SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

APRIL 10, 2018

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Gische, J.P., Kapnick, Oing, Moulton, JJ.

5118-
5119 Index 381022/09

Bank of America, N.A., etc.,
Plaintiff-Respondent,

-against-

Romulo Diaz,
Defendant-Appellant,

New York City Environmental Control Board, et al.,
Defendants.

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Adam E. Mikolay, PC, East Meadow (Adam E. Mikolay of counsel), for appellant.

Pincus Law Group, PLLC, Uniondale (Renee J. Aragona of counsel), for respondent.

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Judgment of foreclosure, Supreme Court, Bronx County (Lucindo Suarez, J.), entered July 19, 2016, bringing up for review an order, same entry date, court and Justice, which granted the motion of plaintiff Bank of America, N.A. to confirm the referee's report and for a judgment of foreclosure, and denied defendant's cross motion to dismiss the complaint for improper service, unanimously reversed, on the law, without costs, the judgment vacated, and the matter remanded to Supreme

Court for a traverse hearing and further proceedings consistent with the determination rendered after such hearing.

Defendant seeks to vacate his default and dismiss this action on the basis that he was never served with the summons and complaint.

As an initial matter, plaintiff asserts that defendant's motion was procedurally improper, in that he did not specify the CPLR provision under which his cross motion was made. Although defendant did not cite a specific section of the CPLR, it is abundantly clear, from his affirmation in support of his cross motion to dismiss and opposition to judgment of foreclosure and sale, that he is asserting that plaintiff failed to obtain jurisdiction over him as the grounds for dismissal. It is clear from the content of the motion papers that defendant intended to make his motion under CPLR 5015(a)(4) (*cf. Caba v Rai*, 63 AD3d 578 [1st Dept 2009], finding that defendant was not entitled to relief under CPLR 5015(a)(4) because "[n]owhere in her motion papers, however, did defendant suggest that the action should be dismissed because the court lacked personal jurisdiction...").

Therefore, we turn to the question of whether plaintiff has established service of the summons and complaint.

While a proper affidavit of service attesting to personal delivery upon a defendant is prima facie evidence of proper

service, "a sworn nonconclusory denial of service by a defendant is sufficient to dispute the veracity or content of the affidavit, requiring a traverse hearing" (*NYCTL 1998-1 Trust & Bank of N.Y. v Rabinowitz*, 7 AD3d 459, 460 [1st Dept 2004]*; Wells Fargo Bank, N.A. v Jones*, 139 AD3d 520, 523 [1st Dept 2016]).

In the instant matter, the affidavit of service indicates that personal service was made on May 26, 2009 at approximately 8:52 pm "at" 1509 East 172nd Street in the Bronx (the 1509 East address). The affidavit provides a description of the person served and indicates that "recipient signed for papers." The description is consistent with defendant's appearance. However, plaintiff does not offer a copy of the summons and complaint, or any other document, that contains the signature of the person allegedly served.

In response, defendant attests that he was never served with the summons and complaint, that he does not reside at the 1509 East address, and has never been inside that property. Defendant submitted extensive supporting documentation including the first page of the mortgage at issue here and sixteen consecutive years' worth of apartment leases for a different address. These documents establish that defendant resided next door to the 1509 East address, at 1511 East 172d Street.

Defendant also points to plaintiff's subsequent service by

mail of both an additional notice under CPLR 3215(g)(3) and a motion for judgment of foreclosure. Both of these submissions were mailed to the 1509 East address. Defendant argues that those mailings demonstrate that plaintiff was under the mistaken impression that defendant resided at that address, and thus plaintiff would presumably direct a process server to that address.

These issues warrant a traverse hearing concerning whether defendant was properly served with the summons and complaint.

Defendant further argues that the additional service requirement for default notices in residential foreclosure actions under CPLR 3215(g)(3) applies. Defendant asserts that plaintiff failed to comply with the additional service requirement of CPLR 3215(g)(3) when it mailed the notice to the 1509 East address rather than defendant's actual address next door.

Defendant submits that the subject action is a residential mortgage foreclosure action requiring a CPLR 3215(g)(3) notice because the mortgage lists the property as "DWELLING ONLY - 2 FAMILY." Defendant also relies on the definition of residential found in RPAPL 1305, which defines residential real property as real property that "is or may be used, in whole or in part, as the home or residence of one or more persons, and shall include

any building or structure used for both residential and commercial purposes."

Plaintiff argues that the subject action is not a residential mortgage foreclosure action because such actions involve foreclosure of a "home loan," which according to RPAPL 1304(6)(iii) is any loan secured by property "which is or will be occupied by the borrower as the borrower's principal dwelling." It is undisputed that defendant does not reside at the mortgaged property. In fact, although Section 6 of the mortgage obligated defendant "to occupy the Property and to use the Property as [his] principal residence for at least one year" within 60 days after executing the mortgage, defendant executed a "Family Rider (Assignment of Rents)" that provided "[u]nless [plaintiff] and [defendant] otherwise agree in writing, Section 6 concerning [defendant's] occupancy of the Property is deleted." Therefore, plaintiff asserts the action is not subject to the additional mailing requirement of CPLR 3215.

Because the RPAPL provisions cited by both plaintiff and defendant were enacted after CPLR 3215(g)(3), the clearest indicator of whether a non-owner-occupied home is a "residential mortgage" for the purpose of the additional notice requirement is the statute itself. CPLR 3215(g)(3) provides that when a default judgment "based upon nonappearance is sought against a natural

person in an action based upon nonpayment of a contractual obligation," that person is entitled to additional notice of the action, which is provided by mailing the summons to his or her place of residence. The provision was enacted out of concern for "unsophisticated homeowners" who "do not receive sufficient notice that they are about to lose their homes through foreclosure" (*Providing Additional Notice to the Mortgagees in Residential Mortgage Foreclosure Proceedings*, 2005 Rep of Advisory Comm on Civ Prac to Chief Admin Judge of Cts of St of NY, at 24, reprinted in 2005 McKinney's Session Laws of NY at 2608-2609). As defendant does not reside at the mortgaged property, this foreclosure proceeding does not place his home at risk. Accordingly, we find that plaintiff was not required to serve a 3215(g)(3) notice on defendant.

Given the factual issues as to the validity of service of the summons and complaint, the threshold issue of personal

service should have been resolved with a traverse hearing (*see* *Wells Fargo Bank, N.A.*, 139 AD3d 520; *NYCTL 1998-1 Trust* 7 AD3d 459). We reverse and remand for such a hearing.

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

ENTERED: APRIL 10, 2018

CLERK

Andrias, J.P., Gesmer, Kern, Singh, Moulton JJ.

5833 In re Carmen R.,
Petitioner-Appellant,

-against-

Luis I.,
Respondent-Respondent.

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Her Justice and Sanctuary for Families,
Amici Curiae.

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Orrick, Herrington & Sutcliffe LLP, New York (Rene Kathawala of counsel), for appellant.

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

Segal & Greenberg LLP, New York (Philip C. Segal of counsel), for amici curiae.

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Order, Family Court, Bronx County (Tracey A. Bing, J.), entered on or about June 5, 2017, which denied petitioner mother's objections to the findings of fact of a Support Magistrate, who, upon the finding that respondent father willfully violated a child support order, deferred the issue of whether to incarcerate him to a post-dispositional hearing, unanimously reversed, on the law, without costs, the mother's objections sustained, and the matter remanded to the Support Magistrate for a final order of disposition, to the extent that

this has not already occurred.[1]

Even though the order appealed from appears to have been superseded by a final order of the Family Court issued after the mother filed her notice of appeal, we find that the mother's appeal is not moot. The issues raised by the mother on appeal are whether the Support Magistrate, without any legal authority, properly ordered a "post-dispositional hearing" to decide whether to recommend incarceration for the father's willful violation of a child support order, and whether the mother's objections to the support magistrate's fact-finding order were properly denied. These issues are not only capable of repetition, but likely to evade review, given that the Family Court's denial of the mother's objections left her with no recourse to challenge the Support Magistrate's decision to delay issuing a recommendation as to incarcerating the father for his willful failure to comply with the support order (*see generally Matter of Hearst Corp. v Clyne*, 50 NY2d 707, 713-715 [1980]). Moreover, the mother's appeal implicates substantial and novel issues regarding proper

[1]The father's counsel states in his appellate brief that the support magistrate issued a fact-finding order dated July 12, 2017 recommending a suspended six-month sentence, and that a Family Court order dated July 12, 2017 confirmed this recommendation. However, since those orders were issued after the mother filed her appellate brief and are not included in the appellate record, we cannot consider them.

child support enforcement proceedings where a finding of willful violation has been entered against a parent (*id.*).

Turning to the merits, we agree with the mother that the Support Magistrate acted outside the bounds of his authority when, after issuing a written fact-finding order in which he determined that the father had willfully violated a child support order, he deferred the issue of a recommendation as to the father's incarceration to a "post-dispositional hearing." The Support Magistrate's decision contravened Family Court Rule § 205.43(g)(3), which states that, upon a finding of willful violation, the findings of fact shall include "a recommendation whether the sanction of incarceration is recommended," and Rule § 205.43(f), which requires that the written findings be issued within five court days after completion of the hearing. Here, instead of issuing such recommendation in his March 7, 2017 fact-finding order after completion of the hearing on the violation petition that day, the Support Magistrate improperly set the matter down for "post-dispositional review" to commence on May 1, 2017, 54 days later. That hearing lasted several months. During this time, the father continued to violate the support order. The Family Court then compounded the Support Magistrate's error of law by denying the mother's objections as premature, leaving her with no recourse to effectively challenge the further delay

that ensued.

The Family Court denied the mother's objections to the Support Magistrate's fact-finding order because it found that the order was not "final." The order cited Family Court Act Section 439(e), which permits objections to a "final" order of a Support Magistrate, and Section 439(a), which provides that a "determination by a Support Magistrate that a person is in willful violation of an order . . . and that recommends commitment . . . shall have no force and effect until confirmed by a judge of the court." This was error. First, under the plain language of the statute, the Support Magistrate's fact-finding order was not an order that "shall have no force and effect until confirmed by a judge of the court," since it did not recommend incarceration. The Support Magistrate's failure to make a recommendation as to incarceration upon his finding of willfulness essentially constituted a recommendation against incarceration, since the mother could not seek that remedy without a recommendation from the Support Magistrate. Moreover, the parties were entitled to a complete written fact-finding order, including a recommendation as to incarceration, within five court days following completion of the hearing on the mother's violation petition (22 NYCRR § 205.43[f], [g]). Accordingly, the Family Court should have considered the mother's

objections, and, upon doing so, should have exercised its authority to remand the matter to the Support Magistrate for an immediate recommendation as to incarceration, or to make, with or without holding a new hearing, its own findings of fact and order based on the record (Family Court Act § 439[e]).

The Family Court's order cited to trial court cases finding that Family Court may consider objections to nonfinal orders where irreparable harm would result from denial of permission to file such objections (*see McGrath v McGrath*, 166 Misc 2d 512 [Fam Ct, Erie Co 1995]; *Matter of Heinlein v Heinlein*, 165 Misc 2d 357 [Fam Ct, Monroe Co 1995]). It nevertheless found that "a delay in the disposition of a violation of child support petition is not an irreparable harm." However, under the circumstances of this case, the mother has made a prima facie showing that she suffered irreparable harm. A litigant has a right to bring a violation petition to an expeditious final disposition (Family Court Act § 439-a). The mother was deprived of the "expedited

process" guaranteed by statute and the Family Court Rules when the support magistrate conducted protracted unauthorized "post-dispositional" proceedings.

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

ENTERED: APRIL 10, 2018

CLERK

Mazzarelli, J.P., Andrias, Webber, Oing, Moulton, JJ.

6113 Jose Portillo, Index 302798/15
Plaintiff-Respondent,

-against-

Island Master Locksmith, Inc., et al.,
Defendants-Appellants.

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

Gorayeb & Associates, P.C., New York (John M. Shaw of counsel), for respondent.

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Order, Supreme Court, Bronx County (Donald Miles, J.), entered on or about June 9, 2017, which denied defendants' motion for summary judgment dismissing the complaint based on plaintiff's inability to establish that he suffered a serious injury within the meaning of Insurance Law § 5102(d), unanimously affirmed, without costs.

Plaintiff alleges that he was knocked off his bicycle by a van owned by defendant Island Master Locksmith and operated by defendant Mallon.

With respect to the permanent consequential limitation of use and significant limitation of use categories, defendants satisfied their prima facie burden of showing that plaintiff did not sustain a serious injury within the meaning of Insurance Law

§ 5102(d) as a result of the accident (*see Toure v Avis Rent A Car Sys.*, 98 NY2d 345, 352 [2003]).

In opposition, plaintiff raised a triable issue of fact as to whether he sustained a serious injury to his right shoulder, cervical spine and lumbar spine (*see Perl v Meher*, 18 NY3d 208, 218-219 [2011]; *Alozie v Tempesta & Son Co., Inc.*, 83 AD3d 535 [1st Dept 2011]). On the record before us, the affirmed report of plaintiff's treating physician was admissible concerning the injuries to the right shoulder, cervical spine and lumbar spine, even though relying in part on unsworn MRI and medical reports and records (*see Jallow v Siri*, 133 AD3d 1391, 1392 [1st Dept 2015]; *Byong Yol Yi v Canela*, 70 AD3d 584 [1st Dept 2010]; *Rivera v Super Star Leasing, Inc.*, 57 AD3d 288 [1st Dept 2008]). Plaintiff's treating physician sufficiently addressed defendants' experts' findings of degeneration by opining that the injuries to the otherwise asymptomatic plaintiff were consistent with and causally related to the accident (*see Yuen v Arka Memory Cab Corp.*, 80 AD3d 481, 482 [1st Dept 2011]).

We have considered defendants' other arguments, including those related to the 90/180 category, and find them unavailing.

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

ENTERED: APRIL 10, 2018

CLERK

Sweeny, J.P., Renwick, Manzanet-Daniels, Kahn, Kern, JJ.

6152 Suttongate Holdings Limited, Index 652393/15
Plaintiff,

-against-

Laconm Management N.V., et al.,
Defendants.

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Laconm Management N.V., et al.,
Counterclaim Plaintiffs-Respondents,

-against-

Suttongate Holdings Ltd.,
Counterclaim Defendant,

Arie E. David,
Counterclaim Defendant-Appellant.

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Olshan Frome Wolosky LLP, New York (Thomas J. Fleming of counsel), for appellant.

Tannenbaum Helpern Syracuse & Hirschtritt LLP, New York (Ralph A. Siciliano of counsel), for respondents.

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Order, Supreme Court, New York County (Charles E. Ramos, J.), entered October 28, 2017, which, to the extent appealed from, denied counterclaim-defendant Arie E. David's (David) motion to dismiss the counterclaims against him, unanimously affirmed, without costs.

Defendants allege that David, their lawyer, abused their attorney-client relationship and committed fraud against them in connection with a joint venture. Conceding that they did not

carefully review the legal documents that David prepared for the joint venture, defendants contend that they justifiably relied on David's representations and assurances to them. Defendants allege that the documents did not reflect the joint venture but required them to repay an $8 million "loan" to Suttongate, an entity controlled by David, while giving David the windfall of a substantial economic interest in their properties.

As an initial matter, we conclude that the court has personal jurisdiction over David. As argued by defendants-counterclaim plaintiffs, the agreements contain New York forum selection clauses. Although David was not a signatory to the agreements, there is record proof in the form of an email sent by David stating that he was in a joint venture with some of the counterclaiming plaintiffs and acknowledging that as part of the new arrangements, he would be in control of the corporate documents of those companies. Thus, the signatories to the agreements may invoke the forum selection clause against the non-signatory David by virtue of the relationship between them (*see Universal Inv. Advisory SA v Bakrie Telecom PTE, Ltd.*, 154 AD3d 171, 179 [1st Dept 2017]).

The allegations of the complaint state a cause of action for fraudulent inducement (*see Sokolow, Dunaud, Mercadier & Carreras v Lacher*, 299 AD2d 64, 70 [1st Dept 2002]). The well settled

principle relied on by David that a party claiming fraudulent inducement cannot be said to have justifiably relied on a representation negated by the plain terms of the contract they signed does not apply here, since his alleged assurances and fraud were the very cause of defendants' failure to review the documents carefully. As it was reasonable for defendants to rely on the advice of counsel, we also reject David's arguments premised on the plain language of the agreements that defendants admit they did not read carefully.

Defendants' allegations describing their attorney-client relationship with David state a cause of action for breach of fiduciary duty. For example, they allege that he served as their attorney for years, both before and during the instant transaction, negotiating unrelated contracts and handling unrelated lawsuits and trusts and estates matters.

While in support of the fraudulent inducement claim defendants allege that the agreements were "brought about by fraud," because, inter alia, David held himself out as their attorney and caused them to sign unfavorable agreements that he drafted, in contrast, in support of the fraud claim defendants focus on events following the execution of the agreements, namely, David's "scheme to manufacture a bogus default" of the loan so as to seize valuable collateral without paying for it.

These allegations state a cause of action for fraud (*see Eurycleia Partners, LP v Seward & Kissel, LLP*, 12 NY3d 553, 559 [2009]). The fraudulent inducement and fraud claims are both pleaded with particularity and are not redundant.

Nor did David establish that the breach of contract claim asserted against him in defendants' third-party complaint arises from the same facts as the fraud claim and should be dismissed as duplicative (*see Cronos Group Ltd. v XComIP, LLC*, 156 AD3d 54, 62-63 [1st Dept 2017]).

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

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

ENTERED: APRIL 10, 2018

CLERK

Mazzarelli, J.P., Kahn, Gesmer, Kern, JJ.

6235-
6236 The People of the State of New York,
Respondent,

-against-

Francisco Tineo-Santos,
Defendant-Appellant.

Ind. 1920/09

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

Richard A. Brown, District Attorney, Kew Gardens (Eric C. Washer of counsel), for respondent.

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Judgment, Supreme Court, Bronx County (Darcel D. Clark, J. at hearing; Megan Tallmer, J. at jury trial and sentencing), rendered January 18, 2013, convicting defendant of murder in the second degree, and sentencing him to a term of 25 years to life, and order, same court (Richard Lee Price, J.), entered November 23, 2016, which denied defendant's CPL 440.10 motion to vacate the judgment, unanimously affirmed.

The court providently exercised its discretion in denying defendant's CPL 440.10 motion (*see People v Samandarov*, 13 NY3d 433, 439-440 [2009]). Based on the submissions on the motion, as well as the trial record, we conclude 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]).

Defendant first contends that counsel was ineffective at the *Huntley* hearing because he "rest[ed] on the record" without making any suppression arguments, even though the People had failed to call any witnesses with personal knowledge of the taking of defendant's initial written statement. Defendant argues that the People thus failed to meet their burden to establish the voluntariness of that statement, and therefore of the videotaped statement that was obtained a day later. Under the circumstances of this case, in which overwhelming proof demonstrated that defendant killed the victim, and did so intentionally, it was objectively reasonable for counsel to believe that admission of the statements, and the video statement in particular, might – without the risk of putting his client on the stand – encourage the jury to find a lack of homicidal intent, elicit sympathy for his client, or at least do no harm. On balance, defendant's version of the incident could be viewed by jurors as at least mitigating. Accordingly, defendant cannot meet his burden to "demonstrate the absence of strategic or other legitimate explanations" for counsel's actions (*People v Carver*, 27 NY3d 418, 420 [2016]). In any event, defendant has not shown ineffective assistance of counsel under either the state or federal standards. As noted, even if counsel had actually

obtained suppression of all statements, the People's case was still overwhelming, and we are unpersuaded that defendant was denied the right to a fair trial (*People v Caban*, 5 NY3d 143, 155-156 [2005]). Defendant's argument about alleged weaknesses in the prosecution's case is unpersuasive.

Defendant also argues that counsel was ineffective for failing to accept the court's offer, prompted by the prosecutor's suggestion, to deviate from the "acquit-first" rule (*see People v Helliger*, 96 NY2d 462 [2001]; *People v Boettcher*, 69 NY2d 174 [1987]), and allow the jury, which had submitted two deadlock notes as to the top charge of murder in the second degree, to consider the lesser included count of manslaughter in the first degree without first reaching a not guilty verdict on the higher charge. We need not decide whether, as the People argue, counsel's choice categorically cannot be deemed professionally unreasonable because the procedure the court made available was clearly contrary to New York law. Rather, we find that the choice counsel faced was quintessentially a judgment call, involving a significant measure of instinct and intuition, and therefore that the course chosen cannot be deemed to lack any objectively reasonable strategic basis. For example, counsel could reasonably have believed, as the court indicated it did, that there was some possibility of acquittal on all counts if the

course of deliberations was not interrupted by an instruction authorizing departure from the acquit-first rule. In any event, defendant has likewise failed to establish ineffective assistance of counsel under either the state or federal standard.

To the extent that, on his direct appeal from the judgment, defendant is separately arguing that one or both of his statements should have been suppressed, that claim is unpreserved and we decline to review it in the interest of justice.

We perceive no basis for reducing the sentence.

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

ENTERED: APRIL 10, 2018

CLERK

Renwick, J.P., Mazzarelli, Kahn, Gesmer, Kern, JJ.

6237 Bannelis Urena, et al., Index 305096/15
Plaintiffs-Respondents,

-against-

GVC Ltd., et al.,
Defendants-Appellants.

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Lewis Brisbois Bisgaard & Smith LLP, New York (Nicholas P. Hurzeler of counsel), for appellants.

Stillman & Stillman, P.C., Bronx (Robert A. Birnbaum of counsel), for respondents.

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Order, Supreme Court, Bronx County (Julia I. Rodriguez, J.), entered December 14, 2016, which granted plaintiffs' motion for summary judgment on the issue of liability and dismissed all affirmative defenses and counterclaims alleging comparative fault, unanimously affirmed, without costs.

"A rear-end collision with a stopped or stopping vehicle establishes a prima facie case of negligence on the part of the driver of the rear vehicle, and imposes a duty on the part of the operator of the moving vehicle to come forward with an adequate, nonnegligent explanation for the accident" (*Matos v Sanchez*, 147 AD3d 585, 586 [1st Dept 2017]). Here, defendant driver's assertion that plaintiffs' vehicle stopped abruptly does not explain why defendant driver failed to maintain a safe distance, and is insufficient to constitute a nonnegligent explanation (*see*

Cabrera v Rodriguez, 72 AD3d 553 [1st Dept 2010]; *Soto-Maroquin v Mellet*, 63 AD3d 449 [1st Dept 2009]). Defendant driver's further argument that the accident occurred because he could not complete a lane change, also fails to constitute a nonnegligent explanation. If he had to complete the attempted lane change to avoid striking the vehicle in front of him, he failed to maintain a safe distance, and the fact that another vehicle prevented him from completing the lane change does not constitute an emergency not of his own making (*see Renteria v Simakov*, 109 AD3d 749, 750 [1st Dept 2013]).

We have considered defendants' remaining arguments, including that plaintiffs' motion should have been denied as premature, and find them unavailing.

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

ENTERED: APRIL 10, 2018

CLERK

Renwick, J.P., Mazzarelli, Kahn, Gesmer, Kern, JJ.

6238 In re Kyeley V., and Another,

Children Under the Age of Eighteen Years, etc.,

Antoinette V.,
Respondent-Appellant,

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

_____

Steven N. Feinman, White Plains, for appellant.

Zachary W. Carter, Corporation Counsel, New York (Jason Anton of counsel), for respondent.

Dawne Mitchell, The Legal Aid Society, New York (Susan Clement of counsel), attorney for the children.

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Order of fact-finding, Family Court, New York County (Emily M. Olshanksy, J.), entered on or about April 6, 2017, which determined, after a hearing, that respondent mother neglected the subject older child by, inter alia, failing to provide adequate medical care and an adequate education, and derivatively neglecting the subject younger child, unanimously affirmed, without costs.

A preponderance of the evidence supports the finding of medical neglect in that the mother failed to keep current on physical examinations and immunizations; delayed seeking initial treatment and failed to obtain recommended neurological testing

and physical therapy for the older child's debilitating foot condition, which doctors suspected may have stemmed from an underlying neurological disorder and which kept her in chronic pain and unable to walk flat on her feet. The mother also failed to timely authorize the maternal grandmother to obtain medical treatment for the children, during the several months she left them in her care, while she sought to relocate to another state (*see e.g. Matter of Angelise L. [Hunter L.]*, 149 AD3d 469 [1st Dept 2017]; *Matter of Sahairah J. [Rosemarie R.]*, 135 AD3d 452 [1st Dept 2016]; *Matter of I-Conscious R. [George S.]*, 121 AD3d 566 [1st Dept 2014], *appeal dismissed* 24 NY3d 1205 [2015]).

A preponderance of the evidence also supports the finding of educational neglect in that the mother failed to ensure that the older child attended school regularly and on time, which resulted in noted educational delays, including an inability to read, half-way through the first grade (*see Matter of Aliyah B. [Denise J.]*, 87 AD3d 943 [1st Dept 2011]; *Matter of Annalize P. [Angie D.]*, 78 AD3d 413, 414 [1st Dept 2010]).

Moreover, the mother's prolonged failure to properly address this child's significant medical and educational needs supported the finding of derivative neglect as to the younger child, a four-year-old child with her own extensive medical needs, untreated severe eczema and asthma, who likewise was at risk of

impairment of her physical and emotional health (*see e.g. Matter of Dayshaun W. [Jasmine G.]*, 133 AD3d 1347 [4th Dept 2015]; *Matter of Danny R.*, 60 AD3d 450 [1st Dept 2009]).

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

ENTERED: APRIL 10, 2018

CLERK

Renwick, J.P., Mazzarelli, Kahn, Gesmer, Kern, JJ.

6239 Leo Chiagkouris also known as Leo Chiag Kouris, Plaintiff-Appellant-Respondent, Index 160540/16

-against-

201 West 16 Owners Corp., Defendant-Respondent-Appellant.

- - - - -

[And a Third Party Action]

_____

Zingman & Associates PLLC, New York (Mitchell S. Zingman of counsel), for appellant-respondent.

Pryor Cashman LLP, New York (Eric D. Sherman and Andrew M. Goldsmith of counsel), for respondent-appellant.

_____

Order, Supreme Court, New York County (Robert R. Reed, J.), entered on or about August 14, 2017, which denied plaintiff's motion for summary judgment declaring, inter alia, that defendant's termination of his proprietary lease is null and void, and denied defendant's request for a search of the record and summary judgment dismissing the complaint, unanimously modified, on the law, to grant defendant's request to the extent of declaring that defendant's termination of plaintiff's lease was proper, and otherwise affirmed, without costs.

At issue is whether plaintiff violated article 14 of the proprietary lease between the parties by allowing a friend (third-party defendant William Scotty Sheriff) to occupy his

apartment in his absence.

Article 14 provides, in pertinent part: "The Lessee shall not, without the written consent of the Lessor on such conditions as Lessor may prescribe, occupy or use the apartment or permit the same or any part thereof to be occupied or used for any purpose other than as a private dwelling for the Lessee and Lessee's spouse, their children, grandchildren, parents, grandparents, brothers and sisters and domestic employees ... *The Lessee may also allow one (1) unrelated party, and that party's dependent children to occupy the apartment without the prior written consent of the Lessor.* In addition to the foregoing, the apartment may be occupied from time to time by guests of the Lessee for a period of time not exceeding one month, unless a longer period is approved in writing by the Lessor, but no guests may occupy the apartment unless one or more of the permitted adult residents are then in occupancy or unless consented to in writing by the Lessor" (emphasis added).

We have previously held that article 14 "permit[s] occupancy by the listed persons other than the lessee only if the lessee maintains a concurrent occupancy" (*see 455/86 Owners Corp. v Haydon*, 300 AD2d 87, 88 [1st Dept 2002]). Plaintiff points out that in *Haydon* we did not interpret the sentence italicized above and contends that nothing in that sentence indicates that the

lessee must be in occupancy with the unrelated party. However, reading Article 14 as a whole, as we must, with no single sentence isolated (*see Bijan Designer for Men v Fireman's Fund Ins. Co.*, 264 AD2d 48, 51-52 [1st Dept 2000], *lv denied* 96 NY2d 707 [2001]), we find that the interpretation we affirmed in *Haydon* is the only reasonable interpretation of the article. Therefore, plaintiff was not permitted to allow Sheriff to occupy his apartment without maintaining a concurrent occupancy.

Plaintiff failed to show that defendant acted outside the scope of its authority, in a way that did not legitimately further its corporate purpose, or in bad faith, and that therefore its decision to terminate his tenancy is not protected by the business judgment rule (*see 40 W. 67th St. v Pullman*, 100 NY2d 147, 155 [2003]).

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

ENTERED: APRIL 10, 2018

CLERK

Renwick, J.P., Mazzarelli, Kahn, Gesmer, Kern, JJ.

6240 In re John Doe, etc., Index 452448/16
Petitioner,

-against-

Howard Zucker, etc., et al.,
Respondents.

_____

The Bronx Defenders, Bronx (Steven T. Hasty of counsel), for petitioner.

Eric T. Schneiderman, Attorney General, New York (Linda Fang of counsel), for respondents.

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Final determination of respondent New York State Department of Health (DOH), dated August 18, 2016, which, after a fair hearing, affirmed the determination of respondent New York State Office for People with Developmental Disabilities (OPWDD), dated April 26, 2016, denying petitioner's application for Medicaid services, unanimously confirmed, the petition denied, and the proceeding brought pursuant to CPLR article 78 (transferred to this Court pursuant to CPLR 7803[4] and 7804[g] by order of Supreme Court, New York County [Manuel J. Mendez, J.], entered April 27, 2017), dismissed on the merits as to DOH and OPWDD and dismissed as brought against an improper party as to OTDA, without costs.

Petitioner contends that he is entitled to the benefits sought because he has a substantial handicap that prevents him

from parenting his child. Respondents dispute that he would be entitled to benefits on that basis. Assuming arguendo, without deciding, that petitioner would be entitled to benefits on that basis, petitioner failed to meet his burden of proof that he was entitled to these benefits, as he failed to show that he has engaged in parenting his child, or that his condition has prevented him from doing so. Accordingly, substantial evidence supports the denial of petitioner's application (*see 300 Gramatan Ave. Assocs. v State Div. of Human Rights*, 45 NY2d 176, 181 [1978]), and the determination was not arbitrary or capricious or affected by any error of law (*see* CPLR 7803[3]).

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 10, 2018

CLERK

Renwick, J.P., Mazzarelli, Kahn, Gesmer, Kern, JJ.

6243 Sherita Sears, etc., Index 117802/09
Plaintiff-Appellant,

-against-

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

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Wigdor LLP, New York (David E. Gottlieb of counsel), for appellant.

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

_____

Order, Supreme Court, New York County (James E. d'Auguste, J.), entered February 16, 2017, which, to the extent appealed from as limited by the briefs, granted defendants' motion for summary judgment dismissing plaintiff's General Municipal Law (GML) § 205-a claim as predicated on violation of Labor Law § 27-a, unanimously affirmed, without costs.

Decedent Jamel Sears, a probationary firefighter, passed away due to dehydration while performing the Fire Academy's physically demanding Functional Skills Training (FST) exercise course, which was designed to simulate actual firefighting tasks under a controlled environment.

Plaintiff is not entitled to recover under GML § 205-a, as the injuries decedent sustained were not the type of occupational injury that Labor Law § 27-a was designed to protect, but rather,

arose from risks unique to firefighting work (*Williams v City of New York*, 2 NY3d 352, 368 [2004]). While the performance of the FST course was part of training, and not part of firefighting per se, the ability to perform it efficiently was a necessary and important part of the job, as it ensures that a firefighter could effectively perform the tasks during an actual fire. The risks of dehydration and other physiological conditions experienced during FST training are the same as those inherent in actual firefighting. Given the special dangers firefighters face, and their responsibility to protect the public, judgments as to how they should be trained are better left for the FDNY supervisors and not second-guessed by the Department of Labor.

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

ENTERED: APRIL 10, 2018

CLERK

Renwick, J.P., Mazzarelli, Kahn, Gesmer, Kern, JJ.

6244 Marietta Small, etc., et al., Index 23325/03
Plaintiffs-Appellants,

-against-

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

_____

Rubert & Gross, P.C., New York (Soledad Rubert of counsel), for appellants.

Zachary W. Carter, Corporation Counsel, New York (Tahirih M. Sadrieh of counsel), for respondents.

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Order, Supreme Court, Bronx County (Douglas E. McKeon, J.), entered September 22, 2015, which granted defendants' motion for summary judgment dismissing the cause of action alleging violations of 42 USC § 1983, and denied plaintiffs' cross motion for summary judgment on liability on that cause of action and to substitute certain named defendants in place of "John Doe, M.D.," defendant, unanimously modified, on the law, to deny defendants' summary judgment motion, and otherwise affirmed, without costs.

In September 2001, the decedent, Miguel Nesbitt, tested positive for exposure to tuberculosis, and began receiving INH therapy (Isoniazid and vitamin B6) to help prevent the onset of the disease. He continued this therapy when he became an inmate at Rikers Island Correctional Facility in December 2001. On May 29, 2002, after he was released from the segregated unit at

Rikers, Nesbitt fell ill and died two days later at Elmhust Hospital from liver failure due to side effects from his treatment with Isoniazid.

On August 29, 2003, plaintiffs, the co-administrators of Nesbitt's estate, commenced this action against the City defendants, as well as against John Doe, M.D., asserting causes of action for medical malpractice and wrongful death, as well as a § 1983 claim alleging that the defendants violated Nesbitt's constitutional rights by failing to adopt and/or enforce proper procedures providing inmates access to medical care and treatment in a manner that constituted deliberate indifference to Nesbitt's right to medical care and treatment, and by failing to properly or effectively train and supervise City medical staff engaged in providing Nesbitt medical care.

In November 2012, defendants moved for partial summary judgment dismissing the § 1983 cause of action, arguing, among other things, that plaintiffs' cause of action should be dismissed in light of the evidence of a medical protocol concerning "tuberculosis therapy" on Rikers Island that was in place at the time of Nesbitt's death, which included a monitoring protocol providing that liver function tests should be performed monthly.

The court found that defendants made a prima facie showing

of entitlement to judgment as a matter of law on the § 1983 claim, finding that the above medical protocol, although it was unsigned and uncertified, demonstrated an official policy designed to protect the rights of inmates like Nesbitt.

In this appeal, defendants, for the first time, admit that the medical protocol they relied on in support of their summary judgment motion, and on which the court relied, applied to inmates with active tuberculosis and did not apply to an inmate like Nesbitt undergoing INH therapy for latent tuberculosis. Instead, they assert that another unsigned and uncertified medical protocol, which they attached to their papers in reply and in opposition to plaintiffs' cross motion and which they cited as part of the policy but misidentified, applied to inmates with latent tuberculosis and provided for monthly liver function blood tests.

We find that on the above record, defendants have not met their burden for summary judgment dismissal of the § 1983 claim. The protocol for treatment on which defendants rely in support of their motion was improperly submitted for the first time in reply (*see e.g. Lazar v Nico Indus.*, 128 AD2d 408, 410 [1st Dept 1987]; *see also Ritt v Lenox Hill Hosp.*, 182 AD2d 560, 562, [1st Dept 1992]). Furthermore, the uncertified protocol "is not in admissible form and thus lacks evidentiary value" (*Cashman v*

Berroa, 101 AD3d 563, 563 [1st Dept 2012]; *see also Raposo v. Robinson*, 106 AD 3d 593 [1st Dept 2013]).

On the other hand, the court properly denied plaintiffs' motion for summary judgment on that claim. Plaintiffs failed to show that the evidence requires, as a matter of law, a finding that the protocol relied on by defendants in this appeal was constitutionally deficient, or that defendants tolerated a custom of failing to enforce the policy, or failed adequately to train their personnel in any such protocol.

The court properly denied plaintiffs' motion for leave to amend the complaint to substitute the proposed individual defendants for John Doe, M.D. Plaintiffs have not satisfied the procedural requirements under CPLR 1024 or CPLR 203(f).

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

ENTERED: APRIL 10, 2018

CLERK

Renwick, J.P., Mazzarelli, Kahn, Gesmer, Kern, JJ.

6245 The People of the State of New York, Respondent, Ind. 3293N/15

-against-

Santo Rosario, Defendant-Appellant.

_____

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

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Judgment, Supreme Court, New York County (Richard Weinberg, J.), rendered February 4, 2016, 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 10, 2018

CLERK

Renwick, J.P., Mazzarelli, Kahn, Gesmer, Kern, JJ.

6246 In re 160 East 84th Street Associates LLC, Petitioner-Appellant-Respondent, Index 100643/16

-against-

New York State Division of Housing and Community Renewal, Respondent-Respondent-Appellant,

Sherry Sado, Intervenor-Respondent.

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

Mark F. Palomino, New York (Martin B. Schneider of counsel), for respondent-appellant.

Sherry Sado, respondent pro se.

Order and judgment (one paper), Supreme Court, New York County (Barbara Jaffe, J.), entered March 1, 2017, granting the petition to modify an order of respondent New York State Division of Housing and Community Renewal (DHCR), issued February 23, 2016, to the extent of vacating the order and remanding the matter to DHCR to determine the base date rent consistent with the standard set forth in *Thornton v Baron* (5 NY3d 175 [2005]), and denying DHCR's cross motion to remand the matter for the correction of mathematical errors therein, unanimously reversed, on the law, without costs, the petition denied, and the cross

motion granted.

DHCR's use of a sampling method to determine the legal regulated rent on intervenor tenant's apartment based on the average stabilized rents for studio apartments in the 2006 registration of the subject building is rationally based in the record and not arbitrary and capricious (*see Matter of Tockwotten Assoc. v New York State Div. of Hous. & Community Renewal*, 7 AD3d 453, 454 [1st Dept 2004]). DHCR providently exercised its broad equity discretion to fashion an equitable solution to the question of the appropriate rent for an apartment that was improperly treated as deregulated for years (*see* Rent Stabilization Code [RSC] [9 NYCRR] § 2522.7; RSC former § 2522.6[b][2]; *Matter of W 54-7 LLC v New York State Div. of Hous. & Community Renewal*, 39 AD3d 312, 313 [1st Dept 2007]).

The market rent of $2,200 per month, established by lease, in effect on the "base date" (RSC § 2520.6[f][1]) was the result of improper deregulation by petitioner and thus may not be adopted as the proper base date rent (*see 72A Realty Assoc. v Lucas*, 101 AD3d 401 [1st Dept 2012]; *Gordon v 305 Riverside Corp.*, 93 AD3d 590, 592 [1st Dept 2012]). However, because petitioner's actions were based upon a mistaken pre-*Roberts v Tishman Speyer Props., L.P.* (13 NY3d 270 [2009]) belief that the apartment had been deregulated, and there is no evidence of

fraud, resort to the punitive default formula set forth in *Thornton v Baron* (5 NY3d 175 [2005]) is inappropriate (see *Taylor v 72A Realty Assoc., L.P.*, 151 AD3d 95, 105 [1st Dept 2017]; *Matter of Park v New York State Div. of Hous. & Community Renewal*, 150 AD3d 105, 115 [1st Dept 2017], *lv dismissed* 30 NY3d 961 [2017]).

DHCR's order shows conflicting amounts for the legal regulated rent. Thus, we remand the matter to DHCR to correct the order.

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

ENTERED: APRIL 10, 2018

CLERK

Renwick, J.P., Mazzarelli, Kahn, Gesmer, Kern, JJ.

6247 Jorge Encalada, Index 303143/07
Plaintiff-Appellant,

-against-

McCarthy, Chachanover & Rosado, LLP,
Defendant-Respondent.

_____

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

Kaufman Dolowich & Voluck LLP, Woodbury (Brett A. Scher of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (Norma Ruiz, J.), entered January 25, 2017, which granted defendant's motion for summary judgment dismissing the complaint, unanimously reversed, on the law, without costs, and the motion denied.

Plaintiff was injured in an accident while working as an asbestos remover on March 31, 2001. Within a few days thereof, he reached out to defendant law firm for legal assistance. The parties dispute whether defendant law firm told plaintiff that it would represent him in all claims related to the accident. Defendant served as legal counsel for plaintiff in the related workers' compensation action until December 2004, when it withdrew as counsel. On November 27, 2007, plaintiff brought a legal malpractice action against defendant for failing to file a notice of claim within 30 days of the accident and failing to

bring a personal injury lawsuit against municipal entities within 1 year and 90 days of the accident.

Defendant as movant met its prima facie burden on summary judgment by showing that plaintiff's legal malpractice case was untimely as it was not commenced within three years of the date of accrual of each legal malpractice claim (*see* CPLR 214[6]).

However, plaintiff raised a triable issue of fact with respect to whether the three-year statute of limitations was tolled under the continuous representation doctrine. Under the continuous representation doctrine, a person seeking professional assistance is placed in a difficult position if required to sue his or her attorney while the attorney continues to represent them on a particular legal matter (*Shumsky v Eisenstein*, 96 NY2d 164, 167-168 [2001]). Accordingly, the doctrine tolls the running of the statute of limitations on malpractice claims until the ongoing representation is completed (*id.*). However, the application of this doctrine is limited "to the course of representation concerning a specific legal matter," and is not applicable to the client's "continuing general relationship with a lawyer ... involving only routine contact for miscellaneous legal representation ... unrelated to the matter upon which the allegations of malpractice are predicated" (*id.* at 168). The record presents an issue of fact as to whether defendant

continuously represented plaintiff in connection with a personal injury claim based on the accident, such as to toll the statute of limitations during that time (*see Glamm v Allen*, 57 NY2d 87, 94 [1982]; *Waggoner v Caruso*, 68 AD3d 1, 6-7 [1st Dept 2009]).

Finally, defendant's argument regarding the alleged contradiction in plaintiff's deposition testimony and affidavit is unavailing. Whether plaintiff's testimony about the initial conversation can support his malpractice claim is ultimately a credibility issue for the fact finder and not appropriate for resolution on summary judgment (*see Ferrante v American Lung Assn.*, 90 NY2d 623, 631 [1997]; *Glick & Dolleck v Tri-Pac Export Corp.*, 22 NY2d 439, 441 [1968]).

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

ENTERED: APRIL 10, 2018

CLERK

Mazzarelli, J.P., Kahn, Gesmer, Kern, JJ.

6249 The People of the State of New York, Ind. 2750/12
Respondent,

-against-

Daniel Straker,
Defendant-Appellant.

_____

Christina A. Swarns, Office of the Appellate Defender, New York (Samuel J. Mendez of counsel), for appellant.

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

_____

Judgment, Supreme Court, Bronx County (Ethan Greenberg, J.), rendered June 18, 2015, unanimously affirmed.

Although we find that defendant did not make a valid waiver of the right to appeal, we perceive no basis for reducing the sentence.

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

ENTERED: APRIL 10, 2018

CLERK

Renwick, J.P., Mazzarelli, Kahn, Gesmer, Kern, JJ.

6250 The Carlyle, LLC, Index 653347/15
Plaintiff-Respondent,

-against-

Quik Park 1633 Garage LLC, et al.,
Defendants-Appellants.

_____

DLA Piper LLP (US), New York (John Vukelj of counsel), for Quik Park 1633 Garage LLC, appellant.

Feuerstein Kulick LLP, New York (David Feuerstein of counsel), for Rafael Llopiz, appellant.

Stroock & Stroock & Lavan LLP, New York (Kevin L. Smith of counsel), for respondent.

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Order, Supreme Court, New York County (Anil C. Singh, J.), entered December 19, 2016, which, insofar as appealed from, denied defendants' motion to dismiss the fraudulent conveyance, tortious interference with contract, piercing the corporate veil, and permanent injunction claims, unanimously reversed, on the law, without costs, the motion granted, and the complaint dismissed in its entirety. The Clerk is directed to enter judgment accordingly.

Plaintiff alleges that defendants engaged in a fraudulent scheme to transfer and dispose of the assets of several related entities (the judgment debtors) in order to thwart plaintiff's ability to collect debts owed by those entities, including

judgments in two related actions.

The actual fraudulent conveyance claims, under the common law and Debtor and Creditor Law (DCL) § 276, should be dismissed because plaintiff failed to allege fraudulent intent with the particularity required by CPLR 3016(b) (*see RTN Networks, LLC v Telco Group, Inc.*, 126 AD3d 477, 478 [1st Dept 2015], *lv dismissed in part, denied in part* 26 NY3d 1059 [2015]; *see also Hoyt v Godfrey*, 88 NY 669, 670-671 [1882]). The key allegations were made "[u]pon information and belief," without identifying the source of the information (*see RTN Networks*, 126 AD3d at 478). Moreover, the timing of the allegedly fraudulent transfers - beginning two years before the judgment debtors incurred the subject debts - undermines the claim of fraudulent intent (*see RTN Networks* at 478; *3 E. 54th St. N.Y., LLC v Patriarch Partners, LLC*, 90 AD3d 418, 419 [1st Dept 2011]).

The constructive fraudulent conveyance claims pursuant to DCL 273, 274, and 275 should be dismissed because plaintiff failed to sufficiently allege that the transfers were made without fair consideration, as the relevant allegations were all made "[u]pon information and belief" (*see RTN Networks* at 478).

Because the viability of the claims under DCL 276-a, 278, and 279 depends on the viability of the other fraudulent conveyance claims, these claims should likewise be dismissed.

The tortious interference claim should be dismissed because plaintiff failed to sufficiently allege that the contract "would not have been breached 'but for' the defendant's conduct" (*Burrowes v Combs*, 25 AD3d 370, 373 [1st Dept 2006], *lv denied* 7 NY3d 704 [2006]). The relevant allegations were vague and conclusory and supported by "mere speculation" (*id.* at 373; *see Washington Ave. Assoc. v Euclid Equip.*, 229 AD2d 486, 487 [2d Dept 1996]).

In light of the dismissal of all of plaintiff's substantive claims, its claims for piercing the corporate veil and a permanent injunction must likewise be dismissed, as they do not constitute independent causes of action (*see Matter of Morris v New York State Dept. of Taxation & Fin.*, 82 NY2d 135, 141 [1993]; *Weinreb v 37 Apts. Corp.*, 97 AD3d 54, 58 [1st Dept 2012]).

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

ENTERED: APRIL 10, 2018

CLERK

Renwick, J.P., Mazzarelli, Kahn, Gesmer, Kern, JJ.

6251 Quattro Parent LLC, Index 651555/17
Plaintiff-Respondent,

-against-

Rakib, Zaki,
Defendant-Appellant.

_____

Gregory Zimmer, New York, for appellant.

Becker, Glynn, Muffly, Chassin & Hosinski LLP, New York (Jesse T. Conan of counsel), for respondent.

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Order, Supreme Court, New York County (Andrea Masley, J.), entered December 7, 2017, which denied defendant's motion to dismiss the complaint pursuant to CPLR 3211(a)(1) and (7), unanimously affirmed, with costs.

Contrary to defendant's contention, the plain terms of the parties' agreement did not conclusively establish a defense that warrants dismissal of the complaint (*see Leon v Martinez*, 84 NY2d 83, 87 [1994]; *see Mill Fin. LLC v Gillett*, 122 AD3d 98 [1st Dept 2014]; *Taussig v Clipper Group, L.P.*, 13 AD3d 166, 167 [1st Dept 2004], *lv denied* 4 NY3d 707 [2005]). Upon de novo review of the parties' agreement (*see Duane Reade, Inc. v Cardtronics, LP*, 54 AD3d 137, 140 [1st Dept 2008]), we find that the subject provision which precluded plaintiff from unwinding its business or subsidiaries during an "interim period" was not an "automatic

termination" clause, as characterized by defendant. No such language was used, or even implied, and the provision's stated intent was to implement a separate operating agreement between the parties by imposing limitations upon plaintiff's actions during the period before such operating agreement could become effective.

It is undisputed that defendant never made the $7,500,000 payment required by the terms of the parties' agreement, giving rise to a cognizable claim for breach of contract (*see e.g. Awards.com v Kinko's Inc.*, 42 AD3d 178, 187 [1st Dept 2007], *affd* 14 NY3d 791 [2010]). Under these circumstances, plaintiff's unwinding of Quattro and a subsidiary one year after defendant's breach does not foreclose plaintiff's breach of contract claim (*see Computer Possibilities Unlimited, Inc. v. Mobil Oil Corp.*, 301 AD2d 70, 77 [1st Dept 2002] ["(b)esides giving the nonrepudiating party an immediate right to sue for damages for total breach, a repudiation discharges the nonrepudiating party's obligations to render performance in the future"]; *see also*

American List Corp. v. U.S. News & World Report, Inc., 75 NY2d 38, 44 [1989]). Accordingly, defendant's pre-answer motion to dismiss the complaint was correctly denied.

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

ENTERED: APRIL 10, 2018

CLERK

Mazzarelli, J.P., Kahn, Gesmer, Kern, JJ.

6252 The People of the State of New York, Respondent,

-against-

Alvin Jennette, Defendant-Appellant.

Ind. 2075/12

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

Darcel D. Clark, District Attorney, Bronx (Justin J. Braun of counsel), for respondent.

Order, Supreme Court, Bronx County (Miriam R. Best, J.), entered on or about November 20, 2015, which adjudicated defendant a level two sexually violent offender pursuant to the Sex Offender Registration Act (Correction Law art 6-C), unanimously affirmed, without costs.

The assessment of 10 points for failure to accept responsibility was supported by clear and convincing evidence of defendant's repeated statements denying guilt. The court properly found that defendant's subsequent statement at the SORA hearing, expressing a general desire to improve his life and avoid trouble, failed to acknowledge responsibility for his misconduct in the underlying case.

The court providently exercised its discretion in declining to grant a downward departure from defendant's presumptive risk

level (*see People v Gillotti*, 23 NY3d 841, 861 [2014]). The risk assessment instrument adequately took into account defendant's completion of sex offender treatment and conduct while incarcerated (*see People v McNeely*, 124 AD3d 433 [1st Dept 2015], *lv denied* 25 NY3d 908 [2015]; *People v Watson*, 112 AD3d 501, 503 [1st Dept 2013], *lv denied* 22 NY3d 863 [2014]). The remaining mitigating factors cited by defendant were outweighed by the seriousness of the underlying offense and his prior criminal history.

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

ENTERED: APRIL 10, 2018

CLERK

Renwick, J.P., Mazzarelli, Kahn, Gesmer, Kern, JJ.

6253N In re Raff & Becker LLP, Index 157209/16
Petitioner-Appellant,

-against-

Kaiser Saurborn & Mair, P.C.,
Respondent-Respondent.

Raff & Becker LLP, New York (Jacob Korder of counsel), for appellant.

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

Order, Supreme Court, New York County (Erika M. Edwards, J.), entered April 25, 2017, which denied the petition to enforce a charging lien, with prejudice, unanimously reversed, on the law, without costs and the petition granted to the extent that the matter is remanded for a hearing and determination of the reasonableness of petitioner's claim for unpaid fees for legal services rendered.

The record demonstrates that petitioner had good cause to seek to withdraw from representation of Ms. Wylomanska (*see Bok v Werner*, 9 AD3d 318 [1st Dept 2004]; *Bankers Trust Co. v Hogan*, 187 AD2d 305 [1st Dept 1992]; *Kiernan v Kiernan*, 233 AD2d 867 [4th Dept 1996]). The irreconcilable differences between client and counsel as to litigation strategies and choices to be made, as well as Ms. Wylomanska's placing of restrictions on

petitioner's communications with her and her expressed lack of trust and confidence that petitioner would represent her interests competently, establish a deterioration of the attorney/client relationship that significantly undermined petitioner's ability to represent Ms. Wylomanska effectively. Petitioner is therefore entitled to recover for services rendered on the basis of quantum meruit (*Bok v Werner*, 9 AD3d 318), to be determined at a hearing (*see Sharbat v Law Offs. of Michael B. Wolk, P.C.*, 121 AD3d 426 [1st Dept 2014]; *Bankers Trust Co. v Hogan*, 187 AD2d at 305).

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

ENTERED: APRIL 10, 2018

CLERK

Renwick, J.P., Mazzarelli, Kahn, Gesmer, Kern, JJ.

6254N Philip Arkoh, Index 304260/14
Plaintiff-Appellant,

-against-

Felix Navarro III, et al.,
Defendants-Respondents.

_____

Law Offices of Alexander Bespechny, Bronx (Louis Badolato of counsel), for appellant.

_____

Appeal from order, Supreme Court, Bronx County (Laura G. Douglas, J.), entered January 6, 2017, which, insofar as appealed from, purportedly granted defendants' motion to compel plaintiff to provide access to his Facebook account, unanimously dismissed, without costs, as taken by a nonaggrieved party.

A reading of the entire order appealed from makes clear that the motion court denied so much of defendants' motion as sought access to plaintiff's Facebook account. As a result, plaintiff

was not aggrieved by the order, and therefore has no standing to appeal (*see* CPLR 5511).

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

ENTERED: APRIL 10, 2018

CLERK

Renwick, J.P., Mazzarelli, Kahn, Gesmer, Kern, J.J.

6255N Quinn Emanuel Urquhart & Sullivan, LLP, Plaintiff-Respondent, Index 158148/14

-against-

AVRA Surgical Robotics, Inc., Defendant-Appellant.

_____

Stamell & Schager, LLP, New York (Andrew R. Goldenberg of counsel), for appellant.

Quinn Emanuel Urquhart & Sullivan LLP, New York (Peter E. Calamari Of counsel), for respondent.

_____

Order, Supreme Court, New York County (Paul Wooten, J.), entered on or about December 22, 2016, which, to the extent appealed from as limited by the briefs, vacated plaintiff's default and granted plaintiff's motion for leave to file an untimely reply to defendant's counterclaim, pursuant to CPLR 3012(d), unanimously affirmed, without costs.

The court providently exercised its discretion in vacating the default and granting plaintiff leave to compel defendant to accept plaintiff's reply to the counterclaim, pursuant to CPLR 3012(d), particularly given the strong public policy in favor of resolving controversies on the merits (*see Yu v Vantage Mgt. Servs., LLC*, 85 AD3d 564, 564 [1st Dept 2011]). Here, plaintiff provided a reasonable explanation for the delay, and there is no

indication that plaintiff's actions were willful or contumacious. There also was no evidence of prejudice to defendant (*see Newyear v Beth Abraham Nursing Home*, 157 AD3d 651, 652 [1st Dept 2018]; *Oberon Sec. LLC v Parmar*, 135 AD3d 446, 446 [1st Dept 2016]). Although it was not essential *(Artcorp Inc. v Citirich Realty Corp.*, 140 AD3d 417, 418 [1st Dept 2016]), plaintiff also demonstrated a meritorious defense to the counterclaim (*Jones v 414 Equities*, 57 AD3d 65, 81 [1st Dept 2008]), as it is not at all clear that the information disclosed in plaintiff's initial complaint was of a kind that could be considered confidential information for which defendant would be entitled to damages.

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

ENTERED: APRIL 10, 2018

CLERK

Renwick, J.P., Richter, Manzanet-Daniels, Andrias, Gesmer, JJ.

5760 In re New York City Transit Authority, et al., Petitioners-Appellants, Index 450078/15

-against-

Earl Phillips, etc., Respondent-Respondent.

_____

James Henley, Brooklyn (Timothy J. O'Shaughnessy of counsel), for appellants.

Advocates for Justice, New York (Arthur Z. Schwartz of counsel), for respondent.

_____

Judgment, Supreme Court, New York County (Alice Schlesinger, J.), entered October 31, 2016, reversed, on the law, without costs, the petition granted, and the matter remanded to a different arbitrator to enter a finding that respondent Aiken subjected Melendez to inappropriate and unwelcome comments of a sexual nature in violation of petitioners' sexual and other discriminatory harassment policy, and to pass upon the appropriateness of the penalty of termination.

Opinion by Manzanet-Daniels. All concur.

Order filed.

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

Dianne T. Renwick, J.P.
Rosalyn H. Richter
Sallie Manzanet-Daniels
Richard T. Andrias
Ellen Gesmer, JJ.

5760
Index 450078/15

_____x

In re New York City Transit Authority, et al.,
Petitioners-Appellants,

-against-

Earl Phillips, etc.,
Respondent-Respondent.
_____x

Petitioners appeal from the judgment of the Supreme Court, New York County (Alice Schlesinger, J.), entered October 31, 2016, denying the petition to vacate an arbitration award, confirming the award, and dismissing the proceeding.

James Henley, Brooklyn (Timothy J. O'Shaughnessy and Lawrence Heisler of counsel), for appellants.

Advocates for Justice, New York (Arthur Z. Schwartz of counsel), for respondent.

MANZANET-DANIELS, J.

In this article 75 proceeding, petitioners seek to vacate a determination by an arbitrator under a collective bargaining agreement that set aside a determination by petitioners that Tony Aiken had committed sexual harassment, and ordered his termination. Although expressly agreeing with the pertinent factual findings in the investigation report of petitioners' Office of Equal Employment Opportunity (EEO) – including findings that Aiken had stated to a colleague that if he had a woman like her he would stay in bed all day and "oil her down" – the arbitrator nonetheless, and incredibly and inconsistently with his own findings, ruled that the conduct did not "rise to the level" of sexual harassment. We now reverse.

In late 2012, Tulani Melendez, a bus dispatcher who worked at the same bus depot as Aiken, submitted a 13-page handwritten complaint to petitioners' EEO describing numerous unwanted advances and sexually inappropriate comments by Aiken, a union delegate and bus operator under her supervision. Melendez asserted that in retaliation for rebuffing his advances, Aiken humiliated her in front of others and countermanded her express directions to subordinates.

The EEO conducted an investigation, interviewing Melendez, Aiken, another bus operator who also reported being harassed by

Aiken, as well as numerous dispatchers, bus operators, two managers, and a union representative. A number of these individuals corroborated Melendez's account of the harassment; none controverted her account.

Melendez described numerous inappropriate statements and conduct, including remarks that Melendez was "sexy," and asking if she were looking for another husband, coupled with an offer to act as her "sugar daddy." On one occasion, as bus operators were reporting to Melendez for their assignments, Aiken remarked loudly, "Isn't she fine? What would you do if you had a woman like her at home? I wouldn't leave the house. I would stay in bed all day. I would oil her down." On at least two occasions when they were in the crew room, Aiken placed his wallet on the ledge and said, in the presence of other operators, "I would give all of this for that [referring to Melendez]."

Melendez claimed that Aiken's conduct took place in front of others, and caused her to feel so humiliated and degraded that on November 11, 2012, she worked out of her car to avoid Aiken. When the harassment first began, Melendez tried to steer clear of Aiken; as the harassment continued, she repeatedly told him to stop and to leave her alone, to no avail.

After Melendez filed an official complaint on December 3, 2012, she was told that Aiken would be limited to the second

floor of the depot, yet on December 15, 2012, Aiken entered the office where she was working.

Coworker Lourdes Alvarado also stated that Aiken was insubordinate and unprofessional with her. When she first arrived at the depot, he would ask the other bus operators, "Isn't she beautiful?" and say to Alvarado, "If you were my wife you wouldn't have to work. You could stay in bed all day. I'd rub your feet." On one occasion in the break room, Aiken threw his wallet on the table where Alvarado was sitting and asked, "How much?" In late 2012, Aiken said to her, "You're cut off. This is my new girlfriend," referring to Melendez, who was standing a few feet away.

On April 12, 2013, the EEO issued a report concluding that there was reasonable cause to believe that Aiken had subjected Melendez to inappropriate and unwelcome comments of a sexual nature in violation of section 3.0 of petitioners' sexual and other discriminatory harassment policy, which defined sexual harassment to include "unwelcome sexual advances and other behavior of a sexual nature when . . . such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creates an intimidating,

hostile, or offensive working environment."[1]

On May 10, 2013, disciplinary charges were issued against Aiken for, inter alia, sexual harassment, discriminatory, harassing and/or sexist language, gross misconduct and conduct unbecoming a MABSTOA employee. The charges cited specific instances of inappropriate and unwelcome comments of a sexual nature made by Aiken to Melendez and Alvarado, and concluded that Aiken had created a hostile work environment for Melendez and other female employees that adversely affected their ability to perform their job.

After Aiken failed to appear for step 1 of the disciplinary grievance procedure, the penalty of termination was deemed imposed. Respondent thereafter commenced a "contract interpretation" grievance (as opposed to a disciplinary grievance) under the collective bargaining agreement, asserting that petitioners had no power to discipline Aiken because he was on union-paid release. The arbitrator issued a decision finding that petitioners had violated the CBA by seeking to impose discipline on Aiken while he was on paid release time, and ruled that the disciplinary charges be held in abeyance in perpetuity

[1]The EEO found no reasonable cause to believe Aiken retaliated against Melendez in violation of petitioners' anti-retaliation policy.

as long as Aiken remained on union-paid release.[2]

The Supreme Court granted the motion to confirm the award in part and the cross motion to dismiss in part, finding that the disciplinary charges could go forward, but that petitioners could not impose discipline on Aiken while he remained on union-paid release.

This Court vacated the arbitration award, finding that "the arbitrator's interpretation of the CBA – requiring reinstatement of the sexual harassment offender because the union-paid release time acts as a shield – runs counter to the identified public policy against sexual harassment in the workplace" (132 AD3d 149, 153 [1st Dept 2015], *lv denied* 27 NY3d 901 [2016]). We stated that the policy prohibiting sexual harassment was "well recognized," noting that Title VII of the Civil Rights Act of 1964 prohibited employment discrimination on the basis of sex, defined as, inter alia, "verbal or physical conduct of a sexual nature . . . [which has] the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment" (*id.*).

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[2]The parties agreed to arbitrate separately the question of whether Aiken was in fact terminated owing to his failure to attend the step 1 grievance. In February 2014, the arbitrator ruled that he was in fact not so terminated. MABSTOA did not challenge that determination in this Court.

The implementing regulations made clear that the onus was on the employer to maintain a workplace free of harassment, rendering it liable for sexual harassment between fellow employees of which the employer knew or should have known, unless it could be shown that the employer took immediate and appropriate corrective action (*id.* at 155). Employers were required to take all reasonable steps to prevent sexual harassment, such as "developing appropriate sanctions," and "creat[ing] a procedure . . . that encourages victims of sexual harassment to come forward" (*id.*). We reasoned that "[b]ecause title VII is designed to encourage the creation of anti-harassment policies and effective complaint mechanisms for reporting harassing conduct, an employer's investigation of a sexual harassment complaint is not a gratuitous or optional undertaking . . ., and appropriate corrective action is required following such investigation (*id.* at 156-157). We noted that state law was to similar effect, and the protections of the New York City Human Rights Law are even more expansive (*id.* at 156).

We found that by ordering reinstatement on the basis of the release time rules, the arbitrator had effectively prevented the Transit Authority from following its policies and satisfying its legal obligation to safeguard against sexual harassment in the workplace (*id.* at 157). Such a result would embolden offenders

like Aiken, while simultaneously deterring victims like Melendez from coming forward to report offensive behavior (*id.*).

The parties proceeded to arbitrate the disciplinary charges on the merits. The arbitrator credited Melendez's testimony that Aiken had made "inappropriate sexist remarks to and/or about her in the presence of other employees on a number of occasions," finding her testimony to be corroborated by that of other witnesses. Although stating that he felt "compelled to come to the same factual conclusions as the EEO Investigators did," and finding Aiken's conduct to have violated applicable workplace directives concerning maintenance of a respectful workplace, the arbitrator nonetheless concluded, without explanation, that Aiken's misconduct did not rise to the level of a dischargeable offense as defined in petitioners' Policy Instruction on Sexual and other Discriminatory Harassment. The arbitrator found that the Authority had not shown cause for Aiken's discharge, but only for imposition of a 10-day suspension and to require that he complete an approved sensitivity training course. The arbitrator blamed Melendez, as a supervisor, for failing to earlier report sexual harassment, reasoning, "If, as she testified, [Aiken's] remarks caused her to feel angry, humiliated and upset, Melendez was obligated to tell him in no uncertain terms his comments were unwelcome and that she would take appropriate action if he did

not cease and desist from making them. She did not do so. . . . Had Melendez notified [petitioners] of [Aiken's] remarks in a timely manner, as she is required to do, it is unlikely this matter would have gone as far as it has." Supreme Court confirmed the arbitration award and denied petitioners' motion to vacate the award. We now reverse. The award in this case is both irrational and against this State's strongly articulated public policy against sexual harassment in the workplace.

Judicial review of an arbitration award is narrowly circumscribed, and vacatur limited to instances where the award is "violative of a strong public policy, is irrational, or clearly exceeds a specific limitation on an arbitrator's power" (*Matter of New York City Tr. Auth. v Transport Workers Union of Am., Local 100, AFL-CIO*, 306 AD2d 486, 486 [2d Dept 2003], *lv denied* 1 NY3d 510 [2004]). Under the public policy exception, courts will intervene only in "cases in which the public policy considerations, embodied in statute or decisional law, prohibit, in an absolute sense, particular matters being decided or certain relief being granted by an arbitrator" (*Matter of New York City Tr. Auth. v Transport Workers Union of Am.*, Local 100, AFL-CIO, 99 NY2d 1, 7 [2002] [internal quotation marks omitted]).

On the prior appeal, we found that shielding perpetrators of sexual harassment from disciplinary action for an indefinite time

on the basis of a technicality concerning union release time fell within the second prong of the public policy exception. That same public policy against workplace sexual harassment that we articulated in our prior opinion is offended here – indeed all the more so – where the arbitrator has made explicit findings of fact concerning the nature of Aiken's misconduct.

The arbitrator's decision fashions a remedy that violates public policy. Moreover, it contains language maligning victims in an entirely inappropriate manner, including statements that it was incumbent on Melendez to take appropriate action if she felt Aiken's comments were inappropriate. Such a "blame the victim" mentality inappropriately shifts the burden of addressing a hostile work environment onto the employee. The arbitrator's decision belies the realities of workplace sexual harassment. The fact that the victim did not earlier report Aiken's behavior is not atypical and should in no way be construed as absolving Aiken of his misconduct.

The arbitrator's decision effectively prevents petitioners from following their policies and fulfilling their legal obligations to protect against workplace sexual harassment. It is the employer's responsibility to implement appropriate policies to protect against workplace harassment, including the institution of appropriate complaint procedures that encourage

victims to come forward, and the implementation of appropriate sanctions that are designed to deter offensive behavior. The arbitrator's decision subverts this well established policy by shifting the onus to the employee to report and fend off the harasser. Indeed, the arbitrator's decision emboldens future harassers to engage in pernicious misconduct, knowing that they are likely to receive little more than a slap on the wrist as punishment. Victims would be less likely to report harassment, knowing that their employer will do little to protect them from even well-documented and pervasive misconduct. Employers' ability to remedy such behavior would be undermined, limiting their ability to punish offenders and to deter similar behavior in the future.

Accordingly, public policy prohibits enforcement of the arbitration award in this case (*see e.g. Matter of Michael Bukowski [State of N.Y. Dept. of Corr. & Community Supervision]*, 148 AD3d 1386 [3d Dept 2017] [in view of strong, explicit, and clearly articulated statutory and regulatory prohibitions against the use of unjustified physical force in the correctional context, and given that the correction officer employee unquestionably engaged in such conduct, public policy prohibited enforcement of the penalty of a 120-day suspension imposed by the arbitrator, and court remitted matter for imposition of a new

penalty]).

Further, the arbitrator's decision is irrational as it purports to adopt the findings of the EEO in all respects, and yet arrives at the unsustainable conclusion that Aiken did not violate the workplace sexual harassment policy. Among the express findings of the EEO – with which the arbitrator was "compelled to agree" – were that Aiken offered to act as Melendez's "sugar daddy"; that Aiken stated, in the presence of others, that he would "stay in bed all day" if he had a woman like Melendez and would "oil her down"; and that Aiken placed his wallet on the ledge and stated in the presence of others, "I would give all of this" for Melendez.

Given such findings, it is unfathomable that the arbitrator could find that Aiken's conduct did not violate the workplace policy against sexual harassment, which expressly defines sexual harassment to include behavior which "has the purpose or effect of unreasonably interfering with an individual's work performance or creates an intimidating, hostile or offensive working environment." This disjunction between the arbitrator's findings and his summary conclusion that Aiken's behavior nonetheless did "did not rise to the level" of sexual harassment is fundamentally irrational (*see e.g. Matter of Livermore-Johnson [N.Y. State Dept. of Corr.* & Community Supervision], 155 AD3d 1391 [3d Dept

2017] [arbitrator's erroneous interpretation of collective bargaining agreement as precluding him from considering whether the employer established probable cause for an employee's suspension, in effect creating a requirement that the suspension notice itself set forth probable cause, was fundamentally irrational, warranting vacatur of arbitration award]).

This case is similar to that of *Matter of Ford v Public Empl. Fed.* (175 AD2d 85 [1st Dept 1991]), where we found an arbitration award to be both contrary to public policy and irrational. In *Ford*, the arbitrator sustained several findings of incompetence and misconduct on the part of the respondent doctor, yet declined to impose any penalty, concluding there was no "just cause" for sanctions under the collective bargaining agreement. We reversed and remanded for the imposition of an appropriate penalty, reasoning that it was error to refuse to impose a sanction on the respondent in light of the findings of incompetence and misconduct (*see id.* at 87-88).

So too here, the arbitrator's conclusion that Aiken's conduct did not rise to the level of sexual harassment, as well as the penalty imposed, a meager 10-day suspension, was fundamentally at odds with the arbitrator's own findings of fact, and contrary to the well-recognized policy of the State in protecting against workplace sexual harassment, and the award

cannot stand.

Respondent misleadingly asserts that the arbitrator found the misconduct in question to fall outside the applicable 30-day limitations period. The arbitrator specifically found that "[n]otwithstanding Melendez's inability to provide specific dates. . . Transit has shown it more likely than not some of the offensive remarks were made within thirty (30) working days prior to her initial complaint."

Accordingly, the judgment of the Supreme Court, New York County (Alice Schlesinger, J.), entered October 31, 2016, denying the petition to vacate an arbitration award, confirming the award, and dismissing the proceeding, should be reversed, on the law, without costs, the petition granted, and the matter remanded to a different arbitrator to enter a finding that respondent Aiken subjected Melendez to inappropriate and unwelcome comments of a sexual nature in violation of petitioners' sexual and other

discriminatory harassment policy, and to pass upon the appropriateness of the penalty of termination.

All concur.

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

ENTERED: APRIL 10, 2018

CLERK