointments, the designations* 'Professor (Research or Clinical)', 'Associate Professor (Research or Clinical)', and '*Assistant Professor (Research or Clinical)' are*

used" (emphasis added).

Since plaintiff does not dispute that her position in the School of Medicine — Assistant Professor (Clinical) of Radiology — was not eligible for tenure, her claim for breach of contract cannot be sustained unless section XI, paragraph 2's requirement of prior notification of intent not to reappoint, on which plaintiff relies, can somehow be harmonized with Bylaw 73's provision that non-tenure positions "shall be for a definite period of time . . . and shall automatically terminate at the close of that period unless there is official notice of renewal." Plaintiff's efforts to harmonize these provisions are unavailing as a matter of law.

To reconcile Bylaw 73 with the application to a non-tenure track faculty member (such as herself) of the notification provision of section XI, paragraph 2, plaintiff chiefly argues that the "automatic[] terminat[ion]" provision of Bylaw 73 applies only to part-time faculty. Since plaintiff's position was full-time, she reasons, Section XI, paragraph 2 (which states that it applies to "a full-time assistant professor, associate professor, or professor") applied to her. Contrary to this argument, however, Bylaw 73 expressly applies to all non-tenure track positions, whether full-time or part-time. The provision begins by stating that "[i]nstruction or research service shall

be without tenure implications of any kind . . . if rendered in a part-time capacity, *or in a temporary position*, or in a program having a subsidy of limited duration" (emphasis added). The word "or" is a disjunctive article that generally indicates a choice between one of two alternatives (*see generally Colbert v International Sec. Bur.*, 79 AD2d 448, 463 [2d Dept 1981], *lv denied* 53 NY2d 608 [1981]). Nothing in Bylaw 73 excludes full-time temporary positions — such as plaintiff's expressly temporary appointment — from the application of its automatic termination provision. Moreover, the above-quoted footnote including an appointment as an "'Assistant Professor (Research or Clinical)'" as a non-tenure position expressly notes that this designation denotes a "full-time service appointment[]." Plaintiff's argument that the automatic termination provision of Bylaw 73 did not apply to her because her position was full-time is simply untenable.

Also unavailing is plaintiff's alternative argument that, even if Bylaw 73 does apply to her (as we find that it does), the notification requirement of section XI, paragraph 2 could also be applied to her without creating an inconsistency. Plaintiff contends that although Bylaw 73 states that her position "shall automatically terminate . . . unless there is an official notice of renewal," she is still entitled to notification of an

intention not to renew the appoint under section XI, paragraph 2. This proposed interpretation is unavailing because it would lead to an illogical result (*see Matter of Lipper Holdings v Trident Holdings*, 1 AD3d 170 [1st Dept 2003]). Application to non-tenured faculty members of section XI, paragraph 2's requirement of advance notice of an intention not to reappoint would make no sense because, in the case of a faculty member having more than two years of service, NYU would have to give the faculty member notice of its intention not to reappoint simultaneously with the making of a one-year appointment. This would utterly negate Bylaw 73's provision that non-tenure appointments "shall automatically terminate at the close of th[e] period [for which the appointment was made] unless there is an official notice of renewal." Again, we are required to construe the parties' agreement — the Handbook — to avoid inconsistencies between different provisions (*see National Conversion Corp.*, 23 NY2d at 625). Here, Bylaw 73 expressly applies to faculty in non-tenure track positions, whether full-time or part-time, and the natural reading of section XI, paragraph 2, is that it applies only to full-time faculty in tenure-eligible positions. Accordingly, the latter provision did not apply to plaintiff, and her breach of contract cause of action is without merit as a matter of law.

Accordingly, the order of the Supreme Court, New York County

(Eileen A. Rakower, J.), entered June 16, 2016, which, to the extent appealed from as limited by the briefs, granted defendants' motion for summary judgment to the extent of dismissing plaintiff's claim for age discrimination in violation of the NYCHRL, and denied the motion with respect to plaintiff's claim for breach of contract, should be modified, on the law, to grant the motion with respect to the claim for breach of contract, and otherwise affirmed, without costs. The Clerk is directed to enter judgment in favor of defendants dismissing the complaint.

All concur.

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

ENTERED: SEPTEMBER 26, 2017

CLERK