SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

APRIL 5, 2018

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Acosta, P.J., Sweeny, Andrias, Gische, Gesmer, JJ.

5471 The People of the State of New York, Respondent, Ind. 1173/14

-against-

Clinton Britt,
Defendant-Appellant.

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Seymour W. James, Jr., The Legal Aid Society, New York (David Crow of counsel), and Paul, Weiss, Rifkind, Wharton & Garrison LLP, New York (Jenny C. Wu of counsel), for appellant.

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

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Judgment, Supreme Court, New York County (Anthony J. Ferrara, J. at suppression hearing; Patricia M. Nuñez J. at jury trial and sentencing), rendered May 21, 2015, convicting defendant of criminal possession of a forged instrument in the first degree (17 counts) and criminal possession of a controlled substance in the seventh degree, and sentencing him, as a second felony offender, to an aggregate term of three to six years, unanimously affirmed.

On March 9, 2014, Police Officer Ryan Lathrop and Sergeant Robert Dixon were in uniform, patrolling in Times Square. The

area had a high number of quality of life crimes, and was "flooded" with police officers. On the north side of 42nd Street and Eighth Avenue was a haunted house tourist attraction called Times Scare. At about 11:15 p.m., Lathrop saw defendant with a group of people in front of Times Scare, drinking a beverage concealed in a brown paper bag. As Lathrop approached, defendant went into Times Scare, and Lathrop ran in after him. Inside, Lathrop caught up with defendant, grabbed him by the arm, and saw that the brown bag contained an alcoholic beverage.

Lathrop brought defendant outside and radioed that he had someone in custody, and Sergeant Dixon arrived within a minute. Although Lathrop planned to issue a summons, defendant's identification cards did not show his date of birth or home address, so, in accordance with police department policy, Lathrop arrested defendant. The officer handcuffed him and searched him for weapons. Defendant asked if he could give his property to his brother Jeff, who worked nearby. Initially, Lathrop agreed, and began collecting defendant's personal property. He retrieved two cell phones, keys, a lanyard with defendant's employee identification cards, an identification card for a man named Douglas Kelly, headphones, and a toothbrush. From defendant's pants pocket, Lathrop recovered a small pink Ziploc bag of what appeared to be crack cocaine. While still handcuffed, defendant

started making a "weird like jumping" or "hopping movement," and began "getting really upset" about being "brought in." Lathrop then noticed two more Ziploc bags at defendant's feet containing what appeared to be crack cocaine.[1] Because he had recovered drugs, the officer collected defendant's property to be vouchered, rather than giving it to defendant's brother.

At the precinct, in response to pedigree questions, defendant told Lathrop that he was unemployed. Lathrop pulled two separate wads of currency from defendant's inside left jacket pocket, one of which was folded with a rubber band around it. First, Lathrop counted the unbanded wad of, which totaled $148. When he began counting the money in the rubber band, he realized immediately that it was counterfeit. All of the $10 bills had the same serial number, and there were three different serial numbers on the 13 $20 bills. There was a total of $300 in counterfeit bills.

As Lathrop brought defendant back to the holding area, defendant said, in a quiet voice under his breath, "I want to talk to a detective, and I will give up who I got the currency from, the counterfeit bills from, if you make the drug charges go

[1] The substance in the pink bag found in defendant's pocket tested positive for cocaine. The clear plastic bag found at defendant's feet contained Methylone, known as ecstasy.

away." Once in the cell, defendant admitted that the pink bag of drugs was his, explaining that he had hurt his back and used the dugs for the pain.

Secret Service Agent Michael Helm trained in the detection of counterfeit currency, identified the $300 that had been rubber-banded together as counterfeit bills. Helm explained that these were not "the highest grade bills." Although real money is made of cotton, the bills that defendant had were made of paper that could be bought in a store. They did not have the optical variable ink, watermark, red and blue fibers, and security strip that appear on genuine currency. Additionally, while genuine bills all have a unique serial number, several of defendant's bills had the same serial number.

In Helm's experience, people passing counterfeit bills would keep their genuine currency and their counterfeit currency in separate pockets. Helm had only made "a couple" of arrests for counterfeit currency. He said that none were street arrests, "because the federal government generally does not prosecute low-level street arrests."

The court properly denied defendant's suppression motion. An officer observed defendant drinking a beverage concealed in a paper bag. Based on his experience, the officer concluded that defendant was drinking in that manner for the purpose of

concealing a violation of the Open Container Law (Administrative Code of City of NY § 10-125). Even if drinking from a can covered by a bag could have innocent explanations, this act, coupled with defendant's active flight at the approach of the police (*see People v Moore*, 6 NY3d 496, 500-501 [2006]) created at least reasonable suspicion justifying pursuit (*see People v Bothwell*, 261 AD2d 232, 234-235 [1st Dept 1999], *lv denied* 93 NY2d 1026 [1999]). When he stopped defendant, the officer saw that the bag contained an alcoholic beverage, whereupon the officer recovered drugs and counterfeit money during a lawful search incident to arrest.

Defendant's arguments concerning the sufficiency and weight of the evidence supporting his convictions of possession of forged instruments are unavailing (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). The evidence supports inferences that defendant knowingly possessed counterfeit money, and did so with the requisite fraudulent intent (*see* Penal Law § 170.30).

The evidence showed, among other things, that defendant kept these bills in a bundle that was separate from his genuine money, and that the material from which the bills were made and their appearance were noticeably different from those of genuine currency. Moreover, defendant's statement to the police could be fairly interpreted as acknowledging that he knew the bills were

counterfeit, and had not just learned that fact upon his arrest. Accordingly, the jury could reasonably have inferred from the totality of the evidence that defendant knew the money was counterfeit (*see People v Bogan*, 80 AD3d 450 [1st Dept 2011], *lv denied* 16 NY3d 856 [2011]).

The evidence also supported the jury's determination that defendant intended to use the counterfeit bills to deceive or defraud. While there is no presumption that knowing possession of counterfeit money establishes intent (*People v Bailey*, 13 NY3d 67, 72 [2009]), the evidence here went beyond mere possession. Defendant carried 17 bills in $10 and $20 denominations, totaling $300. Furthermore, defendant separated the counterfeit bills from his genuine currency by securing them with a rubber band, which suggested an intent to use the counterfeit bills selectively, in situations where they would be least likely to be detected. Based on this combination of factors, and the exercise of common sense, the jury could reasonably have concluded that defendant had no reason to carry these counterfeit bills except to spend them, as soon as the opportunity arose (*see People v Rodriguez*, 17 NY3d 486 [2011]), and we see nothing in *Bailey*, where defendant was arrested for attempting to steal a handbag after police observed him for over an hour attempting to steal from unsuspecting women, to preclude this analysis. Although the

defendant in *Bailey* had three $10 counterfeit bills in his pocket, there was no indication that he intended to defraud, deceive or injure another with counterfeit bills, only that he intended to steal real currency from his intended victims (13 NY3d at 69, 72 and n 2).

Defendant's challenge to the Secret Service agent's testimony about people commonly keeping real and counterfeit money in separate pockets is unpreserved, because defendant only made an unelaborated objection when the testimony was given (*see People v Tevaha*, 84 NY2d 879 [1994]), and because his somewhat more specific objection at the end of the trial was grossly untimely (*see People v Romero*, 7 NY3d 911, 912 [2006]). We decline to review defendant's claims in the interest of justice. As an alternative holding, we find that the agent's experience

was a sufficient basis for the testimony, which did not offer an opinion on the ultimate issue of defendant's intent, or otherwise usurp the jury's fact-finding function.

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

ENTERED: APRIL 5, 2018

CLERK

Acosta, P.J., Tom, Oing, Moulton, JJ.

6215 The People of the State of New York, Respondent, Ind. 3148N/11

-against-

Tyrone Wortham, Defendant-Appellant.

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Seymour W. James, Jr., The Legal Aid Society, New York (William B. Carney of counsel), for appellant.

Tyrone Wortham, appellant pro se.

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

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Judgment, Supreme Court, New York County (Charles H. Solomon, J. at suppression hearing; Richard D. Carruthers, J. at jury trial and sentencing), rendered April 18, 2013, as amended April 22, 2013, convicting defendant of criminal possession of a weapon in the second degree, criminal possession of a weapon in the third degree (two counts), criminal possession of a controlled substance in the third and seventh degrees, criminally using drug paraphernalia in the second degree (two counts), and endangering the welfare of a child (two counts), and sentencing him, as a second violent felony offender, to an aggregate term of 9 years, unanimously affirmed.

The hearing court properly denied defendant's motion to suppress a statement he made in response to an officer's pedigree

question. Although defendant acknowledged that he resided in the apartment where contraband was found, he was responding to a routine administrative question that was not a "disguised attempt at investigatory interrogation" (*People v Rodney*, 85 NY2d 289, 294 [1995]) and was not designed to elicit an incriminating response (*see People v Flagg*, 149 AD3d 513 [1st Dept 2017], *lv denied* 29 NY3d 1079 [2017]).

The trial court properly denied defendant's severance motion. The defenses of defendant and his codefendant were not in "irreconcilable conflict" (*People v Mahboubian*, 74 NY2d 174, 184 [1989]). Throughout the trial, the defenses were generally consistent. To the extent that one of the several theories raised by codefendant's counsel on summation tended to shift blame to defendant, there was no significant danger that "the conflict alone would lead the jury to infer defendant's guilt" (*id.*).

Defendant was not entitled to a hearing pursuant to *Frye v United States* (293 F 1013 [DC Cir 1923]) to determine the reliability of forensic statistical tool DNA evidence (*see e.g. People v Gonzalez*, 155 AD3d 507 [1st Dept 2017]; *People v Lopez*, 50 Misc 3d 632 [Sup Ct, Bronx County [2015]; *People v Debraux*, 50 Misc 3d 247, 259 [Sup Ct, NY County 2015]).

Defendant's pro se ineffective assistance of counsel claims

are unreviewable on direct appeal because they involve matters not reflected in, or fully explained by, the record (*see People v Rivera*, 71 NY2d 705, 709 [1988]; *People v Love*, 57 NY2d 998 [1982]). Accordingly, since defendant has not made a CPL 440.10 motion, the merits of the ineffectiveness claims may not be addressed on appeal. In the alternative, to the extent the existing record permits review, we find that defendant received effective assistance under the state and federal standards (*see People v Benevento*, 91 NY2d 708, 713-714 [1998]; *Strickland v Washington*, 466 US 668 [1984]).

We have considered and rejected defendant's remaining pro se claims.

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

ENTERED: APRIL 5, 2018

CLERK

Acosta, P.J., Tom, Oing, Moulton, JJ.

6217 In re Malik W.,

A Person Alleged to be a
Juvenile Delinquent,
Appellant.
- - - - -
Presentment Agency

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

Zachary W. Carter, Corporation Counsel, New York (Elizabeth I. Freedman of counsel), for presentment agency.

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Order of disposition, Family Court, Bronx County (Peter J. Passidomo, J.), entered on or about April 27, 2016, which adjudicated appellant a juvenile delinquent upon a fact-finding determination that he committed acts that, if committed by an adult, would constitute the crimes of robbery in the third degree and grand larceny in the fourth degree, and placed him on probation for a period of 12 months, unanimously affirmed, without costs.

The court's finding was based on legally sufficient evidence and was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). There is no basis for disturbing the court's determinations concerning identification

and credibility. The evidence supports the conclusions that the victim had a sufficient opportunity to see appellant's face during the robbery, and that she made a reliable identification based on that observation.

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

ENTERED: APRIL 5, 2018

CLERK

Acosta, P.J., Tom, Oing, Moulton, JJ.

6218 Gary Harrigan, et al., Index 156824/14
Plaintiffs-Respondents, 595582/15

-against-

G-Z/10UNP Realty, LLC, et al.,
Defendants-Appellants,

Genie Industries, Inc., et al.,
Defendants.

- - - - -

[And a Third-Party Action]

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Shaub, Ahmuty, Citrin & Spratt, LLP, Lake Success (Christopher Simone of counsel), for appellants.

Pollack, Pollack, Isaac & DeCicco, LLP, New York (Brian J. Isaac of counsel), for respondents.

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Order, Supreme Court, New York County (Joan M. Kenney, J.), entered March 1, 2017 which, to the extent appealed from as limited by the briefs, granted plaintiffs' motion for partial summary on the Labor Law § 240(1) claim against defendants G-Z/10UNP Realty, LLC and Lend Lease (US) Construction LMB, Inc., unanimously affirmed, without costs.

Plaintiffs established prima facie that the injured plaintiff (plaintiff) had not been provided with adequate protection from an elevation-related risk pursuant to Labor Law § 240(1) by submitting evidence that plaintiff fell when the scissor lift he was operating toppled over and that, moreover,

the lift's tilt alarm failed to sound and the lift failed to shut down automatically when the lift unsafely tilted, contrary to the design of the machine. This claim was adequately preserved, since the facts and general theory supporting it were brought to defendants' attention in deposition testimony and expert opinion.

In opposition, defendants failed to raise an issue of fact as to whether the statute was violated. Their evidence is relevant to comparative negligence, which is not a defense to Labor Law § 240(1) (*see Celaj v Cornell*, 144 AD3d 590 [1st Dept 2016]).

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

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

ENTERED: APRIL 5, 2018

CLERK

Acosta, P.J., Tom, Oing, Moulton, JJ.

6221 The People of the State of New York, Ind. 1591/16
Respondent,

-against-

Marvin Taylor,
Defendant-Appellant.

_____

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

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

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An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Maxwell Wiley, J.), rendered November 9, 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.

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

ENTERED: APRIL 5, 2018

CLERK

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

Acosta, P.J., Tom, Oing, Moulton, JJ.

6222 Eve Cuyen Butterworth, et al., Index 150121/14
Plaintiffs-Appellants-Respondents,

-against-

281 St. Nicholas Partners, LLC, et al.,
Defendants-Respondents-Appellants.

_____

Ronald Paul Hart, P.C., New York (Ronald P. Hart of counsel), for appellants-respondents.

Adam Leitman Bailey, P.C., New York (Jeffrey R. Metz of counsel), for respondents-appellants.

_____

Order, Supreme Court, New York County (Geoffrey D. Wright, J.), entered November 23, 2016, which, inter alia, denied defendants' motion for summary judgment dismissing the complaint on the ground that the first rent overcharge occurred more than four years prior to plaintiffs filing their complaint, granted that part of plaintiffs' cross motion for summary judgment on the rent-overcharge claim, and denied that part of the cross motion as sought treble damages, unanimously modified, on the law, to the extent of granting plaintiffs treble damages limited to two years prior to the commencement of this action, limiting the rent- overcharge damages to those overcharges which occurred within four years of the commencement of the action, and remanding the matter for a re-calculation of plaintiffs' damages, and otherwise affirmed, without costs.

The court properly looked back beyond the four-year limitations period for plaintiffs' rent-overcharge claim (CPLR 213-a) to establish the proper base rent, in that sufficient indicia of fraud existed (*see Matter of Grimm v State of N.Y. Div. of Hous. & Community Renewal Off. of Rent Admin.*, 15 NY3d 358, 366-367 [2010]). While neither an increase in rent, standing alone, nor plaintiffs' skepticism about apartment improvements suffice to establish indicia of fraud (*see Matter of Grimm*, 15 NY3d at 367*; Breen v 330 E. 50th Partners, LP*, 154 AD3d 583 [1st Dept 2017]), here at the same time that the predecessor landlord increased the rent from $949.34 to $1,600 in plaintiffs' initial lease, it also ceased filing annual registration statements for 2007 through 2012. Moreover, plaintiffs' initial lease contained a "Deregulation Rider for First Unregulated Rent," which left blank spaces which would have indicated either that the last legal regulated rent or the new legal rent exceeded the $2,000 threshold for deregulation, and may well be viewed as an attempt to obfuscate the regulatory status of the apartment, despite that the rent had not reached the $2,000 threshold.

Nevertheless, while the court properly determined that the last legal rent was $949.34, and that the complaint should not be dismissed based on this four-year limitation period, this look back based on such indicia of fraud did not warrant assessing

overcharge damages for the entire period. Rather, "section 213-a merely limits tenants' recovery to those overcharges occurring during the four-year period immediately preceding [plaintiffs'] rent challenge" (*Conason v Megan Holding, LLC*, 25 NY3d 1, 6 [2015]; CPLR 213-a).

Furthermore, the discrepancies in plaintiffs' initial lease, and the lack of any annual registration statements after the increase, coupled with the fact that the $1,600 did not reach the threshold for deregulation, demonstrate that defendant landlord failed to show by a preponderance of evidence that it did not act willfully (*see Matter of Yorkroad Assoc. v New York State Div. of Hous. & Community Renewal*, 19 AD3d 217, 218 [1st Dept 2005]; *Matter of Sohn v New York State Div. of Hous. & Community Renewal*, 258 AD2d 384 [1st Dept 1999]). However, "[n]o penalty of three times the overcharge may be based upon an overcharge having occurred more than two years before the complaint is filed" (Administrative Code of City of NY § 26-516 [a][2][i]).

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

ENTERED: APRIL 5, 2018

CLERK

Acosta, P.J., Tom, Oing, Moulton, JJ.

6224 Stacey Anderson, Index 306778/14
Plaintiff-Appellant,

-against-

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

_____

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

Zachary W. Carter, Corporation Counsel, New York (Eric Lee of counsel), for respondents.

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Order, Supreme Court, Bronx County (Larry S. Schachner, J.), entered on or about December 2, 2016, which granted the motion of defendants the City of New York and Det. Maria Lopez-Cruz for summary judgment dismissing the complaint, unanimously affirmed, without costs.

Dismissal of plaintiff's false arrest and malicious prosecution claims was proper where defendants submitted competent proof that during the execution of the search warrant plaintiff was in constructive possession of the drugs and paraphernalia in plain view in the living room of the apartment where plaintiff was arrested and that the police had probable cause to arrest her (*see People v Manini*, 79 NY2d 561, 573 [1992]; *Boyd v City of New York,* 143 AD3d 609 [1st Dept 2016]). Even accepting plaintiff's account that she was sleeping in a

bedroom of the apartment when police arrived, she failed to raise a triable issue of fact regarding probable cause (*see e.g. Walker v City of New York*, 148 AD3d 469 [1st Dept 2017]).

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: APRIL 5, 2018

CLERK

Acosta, P.J., Tom, Oing, Moulton, JJ.

6225-
6226-
6227 Ind. 4558/04

The People of the State of New York,
Appellant,

-against-

Amir Douglas,
Respondent.

- - - - -

The People of the State of New York,
Respondent,

-against-

Amir Douglas,
Defendant-Appellant.

_____

Darcel D. Clark, District Attorney, Bronx (Lori A. Farrington of counsel), for appellant/respondent.

Christina Swarns, Office of the Appellate Defender, New York (Joseph M. Nursey of counsel), for respondent/appellant.

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Judgment, Supreme Court, Bronx County (Seth L. Marvin, J.), rendered May 24, 2007, convicting defendant, after a jury trial, of gang assault in the first degree and two counts of assault in the second degree, and sentencing him, as a persistent violent felony offender, to an aggregate term of 25 years to life, unanimously reversed, as a matter of discretion in the interest of justice, and the matter remanded for a new trial. Appeal from order, Supreme Court, Bronx County (April Newbauer, J.), entered on or about March 23, 2017, which granted defendant's CPL 440.10

motion to vacate the judgment of conviction, unanimously dismissed, as academic.

We conclude that the lack of an accomplice corroboration charge (*see* CPL 60.22) warrants a new trial, and we reach this unpreserved issue in the interest of justice. The People's case against defendant was based almost entirely on the testimony of three witnesses, each of whom was either an accomplice as a matter of law or a person who could reasonably be viewed by the jury as an accomplice as a matter of fact (*see People v Sage*, 23 NY3d 16, 23 [2014]; *People v Berger*, 52 NY2d 214, 219 [1981]). While there was some nonaccomplice evidence, it was far from extensive (*see Sage*, 23 NY3d at 27-28). In fact, one of the only other witnesses undermined the accomplice testimony by establishing that defendant was not initially identified as a perpetrator of the underlying assault.

Moreover, we conclude that counsel's admittedly nonstrategic failure to request the instruction constituted ineffective assistance under all the circumstances of the case (*see People v Caban*, 5 NY3d 143, 152 [2005]).

We have considered and rejected defendants' arguments for dismissal, addressed to the sufficiency and weight of the evidence. Since we are ordering a new trial, we find it

unnecessary to reach any other issues raised on defendant's appeal from the judgment. In light of the foregoing, the People's appeal from the order granting defendant's CPL 440.10 motion is academic.

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

ENTERED: APRIL 5, 2018

CLERK

Acosta, P.J., Tom, Oing, Moulton, JJ.

6228 Shanaiah Williams, Index 155569/16
Plaintiff-Appellant,

-against-

268 West 47th Rest. Inc.,
doing business as The Copacabana,
Defendant-Respondent.

_____

Bisogno & Meyerson LLP, Brooklyn (George D. Silva of counsel), for appellant.

Havkins Rosenfeld Ritzert & Varriale, LLP, New York (Steven H. Rosenfeld of counsel), for respondent.

_____

Order, Supreme Court, New York County (Joan M. Kenney, J.), entered February 3, 2017, which granted defendant's motion to dismiss the complaint, and denied plaintiff's cross motion to amend the complaint, unanimously affirmed, without costs.

The complaint alleges that on April 12, 2015, plaintiff was "assaulted, struck, grabbed, battered, beaten, punched, thrown, and seriously injured" by defendant's employee. Contrary to plaintiff's argument, these allegations do not assert a claim sounding in negligence, but rather allege the intentional tort of assault, which is governed by a one-year statute of limitations (CPLR 215[3]). Accordingly, the July 5, 2016 complaint was properly dismissed as untimely (*see Smiley v North Gen. Hosp.*, 59 AD3d 179 [1st Dept 2009]).

The motion court providently exercised its discretion in denying plaintiff's cross motion for leave to amend the complaint to add a cause of action for negligent hiring and retention. Plaintiff failed to show that the proffered amendment was "not palpably insufficient or clearly devoid of merit" (*Cruz v Brown*, 129 AD3d 455, 456 [1st Dept 2015] [internal quotation marks omitted]). Since the complaint sought to impose liability under the principle of respondeat superior, there can be no claim for negligent hiring and retention (*see De La Cruz v Dalmida*, 151 AD3d 563, 564 [1st Dept 2017]).

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

ENTERED: APRIL 5, 2018

CLERK

Acosta, P.J., Tom, Oing, Moulton, JJ.

6229-
6230 Colonial Surety Company,
Plaintiff-Respondent,

-against-

Eastland Construction, Inc.,
et al.,
Defendants-Appellants.

Index 603656/08

Cox Padmore Skolnik & Shakarchy LLP, New York (Sanford J. Hausler of counsel), for appellants.

McElroy, Deutsch, Mulvaney & Carpenter, LLP, New York (Kevin S. Brotspies of counsel), for respondent.

Judgment, Supreme Court, New York County (Saliann Scarpulla, J.), entered December 6, 2016, in plaintiff's favor, unanimously affirmed, with costs. Appeal from order, same court and Justice, entered August 11, 2016, unanimously dismissed, without costs, as subsumed in the appeal from the judgment.

Plaintiff made a prima facie showing of its entitlement to indemnification for payments made in connection with the construction bonds it issued by submitting, in addition to the indemnification agreement and the bonds, an affidavit by its president and an itemized statement of loss and expense, as well as related invoices and checks (*see Prestige Decorating & Wallcovering, Inc. v United States Fire Ins. Co.*, 49 AD3d 406, 406-407 [1st Dept 2008]; *see also Utica Mut. Ins. Co. v Cardet*

Constr. Co., Inc., 114 AD3d 847, 849 [2d Dept 2014]; *International Fid. Ins. Co. v Kulka Constr. Corp.*, 100 AD3d 967, 968 [2d Dept 2012]). The fact that plaintiff's president did not explicitly say that plaintiff "honestly believed" it was liable for the claims on which it made payment does not render plaintiff's showing insufficient (*see generally Safeco Ins. Co. of Am. v M.E.S., Inc.*, 2017 WL 1194730, 2017 US Dist LEXIS 47924 [ED NY, March 30, 2017]).

In opposition, defendants failed to raise a material question of fact as to whether plaintiff made any payments of bond claims in bad faith, since their affidavits do not allege fraud or collusion by plaintiff in connection with its acceptance of liabilities or payment of claims (*see BIB Constr. Co. v Fireman's Ins. Co. of Newark, N.J.*, 214 AD2d 521, 523-524 [1st Dept 1995]; *Frontier Ins. Co. v Renewal Arts Contr. Corp.*, 12 AD3d 891, 893 [3d Dept 2004]; *Peerless Ins. Co. v Talia Constr. Co.*, 272 AD2d 919 [4th Dept 2000]).

Plaintiff's entitlement to the award of attorneys' and consulting fees is demonstrated by the record evidence, including

the testimony taken at an inquest on the reasonableness of the fees paid to Beacon Consulting.

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

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

ENTERED: APRIL 5, 2018

CLERK

Acosta, P.J., Tom, Oing, Moulton, JJ.

6231 The People of the State of New York, Respondent, Ind. 1544/15

-against-

Ronald Lewis, Defendant-Appellant.

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

Judgment, Supreme Court, Ne York County (Richard D. Carruthers, J.), rendered December 17, 2015, 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: APRIL 5, 2018

CLERK

Acosta, P.J., Tom, Oing, Moulton, JJ.

6232N In re Harold Peerenboom, Index 162152/15
Petitioner-Respondent,

-against-

Marvel Entertainment, LLC,
Respondent.
- - - - -
Issac Perlmutter,
Nonparty Appellant.

_____

Paul, Weiss, Rifkind, Wharton & Garrison LLP, New York (Allan J. Arffa of counsel), for appellant.

Kasowitz Benson Torres LLP, New York (Michael P. Bowen of counsel), for respondent.

_____

Order, Supreme Court, New York County (Nancy M. Bannon, J.), entered August 16, 2017, which, to the extent appealed from as limited by the briefs, after remand from this Court (148 AD3d 531 [1st Dept 2017]), denied so much of nonparty Issac Perlmutter's motion for a protective order as sought an order prohibiting respondent Marvel Entertainment, LLC from disclosing 85 specified documents submitted to the Court under seal,[1] under the work

[1] The appeal is limited to the following numbered documents: 1, 8, 9, 20, 27, 34, 35, 36, 51, 52, 55, 57, 58, 82, 110, 189, 190, 223, 247, 260, 265, 266, 267, 268, 272, 274, 283, 286, 288, 294, 305, 308, 309, 310, 312, 317, 318, 323, 330, 332, 333, 336, 343, 371, 395, 401, 410, 418, 420, 422, 424, 427, 428, 430, 431, 432, 433, 434, 435, 436, 437, 438, 443, 447, 454, 455, 456, 457, 459, 469, 470, 471, 493, 529, 622, 767, 768, 769, 770, 790, 791, 819, 854, 855, and 862.

product doctrine, unanimously reversed, on the law and in the exercise of discretion, without costs, and the motion granted to that extent.

After diligent review of approximately 1000 documents that nonparty Perlmutter claimed were exempt from discovery by petitioner Peerenboom on work product grounds (CPLR 3101[c]) and/or as material prepared in anticipation of litigation (CPLR 3101[d]), Supreme Court determined that all but 251 documents were entitled to work product protection. With due deference to the discretion of the trial court, upon review of the submitted documents, we find that nonparty Perlmutter has demonstrated that the above-specified documents are also entitled to protection as work product or materials prepared in anticipation of litigation, and substitute our discretion to that extent (*see Andon v 302-304 Mott St. Assoc.*, 94 NY2d 740, 745 [2000]).

Some of the disputed documents contain draft pleadings or emails discussing changes to such pleadings, which constitute material protected by the work product privilege (*see John Blair Communications v Reliance Capital Group*, 182 AD2d 578, 578 [1st Dept 1992]; *see also Nab-Tern-Betts v City of New York*, 209 AD2d 223, 224 [1st Dept 1994]). In addition, several documents containing discussions between attorneys regarding topics related to the pending Florida action between petitioner and Perlmutter

constitute attorney work product as they reflect "an attorney's legal research, analysis, conclusions, legal theory or strategy" (*Matter of New York City Asbestos Litig.*, 109 AD3d 7, 12 [1st Dept 2013]). The detailed invoices prepared by Perlmutter's attorneys are also protected as work product since they contain summaries of their "legal research, analysis, conclusions, legal theory or strategy" (*id.* at 12; *see De La Roche v De La Roche*, 209 AD2d 157, 159 [1st Dept 1994]).

Perlmutter also has demonstrated that certain documents concerning an investigation undertaken by Kroll Advisory Solutions are entitled to the qualified protection provided by CPLR 3101(d)(2) for materials prepared in anticipation of litigation. The record shows that Kroll was hired by Perlmutter's attorney to conduct an investigation in connection with the pending Florida action, which includes claims of defamation broadly implicating petitioner's reputation. Petitioner has not asserted that the investigation firm was retained for other purposes (*see MBIA Ins. Corp. v Countrywide Home Loans, Inc.*, 93 AD3d 574, 574 [1st Dept 2012]). As such,

emails between and among Kroll and the attorneys discussing the investigation and Kroll's findings are protected, and petitioner has not made any showing of substantial need and inability to obtain this information without undue hardship (CPLR 3101[d][2]).

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

ENTERED: APRIL 5, 2018

CLERK

Acosta, P.J., Tom, Oing, Moulton, JJ.

6233N Richard Martinez, Index 20797/16
Plaintiff-Appellant,

-against-

Leverne C. Pinard, et al.,
Defendants,

Eduard R. Ventura de Leon, et al.,
Defendants-Respondents.

_____

Daniella Levi & Associates, P.C., Fresh Meadows (Daniella Levi of counsel), for appellant.

Mauro Lilling Naparty, LLP, Woodbury (Seth M. Weinberg of counsel), for respondents.

_____

Order, Supreme Court, Bronx County (Laura G. Douglas, J.), entered August 3, 2017, which, to the extent appealed from as limited by the briefs, granted defendants Eduard R. Ventura de Leon and Crida Car, Inc.'s (defendants) motion to preclude plaintiff from being accompanied by a nonlegal representative at a defense physical examination, and denied plaintiff's cross motion to deem defendants to have waived a physical examination or, in the alternative, to be permitted to have a nonlegal representative of his choosing present at the examination, unanimously reversed, on the law, without costs, defendants' motion denied, and plaintiff's cross motion to be permitted to have a representative of his choosing present at his physical

examination granted.

Defendants concede that, under this Court's recent decision in *Santana v Johnson* (154 AD3d 452 [1st Dept 2017]), they can no longer argue that plaintiff was required to show "special and unusual circumstances" to be permitted to have a nonlegal representative present at a physical examination conducted on their behalf pursuant to CPLR 3121.

There is no basis for finding that defendants waived their right to conduct a physical examination of plaintiff by including unreasonable restrictions in their notice of examination. Defendants' conduct was supported by a good faith interpretation of applicable case law (*see Kattaria v Rosado*, 146 AD3d 457, 458 [1st Dept 2017]; *IME Watchdog, Inc. v Baker, McEvoy, Morrissey & Moskovits, P.C.*, 145 AD3d 464 [1st Dept 2016]).

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

ENTERED: APRIL 5, 2018

CLERK

Acosta, P.J., Tom, Oing, Moulton, JJ.

6234N Cynthia Harris, Index 25537/15E
Plaintiff-Respondent,

-against-

The New York City Health and Hospitals Corporation,
Defendant-Appellant,

Reginald Denis, M.D., et al.,
Defendants.

_____

Zachary W. Carter, Corporation Counsel, New York (Emma Grunberg of counsel), for appellant.

Lisa M. Comeau, Garden City, for respondent.

_____

Order, Supreme Court, Bronx County (Douglas E. McKeon, J.), entered December 16, 2016, which granted plaintiff's motion for leave to file an untimely notice of claim, unanimously affirmed, without costs.

This appeal involves a claim against defendant New York City Health and Hospitals Corporation (HHC) for medical malpractice allegedly committed by the individually named defendants during their employment as physicians at Lincoln Medical and Mental Health Center (Lincoln Hospital) in providing plaintiff with medical treatment on or about July 22, 2014 by failing to diagnose that she had a brain tumor.

The Supreme Court providently exercised its discretion in

granting plaintiff leave to file a late notice of claim upon HHC (*see* General Municipal Law § 50-e[5]). Plaintiff's expert affidavit establishes that HHC obtained actual knowledge of the facts underlying plaintiff's theory of a departure from the accepted standard of care with regard to the diagnosis and treatment of her brain tumor and the existence of a causally related injury (*see Alvarez v New York City Health & Hosps. Corp. [North Cent. Bronx Hosp.]*, 101 AD3d 464 [1st Dept 2012]). Although HHC does not deny it has the July 2014 MRI film in its possession, it failed to produce it or submit a medical expert's affidavit rebutting the opinion of plaintiff's medical expert that the MRI establishes that Lincoln Hospital's staff failed to diagnose the mass on plaintiff's brain even though it was visible at the time she received medical treatment at Lincoln Hospital, because the head imaging studies conducted by nonparty New York Radiology Partners on May 7, 2014 and April 27, 2015, respectively, show the tumor (*see Perez v New York City Health & Hosps. Corp.*, 81 AD3d 448, 448-449 [1st Dept 2011]).

Contrary to HHC's contention, plaintiff has demonstrated a reasonable excuse for the delay, because the record shows that her tumor was not diagnosed until April 27, 2015, and that she required two surgeries to treat it (*see Matter of Kellel B. v New York City Health & Hosps. Corp.*, 122 AD3d 495, 496 [1st Dept

2014]). Even if this Court were to find that plaintiff failed to set forth a reasonable excuse for the delay, the lack of a reasonable excuse is not, standing alone, sufficient to deny her leave application because the record shows that HHC received timely actual notice of the essential facts underlying plaintiff's medical malpractice claim (*see Renelique v New York City Hous. Auth.*, 72 AD3d 595, 596 [1st Dept 2010]).

In addition, HHC will not be prejudiced by allowing plaintiff to file a late notice of claim pertaining to the alleged failure to timely diagnose her brain tumor because her medical records presumably reflect the course of treatment and the facts relevant to her claims (*see Uzcha v New York City Health & Hosps. Corp.*, 288 AD2d 48 [1st Dept 2001]). Lastly, HHC's contention that it has been prejudiced because Jarome Kalil Lazaga, M.D., is no longer employed by the Lincoln Hospital, does not remember plaintiff and is now living in California is unavailing, because he is a named defendant who is represented by HHC's counsel and there is no indication in the record that he or

any other witness are actually unavailable (*see Caminero v New York City Health & Hosps. Corp. [Bronx Mun. Hosp. Ctr.]*, 21 AD3d 330, 333 [1st Dept 2005]).

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

ENTERED: APRIL 5, 2018

CLERK

Friedman, J.P., Gesmer, Kern, Moulton, JJ.

4369 The People of the State of New York, Respondent, Ind. 14/10

-against-

Yosttin Ortiz, Defendant-Appellant.

_____

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

Darcel D. Clark, District Attorney, Bronx (Ryan P. Mansell of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (Troy K. Webber, J.), entered on or about December 9, 2015, 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 People met their burden of establishing, by clear and convincing evidence, risk factors bearing a sufficient total point score to support a level three sex offender adjudication (*see* Correction Law § 168-n[3]). Defendant was properly assessed points under the risk factor for being a stranger to the victim. To impute to defendant the codefendant's alleged acquaintance with the victim would be an illogical application of the principle of accessorial liability, having little bearing on defendant's personal risk of reoffense. The court also properly

considered defendant's prior youthful offender adjudication in assessing points under the risk factors for prior crimes and the recency of those prior crimes (*see People v Francis*, - NY3d -, 2018 NY Slip Op 01017 [February 13, 2018]; *see also People v Wilkins*, 77 AD3d 588 [1st Dept 2010], *lv denied* 16 NY3d 703 [2011]).

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, most notably his age (nearly 17) at the time of the underlying crime, were adequately taken into account by the risk assessment instrument, or were outweighed by the heinousness of the crime.

The court properly designated defendant a sexually violent offender because he was convicted of an enumerated offense, as an adult offender under New York law, and it lacked discretion to do otherwise (*see People v Bullock*, 125 AD3d 1 [1st Dept 2014], *lv denied* 24 NY3d 915 [2015]). We have considered and rejected

defendant's constitutional arguments, including his claims that, because of his age at the time of the crime, he was constitutionally entitled to relief from his risk level and his sexually violent offender designation.

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

ENTERED: APRIL 5, 2018

CLERK

Renwick, J.P., Andrias, Kapnick, Gesmer, Moulton, JJ.

5692 Helen Einach, etc., Index 113332/08
Plaintiff-Respondent,

-against-

Lenox Hill Hospital,
Defendant-Appellant.

_____

Shaub, Ahmuty, Citrin & Spratt, LLP, Lake Success (Christopher Simone of counsel), for appellant.

Raymond A. Raskin, Brooklyn ((Louis A. Badolato of counsel), for respondent.

_____

Order, Supreme Court, New York County (Joan B. Lobis, J.), entered on or about July 25, 2016, which, in this action where plaintiff alleges that the decedent suffered intracranial bleeding as a result of defendant's negligent decision to administer Heparin, denied defendant's motion for summary judgment dismissing the complaint, unanimously reversed, on the law, without costs, and the motion granted. The Clerk is directed to enter judgment accordingly.

The affirmation of defendant's expert was sufficient to meet defendant's prima facie burden of establishing the absence of a departure "from good and accepted medical practice, or that any such departure was not a proximate cause of the [decedent's] alleged injuries" (*Anyie B. v Bronx Lebanon Hosp.*, 128 AD3d 1, 3 [1st Dept 2015]).

Although plaintiff's expert affirmation was sufficient to raise issues of fact regarding whether defendant departed from good and accepted practice by prescribing Heparin (*see Diaz v New York Downtown Hosp.*, 99 NY2d 542, 544 [2002]), it was not sufficient to raise any issues of fact as to causation. Additionally plaintiff's expert based his opinion on his on his erroneously belief that plaintiff was taking Plavix. The conclusory assertion of plaintiff's expert that the decedent's intracranial bleeding was not caused by hemorrhagic conversion of an infarct - the contemporaneous diagnosis - but by the administration of Heparin is not sufficient to meet plaintiff's burden - especially in light of his failure to address defendant's expert's opinion that the cause of the bleeding is unknowable because all patients suffering from ischemic stroke are at risk of hemorrhage, with or without Heparin (*see Meyer v Booth Mem. Med. Ctr.*, 270 AD2d 319, 320 [2d Dept 2000], *lv denied* 95 NY2d 755 [2000]). Additionally, after noting in his affirmation that plaintiff had stopped taking Plavix, an antiplatelet, plaintiff's expert then contradicts himself by

basing his opinion in part on the incorrect assertion that plaintiff was still taking the drug when he presented at the Lenox Hill emergency room.

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

ENTERED: APRIL 5, 2018

CLERK

Richter, J.P., Manzanet-Daniels, Andrias, Kapnick, Webber, JJ.

6189 The People of the State of New York, Respondent,

-against-

Eric Soto,
Defendant-Appellant.

Ind. 3282/12

_____

Richard M. Weinstein, New York, for appellant.

Darcel D. Clark, District Attorney, Bronx (Joshua P. Weiss of counsel), for respondent.

_____

Judgment, Supreme Court, Bronx County (Peter J. Benitez, J.), rendered November 14, 2014, convicting defendant, after a jury trial, of grand larceny in the second degree and criminal possession of a forged instrument in the second degree (48 counts), and sentencing him to concurrent terms of 1⅓ to 4 years, unanimously affirmed.

Defendant's claim that he was deprived of his right to call a witness is unpreserved, as well as unreviewable for lack of a proper record, and we decline to review it in the interest of justice. As an alternative holding, we find no basis for reversal.

After the court reserved decision on the relevancy of the testimony of the proposed defense witness, and before it made a ruling, defense counsel stated that the issue was moot and that

the defense was resting without calling the witness. In a CPL 330.30(1) motion to set aside the verdict, defendant claimed, for the first time, that the absence of testimony from the proposed witness was the product of tampering by persons possibly acting in collusion with the prosecutor.

Defendant's postverdict motion had no preservation effect (*see People v Padro*, 75 NY2d 820 [1990]). Moreover, the issue was not cognizable under CPL 330.30(1) because such a motion is limited to grounds appearing in the record (*see People v Wolf*, 98 NY2d 105 [2002]; *see also People v Giles*, 24 NY3d 1066, 1068 [2014]; *People v Bumbray*, 63 AD3d 412 [1st Dept 2009]). In any event, in his offer of proof, defendant did not establish the relevance of the proposed testimony, and it would have been within the court's discretion to exclude it in the first place (*see e.g. People v Danvers*, 59 AD3d 229, 230-231 [1st Dept 2009], *lv denied* 12 NY3d 815 [2009]).

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

ENTERED: APRIL 5, 2018

CLERK

Richter, J.P., Manzanet-Daniels, Andrias, Kapnick, Webber, JJ.

6190 Sigfrido Benitez, Index 151661/15
Plaintiff-Respondent,

-against-

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

Rockledge Scaffolding, et al.,
Defendants-Appellants.

_____

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

Gentile & Associates, New York (Laura Gentile of counsel), for respondent.

_____

Order, Supreme Court, New York County (Lynn R. Kotler, J.), entered July 5, 2017, which, inter alia, denied the motion of defendants Rockledge Scaffolding and Rockledge Scaffolding Corp. (collectively Rockledge) for summary judgment dismissing the complaint and all cross claims as against them, unanimously affirmed, without costs.

Regardless of whether Rockledge established its entitlement to summary judgment, plaintiff's expert affidavit raised a triable issue of fact as to whether, inter alia, it launched an instrument of harm by negligently placing a sidewalk shed's steel vertical support beams, which were allegedly too close to where bus passengers would be disembarking, without mediating the

danger by providing warning or wrapping the beams with padding (*see Espinal v Melville Snow Contrs.*, 98 NY2d 136, 141-142 [2002]*; Schnur v City of New York*, 298 AD2d 332 [1st Dept 2002]; *Dickert v City of New York*, 268 AD2d 343 [1st Dept 2000]).

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

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

ENTERED: APRIL 5, 2018

CLERK

Richter, J.P., Manzanet-Daniels, Andrias, Kapnick, Webber, JJ.

6191 In re Michael R.,

A Child Under Eighteen Years of Age, etc.,

Shirley W.,
Respondent-Appellant.

Administration for Children's Services,
Petitioner-Respondent.

_____

Carol L. Kahn, New York, for appellant.

Zachary W. Carter, Corporation Counsel, New York (Jessica Miller of counsel), for respondent.

_____

Order, Family Court, Bronx County (Monica D. Shulman, J.), entered on or about May 9, 2017, which denied respondent mother's motion to dismiss the neglect petition based on her failure to rebut the presumption that she was properly served with the summons and petition, unanimously affirmed, without costs.

On December 23, 2016, petitioner Administration for Children's Services (ACS) provided the court with an affidavit of attempted service, which evidenced that Nationwide Court Services Inc., the process server, attempted to serve the mother at her undisputed home address, and the female who answered the door refused to identify herself or provide any information with regard to the mother. On January 11, 2017, petitioner provided the court with an affidavit of attempted service, which evidenced

that the process server attempted to serve respondent on three additional dates. The court properly found that reasonable efforts had been made to effectuate personal service, and ordered ACS to serve the mother by "affix and mail" substitute service. The process server submitted an affidavit of substitute service by "affix and mail," which stated that service was effectuated on the mother by affixing a copy of the summons and petition to her home address and by mailing the same documents. Upon the mother's indication in court that she had not been served with papers, the court directed that ACS re-serve the mother by "affix and mail" service at that address. ACS submitted a second affidavit of affix and mail service, again indicating that a copy of the summons and petition had been affixed to the mother's door and mailed to her home address (*see Washington Mut. Bank v Holt*, 71 AD3d 670 [2d Dept 2010]).

The court, therefore, properly determined that even assuming the mother had not been served properly in the first instance, ACS cured any defects when it effectuated service on the mother the second time, as indicated in the second affidavit of "affix and mail service" (Family Court Act § 1036[b]). The mother failed to allege any facts substantiating her claim that she was not served, and had confirmed that she resided at the address to which she twice had been provided with the papers informing her

of the ongoing proceedings. It is further noted that while the mother maintained that the method of service was improper, she did not deny that she received the summons and petition. Additionally, service was completed in the manner directed by the court.

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

ENTERED: APRIL 5, 2018

CLERK

Richter, J.P., Manzanet-Daniels, Andrias, Kapnick, Webber, JJ.

6192 76th and Broadway Owner LLC, et al.,
Plaintiffs-Respondents,

-against-

Consolidated Edison Company of New York Inc.,
Defendant-Appellant,

General Glass & Metal LLC,
Defendant.

- - - - -

Consolidated Edison Company of New York Inc.,
Third-Party Plaintiff,

-against-

Safeway Construction Enterprises, Inc.,
Third-Party Defendant-Appellant.

Index 452935/14

_____

McGaw, Alventosa & Zajac, Jericho (Andrew Zajac of counsel), for appellants.

Hannum Feretic Prendergast & Merlino, LLC, New York (Sean M. Prendergast of counsel), for respondents.

_____

Order, Supreme Court, New York County (Gerald Lebovits, J.), entered September 5, 2017, which, inter alia, denied defendant-third-party plaintiff Consolidated Edison's and third-party defendant Safeway Construction Enterprises, Inc.'s motions for summary judgment dismissing the complaint and cross claims as against them, unanimously reversed, on the law, with costs, and the motions granted. The Clerk is directed to enter judgment

accordingly.

In the underlying personal injury action against the plaintiffs in the instant action, an employee of defendant General Glass & Metal LLC, one of multiple contractors working at a construction site, was injured when he stepped on a protruding nail in a piece of plywood which was allegedly part of a platform in a fenced-in delivery area.

In the instant action, after Con Ed and Safeway established their prima facie entitlement to summary judgment, the motion court erred in finding that plaintiffs raised a triable issue of fact with an accident report based on speculation and hearsay.

Specifically, although the report's author had a business duty to prepare the report, the statement in the report that the platform "must have been moved during demolition and trench work . . . [by Con Ed]" indicated that he did not have first hand knowledge of the occurrence and was relying on speculative statements made by others, who are not identified. Nor is there any indication that this inference was based on first hand knowledge of a third party who was under a business duty to inform the author (*see Cardona v New York City Hous. Auth.*, 153 AD3d 1179 [1st Dept 2017; CPLR 4518). The business records exception to the hearsay rule does not permit the receipt into evidence of entries based upon voluntary hearsay statements made

by third parties not engaged in the business or under a duty in relation thereto (*see Johnson v Lutz*, 253 NY 124, 128 [1930]). Moreover, the statement that the plywood was dislodged from the platform of a traffic light by Con Ed workers was speculative in that the area was replete with employees of various subcontractors performing construction work and with deliveries from numerous vendors, any one of which could have struck the platform on the traffic light (*see Beckford v New York City Hous. Auth.*, 84 AD3d 441 [1st Dept 2011]).

In the absence of any nonhearsay, nonspeculative evidence in opposition, Con Ed and Safeway are entitled to summary judgment (*see Gonzalez v 1225 Ogden Deli Grocery Corp.*, __ AD3d __, 2018 NY Slip Op 01280 [1st Dept 2018]).

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

ENTERED: APRIL 5, 2018

CLERK

Richter, J.P., Manzanet-Daniels, Andrias, Kapnick, Webber, JJ.

6194 In re Barbara White, Petitioner, Index 101029/16

-against-

New York State Division of Human Rights (NYS DHR), et al., Respondents.

_____

Barbara White, petitioner pro se.

Goldberg and Weinberger LLC, New York (Lewis Goldberg of counsel), for respondents.

_____

Final order of respondent New York State Division of Human Rights, dated April 29, 2016, which adopted the recommended order of the Administrative Law Judge, dismissing petitioner's disability and housing discrimination complaint, unanimously confirmed, the petition denied, and the proceeding (transferred to this Court pursuant to Executive Law § 298 and 22 NYCRR 202.57[c] by order of Supreme Court, New York County [Lucy Billings, J.], entered December 6, 2016) dismissed, without costs.

This Court's review of respondent DHR's determination is limited to whether it is supported by substantial evidence in the record (*see 300 Gramatan Ave. Assoc. v State Div. of Human Rights*, 45 NY2d 176, 181 [1978]). Substantial evidence consists of "such relevant proof as a reasonable mind may accept as

adequate to support a conclusion or ultimate fact" (*id.* at 180; *accord Matter of City of New York v New York State Div. of Human Rights*, 228 AD2d 255, 257 [1st Dept 1996]). Moreover, DHR's factual determinations should be given "substantial deference" (*Matter of State Div. of Human Rights v County of Onondaga Sheriff's Dept.*, 71 NY2d 623, 630 [1988]). Under this standard, this Court may not substitute its judgment for the agency's, even if a contrary decision might have been reasonable (*see Ebasco Servs. v New York State Div. of Human Rights*, 234 AD2d 80 [1st Dept 1996]).

Accordingly, we are constrained by precedent to uphold the determination. We have considered petitioner's remaining contentions and find them unavailing.

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

ENTERED: APRIL 5, 2018

CLERK

Richter, J.P., Manzanet-Daniels, Andrias, Kapnick, Webber, JJ.

6195 Jason Goldfarb, Index 159203/15
Plaintiff-Appellant-Respondent,

-against-

Joseph A. Romano, Esq., et al.,
Defendants-Respondents-Appellants.

_____

The Law Offices of Joseph Vozza, Mamaroneck (Joseph Vozza of counsel), for appellant-respondent.

Moses & Singer LLP, New York (Shari Alexander of counsel), for respondents-appellants.

_____

Order, Supreme Court, New York County (Eileen Bransten, J.), entered March 10, 2017, which granted defendants Joseph A. Romano, Esq., Joseph A. Romano, P.C., and Law Offices of Joseph A. Romano, P.C.'s motion to dismiss the causes of action for breach of express contract, breach of implied contract, and unjust enrichment as against them, and the cause of action for quantum meruit as against defendant Joseph A. Romano, Esq., and otherwise denied the motion as to the cause of action for quantum meruit, unanimously modified, on the law, to deny the motion as to the breach of express contract, breach of implied contract, and unjust enrichment causes of action as against defendants Joseph A. Romano, P.C., and Law Offices of Joseph A. Romano, P.C., and otherwise affirmed, without costs.

The statute of frauds (General Obligations Law § 5-701[a][1]) does not bar the alleged oral agreement between plaintiff and defendant law firm, pursuant to which the firm agreed to pay plaintiff 50% of the legal fees it earned on cases that he procured or originated and performed work on. In pertinent part, the statute renders void an agreement that "[b]y its terms is not to be performed within one year from the making thereof." The fact that plaintiff was an at-will employee, i.e., he could be terminated at any time (*see Murphy v American Home Prods. Corp.*, 58 NY2d 293, 300-301 [1983]), made the oral agreement capable of completion within the one-year period (*see D & N Boening, Inc. v Kirsch Beverages*, 63 NY2d 449, 456 [1984]; *compare Kalfin v United States Olympic Commn.*, 209 AD2d 279, 280 [1st Dept 1994] [service contract that could not be terminated by defendant within one year absent breach by plaintiff was not terminable as of right and therefore ran afoul of statute of frauds]). The fact that legal fees earned during the one-year period would not be paid until after the period had ended did not make the agreement incapable of completion within the period (*see Gold v Katz*, 193 AD2d 566, 566 [1st Dept 1993] ["Contingencies on which the payment of an attorney's fee can depend, such as jury verdicts and settlement negotiations, did not create a power in a third person to terminate the alleged

. . . arrangement, such as would make it indefinite and incapable of performance within one year"]).

Plaintiff's allegations, supplemented by email and affidavits by other associates at the firm attesting to a course of dealing, state a cause of action against the law firm for breach of implied contract (*see Sivin-Tobin Assoc., LLC v Akin Gump Strauss Hauer & Feld LLP*, 68 AD3d 616, 617 [1st Dept 2009]; *see Mirchel v RMJ Sec. Corp.*, 205 AD2d 388, 390 [1st Dept 1994]) and unjust enrichment (*see Georgia Malone & Co., Inc. v Rieder*, 86 AD3d 406, 408 [1st Dept 2011], *affd* 19 NY3d 511 [2012]). These causes of action are properly pleaded in the alternative (*see generally Farash v Sykes Datatronics*, 59 NY2d 500, 503-504 [1983]).

Plaintiff adequately pleaded a quantum meruit claim (*see Balestriere PLLC v BanxCorp.*, 96 AD3d 497, 498 [1st Dept 2012]).

The complaint fails to state a cause of action against defendant Joseph Romano individually, since it does not allege that Romano personally entered into any agreement with plaintiff, or was enriched by plaintiff's work separately from the law firm

(*see Newman v Berkowitz*, 50 AD3d 479 [1st Dept 2008]).

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

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

ENTERED: APRIL 5, 2018

CLERK

Richter, J.P., Manzanet-Daniels, Andrias, Kapnick, Webber, JJ.

6196 The People of the State of New York, SCI 1688/14
Respondent,

-against-

Warren Scott,
Defendant-Appellant.

_____

Seymour W. James, Jr., The Legal Aid Society, New York (Tomoeh Murakami Tse of counsel), for appellant.

Darcel D. Clark, District Attorney, Bronx (Beth R. Kublin of counsel), for respondent.

_____

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, Bronx County (George Villegas, J.), rendered August 15, 2014,

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

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

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

ENTERED: APRIL 5, 2018

CLERK

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

Richter, J.P., Manzanet-Daniels, Andrias, Kapnick, Webber, JJ.

6197 Encore I, Inc., Index 157490/12
Plaintiff/Counterclaim
Defendant-Respondent,

-against-

Peter Kabcenell,
Defendant/Counterclaim
Plaintiff-Appellant,

-against-

Greg Selig,
Counterclaim Defendant-Respondent.

_____

Josh Bernstein, P.C., New York (Josh Alexander Bernstein of counsel), for appellant.

Wood Smith Henning & Berman, LLP, New York (Christopher F. Lyon of counsel), for respondents.

_____

Order, Supreme Court, New York County, (Jennifer G. Schecter, J.), entered January 5, 2017, which denied defendant Peter Kabcenell's motion for summary judgment, unanimously affirmed, without costs.

The motion court properly denied defendant's summary judgment motion on the basis that the motion was untimely filed (*see Freire-Crespo v 345 Park Ave. L.P.*, 122 AD3d 501, 502 [1st Dept 2014]). Defendant filed his motion well after the deadline set down in the preliminary conference order of April 23, 2014; that filing deadline continued to control even after the matter

was transferred to a successor justice in the same trial part, since no later order provided otherwise (*id.*; *see also Winfield v Monticello Senior Hous. Assoc.*, 136 AD3d 451, 452 [1st Dept 2016]). In addition, the motion court providently exercised its discretion in determining that defendant provided no good cause for his delay in filing the motion (*Brill v City of New York*, 2 NY3d 648, 652 [2004]).

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

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

ENTERED: APRIL 5, 2018

CLERK

Richter, J.P., Manzanet-Daniels, Andrias, Kapnick, Webber, JJ.

6198-
6199 Index 651888/15

Veneto Hotel & Casino, S.A., et al.,
Plaintiffs-Appellants,

-against-

German American Capital Corporation,
Defendant-Respondent.

_____

Arent Fox LLP, New York (Michael S. Cryan of counsel), for appellants.

Skadden, Arps, Slate, Meagher & Flom LLP, New York (Jonathan L. Frank of counsel), for respondent.

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Judgment, Supreme Court, New York County (Jeffrey K. Oing, J.), entered October 21, 2016, to the extent appealed from as limited by the briefs, dismissing the causes of action for breach of contract and breach of the implied covenant of good faith and fair dealing, unanimously affirmed, with costs. Appeal from order, same court and Justice, entered on or about October 18, 2016, unanimously dismissed, without costs, as subsumed in the appeal from the judgment.

The breach of contract claim asserted by Veneto Hotel & Casino, S.A. based on defendant's alleged breach of section 3.1.7(a)(v) of the parties' loan agreement was properly dismissed. A fair reading of the loan agreement and amendments reveals that defendant lender was not obligated to apply its

security to fund borrower Veneto's expenses following an "Event of Default." Section 3.1.7 of the loan agreement required the Account Trustee to follow the directions defendant provided to it, both when Veneto was in default and when it was not. When read in tandem with section 3.1.11(a), it is clear that defendant had "sole and absolute" discretion regarding whether it would pay for Veneto's operating expenses from the Holding Account following an Event of Default. Section 3.1.7(a)(v) does not supersede section 3.1.11(a), either expressly or impliedly, as it is clear that sections 3.1.7 and 3.1.11(a) work together and do not conflict.

Regardless, even if section 3.1.7(v) could be interpreted to be inconsistent with section 3.1.11(a), section 3.1.11(a) would still prevail in light of the "trumping" language found within it, which provides that it would apply "notwithstanding anything to the contrary" in the Loan Agreement (*Warberg Opportunistic Trading Fund, L.P. v GeoResources, Inc.*, 112 AD3d 78, 83 [1st Dept 2013]). Defendant acted within the authority and discretion provided to it under section 3.1.11(a). As the implied covenant of good faith and fair dealing "cannot negate express provisions of the agreement, nor is it violated where the contract terms unambiguously afford [a party] the right to exercise its absolute discretion," Veneto's implied covenant claim also cannot stand

(*Transit Funding Assoc., LLC v Capital One Equip. Fin. Corp.*, 149 AD3d 23, 29 [1st Dept 2017]).

With respect to the breach of contract and breach of the implied covenant claims asserted by plaintiff SE Leisure Management LLC, these were also properly dismissed. Defendant was not a party to the agreements sued upon, and plaintiffs are unable to overcome this fatal defect (*see Adams v Boston Props. Ltd. Partnership*, 41 AD3d 112, 112 [1st Dept 2007]).

Finally, the IAS court correctly dismissed Veneto's cause of action for breach of the confidentiality provisions of the loan agreement. As the IAS court correctly found, this claim was barred by paragraph 12 of the Pre-Negotiation Agreement, through which it certified that it had no defense to payment or any offsets or claims under the loan agreement (*Orchard Hotel, LLC v D.A.B. Group, LLC*, 106 AD3d 628, 629 [1st Dept 2013]). As there is no ambiguity in paragraph 12 of the Pre-Negotiation Agreement, plaintiffs were barred from relying on extrinsic evidence in an attempt to create one (*Banco Espirito Santo, S.A. v*

Concessionária Do Rodoanel Oeste S.A., 100 AD3d 100, 106 [1st Dept 2012]).

We have considered plaintiffs' remaining claims, and find them unavailing.

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

ENTERED: APRIL 5, 2018

CLERK

Richter, J.P., Manzanet-Daniels, Andrias, Kapnick, Webber, JJ.

6200 Pacific Alliance Asia Opportunity Fund L.P.,
Plaintiff-Appellant,

-against-

Kwok Ho Wan, also known as Kwok Ho, also known as Gwo Wen Gui, also known as Guo Wengui, also known also Guo Wen-Gui, also known as Wan Gue Haoyun, also known as Miles Kwok, also known as Haoyun Guo,
Defendant-Respondent.

Index 652077/17

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O'Melveny & Myers LLP, New York (Anton Metlitsky of counsel), for appellant.

Hodgson Russ LLP, New York (Mark A. Harmon of counsel), for respondent.

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Order, Supreme Court, New York County (Barry R. Ostrager, J.), entered September 20, 2017, which granted defendant's motion to dismiss the complaint pursuant to CPLR 327(a), unanimously reversed, on the facts, with costs, and the motion denied.

Defendant failed to meet the heavy burden of establishing that New York is an inconvenient forum and that there is no substantial nexus between New York and this action (*see Elmaliach v Bank of China Ltd.*, 110 AD3d 192, 208 [1st Dept 2013]). It is true that the agreements at issue in this breach of contract action concern a Chinese real estate development project and that most (although not all) of them were negotiated and executed in

Hong Kong or China. However, while defendant is a Chinese citizen, he has resided in New York for the past two years and is seeking asylum here (*see Yoshida Print. Co. v Aiba*, 213 AD2d 275 [1st Dept 1995]). Moreover, although Hong Kong is a potential alternative forum, it is not a suitable or adequate alternative, because defendant cannot return there due to his pending asylum claim and fugitive status (*see Andros Compania Maritima S.A. v Intertanker Ltd.*, 714 F Supp 669, 678 [SD NY 1989]; *Bank of Boston Intl. of Miami v Arguello Tefel*, 626 F Supp 314, 319 [ED NY 1986]; *Exeed Indus., LLC v Younis*, 2016 WL 128063, *5, 2016 US Dist LEXIS 3432, *15-16 [ND Ill, Jan. 12, 2016]; *see also Broukhim v Hay*, 122 AD2d 9, 10 [2d Dept 1986]).

Defendant has not shown that it will be a hardship for him to litigate in New York. He lives here, has brought suit against others here, and has invited others to sue him here. The agreements at issue, which are written in English, are available here, and, although plaintiff is a foreign corporation, its employees are willing to travel here at no expense to defendant (*see Yoshida*, 213 AD2d at 275). While defendant alleges broadly that his former employees and relevant documents are located in Hong Kong or China, he has not identified any specific witnesses or documents that will be necessary (*see Banco Ambrosiano v Artoc Bank & Trust*, 62 NY2d 65, 74 [1984]). He does not purport to

know the witnesses' whereabouts with certainty, and he has not made any showing with respect to their materiality (*see Yoshida*, 213 AD2d at 275).

The fact that Hong Kong law governs the instant dispute, pursuant to the choice of law provisions in the agreements, is not dispositive, since "our courts are frequently called upon to apply the laws of foreign jurisdictions" (*Intertec Contr. v Turner Steiner Intl.*, 6 AD3d 1, 6 [1st Dept 2004]). Moreover, Hong Kong law is the only foreign jurisdiction's law at issue (*see Wilson v Dantas*, 128 AD3d 176, 187 [1st Dept 2015], *affd* 29 NY3d 1051 [2017]), and there has been no showing that it is in dispute (*see Shin-Etsu Chem. Co. v ICICI Bank Ltd.*, 9 AD3d 171, 176 [1st Dept 2004]).

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

ENTERED: APRIL 5, 2018

CLERK

Richter, J.P., Manzanet-Daniels, Andrias, Kapnick, Webber, JJ.

6202-
6203 The People of the State of New York, Ind. 195/12
Respondent, 6161/11

-against-

Armando Rodriguez,
Defendant-Appellant.

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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.

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An appeal having been taken to this Court by the above-named appellant from judgments of the Supreme Court, New York County (Gregory Carro, J.), rendered August 7, 2013,

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

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

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

ENTERED: APRIL 5, 2018

CLERK

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

Richter, J.P., Manzanet-Daniels, Andrias, Kapnick, Webber, JJ.

6204 John Alverio, Index 303421/12
Plaintiff-Appellant,

-against-

Nelson Bravo Martinez, et al.,
Defendants-Respondents.

_____

Lawrence M. Savedoff, PLLC, Bronx (Laurence M. Savedoff of counsel), for appellant.

Cheven, Keely & Hatzis, New York (Thomas Torto of counsel), for Nelson Bravo Martinez and Miguel Duran, respondents.

Brand Glick & Brand, P.C., Garden City (Kenneth Finkelstein of counsel), for Belmont Leasing, LLC and Arthur Chavis, respondents.

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Order, Supreme Court, Bronx County (Elizabeth A. Taylor, J.), entered January 11, 2017, which granted defendants' motion and cross motion for summary judgment dismissing the complaint on the threshold issue of serious injury under Insurance Law § 5102(d), unanimously affirmed, without costs.

Defendants made a prima facie showing that plaintiff did not sustain a permanent consequential or significant limitation of use of his cervical spine, lumbar spine, or left shoulder, by submitting the report of their orthopedic expert, who found no significant limitations and negative clinical results, and opined that plaintiff had resolved sprains (*see Green v Domino's Pizza, LLC*, 140 AD3d 546, 546 [1st Dept 2016]). His finding of a minor

limitation in one plane of the left shoulder does not defeat defendants' showing that plaintiff did not have significant or permanent limitation in the use of his shoulder (*see Stephanie N. v Davis*, 126 AD3d 502 [1st Dept 2015]). In addition, defendants submitted medical reports of plaintiff's treating physician, who found normal range of motion in plaintiff's lumbar spine and left shoulder the day after the accident (*see Jno-Baptiste v Buckley*, 82 AD3d 578 [1st Dept 2011]). They also submitted plaintiff's deposition testimony, in which he acknowledged that he had a preexisting degenerative lower back condition for which he received Social Security disability benefits, and that he stopped all treatment related to the claimed injuries when he was "cut off" five months after the accident (*see Pommells v Perez*, 4 NY3d 566, 576 [2005]).

In opposition, plaintiff failed to raise an issue of fact. Plaintiff's physician averred that she found significant limitations in range of motion of plaintiff's cervical spine, lumbar spine and left shoulder both shortly after the accident in 2010, and, most recently, in December 2013. However, she failed to explain the conflicting findings of full range of motion in her own reports prepared the day after the accident and in the next two months (*see Colon v Torres*, 106 AD3d 458 [1st Dept 2013]; *Thomas v City of New York*, 99 AD3d 580, 581 [1st Dept

2012], *lv denied* 22 NY3d 857 [2013]). Moreover, plaintiff failed to adequately explain his cessation of treatment for these claimed injuries five months after the accident, notwithstanding that he had medical coverage through Medicare, and continued to see his primary care doctor regularly for other conditions (*see Green*, 140 AD3d at 547; *Merrick v Lopez-Garcia*, 100 AD3d 456, 456-457 [1st Dept 2012]). In light of the extended gap in treatment, plaintiff's physician's opinion that the more severe range-of-motion limitations she found in December 2013 were causally related to the accident is speculative (*see Pommells*, 4 NY3d at 574; *Merrick v Lopez-Garcia*, 100 AD3d at 457).

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: APRIL 5, 2018

CLERK

Richter, J.P., Manzanet-Daniels, Andrias, Kapnick, Webber, JJ.

6205-6206 The People of the State of New York, Respondent,

-against-

Adriano Smajlaj, Defendant-Appellant.

- - - - -

The People of the State of New York, Respondent,

-against-

Arjan Smajlaj, Defendant-Appellant.

Ind. 3996/12

_____

Brafman & Associates, P.C, New York (Mark M. Baker of counsel), for Adriano Smajlaj, appellant.

Mischel & Horn, P.C., New York (Richard E. Mischel of counsel), for Arjan Smajlaj, appellant.

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

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Judgment, Supreme Court, New York County (Daniel P. Conviser, J.), rendered January 17, 2017, convicting defendant Adriano Smajlaj, after a nonjury trial, of attempted assault in the first degree, attempted gang assault in the first degree and assault in the second degree, and sentencing him to an aggregate term of 3½ years, unanimously modified, on the law, to the extent of vacating the second-degree assault conviction and dismissing that charge, and otherwise affirmed. Judgment, same

court, Justice and date, convicting defendant Arjan Smajlaj, after a nonjury trial, of two counts of criminal possession of a weapon in the second degree, and sentencing him to concurrent terms of four years, unanimously affirmed.

The verdicts convicting both defendants were supported by legally sufficient evidence, and were not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). There is no basis for disturbing the court's credibility determinations.

Regarding defendant Arjan Smaljaj, his act of displaying a loaded pistol, racking the slide, and aiming it at the victim during an altercation sufficed to show he intended to use it unlawfully (*People v Toribio*, 216 AD2d 189, 189 [1st Dept 1995], *lv denied* 87 NY2d 908 [1995]). The evidence also supports the conclusion that the pistol recovered by the police was the same pistol wielded by Arjan.

We perceive no basis for either vacating Arjan's conviction or reducing his sentence in the interest of justice.

Regarding defendant Adriano Smaljaj, the evidence showed that he stabbed the victim in the stomach, resulting in an abdominal wound close to the victim's vital organs and that he did so with the intent to cause serious physical injury (*see People v Gilford*, 65 AD3d 840 [1st Dept 2009], *affd* 16 NY3d 864

[2011]).

The court properly denied Adriano's request to consider the defenses of justification and intoxication. There was no reasonable view of the evidence, viewed most favorably to Adriano, that would support a conclusion that he reasonably believed the victim was about to use deadly physical force, or that, at the actual time of the incident, he was so intoxicated he could not form the requisite intent.

When the court acquitted Adriano of the charge of first-degree assault, and convicted him of attempted first-degree assault as a lesser included offense, it should not have gone on to convict him of second-degree assault as an additional, lesser included offense of first-degree assault (*see* CPL 300.50[4]). Accordingly, the conviction of second-degree assault is vacated and the charge dismissed (*People v Stevenson,* 157 AD2d 563, 566 [1st Dept 1990], *lv denied* 77 NY2d 882 [1991]).

The court's verdicts convicting Adriano of attempted gang assault in the first degree but acquitting Arjan and a third defendant were not repugnant. Even assuming, without deciding, that the general principles expressed in *People v Tucker* (55 NY2d 1 [1981]) upholding factually illogical verdicts are not necessarily applicable to a nonjury trial, we find that the court had a basis on which to find that only Adriano had the intent to

cause serious physical injury to the victim, and that the others aided him, but did so with a culpable mental state that fell short of Adriano's (*see People v Sanchez*, 13 NY3d 554, 564 [2009]; *People v Mynin,* 58 AD3d 581 [1st Dept 2009], *affd* 13 NY3d 554 [2009]).

Finally we find that Adriano's statement to detectives, as testified to at trial and at the suppression hearing, was in sum and substance the same as the noticed statement (*see generally* CPL 710.30; *People v Lopez*, 84 NY2d 425, 428 [1994]). Moreover, Adriano had a full opportunity to challenge the statement's voluntariness.

We have considered defendants' remaining contentions and find them to be unavailing.

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

ENTERED: APRIL 5, 2018

CLERK

Richter, J.P., Manzanet-Daniels, Andrias, Kapnick, Webber, JJ.

6214N Migdalia Diaz, as Administratrix of the Estate of Felix Colon, deceased, Plaintiff-Respondent, Index 301016/10

-against-

City of New York, et al., Defendants-Appellants.

_____

Zachary W. Carter, Corporation Counsel, New York (Devin Slack of counsel), for appellants.

Sonin & Genis, Bronx (Robert J. Genis of counsel), for respondent.

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Order, Supreme Court, Bronx County (Larry S. Schachner, J.), entered August 8, 2016, which, to the extent appealed from as limited by the briefs, granted plaintiff's motion to amend the complaint to substitute the names of the arresting officers for John Doe and James Roe, unanimously reversed, on the law, without costs, and the motion denied.

The motion court erred in granting plaintiff leave to amend her complaint and substitute the officers' names under the relation back doctrine, because the officers are not "united in interest" with the City of New York, the original defendant (*see Thomas v City of New York*, 154 AD3d 417 [1st Dept 2017]; *Higgins v City of New York*, 144 AD3d 511 [1st Dept 2016]). Moreover, plaintiff failed to show that the failure to name defendants was

a mistake (*see Buran v Coupal*, 87 NY2d 173, 181 [1995]; *Garcia v New York-Presbyt. Hosp.*, 114 AD3d 615, 616 [1st Dept 2014]). Further, as for those claims where plaintiff was unaware of the officers' identities prior to the statute of limitations running, she failed to show that she conducted a diligent inquiry into the actual identities of the intended defendants before the expiration of the statutory period (*see Goldberg v Boatmax://, Inc.*, 41 AD3d 255, 256 (2007); *Holmes v City of New York*, 132 AD3d 952 [1st Dept 2015]).

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

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

ENTERED: APRIL 5, 2018

CLERK

Sweeny, J.P., Manzanet-Daniels, Webber, Kahn, Moulton, JJ.

5598-
5599 Index 452674/15

Regina Alston, et al.,
Plaintiffs-Respondents,

-against-

Starrett City, Inc., et al.,
Defendants-Appellants.

- - - - -

The City of New York,
Amicus Curiae.

_____

Horing Welikson & Rosen, P.C., Williston Park (Niles C. Welikson of counsel), for appellants.

The Legal Aid Society, New York (Robert Desir of counsel), for respondents.

Zachary W. Carter, Corporation Counsel, New York (Barbara Graves-Poller of counsel), for amicus curiae.

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Order, Supreme Court, New York County (Shlomo Hagler, J.), entered July 7, 2016, reversed, on the law, without costs, the preliminary injunction vacated and defendants' motion to dismiss the complaint granted. The Clerk is directed to enter judgment for defendants.

Opinion by Sweeny, J. All concur.

Order filed.

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

John W. Sweeny, Jr. J.P.
Sallie Manzanet-Daniels
Troy K. Webber
Marcy L. Kahn
Peter H. Moulton, JJ.

5598-5599
Index 452674/15

_____x

Regina Alston, et al.,
Plaintiffs-Respondents,

-against-

Starrett City, Inc., et al.,
Defendants-Appellants.

- - - - -

The City of New York,
Amicus Curiae.

_____x

Defendants appeal from the order of the Supreme Court, New York County (Shlomo Hagler, J.), entered July 7, 2016, which granted plaintiffs' motion for a preliminary injunction to the extent of directing defendants to process and respond to plaintiff Sandra Vaughn-Cooke's application for an apartment in defendants' housing complex, and denied defendants' CPLR 3211 motion to dismiss the complaint for failure to state a claim.

Horing Welikson & Rosen, P.C., Williston Park (Niles C. Welikson of counsel), for appellants.

The Legal Aid Society, New York (Robert Desir, Judith Goldiner, Joshua Goldstein and Beth Hofmeister of counsel), and Mayer Brown LLP, New York (Jason I. Kirschner, Joaquin M. C de Baca, Mark G. Hanchet, Michael E. Rayfield, Noah Liben and Kevin C. Kelly of counsel), for respondents.

Zachary W. Carter, Corporation Counsel, New York (Barbara Graves-Poller, Aaron Bloom and Doris Bernhardt of counsel), for amicus curiae.

SWEENY, J.

This case involves the interplay of several statutes that constitute "[t]he patchwork of rent control legislation" at the federal, state and city levels (*Matter of 89 Christopher v Joy*, 35 NY2d 213, 220 [1974]). The issue before us is whether certain provisions of the City of New York's Living in Communities (LINC) Program violates New York State's Urstadt Law. For the reasons that follow, we hold that defendants correctly contend that the rider provisions contained in the LINC leases do violate the Urstadt Law.

We begin our analysis by reviewing the relevant portions of the statutes and regulations applicable to this case.

In 1971, the State Legislature enacted what is commonly referred to as the Urstadt Law (L 1971, ch 372, as amended by L 1971, ch 1012 [Unconsolidated Laws § 8605]). This statute amended the Local Emergency Housing Rent Control Act (LEHRCA) and provides, in relevant part:

> "[N]o local law or ordinance shall hereafter provide for the regulation and control of residential rents and eviction in respect of any housing accommodations which are (1) presently exempt from such regulation and control or (2) hereafter decontrolled either by operation of law or by a city housing rent agency, by order or otherwise. No housing accommodations presently subject to regulation and control pursuant to local laws or ordinances adopted or amended under authority of this

> subdivision shall hereafter be by local law or ordinance or by rule or regulation which has not been theretofore approved by the state commissioner of housing and community renewal subjected to more stringent or restrictive provisions of regulation and control than those presently in effect.
>
> "Notwithstanding any other provision of law, . . . a city having a population of one million or more shall not, either through its local legislative body or otherwise, adopt or amend local laws or ordinances with respect to the regulation and control of residential rents and eviction, including but not limited to provision for the establishment and adjustment of rents [or] the regulation of evictions . . . ."

The "Urstadt Law was intended to check City attempts, whether by local law or regulation, to expand the set of buildings subject to rent control or stabilization, and particularly to do so in the teeth of State enactments aimed at achieving the opposite effect" (*City of New York v New York State Div. of Hous. & Community Renewal*, 97 NY2d 216, 227 [2001]).

On March 26, 2008, the New York City Human Rights Law (§ 8-101 of the Administrative Code of the City of New York) was amended by Local Law 10 to ban discrimination by landlords against tenants based on their lawful source of income, including Section 8 federal housing vouchers. "Lawful source of income" is defined to "include income derived from social security, or any form of federal, state or local public assistance or housing assistance including section 8 vouchers" (Administrative Code §

8-102[25]).

Administrative Code § 8-107(5)(a)(1)(a) makes it unlawful "[t]o refuse to . . . rent, lease, approve the . . . or otherwise deny to or withhold from any persons or group of persons such a housing accommodation or any interest therein . . . because of any lawful source of income of such person or persons." Furthermore, § 8-107(5)(a)(1)(b) makes it unlawful "[t]o discriminate against "[any person] . . . because of any lawful source of income of such person . . . in the terms, conditions, or privileges of the . . . rental or lease of any such housing accommodation or an interest therein or in the furnishing of facilities or services in connection therewith."

In 2014 and 2015, in an effort to move persons living in homeless and domestic violence shelters into more stable housing, the City, via its Human Resources Administration (HRA) and Department of Homeless Services, promulgated the LINC program. For those who qualify, LINC provides rental supplements or vouchers, usually paid by HRA directly to the landlord. The program also pays other costs such as moving expenses, security deposits and broker commissions.

Most LINC programs, including the one at issue herein, require the landlord to enter into a lease rider. This rider requires the landlord to agree that the LINC tenant's lease shall

automatically renew for a second year at the same rent as the first year, and limits rent increases for the following three years to amounts approved by the Rent Guidelines Board for rent-stabilized apartments throughout the city. These terms are apparently non-negotiable.

Defendant Starrett City, Inc. was formed as a limited profit housing company pursuant to the Private Housing Finance Law, Article II, commonly known as the Mitchell-Lama Law. It is the owner of a 46-building housing complex in Brooklyn known as Spring Creek Towers. Pursuant to the Mitchell-Lama Law, New York State Division of Housing and Community Renewal sets rents at the complex under a Budget Rent Determination (BRD) process. Thus, rents at the complex are not governed by the Rent Control or Rent Stabilization Laws.

Of the complex's 5,881 units, 3,569 are subject to a project-based Section 8 contract with the U.S. Department of Housing and Urban Development. Another 470 tenants hold Section 8 vouchers. Rents for these units are set pursuant to the BRD process.

In 2015, both individual plaintiffs Regina Alston and Sandra Vaughn-Cooke were living in homeless shelters. Both were employed full time but were unable to afford market-rate residences. While in the shelter, each obtained a LINC rent

voucher.

Each individual plaintiff called Starrett at a separate time inquiring about an apartment advertised on its website for the Spring Creek Towers complex. When each advised Starrett's agent she would be using a LINC voucher, both were advised that Starrett did not accept LINC vouchers.

The individual plaintiffs along with plaintiff Fair Housing Justice Center, a housing advocacy group, thereafter commenced this action asserting causes of action against defendants for source of income discrimination under the New York City Human Rights Law. It was alleged, inter alia, that defendants, by refusing to accept LINC vouchers, were engaging in source of income discrimination in violation of Local Law 10. In lieu of an answer, defendants moved to dismiss the complaint for failure to state a cause of action. Defendants contended, among other things, that, because the LINC Program compels landlords to offer covered tenants multiple lease renewals at percentages no greater than prevailing rent stabilized rates, the LINC Program constitutes a de facto expansion of buildings subject to City regulatory control, and, therefore, is violative of the Urstadt Law.

The motion court determined that the initial rent negotiated by the landlord and a potential LINC recipient does not appear to

be governed by rent control and rent stabilization programs and that requiring future rent increases to be governed by the guidelines established for those programs does not convert the apartment into a rent-controlled or rent-stabilized apartment, subject to all the requirements of those programs. The court denied defendants' motion to dismiss and this appeal followed.[1]

The motion court erred in two respects. Although it found that the initial rent need not be determined pursuant to rent control/stabilization restrictions, it discounted the fact that the LINC program *mandates* renewals that are subject to rent stabilization increases. As discussed herein, it is the effect of the local law, not its wording, that determines whether such law expands control over housing units not presently subject to these controls.

More importantly, although the LINC program focuses on rent control/stabilization, that is not the only type of expanded control which the Urstadt Law prohibits. The statute, while of course addressing rent and evictions, also speaks of "more stringent or restrictive provisions of regulation and control than those presently in effect." The Urstadt prohibitions on expanding control thus go beyond the issue of rent regulation,

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[1]The City of New York has filed an amicus curiae brief on behalf of plaintiffs.

and encompass attempts by the local municipality to expand its control over housing units unless approved by the state DCHR. Although the motion court found that, by accepting a LINC applicant, the housing unit did not become a rent-controlled unit, this did not take that unit out of the Urstadt prohibitions. The simple fact is that the unit now became subject to additional controls to which it had not been subject to prior to signing the LINC lease, thereby extending the City's control over that unit, in violation of the Urstadt Law.

Standing alone, neither Local Law 10 nor the LINC Program's use of rent vouchers violates the Urstadt Law. The defendants herein concede as much. In fact, we have previously held that, to the extent it compels landlords to accept governmental rent vouchers for payment of rent, Local Law 10's "source of income" discrimination provisions do not violate the Urstadt Law (*see Tapia v Successful Mgt. Corp.*, 79 AD3d 422, 425 [1st Dept 2010]).

Where the LINC Program runs afoul of the Urstadt Law, however, is in its use of mandatory riders that compel a landlord to renew a lease for up to five years at a minimum increase specifically tied to other City rent regulatory programs to which the housing unit is not presently subject. The application of Local Law 10 to compel acceptance of LINC Program rent vouchers as presently structured effectively expands the number of

buildings subject to City control by imposing on those housing units a more stringent control than presently exists. This creates exactly the situation which the Urstadt Law forbids (*see City of New York*, 97 NY2d at 227; *Real Estate Bd. of N.Y., Inc. v City Council of City of N.Y.*, 16 Misc 3d 530, 532, 538 [Sup Ct, NY County 2007]). In determining whether a local law imposes more stringent or restrictive control over a housing unit than presently existed, the "substance rather than the form of the local law is determinative" (*Mayer v City Rent Agency*, 46 NY2d 139, 149 [1978]). "The key [is] the effect of the legislation on City regulatory control" (*City of New York v New York State Div. of Hous. & Community Renewal*, 97 NY2d at 227). Here, the effect of the LINC lease riders clearly and improperly expands City regulatory control to housing units not presently subject to that control.

Our decision in *Tapia, supra*, relied on by plaintiffs and the amicus, does not require a different result. There we held that, to the extent Local Law 10 required landlords to accept tenants with Section 8 vouchers, it did not violate the Urstadt Law. We explained that "acceptance of plaintiffs' Section 8 vouchers will have no impact in expanding the buildings subject to the rent stabilization law or expanding regulation under the rent laws, and thus does not offend the objective of the Urstadt

Law" (79 AD3d 425). Significantly, the defendants in *Tapia* submitted no evidence that acceptance of Section 8 vouchers would "limit the rent increases that they could [otherwise] obtain" (*Tapia v Successful Mgt. Corp.*, 24 Misc3d 1222(A), 2009 NY Slip Op 51552[U], at **** 6 [Sup Ct, NY County 2009], *affd* 79 AD3d 422 [1st Dept 2010]). Here, by contrast, it is undisputed - indeed it is specifically stated in the LINC program under consideration - that defendants' acceptance of LINC vouchers would limit the amount of rent increases for up to five years, far in excess of the roughly six months of rent restriction held in *Real Estate Board* to be violative of the Urstadt Law.

Based upon the foregoing, it is clear that compelling defendants to accept tenants with LINC Program rent vouchers as structured herein violates the Urstadt Law's proscription against expanding the number of housing units subject to "more stringent or restrictive provisions of regulation and control than those presently in effect."

In view of the foregoing, we need not reach the remaining contentions of the parties.

Accordingly, the order of the Supreme Court, New York County (Shlomo Hagler, J.), entered July 7, 2016, which granted plaintiffs' motion for a preliminary injunction to the extent of directing defendants to process and respond to plaintiff Sandra

Vaughn-Cooke's application for an apartment in defendants' housing complex, and denied defendants' CPLR 3211 motion to dismiss the complaint for failure to state a claim, should be reversed, on the law, without costs, the preliminary injunction vacated, and defendants' motion to dismiss the complaint granted. The Clerk is directed to enter judgment for defendants.

All concur.

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

ENTERED: APRIL 5, 2018

CLERK