SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

APRIL 26, 2018

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Acosta, P.J., Manzanet-Daniels, Tom, Oing, Singh, JJ.

6345-
6346N

Policy Administration Solutions, Inc.,
Plaintiff-Respondent,

-against-

QBE Holdings, Inc., et al.,
Defendants-Appellants.

Index 652273/14

Von Briesen & Roper, S.C., Milwaukee, WI (Jason R. Fathallah of the bar of the State of Wisconsin and the State of Michigan, admitted pro hac vice, of counsel), for appellants.

Butler Fitzgerald Fiveson & McCarthy, New York (David K Fiveson and Claudia G. Jaffe of counsel), for respondent.

Order, Supreme Court, New York County (Charles E. Ramos, J.), entered October 31, 2016, which, to the extent appealed from as limited by this briefs, denied defendants' motion to confirm an arbitration award, granted plaintiff's motion to vacate the award, and remanded the matter for further proceedings, unanimously affirmed, without costs. Order, same court and Justice, entered on or about August 29, 2017, which granted plaintiff's motion to vacate or, in the alternative, modify the award, to the extent of vacating the part of the prior order that

remanded the matter to Peter Brown and instead remanding to the American Arbitration Association (AAA) to determine under its rules who shall preside over the matter upon remand, unanimously affirmed, without costs.

Defendants' failure to disclose to the arbitrator that one of their testifying fact witnesses who was known to be under criminal indictment had agreed to plead guilty to charges in the indictment days before he testified at the arbitration hearing warranted a finding that the arbitration award was procured by misconduct (CPLR 7511[b][1][i]) and that further proceedings before the arbitrator are necessary (*see Matter of Accessible Dev. Corp. [Ocean House Ctr.]*, 4 AD3d 217 [1st Dept 2004]; *Matter of Kalgren [Cent. Mut. Ins. Co.]*, 68 AD2d 549, 552-553 [1st Dept 1979]).

Supreme Court providently exercised its discretion to remit to the AAA to determine who shall preside over the matter upon remand (*see East Ramapo Cent. School Dist. v East Ramapo Teachers*

Assn., 108 AD2d 717 [2d Dept 1985]).

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

ENTERED: APRIL 26, 2018

CLERK

Sweeny, J.P., Manzanet-Daniels, Mazzarelli, Oing, Moulton, JJ.

5952-
5953 The People of the State of New York, Ind. 2950/13
Respondent,

-against-

Shavaler Johnson,
Defendant-Appellant.

- - - - -

The People of the State of New York,
Respondent,

-against-

Vijay Jain,
Defendant-Appellant.

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

Rosemary Herbert, Office of the Appellate Defender, New York (Joseph M. Nursey of counsel), for Vijay Jain, appellant.

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

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Judgments, Supreme Court, New York County (Renee A. White, J. at suppression hearing; Anthony J. Ferrara, J. at jury trial and sentencing), rendered June 23, 2015, convicting defendant Johnson of criminal possession of a controlled substance in the fifth and seventh degrees, and sentencing her, as a second felony drug offender previously convicted of a violent felony, to an aggregate term of 2½ years, and convicting defendant Jain of criminal possession of a controlled substance in the third and

fifth degrees, and sentencing him, as a second felony drug offender, to an aggregate term of 2½ years, unanimously reversed, on the law, and the matter remanded for a new trial.

Defendants were present when parole officers came to the apartment in question to arrest another person for parole violation. After a struggle with the parolee at the doorway, parole officers entered the apartment to conduct a protective sweep of the apartment. An officer saw defendants down a hallway in a kitchen-living room area and proceeded to that area. In plain view on a kitchen island was a clear ziploc bag that contained 26 "twists" of crack cocaine. There was also an unspecified white residue on another kitchen counter. This white residue was not tested. There was no paraphernalia recovered associated with mixing, compounding, packaging or otherwise preparing drugs for sale. Defendants contended that the search was illegal and moved to suppress the drugs. The court denied the suppression motion.

On appeal, defendants assert that the drugs recovered from the apartment should have been suppressed as fruit of an illegal search. They also argue that the court erred in charging the jury with the "drug factory" presumption of Penal Law § 220.25(2). We find that the search was lawful. However, it was error to charge the drug factory presumption.

The court properly denied defendant Johnson's motion to suppress. The officers properly conducted a limited protective sweep of the apartment to determine if there were any people inside who might pose a threat to their safety (*see Maryland v Buie*, 494 US 325, 333-334 [1990]; *People v McAllister*, 35 AD3d 300 [1st Dept 2006], *lv denied* 8 NY3d 925 [2007]). The officers also reasonably believed that there might be a weapon inside the apartment based on the recovery of a firearm from the same apartment a week earlier. Moreover, there was evidence that other people were present in the apartment at the time the officers entered (*see e.g. People v Bryant*, 91 AD3d 558 [1st Dept 2012], *lv denied* 20 NY3d 1009 [2013]). During this valid protective sweep, the officers properly recovered the drugs, which were found in plain view.

The record also supports the hearing court's alternative finding that the search was based on the advance consent of the parolee. The officers had at least a reasonable belief that the third defendant, who had consented to a search of his residence as a condition of his parole, lived in this apartment.

Defendant Jain did not preserve his suppression claim (*People v Buckley*, 75 NY2d 843, 846 [1990] ["Defendant cannot rely on the request of a codefendant" to preserve a claim]; *People v Roseboro*, 151 AD3d 526, 526 [1st Dept 2017], *lv denied*

30 NY3d 983 [2017] [noting that "despite several opportunities to do so, (the defendant) never joined the codefendant's request"]), and we decline to review it in the interest of justice. As an alternative holding, we also reject it for the reasons already stated.

The court's jury instruction on the drug factory presumption of Penal Law § 220.25(2) was improper. The statutory presumption "does not require that mixing or compounding paraphernalia be found on the premises" (*People v de Jesus*, 178 AD2d 180, 181 [1st Dept 1991], *lv denied* 79 NY2d 946 [1992]). However, where, as here, the quantity of drugs found does not show "circumstances evincing an intent to unlawfully mix, compound, package, or otherwise prepare for sale" (Penal Law § 220.25(2)), giving the drug factory charge is unwarranted. Here, the officers recovered approximately one gram of crack cocaine divided between 26 "twists." The fact that a larger bag contained individual twists was not a sufficient basis for the trial court to employ the drug factory presumption (*see Matter of Jermaine M.*, 188 AD2d 336 [1st Dept 1992] [finding that the presence of 36 vials of crack in a bag in the same room as the appellant was insufficient to warrant the presumption]; *People v Martinez*, 186 AD2d 151, 151-152 [2d Dept 1992] [holding that a drug factory charge was unwarranted where police found 1/8 ounce of cocaine in a tinfoil packet and

residue on dollar bills, but no scales, drug paraphernalia or other circumstances evincing an intent to package or prepare for sale], *revd on other grounds*, 83 NY2d 26 [1993], *cert denied* 511 US 1137 [1994]). The presence of an unspecified, untested, white residue on a kitchen counter does not justify the charge, where such is equally consistent with the residue left by household cooking and cleaning products.

Detective Hernandez testified for the People as an expert in "street level narcotics and narcotics investigations." He testified that 26 twists would be more "consistent with sale" than with possession for personal use. However, he conceded that given the absence of packaging or processing materials in the apartment, the bag, by itself, was not conclusive evidence that the drugs contained therein were actually packaged in the apartment; he testified that "[i]t could mean that those drugs were not prepped there in that specific apartment for sale."

Giving the charge when it is unwarranted is not harmless error (*People v Martinez*, 83 NY2d at 37). As such, the matter is reversed and remanded for a new trial.

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

ENTERED: APRIL 26, 2018

CLERK

Sweeny, J.P., Renwick, Mazzarelli, Gesmer, JJ.

6284- Index 161809/15
6285-
6286 Lanzuter Benevolent Association,
Plaintiff-Appellant,

-against-

Cassandra Altman, et al.,
Defendants,

Neil Ross,
Defendant-Respondent.

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Miller Law, PLLC, New York (Meredith R. Miller of counsel), for appellant.

Neil Ross, respondent pro se.

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Orders, Supreme Court, New York County (Joan M. Kenney, J.), entered September 23, 2016, and April 21, 2017, which, to the extent appealed from as limited by the briefs, directed plaintiff to assign defendant Gertrude Ross a burial plot in Mt. Carmel Cemetery upon her production of original permits, denied plaintiff's request for a declaration that Gertrude Ross has no valid claim to a burial plot in Mt. Carmel Cemetery, and denied plaintiff's motion for a default judgment and dismissed the complaint pursuant to CPLR 3215(c), unanimously modified, on the law, to reinstate the complaint, to vacate the orders that directed plaintiff to assign a plot and denied plaintiff's request for a declaration, and to remand the matter for further

proceedings upon the filing of answers by all defendants, properly represented by one "duly . . . licensed and admitted to practice law in the courts of this state" (Judiciary Law § 478), within 30 days after entry of this order, and otherwise affirmed, without costs.

Defendant Neil Ross, who is not an attorney, purports to represent Gertrude Ross, his mother, and at various times in this proceeding, all other defendants as well. This representation violates Judiciary Law § 478. Whether or not the issue was raised before the motion court, it cannot be waived (*Salt Aire Trading LLC v Sidley Austin Brown & Wood, LLP*, 93 AD3d 452, 453 [1st Dept 2012]). Neil Ross's submissions on his mother's behalf, as well as his submissions on behalf of all other defendants, must be stricken, without prejudice to the filing of answers by all defendants, properly represented (*id.*).

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

ENTERED: APRIL 26, 2018

CLERK

Renwick, J.P., Manzanet-Daniels, Tom, Andrias, Oing, JJ.

6368 The People of the State of New York, Respondent, Ind. 5590/13

-against-

Darrell Williams, Defendant-Appellant.

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Rosemary Herbert, Office of the Appellate Defender, New York (Daniel R. Lambright of counsel), for appellant.

Cyrus R. Vance, Jr., District Attorney, New York (Samuel Z. Goldfine of counsel), for respondent.

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Judgment, Supreme Court, New York County (Bruce Allen, J.), rendered January 7, 2015, as amended March 12, 2015, convicting defendant, upon his plea of guilty, of attempted robbery in the second degree, and sentencing him, as a second violent felony offender, to a term of five years, unanimously affirmed.

The court properly denied defendant's suppression motion. When an identified eyewitness/victim told the police that defendant had just tried to rob him, this provided probable cause to arrest defendant (*see People v Hetrick*, 80 NY2d 344, 348 [1992]; *People v Hicks*, 38 NY2d 90 [1975]). Moreover, the reliability of this accusation was enhanced by the officers' observations that the complainant was nervous and had a bruised face and a bloody nose. Even assuming that some of the circumstances, such as that the men were yelling at each other,

may have suggested the possibility of a dispute rather than an attempted robbery, these circumstances were insufficient to negate probable cause (*see People v Dunnell*, 63 AD3d 535 [1st Dept 2009], *lv denied* 13 NY3d 796 [2009]; *People v Roberson*, 299 AD2d 300 [1st Dept 2002], *lv denied* 99 NY2d 619 [2003]).

We have considered and rejected defendant's remaining claims, including his argument that, in order to meet their burden at the suppression hearing, the People were required to call an additional officer as a witness.

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

ENTERED: APRIL 26, 2018

CLERK

Renwick, J.P., Manzanet-Daniels, Tom, Andrias, Oing, JJ.

6369 Jeanine Celentano, Index 301773/16
Plaintiff-Respondent,

-against-

Boo Realty, LLC, et al.,
Defendants-Appellants.

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Babchik & Young, LLP, White Plains (Michael J. Clemente of counsel), for appellants.

Spiegel & Barbato, LLP, Bronx (Brian C. Mardon of counsel), for respondent.

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Order, Supreme Court, Bronx County (Julia I. Rodriguez, J.), entered on or about January 9, 2017, which denied defendants' motion to dismiss the complaint as against defendant Jo Lu Real Properties, Corp. (Jo Lu), and thereupon to change venue to Westchester County, unanimously affirmed, with costs.

In this premises liability action, plaintiff alleges that defendants Boo Realty, LLC and Jo Lu owned, managed and/or maintained plaintiff's apartment, where the accident occurred. The complaint states a cognizable cause of action against Jo Lu, and its allegations must be accepted as true on a motion to dismiss (*see* CPLR 3211[a][7]; *Rovello v Orofino Realty Co.*, 40 NY2d 633 [1976]).

The documentary evidence submitted by defendants in support of their motion to dismiss neither "utterly refutes plaintiff's

factual allegations," nor "conclusively establishes a defense to the asserted claims as a matter of law" (*Mill Fin., LLC v Gillett*, 122 AD3d 98, 103 [1st Dept 2014] [internal quotation marks omitted]; CPLR 3211[a][1]). The deed for the property and the lease for plaintiff's apartment show that Boo Realty owns the property, but those documents alone are insufficient to refute plaintiff's allegations that Jo Lu managed and maintained the premises (*see 138-140 W. 32nd St. Assoc. LLC v 138-140 W. 32nd Assoc.*, 128 AD3d 548 [1st Dept 2015]). The factual affidavit of Boo Realty's member is not "documentary evidence" for purposes of CPLR 3211(a)(1) (*see Flowers v 73rd Townhouse LLC*, 99 AD3d 431 [1st Dept 2012]; *Tsimerman v Janoff*, 40 AD3d 242 [1st Dept 2007]), and even if the conclusory affidavit is considered, it is insufficient since it failed to explain why Jo Lu is the entity named on the insurance policy for the premises.

Since Jo Lu has a principal place of business in Bronx County, plaintiff properly placed venue there (*see Krochta v On*

Time Delivery Serv., Inc., 62 AD3d 579 [1st Dept 2009]). Defendants made no attempt to demonstrate that a discretionary change of venue would be warranted based on the convenience of any specified witnesses (*see* CPLR 510[3]).

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

ENTERED: APRIL 26, 2018

CLERK

Renwick, J.P., Manzanet-Daniels, Tom, Andrias, Oing, JJ.

6370-
6371 In re Messiah G.,

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

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Larry S. Bachner, New York, for appellant.

Zachary W. Carter, Corporation Counsel, New York (Megan E.K. Montcalm of counsel), for presentment agency.

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Order of disposition, Family Court, Bronx County (Peter J. Passidomo, J.), entered on or about February 16, 2017, which adjudicated appellant a juvenile delinquent upon a fact-finding determination that he committed acts that, if committed by an adult, would constitute the crimes of criminal sexual act in the first and third degrees, sexual abuse in the first and third degrees, sexual misconduct and unlawful imprisonment in the second degree, and imposed a conditional discharge for a period of 12 months, unanimously affirmed, without costs.

The court's findings were based on legally sufficient evidence and were not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348 [2007]). There is no basis for disturbing the court's credibility determinations. The evidence established appellant's accessorial liability under

Penal Law § 20.00. The victim's testimony established that appellant acted in concert with two other youths to hold the victim down to the floor while one of appellant's accomplices subjected the victim to oral sexual conduct (*see Matter of Andre N.*, 282 AD2d 273, 274 [1st Dept 2001], *lv denied* 96 NY2d 717 [2001]; *see also Matter of Rashaun S.*, 46 AD3d 412 [1st Dept 2007]).

The court providently exercised its discretion in adjudicating appellant a juvenile delinquent, imposing a conditional discharge, and denying his request for an adjournment in contemplation of dismissal. The conditional discharge was the least restrictive alternative in light of the seriousness of the offense, appellant's failure to accept responsibility for his conduct, and the need for a year-long period of supervision to ensure compliance with a treatment program (*see Matter of Katherine W.*, 62 NY2d 947 [1984]).

Appellant's conclusory assertion that various counts should be dismissed as lesser included offenses of first-degree criminal sexual act is unavailing.

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

ENTERED: APRIL 26, 2018

CLERK

Renwick, J.P., Manzanet-Daniels, Tom, Andrias, Oing, JJ.

6372 Charmaine Falcone, Index 160577/15
Plaintiff-Appellant,

-against-

Claude Dorius, et al.,
Defendants-Respondents,

Veruskha Santana,
Defendant.

_____

Diamond & Diamond, LLC, Brooklyn (Stuart Diamond of counsel), for appellant.

Marjorie E. Bornes, Brooklyn, for Claude Dorius and Surrey Cab Corp., respondents.

Law Offices of Richard A. Reinstein, P.C., Brooklyn (Robert J. Adams, Jr. of counsel), for Jaekyu A. Kim and David Mashkabov, respondents.

_____

Order, Supreme Court, New York County (Paul A. Goetz, J.), entered September 1, 2017, which granted defendants-respondents' motions for summary judgment dismissing the complaint and all cross claims as against them, unanimously affirmed, without costs.

The unrefuted evidence establishes that defendants Claude Dorius and Jaekyu A. Kim, operating taxis owned by defendants Surrey Cab Corp. and David Mashkabov, respectively, were lawfully double-parked, discharging passengers, when a car allegedly driven by defendant Veruskha Santana collided with the rear of

Kim's car, which caused Kim's car to collide with Dorius's car as plaintiff was preparing to exit it. The fact that the taxis were rear-ended while stopped is prima facie evidence that their drivers were not negligent (*Profita v Diaz*, 100 AD3d 481 [1st Dept 2012]; *see also* Rules and Regulations of City of NY Department of Transportation [34 RCNY] § 4-11[d]). Plaintiff failed to offer a nonnegligent explanation for the rear-ending of Kim's car that raises an issue of fact as to the taxi drivers' negligence (*see Santana v Tic-Tak Limo Corp.*, 106 AD3d 572, 573-574 [1st Dept 2013]).

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 26, 2018

CLERK

Renwick, J.P., Manzanet-Daniels, Tom, Andrias, Oing, JJ.

6373 The People of the State of New York, Respondent, Ind. 4647/15

-against-

Terrence Colson, Defendant-Appellant.

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

Cyrus R. Vance, Jr., District Attorney, New York (Andrew E. Seewald of counsel), for respondent.

_____

Appeal from judgment, Supreme Court, New York County (Thomas A. Farber, J. at hearing; Mark Dwyer, J. at plea and sentencing), rendered October 25, 2016, convicting defendant of two counts of robbery in the second degree, and sentencing him, as a second felony offender, to concurrent terms of seven years, held in abeyance, and the matter remitted for further proceedings on defendant's motion to withdraw his plea, with new counsel assigned.

Before sentencing, defendant made a written pro se motion to withdraw his guilty plea, asserting that his plea was involuntary because he "was not fully aware of the circumstances involved," and that he had a meritorious defense. In a companion motion, he cited specific inconsistencies in the victim's statements. Defendant did not claim there were any deficiencies in defense

counsel's performance. However, when asked by the court whether she had anything to say "on behalf of the motion," counsel replied, "I don't think that there . . . is a basis for it," and that defendant had not wanted to proceed to trial.

This constituted taking a position adverse to defendant's, and thus warranted assignment of new counsel (*see People v Christian*, 112 AD3d 414 [1st Dept 2013]; *see also People v Ferguson*, 140 AD3d 976, 977 [2d Dept 2016]). To the extent that, after the court denied the motion, counsel made additional comments that appeared to bear on her advice to defendant about taking the plea, these were unnecessary because, in his plea withdrawal motion, defendant never complained about his attorney's conduct. Thus, counsel's comments were adverse to her client's position, and "went beyond a mere explanation of h[er] performance" (*Christian*, 112 AD3d at 414).

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

ENTERED: APRIL 26, 2018

CLERK

Renwick, J.P., Manzanet-Daniels, Tom, Andrias, Oing, JJ.

6374 Jennifer Cangro, Index 101254/16
Plaintiff-Appellant,

-against-

John Z. Maranzos,
Defendant-Respondent.

_____

Jennifer Cangro, appellant pro se.

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Order, Supreme Court, New York County (Arlene P. Bluth, J.), entered October 31, 2016, which denied plaintiff's motion for damages and sanctions against defendant, and dismissed the complaint, unanimously affirmed, without costs. Plaintiff is enjoined from commencing any further litigation relating to this matter without permission of the appropriate Administrative Judge. The Clerk of the Court is directed to accept no filings from plaintiff as to such matter without prior leave of the Court.

This action is yet another impermissible collateral attack by plaintiff on her divorce judgment, and was properly dismissed (*see e.g. Cangro v Marangos*, 132 AD3d 573 [1st Dept 2015], *appeal dismissed* 26 NY3d 1113 [2016]). Furthermore, plaintiff failed again to comply with prior orders requiring her to obtain written approval from the administrative judge before commencing an action arising from the matrimonial action (*id.; see also Cangro*

v Cangro, 288 AD2d 417 [2d Dept 2001]).

We enjoin plaintiff from commencing further proceedings against defendant without prior judicial permission, in light of her history of frivolous and abusive litigation, including this meritless action.

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

ENTERED: APRIL 26, 2018

CLERK

Renwick, J.P., Manzanet-Daniels, Andrias, Oing, JJ.

6375 Board of Managers of Honto 88 Condominium,
Plaintiff-Respondent,

-against-

Red Apple Child Development Center, a Chinese School, et al.,
Defendants-Appellants,

Bank of China, New York Branch,
Defendant,

Xiaoping Fan also known as Joanna Fan, President of Red Apple Child Development Center, et al.,
Defendants-Appellants. Index 110827/07

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Red Apple Child Development Center, A Chinese School, et al.,
Plaintiffs-Appellants,

Bank of China, New York Branch,
Plaintiff,

-against-

Board of Managers of Honto 88 Condominium, et al.,
Defendants-Respondents.

- - - - -

Board of Managers of Honto 88 Condominium,
Plaintiff-Respondent,

-against-

Red Apple Child Development Center, a Chinese School,
Defendant-Appellant,

Bank of China, New York Branch,
Defendant,

Xiaoping Fan also known as Joanna Fan,
President of Red Apple Child Development
Center, et al.,
Defendants-Appellants.

_____

The Bresky Law Firm PLLC, Elmhurst (Marc S. Bresky of counsel), for appellants.

Anderson Kill PC, New York (Deborah B. Koplovitz of counsel), for respondents.

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Judgment and order of foreclosure and sale of the Supreme Court, New York County (Debra A. James, J.), entered April 7, 2016, bringing up for review an order, same court and Justice, entered January 28, 2013, which, inter alia, granted the motion of the Board of Managers of Honto 88 Condominium and its individual members (collectively, the Board) for summary judgment dismissing the claims of Red Apple Child Development Center, a Chinese School, Xiaoping Fan a/k/a Joanna Fan, as President of Red Apple and individually, and Ziming Shen, as Trustee of Red Apple and individually (collectively, Red Apple), unanimously affirmed, without costs.

Red Apple's first cause of action, for breach of contract, was properly dismissed. The evidence submitted with the summary judgment motion was sufficient to establish, prima facie, that the Board did not breach the condominium's by-laws with respect to a failure to pay for the common electrical charges. The Board

concedes that it was responsible for paying those charges, and thus the only relevant issue with respect to this claim is whether the Board in fact paid for them. The condominium's managing agent testified that there is a separate meter for the electricity for all of the "Common Elements" of the building, including the common medical spaces owned by Red Apple, and that the condominium has always paid for these charges in full. The evidence submitted by Red Apple does not refute this contention.

Further, as the Board has admitted that it has always paid for the electrical charges for the common elements of the building, there is no "justiciable controversy" necessitating a declaration that the Board was required to pay for them (CPLR 3001; *Big Four LLC v Bond St. Lofts Condominium*, 94 AD3d 401, 403 [1st Dept 2012], *lv denied* 19 NY3d 808 [2012]), thus warranting dismissal of Red Apple's second cause of action.

Red Apple's third and fourth causes of action, for unjust enrichment and "money had and received," should not be reinstated. A claim for unjust enrichment will not stand when the matter is controlled by a governing contract, as is the case here (*Goldman v Metropolitan Life Ins Co.*, 5 NY3d 561, 572 [2005]). Nor has Red Apple demonstrated that there was any error in the court's dismissal of the claim for "money had and received" (*Parsa v State of New York*, 64 NY2d 143, 148 [1984]).

Besides the presence of a governing agreement, the record also does not support Red Apple's claim that the Board possessed money that did not rightfully belong to it.

The IAS court also properly dismissed Red Apple's fifth cause of action, for breach of contract relating to the Board's alleged failure to maintain the common areas of the condominium.

The record demonstrates that the Board fulfilled its obligations to keep these areas in good repair. The Board's managing agent testified regarding Red Apple's complaints in this regard, which they had investigated and determined to be unfounded, and Red Apple did not submit any proof regarding the damages relating to the Board's alleged shortcomings. The IAS court also properly dismissed the sixth cause of action, sounding in nuisance, and there is nothing in the record to support a "pattern of continuity or recurrence of objectionable conduct" or of intentional wrongdoing on the part of the Board (*Berenger v 261 W. LLC*, 93 AD3d 175, 182-183 [1st Dept 2012]; *Copart Indus. v Consolidated Edison Co. of N.Y.*, 41 NY2d 564, 570-571 [1977]).

Red Apple's seventh cause of action, for a breach of fiduciary duty also does not withstand scrutiny. The individual Board members are protected by the business judgment rule absent allegations of tortious acts outside of legitimate condominium purposes (*Pelton v 77 Park Ave. Condominium*, 38 AD3d 1 [1st Dept

2006], *overruled on other grounds by Fletcher v Dakota, Inc.*, 99 AD3d 43 [1st Dept 2012]). Red Apple alleges no such tortious acts, and its reliance on *Fletcher* does not compel a different result. There is nothing to support Red Apple's conclusory allegations that it was discriminated against because its owners were from the north of China and the members of the Board were from the south. As Red Apple has not set forth any supportable basis for the imposition of personal liability on the individual Board members for their business judgment decisions, this claim was properly dismissed (*20 Pine St. Homeowners Assn. v 20 Pine St. LLC*, 109 AD3d 733, 735-736 [1st Dept 2013]).

Finally, Red Apple's eighth and ninth claims, relating to a board election were also properly dismissed. The by-laws do not require an officer of the condominium to sign the notice of meeting. Further, Red Apple failed to make a prompt application to the court in an effort to determine its voting rights in the election, and thus there was no reason to interfere with the condominium's internal affairs absent a clear showing that such action was warranted (*Matter of Goldfield Corp. v General Host Corp.*, 36 AD2d 125, 127 [1st Dept 1971], *affd* 29 NY2d 264 [1971]). Red Apple's ninth cause of action, for injunctive relief – based on substantially the same allegations asserted in

the eighth cause of action – fails for the same reasons. We have considered the parties' remaining contentions and find them unavailing.

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

ENTERED: APRIL 26, 2018

CLERK

Renwick, J.P., Manzanet-Daniels, Tom, Andrias, Oing, JJ.

6376 Joy Ifill-Colon, et al., Index 300356/13
Plaintiffs-Appellants-Respondents,

-against-

153 E. 149th Realty Corp.,
Defendant,

Baychester Payment Center, LLC, et al.,
Defendants-Respondents-Appellants.

_____

Parker Waichman LLP, Port Washington (Jay L.T. Breakstone of counsel), for appellants-respondents.

Litchfield Cavo LLP, New York (David Lafarga of counsel), for respondents-appellants.

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Order, Supreme Court, Bronx County (Sharon A.M. Aarons, J.), entered September 17, 2015, which, to the extent appealed from as limited by the briefs, granted defendants' respective motions for summary judgment dismissing the complaint, unanimously reversed, on the law, without costs, and the motions for summary judgment denied. Appeal from so much of the same order as granted defendant 153 E. 149th Realty Corp.'s motion for contractual indemnification from defendants Baychester Payment Center, LLC and Wink Check Cashing Corp., unanimously dismissed, without costs, as abandoned.

Defendants never met their burden to show that the subject stairway defect was trivial as a matter of law, because the

photographs relied upon by their expert indicate that the defect was repaired post-accident. The expert affidavit of professional engineer Stan S. Pitera submitted by defendants Baychester Payment Center, LLC and Wink Check Cashing Corp. does not aver that the crack at issue was unchanged between the time of the accident, October 11, 2013, and his May 20, 2015 inspection, nor does Pitera explain why the photographs authenticated by plaintiff as fairly and accurately depicting the accident location show a stairway with five steps and a crack with a hole around the bottom step's handrail. The other photographs in the record show a stairway with six steps and a crack that appears filled-in with no hole around the handrail for the second to last step. Since defendants failed to meet their initial burden as the movants by establishing the width, depth and elevation of the crack when the accident happened, it is not necessary to review the sufficiency of plaintiff's opposition papers (*see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]).

Lastly, defendants Baychester Payment Center, LLC's and Wink Check Cashing Corp.'s appeal of the determination awarding 153 E. 149th Street Realty judgment on its claim for contractual

indemnity and for defense costs incurred in the action is dismissed as abandoned, as they raise no challenge to that determination on appeal (*see Richbell Info. Servs. v Jupiter Partners*, 309 AD2d 288, 308 [1st Dept 2003]).

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

ENTERED: APRIL 26, 2018

CLERK

Renwick, J.P., Manzanet-Daniels, Tom, Andrias, Oing, JJ.

6377 New WTC Retail Owner LLC, Index 653169/16
Plaintiff-Appellant,

-against-

Pachanga, Inc.,
Defendant-Respondent.

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Herrick Feinstein LLP, New York (Michael Berengarten and Jared Newman of counsel), for appellant.

Vigorito, Barker, Porter & Patterson, LLP, Valhalla (Leilani Rodriguez of counsel), for respondent.

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Order, Supreme Court, New York County (Melissa Crane, J.), entered September 20, 2017, which denied plaintiff's motion to dismiss the counterclaims, unanimously modified, on the law, to grant the motion as to the counterclaims for fraud and negligent misrepresentation, and otherwise affirmed, without costs.

The motion court correctly declined to dismiss the counterclaim for rescission of the parties' lease, which is based on the allegation that plaintiff breached the lease by failing to deliver the premises and the patio in tenant-ready condition on time (*see Lasker-Goldman Corp v City of New York*, 221 AD2d 153 [1st Dept 1995], *lv dismissed* 87 NY2d 1055 [1996]). Defendant's principal says in an affidavit that when plaintiff notified him that the premises was ready for occupancy, the premises was not in fact ready; he submitted supporting photographs of the

condition of the premises, including the patio, at the time of delivery. Plaintiff failed to demonstrate that it delivered the premises in tenant-ready condition on time.

Plaintiff argues that pursuant to section 5.03 of the lease defendant agreed to accept delivery in "as is" condition, except as expressly provided in the lease, that the lease did not permit defendant to rescind based on the condition of the premises, that there was no firm delivery date, and that the lease expressly made RPL 223-a inapplicable.[1] However, defendant presented evidence that supports the allegations pleaded in the counterclaim that plaintiff intentionally caused the delay, in which event the otherwise generally enforceable exculpatory clause in the lease would not avail plaintiff (*see Bovis Lend Lease LMB v GCT Venture*, 6 AD3d 228 [1st Dept 2004]; *LoDuca Assoc., Inc. v PMS Constr. Mgt. Corp.*, 91 AD3d 485 [1st Dept 2012]). Defendant submitted an affirmation by counsel for a party (a potential tenant) sued in another action by plaintiff that was prepared for use in opposition to plaintiff's motion to dismiss the party's counterclaim for fraud in the inducement.

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[1] RPL 223-a provides that in every lease there is implied a condition that the lessor will deliver possession at the beginning of the term, and that in the event of a breach of this implied condition the lessee will have the right to rescind the lease and recover consideration paid.

The affirmation suggests that plaintiff knew before the contract was executed that it would be unable to deliver the premises within a reasonable time of the estimated date provided in the contract. Since defendant did not have the opportunity to conduct discovery on this issue, both the rescission counterclaim and the counterclaim for breach of contract were correctly sustained.

The counterclaim for fraud in the inducement should be dismissed, because sections 5.03 and 27.02 of the lease provided that no representations were made to defendant about the suitability of the premises for defendant's use, that defendant waived any claim for delay damages, that the lease superseded all prior agreements between the parties and set forth all their agreements, and that no representations were made about the issues relevant to the counterclaim (*see Merrill Lynch, Pierce, Fenner & Smith, Inc. v Wise Metals Group, LLC*, 19 AD3d 273, 275 [1st Dept 2005]).

The counterclaim for negligent misrepresentation should be dismissed, because there was no special, privity-like relationship between the parties that imposed a duty on plaintiff to impart correct information to defendant (*see J.P. Morgan Sec. Inc. v Ader*, 127 AD3d 506 [1st Dept 2015]). The parties were engaged in an arm's-length business transaction (*see Dembeck v*

220 Cent. Park S., LLC, 33 AD3d 491 [1st Dept 2006]).

The court correctly declined to dismiss the counterclaim for breach of the covenant of good faith and fair dealing (*see 511 W. 232nd Owners Corp. v Jennifer Realty Co.*, 98 NY2d 144, 153 [2002]). The aforementioned affirmation saying that plaintiff knew before executing the contract at issue in the other action that the premises would not be delivered on time, due to a dispute with the Port Authority, sufficiently supports this counterclaim's allegations for the purpose of withstanding a 3211 dismissal motion.

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 26, 2018

CLERK

Renwick, J.P., Manzanet-Daniels, Andrias, Oing, JJ.

6378 The People of the State of New York, Ind. 3410/14
Respondent,

-against-

Jose Colon,
Defendant-Appellant.

_____

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

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

_____

Judgment, Supreme Court, New York County (Laura A. Ward, J. at plea; Patricia M. Nuñez, J. at sentencing), rendered February 25, 2016, convicting defendant, upon his plea of guilty, of criminal sale of a controlled substance in the fourth degree, and sentencing him, as a second felony drug offender, to a term of four years, with three years postrelease supervision, unanimously modified, as a matter of discretion in the interest of justice, to the extent of reducing the prison term to 1½ years, and otherwise affirmed.

We do not find that defendant made a valid waiver of his right to appeal. We find the sentence excessive to the extent indicated.

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

ENTERED: APRIL 26, 2018

CLERK

Renwick, J.P., Manzanet-Daniels, Tom, Andrias, Oing, JJ.

6379 Jose Pena, Index 23066/14E
Plaintiff-Respondent,

-against-

Elijah Anokye, et al.,
Defendants,

Pedro Auto Corp., et al.,
Defendants-Appellants.

_____

Marjorie E. Bornes, Brooklyn, for appellants.

Scott Baron & Associates, PC, Yonkers (Elliot Skydel of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (Mary Ann Brigantti, J.), entered February 9, 2017, which denied the motion of defendants Pedro Auto Corp. (PAC) and Mamerto Torres for summary judgment dismissing the complaint as against them, unanimously reversed, on the law, without costs, and the motion granted. The Clerk is directed to enter judgment accordingly.

Defendants Torres and PAC established entitlement to judgment as a matter of law by establishing that they were not negligent. Torres and PAC submitted evidence showing that on the day of the accident, Torres was operating a vehicle owned by PAC when it overheated. Torres pulled the vehicle over into a bus stop lane, raised the hood, and turned on the car's hazard lights. Plaintiff was driving by when he recognized Torres, and

pulled his vehicle over in front of Torres's vehicle to see if he could be of assistance. While Torres and plaintiff stood in front of the disabled vehicle, it was struck by a vehicle operated by defendant Elijah Anokye, resulting in plaintiff's injuries (*see Russo v Sabella Bus Co.*, 275 AD2d 660 [1st Dept 2000]; *Zbock v Gietz*, 145 AD3d 1521 [4th Dept 2016]).

Plaintiff's affidavit, in which he stated that Torres's vehicle was approximately three-to-four feet from the curb, failed to rebut defendants' showing. There is no evidence that any portion of Torres's vehicle was located in the traffic lane, or unnecessarily blocked traffic. In fact, plaintiff observed the disabled vehicle, and drove past it before stopping to assist Torres. That Torres's vehicle was allegedly improperly parked at the bus stop for approximately 45 minutes, instead of 30-40 feet ahead at a metered spot in the same lane, is irrelevant to the cause of the accident (*see Sheehan v City of New York*, 40 NY2d 496, 503 [1976]).

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

ENTERED: APRIL 26, 2018

CLERK

Renwick, J.P., Manzanet-Daniels, Tom, Andrias, Oing, JJ.

6380 Sherlock Nicholson, Index 156351/12
Plaintiff,

-against-

Sabey Data Center Properties, LLC,
et al.,
Defendants.

- - - - -

[And a Third-Party Action]

- - - - -

Select Safety Consulting Services, Inc.,
Second Third-Party Plaintiff-Appellant,

-against-

Cirocco and Ozzimo, Inc.,
Second Third-Party Defendant-Respondent.

_____

Nicoletti Gonson Spinner LLP, New York (Benjamin N. Gonson of counsel), for appellant.

Koster, Brady & Nagler, LLP, New York (Kenneth Todd Bierman of counsel), for respondent.

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Order, Supreme Court, New York County (Arlene P. Bluth, J.), entered on or about February 24, 2017, which, insofar as appealed from as limited by the briefs, granted second third-party defendant's (Cirocco) motion pursuant to CPLR 3211(a)(1) to dismiss the second third-party causes of action for contractual indemnification and breach of contract for failure to procure insurance, unanimously affirmed, with costs.

The subcontract between Cirocco and defendant Sabey

Construction, Inc. neither identified second third-party plaintiff (Select) as an "agent" nor included Select in the entities identified in the indemnification provision. Thus, it did not "spell out" an obligation on Cirocco's part to indemnify Select, and no such obligation will be read into it (*see Tonking v Port Auth. of N.Y. & N.J.*, 3 NY3d 486, 490 [2004]; *A.R. Mack Constr. Co. v Patricia Elec.*, 5 AD3d 1025, 1027 [4th Dept 2004]). "If the parties intended to cover [Select] as a potential indemnitee, they had only to say so unambiguously" (*Tonking*, 3 NY3d at 490).

Nor did the subcontract "expressly and specifically" state a requirement that Cirocco name Select as an additional insured under an insurance policy (*see* 77 *Water St., Inc. v JTC Painting & Decorating Corp.*, 148 AD3d 1092, 1096 [2d Dept 2017] [internal quotation marks omitted]). The entities that Cirocco was required to name as additional insureds were listed in exhibits to the subcontract; Select was not included among those entities.

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

ENTERED: APRIL 26, 2018

CLERK

Renwick, J.P., Manzanet-Daniels, Tom, Andrias, Oing, JJ.

6382 Letys Mejia, Index 157361/14
Plaintiff-Respondent,

-against-

Samuel Delgado, Jr., et al.,
Defendants-Appellants.

_____

Sweetbaum & Sweetbaum, Lake Success (Joel A. Sweetbaum of counsel), for appellants.

Law Offices of Devon M. Wilt, New York (Devon M. Wilt of counsel), for respondent.

_____

Order, Supreme Court, New York County (Carol R. Edmead, J.), entered September 7, 2017, which denied defendants' motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

Defendants failed to establish that the theory of res ipsa loquitur is inapplicable to this case (*see Dermatossian v New York City Tr. Auth.*, 67 NY2d 219, 226-227 [1986]; *Crawford v City of New York*, 53 AD3d 462, 464 [1st Dept 2008]). They do not dispute that the wooden deck that collapsed has been in their exclusive control since 2009, when they purchased their house. They argue that the deck was not in their exclusive control when it was built, some time before 2009. However, since plaintiff alleges negligent maintenance only, it is immaterial that defendants were not in control of the deck before 2009.

Plaintiff's expert opined that, while negligent design or construction was a possibility, negligent maintenance was the more likely cause of the collapse (*see Banca Di Roma v Mutual of Am. Life Ins. Co., Inc.*, 17 AD3d 119, 121 [1st Dept 2005]). This conclusion is supported by the home inspection report and certificate of compliance issued at the time of purchase, which did not identify any structural issues relating to the deck, as well as by defendants' testimony that they had previously held several large parties on the deck without any issues arising, and did not inspect the deck or perform any structural repairs post-purchase.

The absence of any evidence that defendants had actual or constructive notice of a defect in the deck is not fatal to plaintiff's claim, because notice is inferred when the doctrine of res ipsa loquitur applies (*see Ezzard v One E. Riv. Place Realty Co., LLC*, 129 AD3d 159, 163 [1st Dept 2015]; *accord Harmon v United States Shoe Corp.*, 262 AD2d 1010, 1011 [4th Dept 1999]).

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

ENTERED: APRIL 26, 2018

CLERK

Renwick, J.P., Manzanet-Daniels, Tom, Andrias, Oing, JJ.

6383 Catherine Ford, etc., Index 805242/12
Plaintiff-Appellant,

-against-

Howard Riina, M.D., et al.,
Defendants,

Concentric Medical, Inc.,
Defendant-Respondent.

_____

Danker Milstein, P.C., New York (Alexander J. Wulwick of counsel), for appellant.

Harris Beach PLLC, New York (Victoria A. Graffeo of counsel), for respondent.

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Order, Supreme Court, New York County (George J. Silver, J.), entered on or about May 4, 2017, which granted the motion of defendant Concentric Medical, Inc. (Concentric) for summary judgment dismissing the complaint as against it, unanimously affirmed, without costs.

In this medical malpractice and products liability action, plaintiff Catherine Ford, as guardian of the person and property of her husband, seeks recovery for brain damage sustained by Mr. Ford during a procedure performed by defendant Dr. Howard Riina to treat a brain aneurysm after two V Series Merci Retriever devices, manufactured by Concentric, fractured.

Concentric established entitlement to dismissal of the duty

to warn claim as its Instructions For Use specifically warned of the risk of fracture and how to reduce such risk (*see Mulhall v Hannafin*, 45 AD3d 55, 58 [1st Dept 2007]). Further, Dr. Riina acknowledged being aware of the risk of fracture through, inter alia, case reports, published literature, and the Instructions For Use (*see Martin v Hacker*, 83 NY2d 1, 9 [1993]).

"[A] defectively designed product is one which, at the time it leaves the seller's hands, is in a condition not reasonably contemplated by the ultimate consumer and is unreasonably dangerous for its intended use; that is one whose utility does not outweigh the danger inherent in its introduction into the stream of commerce" (*Voss v Black & Decker Mfg. Co.*, 59 NY2d 102, 107 [1983] [internal quotation marks omitted]). Concentric established, via the submission of, inter alia, the affidavits of a bioengineer, a vascular neurologist, and an engineer, that the V Series Retriever was state of the art at the time of its design and complied with all applicable industry standards (*see Ramos v Howard Indus., Inc.*, 10 NY3d 218, 223 [2008]; *Wesp v Carl Zeiss, Inc.*, 11 AD3d 965, 967 [4th Dept 2004]). Furthermore, the risk-utility analysis of the device favors Concentric, as the Retriever was the only device on the market at the time that could mechanically remove clots and one of only three FDA-devices approved to remove foreign bodies, and had a low fracture rate of

less than .25% (*see Yun Tung Chow v Reckitt & Colman, Inc.*, 17 NY3d 29, 34 [2011]; *Voss* at 108-109).

To the extent that plaintiffs' experts' relied upon tests, for which the methodology was provided in only general terms, unsupported by analysis or data, the same was properly rejected by the motion court as lacking probative value (*see Stalker v Goodyear Tire & Rubber Co.*, 60 AD3d 1173, 1175 [3d Dept 2009]). Plaintiffs' experts' opinions contained conclusory and speculative assertions as to the existence and nature of a defect (*see Ramos* at 224), and failed to explain how the proposed design changes, even if feasible, would have avoided the outcome here.

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

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

ENTERED: APRIL 26, 2018

CLERK

Renwick, J.P., Manzanet-Daniels, Andrias, Oing, JJ.

6384 The People of the State of New York, Ind. 3424/15
Respondent,

-against-

Julio Flores,
Defendant-Appellant.

_____

Seymour W. James, Jr., The Legal Aid Society, New York (Adrienne M. Gantt of counsel), for appellant.

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

_____

Judgment, Supreme Court, New York County (A. Kirke Bartley, Jr., J.), rendered February 26, 2016, convicting defendant, upon his plea of guilty, of auto stripping in the second degree, and sentencing him, as a second felony offender, to a term of two to four years, unanimously modified, as a matter of discretion in the interest of justice, to the extent of reducing the sentence to a term of 1½ to 3 years, and otherwise affirmed.

We find the sentence excessive to the extent indicated.

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

ENTERED: APRIL 26, 2018

CLERK

Renwick, J.P., Manzanet-Daniels, Tom, Andrias, Oing, JJ.

6385-
6386 The People of the State of New York,
Respondent,

-against-

Wilfred Davis,
Defendant-Appellant.

Ind. 6460/05
SCI 5218/07

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

Judgments, Supreme Court, New York County (Charles H. Solomon, J.), rendered July 13, 2012, 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 26, 2018

CLERK

Renwick, J.P., Manzanet-Daniels, Tom, Andrias, Oing, JJ.

6387N Resurgence Asset Management, LLC, Index 651737/12
Plaintiff-Respondent,

Resurgence GP III, L.L.C., et al.,
Plaintiffs,

-against-

Steve Gidumal,
Defendant-Appellant.

_____

O'Brien, LLP, New York (Sara Welch of counsel), for appellant.

Pollack Solomon Duffy LLP, New York (Barry S. Pollack of counsel), for respondent.

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Order, Supreme Court, New York County (Anil C. Singh, J.), entered on or about February 14, 2017, which denied defendant's motion for sanctions against plaintiff Resurgence Asset Management, LLC, pursuant to CPLR 3126 and 22 NYCRR 130-1.1, unanimously affirmed, without costs.

We agree with the motion court that, rather than

demonstrating that plaintiff Resurgence Asset Management engaged in sanctionable conduct, such as a pattern of delay or failure to comply with discovery orders, defendant has raised credibility issues, the determination of which is for a factfinder.

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

ENTERED: APRIL 26, 2018

CLERK

Renwick, J.P., Tom, Andrias, Oing, JJ.

6388N Jane Doe, etc., et al., Index 306670/14
Plaintiffs-Respondents,

-against-

The Bronx Preparatory Charter School,
Defendant-Appellant,

Democracy Prep Public Schools,
Defendant.

_____

Biedermann Hoenig Semprevivo, New York (Megan R. Siniscalchi of counsel), for appellant.

Segal & Lax, P.C., New York (Patrick D. Gatti of counsel), for respondents.

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Order, Supreme Court, Bronx County (Wilma Guzman, J.), entered November 28, 2016, which, inter alia, denied defendant The Bronx Preparatory Charter School's motion for an order precluding plaintiffs from submitting evidence and testimony at trial and compelling plaintiffs to provide authorizations to obtain the infant plaintiff's social media records for five years prior to the incident and her cell phone records and accompanying authorizations for two years prior to the incident, unanimously affirmed, without costs.

The court providently exercised its discretion in declining to impose sanctions on plaintiffs or to compel further disclosure of the infant plaintiff's social media and cell phone history,

since defendant failed to submit papers necessary to determine whether plaintiffs had not complied with a prior discovery order (*see Nyadzi v Ki Chul Lee*, 129 AD3d 645 [1st Dept 2015]; *Ventura v Ozone Park Holding Corp.*, 84 AD3d 516, 517–518 [1st Dept 2011]). Further, there was no showing that plaintiffs wilfully failed to comply with any discovery order, since they provided access to the infant plaintiff's social media accounts and cell phone records for a period of two months before the date on which she was allegedly attacked on defendant's premises to the present, which was a reasonable period of time. Defendant's demands for access to social media accounts for five years prior to the incident, and to cell phone records for two years prior to the incident, were overbroad and not reasonably tailored to obtain discovery relevant to the issues in the case (*see Forman v Henkin*, 30 NY3d 656, 665 [2018]).

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

ENTERED: APRIL 26, 2018

CLERK

Mazzarelli, J.P., Kapnick, Kern, Singh, JJ.

6389 The People of the State of New York, Respondent, Ind. 4072/13

-against-

Major James,
Defendant-Appellant.

_____

Seymour W. James, Jr., The Legal Aid Society, New York (Svetlana M. Kornfeind of counsel), and Paul, Weiss, Rifkind, Wharton & Garrison LLP, New York (Katriana G. Roh of counsel), for appellant.

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

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Judgment, Supreme Court, New York County (Michael Obus, J. at dismissal motion; Marcy L. Kahn, J. at jury trial and sentencing), rendered August 13, 2014, convicting defendant of robbery in the second and third degrees, and sentencing him, as a persistent felony offender, to an aggregate term of 15 years to life, unanimously affirmed.

The court properly denied defendant's motion to dismiss the indictment, because the errors in the grand jury presentation did not rise to the level of impairing the integrity of the proceeding. In addition to admissible evidence that amply supported the indictment, some of the evidence before the grand jury was inadmissible, at least without limiting instructions that the prosecutor did not provide. However, this was not one

of the "rare cases of prosecutorial misconduct" entitling a defendant to the "exceptional remedy of dismissal," because there is no "showing that, in the absence of the complained-of misconduct, the grand jury might have decided not to indict the defendant" (*People v Thompson*, 22 NY3d 687, 699 [2014] [internal quotation marks omitted]). Moreover, much of the improper testimony was elicited in response to questions by the grand jurors. We reject, as speculative, defendant's suggestion that the grand jury's request to ask a police witness additional questions after the prosecutor's examination had been completed evinced a hesitancy to indict.

The trial court providently exercised its discretion in admitting evidence of two highly similar prior uncharged crimes. The crimes had enough distinctive aspects to establish a pattern that was probative of defendant's identity (*see People v Beam*, 57 NY2d 241, 253 [1982]; *People v Swinton*, 87 AD3d 491, 493 [1st Dept 2011], *lv denied* 18 NY3d 862 [2011]). Although the crimes were not identical, "[i]t is not necessary that the pattern be ritualistic for it to be considered unique; it is sufficient that it be a pattern which is distinctive" (*Beam*, 57 NY2d at 253). Furthermore, the court's limiting instructions minimized any prejudicial effect.

The verdict, including the finding of physical injury

necessary to support the second-degree robbery conviction (*see* Penal Law § 160.10[2][a]), was supported by legally sufficient evidence and was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348 [2007]). The forceful nature of the assault on the 75-year-old victim, by hurling him into a wall and shoving him to the ground in the course of a robbery, the extensive bruising on the victim's arm visible on a photograph displayed to the jury, and especially the multiple and extended measures which the victim sought to alleviate the pain, indicate that defendant's conduct caused "more than slight or trivial pain" (*People v Nelson*, 63 AD3d 629, 629 [1st Dept 2009] *lv denied* 13 NY3d 861 [2009]). Although the victim testified that he had preexisting pain in the injured arm, the evidence supports the inference that the additional pain caused by defendant was substantial, as well as the inference that the victim obtained extended treatment and therapy because of that injury and not because of the preexisting condition.

The court providently exercised its discretion in adjudicating defendant a persistent felony offender. Defendant's constitutional challenge to that adjudication is without merit.

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

ENTERED: APRIL 26, 2018

CLERK

Mazzarelli, J.P., Kapnick, Kahn, Kern, Singh, JJ.

6391 In re Mariama J.,

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

Jainaba C.,
Respondent-Appellant,

Lutheran Social Services of New York,
Petitioner-Respondent.

_____

Larry S. Bachner, New York, for appellant.

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

Dawne Mitchell, The Legal Aid Society, New York (Raymond E. Rogers of counsel), attorney for the child.

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Order of fact-finding, Family Court, Bronx County (Carol R. Sherman, J.), entered on or about October 18, 2016, which determined, after a hearing, that respondent permanently neglected the subject child, unanimously affirmed, without costs.

We deem the notice of appeal from the fact-finding order a request for permission to appeal, and grant the request (*compare Matter of Alyssa L. [Deborah K.]*, 93 AD3d 1083, 1085-1086 [3d Dept 2012]).

The finding of permanent neglect is supported by clear and convincing evidence (Social Services Law § 384-b[7][a], [3][g][i]). The record shows that petitioner agency made

diligent efforts to encourage and strengthen the parental relationship by arranging for contact between respondent, who is incarcerated, and the child, obtaining services for respondent during her incarceration, reminding her of her planning obligations, and keeping her updated on the child's progress (*see Matter of Eddie Christian S.*, 44 AD3d 504 [1st Dept 2007], *lv denied* 9 NY3d 818 [2008]; *Matter of Denzell H.*, 308 AD2d 370 [1st Dept 2003]; Social Services Law 384-b[7][f]). However, while respondent tried to maintain contact with the child, she failed to plan for the child's future. Her initial plan, to have the child cared for by relatives, resulted in the child's abuse and maltreatment by her care givers. Her only other plan, to keep the child in foster care during the period of her incarceration, which was estimated to extend to at least 2020, was no plan at all (*Matter of Danyel Ramona C.*, 306 AD2d 127, 128 [1st Dept 2003]).

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

ENTERED: APRIL 26, 2018

CLERK

Mazzarelli, J.P., Kapnick, Kahn, Kern, Singh, JJ.

6392 The People of the State of New York, Respondent, Ind. 923/12

-against-

Emmanuel Almonte, Defendant-Appellant.

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Seymour W. James, Jr., The Legal Aid Society, New York (David Crow of counsel), and Davis Polk & Wardwell LLP, New York (Stephen J. Yanni of counsel), for appellant.

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

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Judgment, Supreme Court, Bronx County (James M. Kindler, J.), rendered August 2, 2013, convicting defendant, after a jury trial, of robbery in the second degree (two counts), attempted assault in the first degree and assault in the second degree, and sentencing him to an aggregate term of five years, unanimously affirmed.

The court properly admitted a 911 phone call between the victim and a 911 dispatcher under the excited utterance exception to the hearsay rule (*see People v Johnson*, 1 NY3d 302, 306 [2003]; *People v Vasquez*, 88 NY2d 561, 579 [1996]). The victim's statements were made within minutes after he was attacked. The record indicates that he was still under the influence of the stress of the incident despite the lapse of time (*see People v*

Brown, 70 NY2d 513, 520-522 [1987]), and that his statements were spontaneous and trustworthy, and not the product of reflection or possible fabrication. In any event, any error was harmless. The victim testified at trial, and "prior consistent statements are notably less prejudicial to the opposing party than other forms of hearsay, since by definition the maker of the statement has said the same thing in court as out of it, and so credibility can be tested through cross-examination" (*People v Ludwig*, 24 NY3d 221, 230 [2014]).

Defendant failed to preserve the specific legal sufficiency claim he raises on appeal regarding his attempted assault conviction, and we decline to review it in the interest of justice. As an alternative holding, we reject it on the merits. We also find that the verdict was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). The evidence supported the jury's finding that defendant shared his codefendant's intent to cause serious physical injury to the victim (*see People v Degraffenreid*, 138 AD3d 456, 456-457 [1st Dept 2016], *affd* 29 NY3d 935 [2017]; *Matter of Tatiana N.*, 73 AD3d 186, 191 [1st Dept 2010]).

The court properly denied defendant's request to submit third-degree assault as a lesser included offense of second-degree assault. There was no reasonable view of the evidence,

viewed most favorably to defendant, that the injury at issue was inflicted without the use of a deadly weapon or a dangerous instrument.

In imposing sentence, the court providently exercised its discretion in taking into consideration the fact that defendant absconded during trial. The court had no obligation to warn defendant that commission of a new criminal act (in this case bail jumping) would adversely affect his sentence upon conviction after *trial*; defendant's citation to cases involving conditions of negotiated pleas is misplaced. We perceive no basis for reducing the sentence.

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

ENTERED: APRIL 26, 2018

CLERK

Mazzarelli, J.P., Kapnick, Kahn, Kern, Singh, JJ.

6393 Michael McCue, Index 156805/12
Plaintiff-Appellant,

-against-

Cablevision Systems Corporation,
Defendant-Respondent,

Consolidated Edison Co. of New York, Inc., et al.,
Defendants.

_____

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

Fabiani Cohen & Hall, LLP, New York (Allison A. Snyder counsel), for respondent.

_____

Order, Supreme Court, New York County (Joan A. Madden, J.), entered October 31, 2016, which, to the extent appealed from, denied plaintiff's motion for summary judgment on liability on his Labor Law § 240(1) claim, unanimously affirmed, without costs.

Plaintiff commenced this action to recover for personal injuries he allegedly sustained when he fell from a utility pole while attempting to troubleshoot a cable installation activation that did not work. However, his supervisor submitted an affidavit asserting, inter alia, that plaintiff's sole job functions were as a manager, providing administrative services and training, assessing materials and equipment needed for a job,

and occasionally following up with an activation from ground level only, but that in no event were his duties to entail climbing any poles.

Supreme Court correctly determined that issues of fact exist as to whether the aerial work plaintiff contends he was performing when he fell was outside the scope of his employment and thus outside the protection of Labor Law § 240(1) (*Simoes v City of New York*, 81 AD3d 514 [1st Dept 2011]; *Vega v Renaissance 632 Broadway, LLC*, 103 AD3d 883, 885 [2d Dept 2013]). Moreover, Supreme Court correctly determined that issues of fact exist as to how the accident occurred. Specifically, the individual who performed that activation testified that plaintiff was not present, and he could not recall any problems with the activation (*see Macchia v Natasi White, Inc.*, 26 AD3d 225 [1st Dept 2006].

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

ENTERED: APRIL 26, 2018

CLERK

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

6395-
6396 Index 653468/15

Wimbledon Financing Master Fund, Ltd.,
Plaintiff-Respondent,

-against-

Weston Capital Management LLC, et al.,
Defendants,

Leonard De Waal, et al.,
Defendants-Appellants.

_____

Kudman Trachten Aloe, LLP, New York (Paul H. Aloe of counsel), for appellants.

Kaplan Rice LLP, New York (Michelle A. Rice of counsel), for respondent.

_____

Orders, Supreme Court, New York County (Shirley Werner Kornreich, J.), entered July 18, 2017 and August 1, 2017, which, to the extent appealed from as limited by the briefs, denied the motion of defendants Leonard De Waal and Arie Bos (defendants) to dismiss the amended complaint as against them in its entirety pursuant to CPLR 3211(a)(1), (3), (7), and (8), unanimously modified, on the law, to dismiss the cause of action for unjust enrichment, and otherwise affirmed, without costs.

We take judicial notice of the since-filed second amended complaint, and defendants' motion to dismiss the breach of fiduciary duty and aiding and abetting breach of fiduciary duty

causes of action in the second amended complaint, which have been repleaded. Ordinarily, service of the second amended complaint, which takes the place of the amended complaint, would render the instant appeal from the order based on the first amended complaint academic (*100 Hudson Tenants Corp. v Laber*, 98 AD2d 692 [1st Dept 1983]; *see also Federated Project & Trade Fin. Core Fund v Amerra Agri Fund, LP*, 106 AD3d 467 [1st Dept 2013]). However, the parties have charted their own course by proceeding as if the instant appeal is not rendered moot, and we address all but the arguments pertaining to the since-repleaded breach of fiduciary duty and aiding and abetting breach of fiduciary duty causes of action (*Guibor v Manhattan Eye, Ear & Throat Hosp.*, 56 AD2d 359, 361 [1st Dept 1977], *affd* 46 NY2d 736 [1978]; *see Cullen v Naples*, 31 NY2d 818, 820 [1972]).

The Supreme Court properly concluded that defendants are subject to jurisdiction under New York's long-arm statute because they were part of a conspiracy that involved the commission of tortious acts in New York (CPLR 302[a][2]; *Lawati v Montague Morgan Slade Ltd.*, 102 AD3d 427, 428 [1st Dept 2013]; *see also LaMarca v Pak-Mor Mfg. Co.*, 95 NY2d 210, 217-219 [2000]). Defendants were directors on Gerova's board during most of the time when Gerova was involved in a fraudulent scheme. The amended complaint details the conspiracy to commit fraud using

Gerova, the agreements between Gerova and Weston board members and insiders, among others, to loot Wimbledon, and Wimbledon's resulting insolvency (*see 1766-68 Assoc., LP v City of New York*, 91 AD3d 519, 520 [1st Dept 2012]). Although defendants did not reside or do business in New York, other Gerova defendants were in New York or interacted regularly with New York, including one of the masterminds of the fraudulent scheme, John Galanis. Regarding their overt acts in furtherance of the conspiracy, defendants' approval of a Gerova proxy statement on which they are listed and which seeks approval of the sham acquisition of a reinsurance company, their receipt of "hush money" to ignore certain red flags at Gerova, and their failure to correct misrepresentations or disclose material information to the public sufficed at this stage. Although defendants did not mastermind the conspiracy, their receipt of "hush money" allows the reasonable inference that they exerted "control" to the extent that the fraud could not have been accomplished without their acquiescence to the proxy and other misconduct (*Lawati* at 428-429*; see Coast to Coast Energy, Inc. v Gasarch*, 149 AD3d 485, 487-488 [1st Dept 2017]).

The Supreme Court correctly found that plaintiff had standing to bring the fraud claim because it alleged that it was the target of the conspiracy and sued directly to recover damages

for the looting and theft of its assets (*see generally Yudell v Gilbert*, 99 AD3d 108, 114 [1st Dept 2012]; *Gordon v Credno*, 102 AD3d 584, 585 [1st Dept 2013]).

To the extent that plaintiff alleges that de Waal and Bos were aware of misrepresentations and omissions in the Gerova proxy statement, knew but failed to disclose to Wimbledon or its investors that Galanis, who was prohibited from serving as an officer or director, controlled Gerova, and knew that Gerova was functionally insolvent, the complaint adequately pleads fraud with the requisite particularity (*Basis Yield Alpha Fund [Master] v Goldman Sachs Group, Inc.*, 115 AD3d 128, 135-136 [1st Dept 2014]; *see Eurycleia Partners, LP v Seward & Kissel, LLP*, 12 NY3d 553, 559 [2009]; *Pludeman v Northern Leasing Sys., Inc.*, 10 NY3d 486, 492 [2008]; *see also* CPLR 3016[b]). Even if defendants did not themselves include the misrepresentations in the public filings, one can rationally infer that as Gerova directors, they knew of the falsity of facts therein, did not disclose material information, and allowed the misrepresentations to be publicly stated (*Houbigant, Inc. v Deloitte & Touche*, 303 AD2d 92, 99 [1st Dept 2003]; *see AIG Fin. Prods. Corp. v ICP Asset Mgt., LLC*, 108 AD3d 444, 446 [1st Dept 2013]).

Moreover, the fraud claim was timely asserted, and there is no basis to conclude, as defendants urge, that Florida's four-

year statute of limitations applies merely because Florida is purportedly the principal place of business of defendant Weston Capital Asset Management LLC (WCAM) and the residence of WCAM's founder, Albert Hallac (*see* CPLR 202, 213[8]; *Salzmann v Prudential Sec. Inc.*, 1994 WL 191855, *4 [SD NY, May 16, 1994, No. 91-CIV-4253(KTD)]). Defendants do not suggest that plaintiff's assets were located in or channeled through Florida accounts or that any relevant meetings or other conduct occurred in Florida. Moreover, plaintiff alleges that its assets were stolen from New York bank accounts and New York is thus where the economic loss occurred.

In alleging unjust enrichment, the amended complaint merely repeats all of the allegations pertaining to the fraud, and alleges that defendants "financially benefitted from their participation in the fraud." The complaint does not seek any specific damages in connection with the unjust enrichment cause of action, as opposed to the fraud cause of action. Accordingly, the unjust enrichment cause of action should have been dismissed (*American Mayflower Life Ins. Co. of N.Y. v Moskowitz*, 17 AD3d 289, 293 [1st Dept 2005]).

Since plaintiff sufficiently alleged fraudulent inducement in entering into a settlement agreement which contained a written release of claims against defendants, which would appear to cover

de Waal and Bos (*Merrill Lynch, Pierce, Fenner & Smith, Inc. v Wise Metals Group, LLC*, 19 AD3d 273, 275 [1st Dept 2005]), the court correctly observed that the release did not warrant dismissal of the complaint, as a release procured by fraud is not enforceable (*see Mangini v McClurg*, 24 NY2d 556, 563 [1969]).

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

ENTERED: APRIL 26, 2018

CLERK

Mazzarelli, J.P., Kapnick, Kahn, Kern, Singh, JJ.

6397 The People of the State of New York, Ind. 109/16
Respondent,

-against-

Richard McCantis,
Defendant-Appellant.

_____

Seymour W. James, Jr., The Legal Aid Society, New York (Adrienne M. Gantt of counsel), for appellant.

Cyrus R. Vance, Jr., District Attorney, New York (Alan Gadlin 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 (Gregory Carro, J.), rendered April 6, 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 26, 2018

CLERK

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

Mazzarelli, J.P., Kapnick, Kahn, Kern, Singh, JJ.

6398 In re Baltic Trading Stockholders Litigation — Ind. 651241/15

- - - - -

Justin Wilson, et al.,
Plaintiffs-Appellants,

-against-

Baltic Trading, Ltd. et al.,
Defendants-Respondents.

_____

Milberg Tadler Phillips Grossman LLP, New York (Kent A. Bronson of counsel), for appellants.

Arnold & Porter Kaye Scholer LLP, New York (Aaron Rubinstein of counsel), for Baltic Trading Ltd., Basil G. Mavroleon, Harry A. Perrin, Edward Terino and George Wood, respondents.

Kramer Levin Naftalis & Frankel LLP, New York (Alan R. Friedman of counsel), for Peter C. Georgiopoulos, respondent.

Milbank, Tweed, Hadley & McCloy LLP, New York (Alan J. Stone of counsel), for Genco Shipping & Trading Ltd. and Poseidon Merger Sub Ltd., respondents.

_____

Appeal from order, Supreme Court, New York County (Jeffrey K. Oing, J.), entered August 31, 2016, which granted defendants' motion to dismiss the first consolidated amended class action complaint, deemed appeal from judgment, same court and Justice, entered September 16, 2016 (CPLR 5520[c]), dismissing the complaint, and, so considered, said judgment unanimously affirmed, with costs.

Plaintiffs allege that defendant Genco Shipping & Trading

Ltd., the controlling shareholder of defendant Baltic Trading Ltd., acquired the minority interest in Baltic (the merger) for inadequate consideration. They assert breach of fiduciary duty against Genco and the Baltic Special Committee formed to consider the merger.

Plaintiffs contend that this merger between a controlling stockholder and its corporate subsidiary should be evaluated under the heightened "entire fairness" standard rather than the business judgment rule, because defendants cannot satisfy the requirements laid down in *Kahn v M&F Worldwide Corp.* (88 A3d 635, 644-645 [Del 2014]) (*MFW*) for the business judgment rule to apply. One of these requirements is that "the controller conditions the procession of the transaction on the approval of both a Special Committee and a majority of the minority stockholders" (*id.* at 645). Plaintiffs argue that Genco did not condition its acquisition of the portion of Baltic that it did not already own on the approval of a special committee. However, they did not make this argument before the motion court, and since the argument might have been factually countered if made at that stage, we will not consider it (*see Waterfront NY Realty Corp. v Weber*, 281 AD2d 180, 181 [1st Dept 2001]).

Relying on footnote 14 in *MFW* (88 A3d at 645), plaintiffs contend that their complaint should survive a motion to dismiss

because it sufficiently alleges that the price paid by Genco was inadequate. However, "[i]t is not enough to argue that the financial press published objections to the adequacy of the sale price" (*Miramar Firefighters Pension Fund v AboveNet, Inc.*, 2013 WL 4033905, *4, 2013 Del Ch LEXIS 200, *13 [July 31, 2013, C.A. No. 7376-VCN] [internal quotation marks and some brackets omitted]). "There is no rule that a low premium represents a bad deal, much less bad faith" (*In re MeadWestvaco Stockholders Litig.*, 168 A3d 675, 687 [Del Ch 2017] [internal quotation marks omitted]).

The second *MFW* requirement for business judgment review is that "the Special Committee is independent" (88 A3d at 645). Plaintiffs' allegation that Special Committee member Edward Terino was not independent due to his business deal with defendant Peter C. Georgiopoulos (the chairman of both Genco and Baltic) seven years before the merger at issue is insufficient (*see MFW*, 88 A3d at 647, 649).

The fact that Baltic Special Committee member Harry A. Perrin was a Genco director along with Georgiopoulos, Terino, and defendant Basil G. Mavroleon from August 2005 to July 2014 and sat with those persons on Baltic's board from 2010 does not show that he was not independent (*see e.g. Kahn v Caporella*, 1994 WL 89016, *1, 7, 1994 Del Ch LEXIS 29, *2-3, 21 [March 10, 1994,

C.A. No. 13248] [fact that member of Special Committee used to be member of parent's board did not mean he was not independent]; *In re BJ's Wholesale Club, Inc. Shareholders Litig.*, 2013 WL 396202, *1-2, 6 n 63, 2013 Del Ch LEXIS 28, *4, 6, 22 n 63 [Jan. 31, 2013, C.A. No. 6623-VCN] [allegation that chair of Special Committee had nearly 20 years of board service alongside an interested director did not raise reasonable doubt as to chair's independence]).

The fact that Special Committee member Mavroleon was a Genco director from July 2005 to July 2014 is a mere allegation of friendliness and past business relationship, which is insufficient (*see MFW*, 88 A3d at 649; *see also Caporella*, 1994 WL 89016, 1994 Del Ch LEXIS 29; *BJ's*, 2013 WL 396202, 2013 Del Ch LEXIS 28, *supra*). The fact that he became a Genco director after the merger does not create a conflict of interest between him and the other Baltic shareholders (*see Krim v ProNet, Inc.*, 744 A2d 523, 525, 528 and n 16 [Del Ch 1999]). The fact that Baltic considered using Mavroleon's company as the broker for the sale of two vessels in connection with the merger but ultimately used another broker does not mean that he was not independent (*see Lichtenberg v Zinn*, 260 AD2d 741, 743 [3d Dept 1999], *lv denied* 94 NY2d 754 [1999]). Even if Baltic used Mavroleon's company for a different vessel transaction, plaintiffs have made no

nonconclusory allegations of materiality (*see e.g. MFW*, 88 A3d at 649; *In re General Motors [Hughes] Shareholder Litig.*, 2005 WL 1089021, *1 and n 7, *8-9, 2005 Del Ch LEXIS 65, *5 and n 7, *31-32, *38 [May 4, 2005, No. Civ. A. 20269], *affd* 897 A2d 162 [Del 2006]).

Finally, plaintiffs allege that Special Committee member George Wood was negotiating a multi-million-dollar, non-merger-related deal with nonparty James Dolphin, the Genco director who was negotiating the merger with Baltic. However, they fail to make nonconclusory allegations of materiality (*see MFW*, 88 A3d at 649; *General Motors*, 2005 WL 1089021, 2005 Del Ch LEXIS 65, *supra*).

The third *MFW* requirement for business judgment review is that "the Special Committee is empowered to freely select its own advisors and say no definitively" (88 A3d at 645). Baltic's Special Committee satisfied this condition.

The fourth *MFW* requirement is that "the Special Committee meets its duty of care in negotiating a fair price" (*id.*). To establish that the committee did not meet this duty, the complaint must allege facts from which it can reasonably be inferred that the directors were grossly negligent (*In re Books-A-Million, Inc. Shareholders Litig.*, 2016 WL 5874974, *17, 2016 Del Ch LEXIS 154, *60 [Oct. 10, 2016, C.A. No. 11343-VCL], *affd*

164 A3d 56 [Del 2017]). Plaintiffs did not meet this "very tough standard," which "is only satisfied by conduct that . . . requires recklessness" (*Swomley v Schlecht*, 2014 WL 4470947 [Del Ch, Aug. 27, 2014, No. 9355-VCL], *affd* 128 A3d 992 [Del 2015]; *see also Martha Stewart*, 2017 WL 3568089 at *23, 2017 Del Ch LEXIS 151 at *61-62).

The fifth *MFW* requirement for business judgment review is that "the vote of the minority is informed" (88 A3d at 645). The proxy statement disclosed that one of the Baltic Special Committee's financial advisors had previously done work for Genco. It also disclosed the Special Committee members' ties to Genco. Plaintiffs' contention that the proxy does not contain enough information about the analysis of the Special Committee's other financial advisor is unavailing (*see e.g. General Motors*, 2005 WL 1089021 at *16, 2005 Del Ch LEXIS 65 at *65; *In re Saba Software, Inc. Stockholder Litig.*, 2017 WL 1201108, *10-11, 2017 Del Ch LEXIS 52, *29-33 [March 31, 2017, C.A. No. 10697-VCS]; *In re BioClinica, Inc. Shareholder Litig.*, 2013 WL 5631233, *9, 2013 Del Ch LEXIS 250, *34-35 [Oct. 16, 2013, Civil Action No. 8272-VCG]).

The sixth *MFW* requirement is that "there is no coercion of the minority" (88 A3d at 645). Plaintiffs contend that the minority (i.e., Baltic shareholders other than Genco) was coerced

because it included large Baltic shareholders that were also among the largest Genco shareholders, and one of those shareholders had agreed to vote for the merger. This argument is unavailing (*see In re Synthes, Inc. Shareholder Litig.*, 50 A3d 1022, 1048 n 119 [Del Ch 2012] ["voting agreement locking up 27% of the vote in favor of the proposed merger . . . did not appear impermissibly coercive"]; *Gradient OC Master, Ltd. v NBC Universal, Inc.*, 930 A2d 104, 120-121 [Del Ch 2007] ["Accurately disclosing circumstances or realities surrounding a recapitalization plan, such as informing shareholders that the majority shareholder will approve the transaction (thus making the recapitalization virtually assured) is not actionably coercive"], *appeal refused* 930 A2d 928 [Del 2007]).

In any event, a post-*MFW* case that was affirmed by the Delaware Supreme Court said, "The question on coercion is whether you can vote down a deal and keep the status quo" (*Swomley*, 2014 WL 4470947). The Baltic shareholders had this option.

Since the *MFW* requirements have been satisfied, and plaintiffs have not pleaded a claim of waste (*see Martha Stewart*, 2017 WL 3568089 at *2, 2017 Del Ch LEXIS 151 at *5), the court correctly dismissed the first and second causes of action (breach of fiduciary duty against the Baltic Special Committee and Genco, respectively). The third cause of action (aiding and abetting

the Special Committee's alleged breaches of fiduciary duty) was correctly dismissed due to the lack of an underlying breach of fiduciary duty (*see e.g. KKR Fin. Holdings LLC Shareholder Litig.*, 101 A3d 980, 1003 [Del Ch 2014], *affd sub nom. Corwin v KKR Fin. Holdings LLC*, 125 A3d 304 [Del 2015]).

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

ENTERED: APRIL 26, 2018

CLERK

Mazzarelli, J.P., Kapnick, Kahn, Kern, Singh, JJ.

6399 Deborah Savio, Index 309193/11
Plaintiff-Respondent,

-against-

St. Raymond Cemetery, et al.,
Defendants-Appellants,

_____

Leahey & Johnson, P.C., New York (Joanne Filiberti of counsel), for appellants.

Alexander J. Wulwick, New York, for respondent.

_____

Order, Supreme Court, Bronx County (Julia I. Rodriguez, J.), entered on or about October 2, 2017, which, to the extent appealed from, denied the motion of defendant St. Raymond Cemetery for summary judgment dismissing the complaint as against it, unanimously affirmed, without costs.

Defendant did not establish its entitlement to judgment as a matter of law in this action where plaintiff allegedly injured her ankle when she stepped in a hole on defendant's grounds. The fact that defendant's director testified that he did not receive any complaints about the condition of the grounds prior to the accident does not establish that defendant lacked actual notice of the hole, because the director did not state that he was working on the day of the accident (*see Clarkin v In Line Rest. Corp.*, 148 AD3d 559, 560 [1st Dept 2017]).

Defendant also failed to demonstrate that it lacked constructive notice of the hole. Its director's testimony that he would inspect the premises when his duties permitted does not establish when the subject location was last checked before the accident (*see id.; Baptiste v 1626 Meat Corp.*, 45 AD3d 259 [1st Dept 2007]).

Since defendant failed to meet its initial burden to demonstrate that it lacked actual or constructive notice as a matter of law, the burden never shifted to plaintiff to establish how long the condition existed (*see Sabalza v Salgado*, 85 AD3d 436, 438 [1st Dept 2011]).

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

ENTERED: APRIL 26, 2018

CLERK

Mazzarelli, J.P., Kapnick, Kahn, Kern, Singh, JJ.

6400-
6400A Sean Reeps, etc.,
Plaintiff-Respondent,

-against-

BMW of North America, LLC, et al.,
Defendants-Appellants.

Index 100725/08

Biedermann Hoenig Semprevivo, P.C., New York (Philip C. Semprevivo, Jr. of counsel), for BMW appellants.

Lawrence, Worden, Rainis & Bard, P.C., Melville (Leslie McHugh of counsel), for Martin Motor Sales, Inc., appellant.

Brill & Associates, New York (Haydn J. Brill of counsel), for Hassel Motors, Inc., appellant.

Phillips & Paolicelli LLP, New York (Steven J. Phillips of counsel), for respondent.

Orders, Supreme Court, New York County (Kathryn E. Freed, J.), entered May 1, 2017, which denied defendants' motions for summary judgment as untimely filed, unanimously reversed, on the law, without costs, and the matter remanded for further proceedings consistent herewith.

Prior court orders and stipulations between the parties show that the parties, with the court's consent, charted a procedural course that deviated from the path established by the CPLR and allowed for defendants' filing of this round of summary judgment motions more than 120 days after the filing of the note of issue

(*see Corchado v City of New York*, 64 AD3d 429 [1st Dept 2009]). Thus, the motions were timely, and we remand the matter to the motion court for a full consideration of their merits (*see Fomina v DUB Realty, LLC*, 156 AD3d 539 [1st Dept 2017]).

In considering the merits, the court should consider plaintiff's new and recast expert affidavits submitted in opposition to the motions, which were first filed in 2016 (*see* CPLR 3212[b]), after holding a hearing in accordance with *Frye v United States* (293 F 1013 [1923]) to determine whether the expert affidavits on exposure and general causation (*see Parker v Mobil Oil Corp.*, 7 NY3d 434, 448 [2006]) are adequately supported in the medical and scientific literature.

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

ENTERED: APRIL 26, 2018

CLERK

Mazzarelli, J.P., Kapnick, Kahn, Kern, Singh, JJ.

6401 The People of the State of New York, Ind. 1661/16
Respondent,

-against-

Darryl Gaymon,
Defendant-Appellant.

_____

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

Darcel D. Clark, District Attorney, Bronx (David A. Slott 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 (William Mogulescu, J.), rendered August 10, 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 26, 2018

CLERK

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

Mazzarelli, J.P., Kapnick, Kahn, Kern, Singh, JJ.

6402 Aminata Sow, Index 103599/12
Plaintiff-Appellant,

-against-

Fedcap Rehabilitative Services, Inc.,
Defendant-Respondent.

_____

David Gendelman, New York (Gary E. Divis of counsel), for appellant.

Eustace, Marquez, Epstein, Prezioso & Yapchanyk, New York (Maureen E. Peknic of counsel), for respondent.

_____

Order, Supreme Court, New York County (Debra A. James, J.), entered February 3, 2017, which granted defendant's motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

Defendant established prima facie that it was entitled to summary dismissal of the complaint by submitting certified weather records, an affidavit by a meteorologist, and plaintiff's own testimony showing that a winter storm was in progress at the time that plaintiff slipped and fell on sidewalk ice in front of its building (*see Levene v N. 2 West 67th St., Inc.*, 126 AD3d 541 [1st Dept 2015]).

In opposition, plaintiff failed to raise a triable issue, merely speculating that she slipped on ice that had formed after

previous snowfalls had melted and refrozen. Contrary to plaintiff's contention, in asserting the storm-in-progress defense, defendant was not required to submit records showing the last time it removed snow and ice from its sidewalks; that is evidence required to refute constructive notice of a hazardous condition (*see e.g. Gautier v 941 Intervale Realty LLC*, 108 AD3d 481 [1st Dept 2013]).

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

ENTERED: APRIL 26, 2018

CLERK

Mazzarelli, J.P., Kapnick, Kahn, Kern, Singh, JJ.

6403 Ricky Davis, Index 152416/13
Plaintiff-Appellant,

-against-

The City of New York,
Defendant-Respondent,

Police Officer "John" Casey
(first name unknown),
Defendant.

_____

Jonah Grossman, Jamaica (Lawrence B. Lame of counsel), for appellant.

Zachary W. Carter, Corporation Counsel, New York (Melanie T. West of counsel), for respondent.

_____

Order, Supreme Court, New York County (James E. d'Auguste, J.), entered January 11, 2017, which granted defendant City of New York's motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

Plaintiff alleges that he was unlawfully arrested and charged with several gambling-related offenses for soliciting people on the street to play three-card monte. Plaintiff cannot prevail, however, on his false arrest, false imprisonment, and malicious prosecution claims because the police officer's observations, training and experience, and the report of an identified citizen accusing plaintiff of committing the specified criminal conduct gave the officer probable cause to arrest

plaintiff (*see Walker v City of New York*, 148 AD3d 469, 470 [1st Dept 2017]; *Leftenant v City of New York*, 70 AD3d 596 [1st Dept 2010]). Moreover, there were no "materially impeaching circumstances" of the officer's testimony so as to raise a question of fact as to whether he had probable cause to effectuate plaintiff's arrest (*see Grimes v City of New York*, 106 AD3d 441 [1st Depot 2013]; *Medina v City of New York*, 102 AD3d 101, 105 [1st Dept 2012]).

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

ENTERED: APRIL 26, 2018

CLERK

Mazzarelli, J.P., Kapnick, Kahn, Kern, Singh, JJ.

6404 The People of the State of New York, Respondent, Ind. 2797/14

-against-

Jean-Carlo Flambert, Defendant-Appellant.

_____

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

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

_____

Judgment, Supreme Court, New York County (Patricia M. Nuñez, J.), rendered August 10, 2015, convicting defendant, after a jury trial, of assault in the second degree and criminal possession of a weapon in the fourth degree, and sentencing him to a term of five years' probation, unanimously affirmed.

The verdict was based on legally sufficient evidence and was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). There is no basis for disturbing the jury's credibility determinations. Defendant hit the victim with a clothing iron, causing a bump on the victim's head and a laceration on his collarbone. The testimony of the victim, police officers and an emergency room physician supported the conclusion that the injury caused "more than slight or trivial pain" (*see People v Chiddick*, 8 NY3d 445, 447 [2007]; *see also*

People v Guidice, 83 NY2d 630, 636 [1994]).

In this domestic violence case, the court providently exercised its discretion in admitting evidence of defendant's past physical and verbal abuse of the victim when defendant was "heavily intoxicated." This evidence constituted highly probative background information that tended to explain the relationship between defendant and the victim, place the events in question in a believable context and refute defendant's defense (*see People v Frankline*, 27 NY3d 1113, 1115 *People v Dorm*, 12 NY3d 16 [2009]; *People v Steinberg*, 170 AD2d 50, 72-74 [1st Dept 1991], *affd* 79 NY2d 673 [1992]). The probative value of this evidence exceeded any prejudicial effect, which was minimized by the court's instructions.

The court properly denied defendant's challenges for cause to two prospective jurors. Neither juror's comments "cast serious doubt on [his or her] ability to render an impartial verdict," (*People v Arnold*, 96 NY2d 358, 363 [2001]) and each panelist's responses, viewed as a whole, provided an unequivocal declaration of impartiality.

In those instances where the court overruled objections to the prosecutor's summation that were made on specific grounds relating to alleged misstatements of the evidence, we find that the remarks at issue sought to draw permissible inferences from

the record (*see People v Overlee*, 236 AD2d 133 [1st Dept 1997], *lv denied* 91 NY2d 976 [1992]). Defendant did not preserve any of his other claims regarding the summation, or his challenge to the court's response to a jury note, and we decline to review them in the interest of justice. As an alternative holding, we find no basis for reversal.

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

ENTERED: APRIL 26, 2018

CLERK

Mazzarelli, J.P., Kapnick, Kahn, Kern, Singh, JJ.

6405N STB Investments Corporation, et al.,
Plaintiffs-Respondents,

-against-

Sterling & Sterling, Inc.,
Defendant-Appellant.

Index 650390/14

_____

Goldberg Segalla LLP, New York (Peter J. Biging of counsel), for appellant.

Duane Morris LLP, New York (Fran M. Jacobs of counsel), for respondents.

_____

Order, Supreme Court, New York County (Eileen Bransten, J.), entered December 21, 2016, which denied in part defendant's motion to compel discovery, unanimously affirmed, without costs.

The motion court providently exercised its discretion when it limited discovery in this action (*see generally Wyda v Makita Elec. Works*, 162 AD2d 133 [1st Dept 1990]). The crux of this dispute is what coverage was offered by defendant to plaintiffs with respect to a demolition project. Thus, as previously stated by this Court on a prior appeal, "[b]ecause all documents 'concerning insurance coverage for the Demolition Project' have been produced, there is nothing further to compel" (140 AD3d 449, 450 [1st Dept 2016]). The motion court appropriately directed plaintiffs to expand their search term to include the email

address for "@sterlingrisk.com," the producer who procured the disputed coverage, and beyond that, defendant has not "established that the line of inquiry they seek to pursue will avail them of any useful information" with respect to plaintiffs' comptroller, plaintiffs' architect, or conversations between plaintiffs' attorney and third parties (*Monica W. v Milevoi*, 252 AD2d 260, 264 [1st Dept 1999]).

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

ENTERED: APRIL 26, 2018

CLERK