SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

**MARCH 29, 2018**

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Tom, J.P., Mazzarelli, Andrias, Oing, Singh, JJ.

4534 In re Wayne Seon, Index 260242/16
Petitioner,

-against-

The New York State Department
of Motor Vehicles, et al.,
Respondents.

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Armienti DeBellis Guglielmo & Rhoden LLP, New York (Mohammad M. Haque of counsel), for petitioner.

Eric T. Schneiderman, Attorney General, New York (Judith N. Vale of counsel), for respondents.

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In this proceeding brought pursuant to CPLR article 78 (transferred to this Court by order, Supreme Court, Bronx County [Kenneth L. Thompson, Jr., J.], entered on or about October 3, 2016), to annul the determination of respondent New York State Department of Motor Vehicles (DMV), dated March 28, 2016, which, after a hearing, upheld the suspension of petitioner's driver's license for six months based on a violation of Vehicle and Traffic Law § 1146, the petition is granted, without costs, the

determination of DMV is annulled and vacated, and petitioner's driver's license reinstated.

This proceeding arises out of a summons issued to petitioner, a New York City Transit bus driver, for allegedly failing, in violation of Vehicle and Traffic Law section 1146(c), to "exercise due care to avoid colliding" with an 88-year-old pedestrian, causing the pedestrian's death. A hearing was held to adjudicate the summons, at which Charlie Viera, the investigating officer, who is an accident reconstruction specialist, and petitioner both testified. The only exhibits submitted into evidence by DMV were two accident reports, one prepared at the scene and one prepared a month later by Viera, after the pedestrian died, and a witness statement provided by petitioner. Viera was not assigned to the matter until after the pedestrian's death.

According to the report prepared at the scene, the collision occurred on the evening of November 13, 2014, at the intersection of Vyse Avenue and East 174th Street in the Bronx. The bus was making a right turn onto Vyse Avenue, with a green light, and the pedestrian was walking across Vyse Avenue, in the crosswalk, with the walk signal. The bus "had front tires already through the crosswalk when [the pedestrian] made contact, becoming pinned

under the passenger side door of the bus behind the front wheel." According to the report prepared by Viera after the pedestrian died and he was assigned the investigation, the pedestrian was admitted to St. Barnabas Hospital and died there "as a result of his injuries." The report does not explain on what basis Viera believed that the pedestrian's death, over one month after the accident, was directly caused by the accident. Further, the report states that at the scene of the accident his injuries, which were to his legs, "were not considered life threatening."

Viera's direct testimony largely consisted of his reading or summarizing the contents of the reports. He concluded that petitioner "struck the pedestrian with the front right side of the bus, running over the legs of the pedestrian with the front passenger's side tire." Although Viera testified that the pedestrian "suffered a severe leg injury" and "was transported by EMS to St. Barnabas where he later died as a result of his injuries," he did not identify on what basis he concluded that the injury was severe or that, as implied, the pedestrian's death could be linked to the accident. On cross-examination, Viera acknowledged that, when the accident occurred, it was nighttime and it was raining heavily, and the crosswalk was very poorly lit. He further admitted that the pedestrian was wearing a

hoodie and carrying an open umbrella, and that these things could have obstructed his vision. As for the injury, Viera testified that the pedestrian's death "was determined complication from the collision of the accident [sic]." Again, however, he did not explain who determined this. Further, he conceded that he did not know which part of the pedestrian's leg had been impacted, and that it could have possibly been a foot. Injury to a foot, he acknowledged, is not generally considered life threatening. Finally, Viera stated that he did not read any medical reports, and that he did not know whether there were "other medical complications" that caused the pedestrian to die.

Petitioner testified that as he made his right hand turn onto Vyse Avenue, a one-way street, he noticed parked cars on both sides of the street, and no pedestrians in the crosswalk. He scanned his mirrors on the left and right side of the bus to make sure that he didn't hit any pedestrians or parked cars.
After scanning his mirrors, he heard a thump on the right side of the bus, by the front door. He secured the bus, then stepped out, and saw the pedestrian "laying on the side of the tire, just behind the tire itself, wearing a black hoodie (with the hood over his head) and a big, large ... black umbrella." Petitioner stated that he did not take any drugs for 24 hours before the

accident, and that 24 hours after the accident, he tested negative for drugs and alcohol.

The Administrative Law Judge found that the charge had been established by clear and convincing evidence that "the motorist failed to exercise due care and violated 1146C [sic] of the Vehicle and Traffic Law." The Administrative Law Judge imposed a fine of $150 and, noting that petitioner had no relevant convictions in the past 18 months, and "given the lighting conditions, the weather conditions, the motorist's record in the last 18 months," his license would be suspended for 75 days "as per statute." The Administrative Law Judge did not mention the pedestrian's death in declaring that petitioner violated Vehicle and Traffic Law § 1146, other than to note the death in fashioning a penalty. The following day DMV sent petitioner an order of suspension, stating that his license would be suspended for six months pursuant to Vehicle and Traffic Law § 510.2 for failure to exercise due care with serious physical injury resulting. Petitioner appealed to the Traffic Violations Bureau Appeals Board of DMV, which upheld the determination.

Petitioner commenced this article 78 proceeding, arguing that neither substantial evidence nor clear and convincing evidence supports the charge that he failed to exercise due care

and violated Vehicle and Traffic Law § 1146(c); that his due process rights were violated because the admitted evidence was not provided to him prior to or during his hearing; and that his due process rights were further violated when, subsequent to affirmance by the Appeals Board, the DMV imposed a suspension of "at least 177 days" which was unconstitutionally vague. The court stayed the suspension and transferred the proceeding to this Court for substantial evidence review.

This Court has described substantial evidence as a "minimal standard," constituting a "low threshold," and requiring less than "a preponderance of the evidence, overwhelming evidence or evidence beyond a reasonable doubt" (*Matter of Shuman v New York State Racing & Wagering Bd.*, 40 AD3d 385, 385 [1st Dept 2007] [internal quotation marks omitted]). "[A]s a burden of proof, it demands only that a given inference is reasonable and plausible, not necessarily the most probable," and "the courts may not weigh the evidence or reject the conclusion of the administrative agency where the evidence is conflicting and room for choice exists" (*id.* at 386 [internal quotation marks and emphasis omitted]). Petitioner acknowledges that substantial evidence is the standard of review in this case, but insists that it must be applied in light of the standard of review that the

Administrative Law Judge was required to apply in the DMV proceeding. That standard was one of clear and convincing evidence (Vehicle and Traffic Law § 227[1]). In response, DMV cites *Matter of Williams v Perales* (156 AD2d 697 [2d Dept 1989]). In that case, which dealt with a violation of the rules governing food stamps, the court stated that "[a]lthough the applicable administrative standard of review in determining whether a local agency has established an intentional program violation is 'clear and convincing evidence,' the proper judicial standard of review of the Commissioner's determination is whether the determination is based on substantial evidence" (156 AD2d at 698 [internal citation omitted]).

This Court does not appear to have addressed the issue directly. However, other Second Department cases suggest that, notwithstanding *Matter of Williams*, the Appellate Division is not required to ignore the underlying standard of evidence when conducting a substantial evidence review pursuant to CPLR 7804(g). For example, in *Matter of Kaplowitz v Jackson* (267 AD2d 239, 239-240 [2d Dept 1999]), the Court, in finding that a determination by DMV that the petitioner was guilty of speeding was supported by substantial evidence, stated "that in finding clear and convincing evidence that a traffic infraction had been

committed, the Administrative Law Judge properly relied upon the results of radar testing and upon the arresting officer's visual estimate of the speed of the petitioner's vehicle." Similarly, in *Matter of Anthony Grace & Sons v New York State Dept. of Motor Vehs.* (266 AD2d 284 [2d Dept 1999]), the Court held that "[t]he determination that there was clear and convincing evidence ... that the petitioner violated [the VTL] is supported by substantial evidence." Thus, while the appellate standard of review of substantial evidence requires great deference to findings that a hearing officer makes based on the evidence placed before it, it still calls for the reviewing court to ensure that such findings are not made in the absence of evidence that could, again with the proper amount of deference, reasonably be called clear and convincing.

Here, DMV was required to establish that petitioner violated Vehicle and Traffic Law § 1146(c)(1), which imposes liability on "[a] driver of a motor vehicle who causes serious physical injury as defined in article ten of the penal law to a pedestrian or bicyclist while failing to exercise due care." The referenced definition of "serious physical injury" includes "physical injury . . . which causes death," (Penal Law § 10.00[10]), which is presumably the basis for the charge against petitioner since he

was not issued a summons until after the pedestrian died in the hospital. Thus, DMV was required to present clear and convincing evidence of both failure to exercise care and that such failure led to the pedestrian's demise. Petitioner claims that DMV failed in both respects. Regarding the accident itself, petitioner posits that the evidence was not clear and convincing that he failed to exercise due care, because it was equally plausible that the pedestrian, considering the lighting, the weather, and the hoodie and umbrella that may have obstructed his view, walked into the side of the bus. We reject this position. Under the substantial evidence standard of review, so long as there was some evidence that the Administrative Law Judge could have reasonably deemed to be clear and convincing proof that petitioner should have seen the pedestrian, we may not disturb the administrative finding. Based on the uncontested fact that the pedestrian had the right of way, and the testimony of an experienced accident reconstruction specialist that petitioner should have seen him and allowed him to proceed before he drove through the intersection, the Administrative Law Judge had ample evidence to find that petitioner failed to exercise due care.

With regard to the requirement that DMV establish serious physical injury, however, we find that there is not substantial

evidence in the record to support the Administrative Law Judge's implicit finding that clear and convincing evidence existed that the accident caused the pedestrian's death. This conclusion does not require us to weigh evidence, determine witness credibility, or otherwise second-guess educated findings made by the Administrative Law Judge, all of which are prohibited under the substantial evidence standard of review (*Matter of Shuman,* 40 AD3d at 385). Rather, it is a recognition that the DMV presented no evidence at all tying the pedestrian's death to the injuries suffered by him in the accident, not even a death certificate. Viera, the only witness presented by DMV, presented no medical evidence whatsoever. He never stated that anyone medically qualified to do so told him that the pedestrian died because of his injuries, he merely stated that this was "determined." The only reference to a doctor in the investigative report he prepared merely states that a Dr. Carazas at St. Barnabas Hospital pronounced the pedestrian dead. Further, the investigative report Viera prepared stated that the pedestrian's injuries at the scene were not life threatening, and he imparted no knowledge about the severity of the injuries at any point before the death of the pedestrian, even admitting to not knowing what part of the pedestrian's leg was impacted by the bus. Thus,

there was no basis for the Administrative Law Judge to even draw an inference that the pedestrian died as a result of his injuries.

The dissent states that "the record contains clear and uncontroverted evidence of how this accident occurred and the resulting serious injury sustained by the pedestrian," focusing on the statement in the initial accident report that the pedestrian was "pinned under the passenger side door[1] of the bus behind the front wheel." This, of course, ignores that DMV, at the hearing, did not proceed on the theory, much less offer any medical proof, that the pedestrian sustained "serious and protracted disfigurement, protracted impairment of health or protracted loss or impairment of the function of any bodily organ" (Penal Law section 10[12]). The dissent's approach further ignores that the Administrative Law Judge made no findings concerning whether the pedestrian sustained a "serious physical injury." In any event, even were it proper for this Court, in performing its review, to uphold the determination on a ground not pursued at the administrative level, we cannot

[1]The dissent reads the narrative in the report as stating ". . . passenger side body of the bus . . ." The narrative is handwritten and the word is admittedly not readily discernable.

disregard that petitioner testified that when he exited the bus after hearing a "thump," the pedestrian was "laying on the side of the tire, just behind the tire itself." This is not consistent with the notion that the pedestrian was "pinned," which would imply that the full, or a significant portion of, the weight of the bus had rendered the pedestrian's leg immobile. That would arguably imply a significant injury, but the evidence is not clear and convincing that this was the case. Thus, it is an open question how the pedestrian's leg was impacted. Without minimizing the potential for danger to an octogenarian who is hit by a bus, there is simply nothing in the record to suggest that the accident, even if it did not cause the pedestrian's death, satisfied the requirement that the pedestrian suffered "serious physical injury" as required by Vehicle and Traffic Law § 1146(c).

To be sure, one could speculate, as does the dissent, that the pedestrian suffered a "serious physical injury." But to engage in speculation would be to ignore the underlying standard of clear and convincing evidence, which even the dissent agrees applied in the administrative proceeding and is relevant to our review. "Clear and convincing evidence is evidence that satisfies the factfinder that it is highly probable that what is

claimed actually happened . . . and it is evidence that is neither equivocal nor open to opposing presumptions" (*Matter of Gail R. [Barron]*, 67 AD3d 808, 812 [2d Dept 2009][internal citations and quotation marks omitted]). Given that standard, and the remarkable lack of compelling evidence before us, we would be abdicating our role were we simply to defer to the conclusions drawn by the Administrative Law Judge, and raising a serious question as to the very purpose of having any appellate review in this matter.

Because we find that the Administrative Law Judge's determination was not supported by substantial evidence, we need not consider petitioner's argument that his due process rights were impaired or that the penalty was unduly severe.

All concur except Tom, J.P. and Andrias, J. who dissent in a memorandum by Tom, J.P. as follows:

TOM, J. (dissenting)

I agree with the majority's discussion of the interplay between our standard of review on appeal and the underlying clear and convincing standard in the DMV proceeding, and the majority's finding that petitioner violated Vehicle and Traffic Law § 1146(c)(1) by failing to exercise due care when he struck a pedestrian with his bus. However, I would find that substantial evidence in the record supports the Administrative Law Judge's finding that clear and convincing evidence existed that the accident caused the pedestrian serious physical injury. Accordingly, I respectfully dissent.

The decedent Julian Porres Mendez was struck and run over by a bus at the crosswalk at the intersection of Vyse Avenue and East 174th Street in the Bronx. Decedent was taken to St. Barnabas Hospital by EMS and died a few weeks later.

New York State Department of Motor Vehicles issued petitioner Wayne Seon (the bus driver) a summons for violating Vehicle and Traffic Law § 1146(c) for failing to "exercise due care to avoid colliding" with and causing a pedestrian to sustain "a serious physical injury."

The majority finds there was insufficient evidence to support a violation of section 1146(c) because "there is not

substantial evidence in the record to support the Administrative Law Judge's implicit finding that clear and convincing evidence existed that the accident caused the pedestrian's death."

To sustain the Administrative Law Judge's finding we do not need to conclude that there was clear and convincing evidence before the agency that the collision caused the pedestrian's death or a substantial risk of death. Rather, under the statutory definition, it suffices where there is clear and convincing proof of the "protracted impairment of health or protracted loss or impairment of the function of any bodily organ."

Vehicle and Traffic Law § 1146(c)(1) provides in part:

> "A driver of a motor vehicle who causes serious physical injury as defined in article ten of the penal law to a pedestrian . . . while failing to exercise due care . . . shall be guilty of a traffic infraction..."

Penal Law § 10.00(10) defines "serious physical injury" as:

> "'Serious physical injury' means physical injury which creates a substantial risk of death, or which causes death or serious and protracted disfigurement, protracted impairment of health or protracted loss or impairment of the function of any bodily organ."

Clearly, then, serious physical injury may be proven by demonstrating that an injury either created a substantial risk of death or caused death, or caused protracted impairment of health

or loss or impairment of the function of any bodily organ.

The majority's contention that the basis for the charge against petitioner was the death of the pedestrian is without merit. The record is bare of any evidence to support this supposition. The majority's conclusion that DMV charged petitioner under the death provision of the statute solely because the summons was served upon petitioner after the pedestrian's death is rank speculation and should be outright rejected. The evidence in this case clearly showed that DMV proceeded in its charge against petitioner under the entire provision of § 1146(c). In fact, petitioner was charged in the summons with violation of "section 1146(c)" and the Administrative Law Judge after a hearing found in his decision that petitioner "violated 1146(c) of the Vehicle and Traffic Law." There was no mention of pedestrian's death in the charge or the holding of the Administrative Law Judge. It is clear that the charge against petitioner and findings by the agency refer to section 1146(c) as a whole and did not focus on a particular definition of serious physical injury.

It should be noted that "[h]earsay evidence can be the basis of an administrative determination," including documentary evidence such as photographs, police accident and any police

investigative reports (*Matter of Gray v Adduci*, 73 NY2d 741, 742 [1988]; *see also Matter of Guarino v New York State Dept. Of Motor Vehs.*, 80 AD3d 697 [2d Dept 2011]; *Matter of Fazzone v Adduci*, 155 AD2d 540 [2d Dept 1989]). There is no requirement that a particular form of medical proof is needed to sustain a finding of a serious injury in this administrative hearing as urged by the majority. Further, given that hearsay evidence can be the basis of an administrative determination and may on its own constitute substantial evidence (*see Matter of Cafe La China Corp. v New York State Liquor Auth.*, 43 AD3d 280, 281 [1st Dept 2007]), no particular type of evidence was required to be put forth at the hearing. Thus, it is inconsequential that the DMV presented no medical evidence or medical reports so long as testimony of witnesses, and police accident and investigative reports, meet petitioner's burden of proof. Here, the evidence clearly and convincingly supports the finding of a serious injury.

In this case, there was ample evidence to support the finding that decedent was struck and run over by a bus, and sustained a serious physical injury in conjunction with section 1146(c) under the clear and convincing standard of review by the Administrative Law Judge.

It appears that the majority is questioning whether the bus struck and ran over the pedestrian and whether he sustained a serious injury pursuant to Penal Law § 10.00(1) as a result of this accident.

Once again, the record contains clear and uncontroverted evidence of how this accident occurred and the resulting serious injury sustained by the pedestrian. Police Officer Casey prepared the accident report which was marked into evidence. The report states that the pedestrian was "pinned under the passenger side body of the bus behind the front wheel." In light of this evidence with no proof to the contrary, the majority continues to question whether the pedestrian was run over by and pinned under the front tire of the bus. The majority states the evidence is "not consistent with the notion that the pedestrian was 'pinned,' which would imply that the full . . . weight of the bus had rendered the pedestrian's leg immobile." Once again, the fact that the pedestrian was pinned under the front wheel of the bus was reported in the accident report by the police officer at the scene of the accident. The accident report was admitted into evidence without objection. Even the petitioner does not contest the pedestrian was pinned under the bus. Petitioner testified that as he was making a right turn he heard a "thump" in front of

the bus. The thump sound was significant enough of an impact for him to immediately stop and exit the bus to investigate. Petitioner then testified that he observed the pedestrian "laying on the side of the tire, just behind the tire itself," which is consistent with the information in the accident report that the pedestrian was pinned behind the front tire. We can logically conclude that a person had to be first run over by a vehicle moving forward to be pinned under the back part of the front tire. Police Officer Charlie Viera, who investigated the accident, testified that, based on his investigation, including reports of the witnesses at the scene, the bus "struck the pedestrian with the front side of the bus, running over the legs of the pedestrian with the front passenger's side tire." In response to the Administrative Law Judge's question whether it was possible the pedestrian walked into the bus, Officer Viera, an accident reconstructionist, testified that it was the bus that struck the pedestrian.

The record also contains evidence to show by clear and convincing proof that the pedestrian sustained a serious injury. Police Officer Viera sets forth in his investigative report, also marked into evidence, that following the collision the pedestrian was admitted to St. Barnabas Hospital where a month later he died

as a result of his injuries. The majority states that Dr. Carazas merely "pronounced the pedestrian dead." This is inaccurate. The investigative report also marked into evidence without objection provides that the pedestrian "died as a result of his injuries, pronounced by Dr. Carazas." Officer Viera testified that based on his investigation it was determined that decedent's death was caused by "complication from the collision of the accident." This was based on contact with the physician who pronounced Mendez dead as a result of his injuries.

Once again, section 1146(c) is not limited to death or a substantial risk of death but also applies to the "protracted loss or impairment of the function of any bodily organ." Whether the injured extremity was a leg or a foot, whether the injuries resulted in substantial risk of death or death, and whether additional complications occurred, any person, let alone an 88 year old, admitted to the hospital for a month based on injuries sustained after being run over and pinned under a bus, has suffered serious physical injuries. Moreover, before the bus ran over his extremities there was the impact of the bus slamming into the pedestrian's body causing a significant "thump" sound prompting the bus driver to stop the bus to investigate. Indeed, such injuries undoubtedly constitute a "protracted impairment of

health or protracted loss or impairment of the function of [a] bodily organ" under section 1146(c)(1).

Notwithstanding the ample evidence submitted by respondent in support of its position, for the majority to raise the issue of whether the elderly pedestrian sustained a serious injury as a result of this horrific accident would defy logic and clearly life's realities. Here, the elderly pedestrian in this case would turn 90 years old in a little more than a year from the time of the accident. A city bus carrying 30 to 35 passengers struck him and ran over his legs, pinning him behind the right front tire of the bus. It would be a miracle even for a young, healthy person not to sustain a serious injury under such circumstances, and for a person of the decedent's age, serious injury would be inescapable. A person of such advanced age would most likely sustain a serious injury even by an accidental fall without the impact of a city bus striking and running over him. The pedestrian was immediately transported to St. Barnabas Hospital where he remained for one month before his death. We should be mindful that this is an administrative hearing and not a judicial trial on the merits where the rules of evidence are strictly adhered to. The above factual scenario together with the accident report, the investigative report and the testimony

of Officer Viera and petitioner clearly and convincingly proved that the bus struck and ran over the pedestrian causing him at a minimum to sustain a serious injury of a "protracted impairment of health or protracted loss or impairment of the function of any bodily organ" (Penal Law § 10.00[10]; Vehicle and Traffic Law § 1146[c]). To hold otherwise would make our appellate review process illogical, unsound and contrary to the law concerning administrative hearings.

Therefore, I would confirm respondents' determination, including the penalty, and deny and dismiss the petition.

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

ENTERED: MARCH 29, 2018

DEPUTY CLERK

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

5203-
5203A Index 650928/16

Alden Global Value Recovery Master Fund, L.P., etc.,
Plaintiff-Appellant,

-against-

KeyBank National Association, et al.,
Defendants-Respondents,

Wells Fargo Bank, N.A., etc.,
Nominal Defendant.

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Duval & Stachenfeld LLP, New York (Kirk L. Brett of counsel), for appellant.

Steptoe & Johnson, Chicago, IL (Michael Dockterman of the bar of the State of Illinois, admitted pro hac vice, of counsel), for KeyBank National Association, respondent.

Loeb & Loeb LLP, New York (Gil Feder of counsel), for Berkadia Commercial Mortgage LLC, respondent.

Miller Field Paddock & Stone, P.L.C., Troy, MI (James L. Allen of the bar of the State of Michigan, the State of Ohio and the State of Illinois, admitted pro hac vice, of counsel), for Berkadia Commercial Mortgage LLC, respondent.

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Orders, Supreme Court, New York County (Anil C. Singh, J.), entered November 29, 2016, which granted defendants KeyBank National Association and Berkadia Commercial Mortgage LLC's motions to dismiss the complaint as against them with prejudice, unanimously affirmed, without costs.

The principal issue before us is whether, in granting

defendants' motions to dismiss in this purported derivative action for breach of an Amended and Restated Pooling and Servicing Agreement (PSA), Supreme Court improperly interpreted the term "default," as employed in one provision of the PSA, as synonymous with the term "Event of Default," as defined in a preceding provision of the PSA. We find that Supreme Court's determination was correct, and therefore affirm.

I. *Background*

This appeal arose from the sale of a commercial mortgage loan for allegedly less than "fair value."

In 2007, the Bryant Park Hotel, located at 40 W. 40th Street, borrowed funds from the J.P. Morgan Chase Commercial Mortgage Securities Trust Series 2007-CIBC18 (the Trust), which was created pursuant to a pooling and servicing agreement dated March 7, 2007. Under the terms of that agreement, defendant Wells Fargo Bank was designated as the Trustee and Paying Agent, defendant Berkadia was designated as the Master Servicer and defendant KeyBank was designated as the Special Servicer. The Bryant Park Hotel loan was pooled with other commercial mortgage loans and securitized into the Trust.

Section 6.03 of the PSA limits the potential claims of liability that may be brought against the servicers of the Trust

to willful misfeasance, bad faith, negligence or negligent disregard of their duties under the PSA. That section also provides that the servicers will be indemnified by the Trust for all expenses unless incurred by reason of bad faith, willful misconduct, negligence or negligent disregard.

Article VII of the PSA, entitled "Default," includes alternative definitions of the term "Event of Default" (Section 7.01[a]). The parties agree that the only definition of "Event of Default" applicable to the circumstances presented in this case is the following:

> "[A]ny failure on the part of the Master Servicer [or] the Special Servicer . . . duly to observe or perform in any material respect any of its other covenants or obligations contained in this Agreement which continues unremedied for a period of 30 days . . . after the date on which *written notice of such failure, requiring the same to be remedied, shall have been given . . . to the Master Servicer [or] the Special Servicer . . .* as the case may be, *with a copy to each other party to this Agreement,* by the Holders of Certificates evidencing Percentage Interests aggregating not less than 25%" (Section 7.01[a][iii] [emphasis added]).

Section 12.03(c) of the PSA (the "no-action" clause) sets forth the limited circumstances under which a certificateholder may institute suit. Section 12.03(c) provides, in pertinent part:

> "No Certificateholder shall have any right by virtue of any provision of this Agreement to institute any suit,

> action or proceeding in equity or at law upon or under or with respect to this Agreement or any Mortgage Loan, unless, with respect to any suit, action or proceeding upon or under or with respect to this Agreement, such Holder previously shall have given to the Trustee and the Paying Agent *a written notice of default* hereunder, and of the continuance thereof, *as herein before provided*, and unless also (except in the case of a default by the Trustee) the Holders of Certificates of any Class evidencing not less than 25% of the related Percentage Interests in such Class shall have made written request upon the Trustee to institute such action, suit or proceeding in its own name as Trustee hereunder and shall have offered to the Trustee such reasonable indemnity as it may require against the costs, expenses and liabilities to be incurred therein or thereby, and the Trustee, for 60 days after its receipt of such notice, request and offer of indemnity, shall have neglected or refused to institute any such action, suit or proceeding" (emphasis added).

The PSA sets forth no definition of the term "default" as employed in section 12.03(c).

In October 2011, the borrower defaulted on the loan, and Berkadia, which had been responsible for servicing the loan as Master Servicer, transferred that responsibility to KeyBank, as Special Servicer. KeyBank, as Special Servicer, was tasked with determining the "fair value" of the loan, and Berkadia, as Master Servicer, was responsible for reviewing KeyBank's fair value determination.

Effective February 27, 2012, the original pooling and servicing agreement was amended, restated and replaced by the

PSA.

In April 2014, KeyBank obtained an appraisal of the land and building by Cushman & Wakefield of $71 million. Thereafter, KeyBank valued the loan at $65,058,844, even though the amount owed on the loan was $85.5 million. The nonparty Controlling Class Option Holder (the certificateholder with the largest balance of certificates in the "Controlling Class") (CCOH) elected to exercise its option to purchase the loan from the Trust. Later that month, Berkadia, as Master Servicer, approved KeyBank's valuation.

On May 20, 2014, the CCOH consummated the purchase of the loan from the Trust, but the Trust received approximately $59 million, approximately $6 million less than KeyBank's and Berkadia's valuation. A few weeks later, the loan was restructured and refinanced by a lender for more than $100 million.

On May 18, 2015, plaintiff Alden Global Recovery Master Fund, L.P., a holder of at least 25% of the Class C group of certificates, sent a letter to Wells Fargo as Trustee and Paying Agent notifying them of defaults by KeyBank and Berkadia. In that same letter, plaintiff related the above appraisal history and requested that Wells Fargo institute a suit against both

KeyBank and Berkadia and offered Wells Fargo "such reasonable indemnity as it may require."

In mid-July 2015, counsel for Wells Fargo orally advised plaintiff that it would not institute a suit.

On February 23, 2016, plaintiff commenced the instant action, alleging that both KeyBank, as Special Servicer, and Berkadia, as Master Servicer, breached their duties under the PSA by failing to comply with their obligations in determining the fair value of the loan. Specifically, plaintiff alleged that KeyBank placed its reliance on a single appraisal from Cushman and Wakefield and undervalued the loan. Plaintiff further alleged that Berkadia failed in its duty to review KeyBank's valuation by ignoring KeyBank's blatant errors, which should have raised substantial doubts about the reliability of the valuation. Additionally, plaintiff alleged that neither of those defendants was entitled to indemnification and that KeyBank had failed to act in good faith.

In separate motions, both Berkadia and KeyBank moved to dismiss the complaint. As stated above, by order entered November 29, 2016, Supreme Court granted both motions on both CPLR 3211(a)(1) and (7) grounds.

On this appeal, plaintiff's principal argument is that

Supreme Court erred in granting defendants' motions to dismiss based upon its incorrect interpretation of the undefined term "default," as employed in section 12.03(c) of the PSA, as having the same meaning as the term "Event of Default" as defined in section 7.01(a)(iii), in that the cases upon which Supreme Court relied are either legally or factually inapposite to the instant case. Relying on *Teachers Ins. & Annuity Assn. of Am. v CRIIMI Mae Servs. Ltd. Partnership* (681 F Supp 2d 501 [SD NY 2010], *affd* 481 Fed Appx 686 [2d Cir 2012], *cert denied* 568 US 1010 [2012]), plaintiff maintains that application of the term "Event of Default" is limited to the removal of a servicer and is, therefore, inapplicable to the initiation of certificateholder litigation. Plaintiff further contends that, in any event, dismissal of the complaint was improper because the language of section 12.03(c) is ambiguous. Additionally, plaintiff argues that there is case law precedent for the principal that uncapitalized, undefined general terms in a contract should not be interpreted to have the same meaning as capitalized terms defined elsewhere in the same contract.

Defendants maintain that there is controlling precedent for upholding Supreme Court's determination that the two terms in question have the same meaning, that plaintiff cannot advance its

ambiguity argument on this appeal because it did not raise it before the motion court, and that, in any event, the argument lacks merit because the phrase "as herein before provided" clearly refers to default provisions of the PSA preceding section 12.03(c). Defendants further argue that the cases cited by plaintiff in support of its argument that an uncapitalized contract term should not be interpreted as synonymous with a contractually defined contract term are neither binding precedent nor factually apposite to the instant case.

II. *Legal Standards*

On a CPLR 3211(a)(1) motion to dismiss based upon documentary evidence, "a dismissal is warranted only if the documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law" (*Leon v Martinez*, 84 NY2d 83, 88 [1994]). On a CPLR 3211(a)(7) motion to dismiss for failure to state a cause of action, the complaint must be construed in the light most favorable to the plaintiff and all factual allegations must be accepted as true (*see 219 Broadway Corp. v Alexander's, Inc.*, 46 NY2d 506, 509 [1979]). Further, on such a motion, the complaint is to be construed liberally and all reasonable inferences must be drawn in favor of the plaintiff (*Leon v Martinez*, 84 NY2d at 87-88).

III. *Discussion*

A. Interpretation of "default" as Employed in "No-action" Clause

On the issue of whether the word "default," as used in section 12.03(c) of the PSA, is synonymous with the term "Event of Default" as defined in the preceding section 7.01(a)(iii), our precedent is instructive.

In *ACE Sec. Corp. v DB Structured Prods., Inc.* (112 AD3d 522 [1st Dept 2013], *affd* 25 NY3d 581 [2015]), we were presented with a case involving a pooling and servicing agreement containing language and enumeration of provisions in a manner strikingly similar to the PSA in the instant case. Although we dismissed the action in *ACE* on statute of limitations grounds (and the Court of Appeals affirmed solely on that basis), we also took pains to observe that, "[i]n any event, the certificate holders lacked standing to commence the action on behalf of the trust . . . [because] [t]he "no-action" clause in section 12.03 of the PSA sets forth as a condition precedent to such an action that the certificate holders provide the trustee with 'a written notice of default and of the continuance thereof[,]'" and further observed that the "'defaults' enumerated in the PSA concern failures of performance by the servicer or master servicer only" (112 AD3d at

523). In making that observation, we were referring to Article VIII of the pooling and servicing agreement in *ACE*, which is entitled "Default" and enumerates failures of performance under the definition of "Servicer Event of Default." In *ACE*, we concluded that the pooling and servicing agreement did not authorize the certificateholders to issue a notice of default relating to the sponsor's alleged breach of representations.

In order to reach our conclusion in *ACE*, we reasoned that the word "default" as employed in section 12.03 of the pooling and servicing agreement in *ACE* referred to the preceding enumerated definitions of "Servicer Event of Default" in that agreement. (112 AD3d at 523). Thus, *ACE* provides support for adherence to similar reasoning in interpreting the strikingly similar PSA in question in this case.

In *ACE*, we cited our earlier decision in *Walnut Place LLC v Countrywide Home Loans, Inc.* (96 AD3d 684, 684 [1st Dept 2012]), in which we affirmed the motion court's granting of the defendants' motion to dismiss based on our holding that the action brought by the certificateholders in that case was "barred by the 'no-action' clause[s] in the PSAs, which plainly limit[] certificate holders' right to sue to an 'Event of Default,' which, under section 7.01 of the PSAs, involves only the master

servicer."[1] In *Walnut Place*, we rejected the plaintiff's argument that the provision defining "Event of Default" in each of the PSAs in that case did not apply, reasoning that the "[p]laintiff's interpretation of the 'no-action' clause would improperly excise the 'Event of Default' provision and distort the plain meaning of the clause" (96 AD3d at 685). Put otherwise, the "no-action" clause and the preceding provisions of the PSA defining "Event of Default" were to be read together. Our reasoning in *Walnut Place* is equally applicable in this case. The applicability of *Walnut Place* to this case is further demonstrated by our adherence to its reasoning in *ACE* notwithstanding the use of the term "default" in the "no-action" clause of the pooling and servicing agreement in that case rather

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[1] The identically worded language of the no-action clauses of two identically worded pooling and servicing agreements at issue in *Walnut Place* provide, in pertinent part:

> "No Certificateholder shall have any right by virtue or by availing itself of any provisions of this Agreement to institute any suit, action or proceeding in equity or at law upon or under or with respect to this Agreement, [1] unless such Holder previously shall have given to the Trustee *a written notice of an Event of Default and of the continuance thereof*, as provided in this Agreement . . . ." (emphasis added) (*Walnut Place*, 2012 WL 13024309, Brief for Plaintiffs-Appellants, at *7).

than the term "Event of Default," as in the *Walnut Place* agreements, which made no difference in our reasoning or in our conclusion in both of those cases that the certificateholders lacked standing to sue.

Moreover, section 12.03 of the PSA in this case provides for "a written notice of default hereunder, and of the continuance thereof, *as herein before provided*" (emphasis added). There is no possible antecedent provision in the PSA to which "a written notice of default" could refer other than the language of section 7.01(a)(iii) requiring provision of a written notice of default to the Special and Master Servicers, as well as to all of the parties to the PSA. Moreover, we have previously concluded that the language "as herein before provided" refers back to a preceding provision of the same agreement (*149 Madison LLC v Bosco*, 103 AD3d 523, 524 [1st Dept 2013] [holding that the language "as hereinbefore provided," "properly read," refers to a prior portion of a lease agreement], *lv dismissed* 22 NY3d 950 [2013]).

Significantly, further support for interpretation of "default" as used in section 12.03 of the PSA in this case as synonymous with "Event of Default" is found in section 8.02(vii), where the two terms are used interchangeably. Section 8.02(vii)

provides, in pertinent part:

> "For all purposes under this Agreement, the Trustee shall not be deemed to have notice of any *Event of Default* unless a Responsible Officer of the Trustee has actual knowledge thereof or unless written notice of any event which is in fact such a *default* is received by the Trustee. . ." (emphasis added).

Plaintiff's reliance on *Teachers Ins. & Annuity Assn. of Am. v CRIIMI Mae Servs. Ltd. Partnership* (681 F Supp 2d 501 [SD NY 2010], *affd* 481 Fed Appx 686 [2d Cir 2012], *cert denied* 568 US 1010 [2012]), is misplaced. In *Teachers*, the court reached the conclusion that the "Special Servicer Event of Default" definition section of the pooling and servicing agreement in that case set forth preconditions applicable only to the removal of a Special Servicer, and not to the initiation of certificateholder litigation (681 F Supp 2d at 510). In *Teachers*, however, the notice provisions for a "Servicer Event of Default" were combined with those governing removal of a servicer in a single section of the agreement in question (*id.*). In this case, however, sections 7.01(a)(i) to (x) of the PSA set forth ten events, each of which constitutes an "Event of Default," including section 7.01(a)(iii), which defines "Event of Default" on the part of the Master Servicer or the Special Servicer and sets forth notice requirements as an element of the definition of that term, while

a separate section of the PSA, section 7.01(b), provides for removal of a defaulting servicer as a remedy for the default. This remedy "may" be exercised only by the Trustee or the Depositor, or must be exercised by the Trustee "at the written direction of the Directing Certificate holder or the Holders of Certificates entitled to at least 51% of the Voting Rights." There is no language in section 7.01(b) stating removal is the exclusive remedy for any default of the part of a servicer, however. Moreover, as noted, here, the 7.01(a)(iii) notice requirements are the sole antecedent provision to which the phrase "as herein before provided" in the section 12.03© "no-action" clause could possibly be referring. In accordance with our precedent, as evidenced by *149 Madison*, such a reference dictates that we must read those two provisions together. In any event, *Teachers* is not binding precedent in this Court.

In sum, interpretation of the word "default," as used in section 12.03(c) (the "no-action" clause) of the PSA in this case, as synonymous with "Event of Default" as defined in the preceding section 7.01(a)(iii), is consistent not only with our precedent,[2] but also with the interchangeable use of the two

[2] The fact that the statute of limitations issue was dispositive in *ACE* does not dilute the soundness or significance

terms in the PSA itself.

Plaintiff also argues, for the first time on this appeal, that the "no-action" clause is ambiguous. An argument raised for the first time on appeal may be considered by this Court where the party raising it alleges no new facts but, rather, raises a legal argument which appeared upon the face of the record and which could not have been avoided if brought to the opposing party's attention at the proper juncture (*Vanship Holdings Ltd. v Energy Infrastructure Acquisition Corp.*, 65 AD3d 405, 408 [1st Dept 2009]).

Indeed, this appeal revolves around the strictly legal issue of how the PSA should be interpreted. In that regard, we have explained that

> "[t]o be found ambiguous, a contract must be susceptible of more than one commercially reasonable interpretation (*Ellington v EMI Music Inc.*, 24 NY3d 239, 244 [2014]). The existence of ambiguity must be determined by examining the 'entire contract and

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of our implicit reasoning there that the term "default" as used in the "no-action" clause of a pooling and servicing agreement, is synonymous with "Event of Default" as defined in a preceding section of that agreement. Furthermore, the fact that the "no-action" clauses in *Walnut Place* were differently, and arguably more artfully, drafted than the comparable clause in this case, in that the *Walnut Place* language explicitly referred to "Event of Default" rather than "default," as in this case, does not render our reasoning in *Walnut Place* any less applicable here than it was in *ACE*.

> consider[ing] the relation of the parties and the circumstances under which it was executed,' with the wording to be considered 'in the light of the obligation as a whole and the intention of the parties as manifested thereby' (*Riverside S. Planning Corp. v CRP/Extell Riverside, L.P.*, 60 AD3d 61, 66–67 [1st Dept 2008], *affd* 13 NY3d 398 [2009]). Further, in deciding the motion, '[t]he evidence will be construed in the light most favorable to the one moved against' (*Kershaw v Hospital for Special Surgery*, 114 AD3d 75, 82 [1st Dept 2013], citing . . . *Young v New York City Health & Hosps. Corp.*, 91 NY2d 291, 296 [1998])" (*Perella Weinberg Partners LLC v Kramer*, 153 AD3d 443, 446 [1st Dept 2017]).

In this case, all that is needed to determine the validity of plaintiff's argument can be found within the four corners of the PSA, which was made part of the record. Here, upon our examining the entire PSA, considering the relation of the parties and the circumstances under which the PSA was executed, viewing the wording of the PSA in light of the obligation as a whole and the intention of the parties, and construing the evidence in the light most favorable to plaintiff, we find that the language of the "no-action" clause of the PSA is susceptible of only one reasonable interpretation, that being that the phrase "written notice of *default* hereunder, and of the continuance thereof, *as herein before provided*" (emphasis added) refers to the term "Event of Default" as defined in section 7.01(a)(iii). Thus, reading the language of 7.01(a)(iii) and 12.03(c) together, that

"no-action clause" language is not ambiguous.

Moreover, plaintiff's argument that "default" as used in the section 12.03(c) "no-action" clause does not have the same meaning as "Event of Default" as defined in section 7.01(a)(iii) is not based upon any reasonable interpretation of the term "default" as employed in the "no-action" clause. Indeed, plaintiff provides no reasonable interpretation of the word "default," in the context of the phrase "written notice of default . . . as herein before provided," as an alternative to interpreting "default" as synonymous with "Event of Default." In the absence of an explanation of what preceding provision of the PSA other than section 7.01(a)(iii) provides for a written notice of default, both the word "default" and the phrase "as herein before provided" are rendered nothing more than meaningless surplusage. As there is no reasonable interpretation of use of the word "default" in the section 12.03(c) language in question other than that it means "Event of Default" as defined in section 7.01(a)(iii), plaintiff's argument is unavailing.

Plaintiff correctly relies upon *Quadrant Structured Prods. Co., Ltd. v Vertin* (23 NY3d 549 [2014]) for the general principles that "no-action" clauses should be read to "give effect to the precise words and language used" and should be

"strictly construed" (23 NY3d at 560 [internal quotation marks omitted]). Application of those principles to the "no-action" clause in this case, however, leads to the conclusion that the phrase "as herein before provided" refers back to the notice requirements of section 7.01(a)(iii) of the PSA, and that that provision and the "no-action" clause are to be read together.

The federal district court and bankruptcy court cases cited by plaintiff in support of its view that a capitalized, defined contractual term cannot have the same meaning as an uncapitalized, undefined term do not involve circumstances or contractual provisions in any way similar to those presented in the instant case (*see Sunbelt Rentals, Inc. v Charter Oak Fire Ins. Co.*, 839 F Supp 2d 680, 688-689 [SD NY 2012, Maas, M. J.] [drawing distinction between "equipment" and defined term "Equipment" in an equipment rental agreement]; *Metro Funding Corp. v WestLB AG*, 2010 WL 1050315, *27, 2010 US Dist LEXIS 26680, *72-73 [SD NY, Mar. 19, 2010, No. 10-Civ-1382 (CM), McMahon, J.] [distinguishing "advances" by Servicer, as employed in one section of a Servicing Agreement, from "Servicer Advances" as defined elsewhere in the agreement]; *In re LightSquared Inc.*, 504 BR 321, 345 and n 37 [Bankr SD NY 2013, Chapman, J.] [rejecting argument that the word "subsidiary" as used in a

credit agreement should be given the same meaning as the defined term "Subsidiary"]). In any event, none of these cases are binding on this Court.

B. Conditions Precedent to Plaintiff's Attainment of Standing to Sue

Because sections 12.03(c) and 7.01(a)(iii) of the PSA are properly read together, in order for plaintiff, a certificateholder, to have attained standing to sue in this case, plaintiff must have met the conditions precedent set forth in both sections.

Section 12.03(c) sets forth four prerequisites to plaintiff's attainment of standing to sue. First, plaintiff must have provided the "Trustee and the Paying Agent a written notice of default hereunder, and of the continuance thereof, as herein before provided." Second, plaintiff must have been a holder of at least 25% of a class of certificates. Third, plaintiff must have made a written request of the Trustee to institute an action and must have offered the Trustee reasonable indemnity against the cost and expense to be incurred in pursuing the action. Fourth, prior to plaintiff's institution of suit, sixty days must have passed during which the Trustee has refused to institute such an action.

Here, a review of the documentary evidence of record, as required by CPLR 3211(a)(1), reveals that plaintiff provided Wells Fargo, the Trustee and Paying Agent, a letter dated May 18, 2015, which served as a written notice of default on the part of both KeyBank, as Special Servicer, and Berkadia, as Master Servicer, thereby meeting the first requirement. It is uncontroverted that, as plaintiff stated in its May 18, 2015 letter, plaintiff was at that time the "Holder of Certificates, with more than twenty-five percent (25%) of the Percentage Interests in Class C," and therefore met the second requirement. In the May 18, 2015 letter, plaintiff "request[ed] that the Trustee institute an action against Key[Bank] and Berkadia so as to hold them liable for the consequences of such default" (*id.*) and "offer[ed] to the Trustee such reasonable indemnity as it may require against the costs, expenses and liabilities to be incurred in connection with this proposed action," and thereby met the third requirement. With respect to the fourth requirement, it is uncontroverted that the Trustee refused to institute suit in mid-July 2015, and the record reflects that plaintiff did not institute the instant action until February 23, 2016, well over sixty days past the Trustee's refusal. Thus, the documentary evidence establishes that plaintiff has met all four

of the section 12.03(c) conditions precedent.

In order to have attained standing to sue, however, plaintiff was also required to demonstrate a default that was actionable under the PSA. Section 12.03(c) Crefers to "a written notice of default hereunder . . . as herein before provided" in section 7.01(a)(iii). The latter section defines an Event of Default as

> "[a]ny failure on the part of the Master Servicer [or] the Special Servicer . . . duly to observe or perform in any material respect any of its . . . covenants or obligations contained in this Agreement which continues unremedied for a period of 30 days . . . *after the date on which written notice of such failure, requiring the same to be remedied, shall have been given . . . to the Master Servicer [or] the Special Servicer*" (emphasis added*)*.

Here, the record is devoid of any documentary evidence that plaintiff provided any such written notice to the Master Servicer and the Special Servicer. Furthermore, the May 18, 2015 letter itself does not indicate that copies of that letter were transmitted by plaintiff to any entity or party to the PSA other than the Trustee, as addressee.

Because the uncontroverted and unambiguous documentary evidence demonstrates that plaintiff failed to satisfy the terms of section 7.01(a)(iii) defining the Event of Default here at issue, plaintiff's compliance with the conditions precedent of

section 12.03(c) does not suffice to afford it standing to sue, as it has failed to demonstrate an actionable Event of Default under the PSA. Thus, KeyBank and Berkadia have conclusively established a defense to plaintiff's asserted claims as a matter of law (*Leon v Martinez*, 84 NY2d at 88) and the motion court correctly granted both defendants' CPLR 3211(a)(1) motions to dismiss.

Alternatively, with respect to defendants' CPLR 3211(a)(7) motions, a review of the complaint reveals that plaintiff has stated the manner in which it complied with the first three requirements of section 12.03(c), referencing the May 18, 2015 letter and annexing a copy of that letter to its complaint as Exhibit A (record at 38). Furthermore, in its complaint, plaintiff has averred that the Trustee advised plaintiff of the Trustee's refusal to sue in mid-July 2015 (*id.*), and the record indicates that the complaint was filed on February 23, 2016. Nonetheless, the complaint is devoid of any allegations that plaintiff provided any written notice of default to KeyBank, Berkadia or any party to the PSA other than the Trustee. Therefore, accepting all of plaintiff's allegations as true, construing those allegations in the light most favorable to plaintiff and giving plaintiff the benefit of all reasonable

inferences, we find that plaintiff has failed to plead with sufficiency that it has attained standing to sue and therefore has failed to state any cognizable causes of action. Therefore, the motion court properly granted defendants' motions to dismiss on CPLR 3211(a)(7) grounds (*see Leon v Martinez*, 84 NY2d at 87-88; *219 Broadway Corp. v Alexander's, Inc.*, 46 NY2d at 509).

In light of the foregoing disposition of this appeal, we need not consider defendants' alternative arguments in support of affirmance.

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

ENTERED: MARCH 29, 2018

DEPUTY CLERK

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

5395-
5396 Leslie Benzies,
Plaintiff-Respondent-Appellant,

-against-

Take-Two Interactive Software,
Inc., et al.,
Defendants-Appellants-Respondents.

Index 651920/16

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Kelley Drye & Warren LLP, New York (Michael C. Lynch of counsel), for Take-Two Interactive Software, Inc., Rockstar Games, Inc. and Rockstar North Ltd., appellants-respondents.

Dechert LLP, New York (Andrew J. Levander of counsel), for Rockstar Games, Inc., Rockstar North Ltd., Dan Houser and Sam Houser, appellants-respondents.

Lewis Brisbois Bisgaard & Smith LLP, New York (Peter T. Shapiro of counsel), for respondent-appellant.

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Order, Supreme Court, New York County (Barry R. Ostrager, J.), entered June 15, 2017, and order (same court and Justice), entered July 5, 2017, which granted in part and denied in part defendants' motion to dismiss the amended complaint, unanimously modified, on the law, to grant the motion to dismiss the ninth cause of action to the extent it alleges tortious interference with the 2009 Royalty Plan, and the eighteenth cause of action for reformation of the 2009 Royalty Plan, and otherwise affirmed, without costs.

Plaintiff has not alleged a mutual mistake or fraudulently induced unilateral mistake sufficient to support his claim for reformation of the 2009 Royalty Plan (*Goldberg v Manufacturers Life Ins. Co.*, 242 AD2d 175, 179 [1st Dept 1998], *lv dismissed in part, denied in part* 92 NY2d 1000 [1998]).

Plaintiff has adequately alleged a breach of the 2009 Royalty Plan and the 2012 Employment Agreement. The existence of those agreements is undisputed, and plaintiff has alleged his performance by his design of the Grand Theft Auto products, defendants' failure to pay him royalties, and his damages (*Nevco Contr. Inc. v R.P. Brennan Gen. Contrs. & Bldrs., Inc.*, 139 AD3d 515 [1st Dept 2016]). Moreover, plaintiff has sufficiently alleged that defendants breached the 2009 Royalty Plan by, inter alia, not forming the Allocation Committee that was tasked with making royalty determinations.

We agree with defendants that section 2.1 of the 2009 Royalty Plan provides for discretionary royalty payments by the Allocation Committee and contains no language mandating equal payments to the principals. The unambiguous terms of that provision cannot be altered by the subsequently-executed 2012 Employment Agreement (*see W.W.W. Assoc. v Giancontieri*, 77 NY2d 157, 163 [1990]). Nevertheless, at this early stage of the

litigation, we decline to dismiss plaintiff's independent claim for royalties based on the 2012 Employment Agreement. According plaintiff the benefit of every possible favorable inference, as is required on this CPLR 3211 motion, defendants have not shown as a matter of law that their interpretation of the 2012 Employment Agreement is the only reasonable one, particularly in light of the language stating that plaintiff "remains *entitled* to receive certain royalties [emphasis added]" as part of his "[c]ompensation." In addition, the amended complaint sufficiently alleges a breach of the 2012 Employment Agreement based on salary and stock allegedly withheld from plaintiff.

Plaintiff has also sufficiently alleged breach of the Sabbatical Agreement, which he claims defendants breached by improperly terminating him and refusing to pay him royalties.

The amended complaint states a claim for tortious interference with both the 2012 Employment Agreement and the Sabbatical Agreement. However, that part of the ninth cause of action alleging that defendants Sam and Dan Houser tortiously interfered with the 2009 Royalty Plan should be dismissed because the Housers, as parties to that contract, cannot tortiously interfere with it (*see Buller v Giorno*, 28 AD3d 258, 259 [1st Dept 2006]).

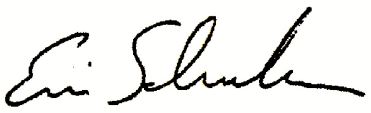
The court properly declined to dismiss the claims for constructive discharge (*see Polidori v Societe Generale Groupe*, 39 AD3d 404, 405 [1st Dept 2007]), and breach of the duty of good faith and fair dealing implicit in the 2009 Royalty Plan (*see Dalton v Educational Testing Serv.*, 87 NY2d 384, 389 [1995] ["Where the contract contemplates the exercise of discretion, this pledge includes a promise not to act arbitrarily or irrationally in exercising that discretion"]).

The breach of fiduciary duty claim is not viable because the complaint alleges only arm's length business transactions and no special circumstances that might give rise to a fiduciary relationship between plaintiff and Sam Houser (*see V. Ponte & Sons v American Fibers Intl.*, 222 AD2d 271, 272 [1st Dept 1995]). The emails in the record, although showing a close friendship, are not sufficient to establish the necessary requirement of trust and confidence. In the absence of a fiduciary relationship, the claims for aiding and abetting breach of fiduciary duty, constructive fraud and negligent misrepresentation cannot stand (*see Leidel v Annicelli*, 114 AD3d 536, 537 [1st Dept 2014], *lv dismissed* 24 NY3d 976 [2014]; *Sebastian Holdings, Inc. v Deutsche Bank AG*, 78 AD3d 446, 447 [1st Dept 2010]).

The unjust enrichment claim was properly dismissed as duplicative of the contract claims (*Eagle v Emigrant Sav. Bank*, 148 AD3d 476, 477 [1st Dept 2017]). The fraudulent inducement claims fail because the complaint does not sufficiently allege the requisite knowing misrepresentation of material present fact (*see Gleyzerman v Law Off. of Arthur Gershfeld & Assoc., PLLC*, 154 AD3d 512, 513 [1st Dept 2017]). The court properly dismissed the breach of joint venture claim.

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

ENTERED: MARCH 29, 2018



DEPUTY CLERK

Friedman, J.P., Tom, Kapnick, Singh, JJ.

6118-
6119 The People of the State of New York,
Respondent,

-against-

Nelson Rodriguez,
Defendant-Appellant.

Ind. 1714/09

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

Cyrus R. Vance, Jr., District Attorney, New York (Elizabeth N. Krasnow of counsel), for respondent.

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Judgment, Supreme Court, New York County (Ronald A. Zweibel, J.), rendered December 17, 2009, convicting defendant, after a jury trial, of course of sexual conduct against a child in the first degree, and sentencing him to a term of 23 years, and order, same court and Justice, entered on or about December 1, 2016, which denied defendant's CPL 440.10 motion to vacate the judgment, unanimously affirmed.

The court properly admitted evidence of uncharged sex offenses committed against the victim's half sister. The victim's testimony that defendant (her father) told her about these acts against his stepdaughter tended to explain his daughter's delay in reporting defendant's regular sexual conduct

with her over the course of four years, and to rebut the defense attack on her credibility based on the delay (*see People v Nicholson*, 26 NY3d 813, 829 [2016]; *People v Rosario*, 34 AD3d 370, 370 [1st Dept 2004], *lv denied* 8 NY3d 949 [2007]). The victim's half sister was also properly allowed to testify about this matter in order to corroborate the victim's testimony (*see People v Morris*, 21 NY3d 588, 597 [2013]). The probative value of the challenged evidence outweighed any prejudicial effect, which was minimized by the court's limiting instruction. Moreover, any error in the court's ruling was harmless in light of the overwhelming evidence of guilt (*see People v Crimmins*, 36 NY2d 230, 242 [1975]).

The court properly denied defendant's CPL 440.10 motion alleging ineffective assistance of counsel. We find that counsel was effective under the federal and state standards (*see Strickland v Washington*, 466 US 668 [1984]; *People v Benevento*, 91 NY2d 708 [1998]). Defendant has not shown that any of counsel's alleged deficiencies fell below an objective standard of reasonableness, or that, viewed individually or collectively, they deprived defendant of a fair trial or affected the outcome of the case.

In his testimony at a hearing on the motion, counsel

established that he reasonably chose not to cross-examine the victim about apparent inconsistencies concerning her allegations, to avoid the risks of making a negative impression on the jury by questioning the young witness too aggressively, or prompting an emotional reaction that could have enhanced the victim's credibility in the jury's mind. Given that the People's medical expert conceded that an examination of the victim did not reveal any physical signs of abuse, counsel's decision not to call a medical expert did not constitute ineffective assistance of counsel (*see People v Green*, 108 AD3d 782, 786 [3d Dept 2013], *lv denied* 21 NY3d 1074 [2013]; *see also People v Medlin*, 144 AD3d 426, 427 [1st Dept 2016], *lv denied* 29 NY3d 999 [2017]). Counsel's decision to call character witnesses, who resided in the same apartment building where defendant lived and worked, and where the incidents allegedly occurred, was based on a reasonable strategy of seeking to cast defendant in a positive light and raise doubts about whether the alleged incidents actually

occurred. We also reject defendant's remaining arguments in support of his ineffectiveness claim.

We perceive no basis for reducing the sentence.

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

ENTERED: MARCH 29, 2018

DEPUTY CLERK

Friedman, J.P., Tom, Kapnick, Singh, JJ.

6120 George Laboy, As Executor of the Estate of Carmen Figueroa, Plaintiff-Appellant, Index 17190/99

-against-

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

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The Law Office of Maury B. Josephson, P.C., Uniondale (Maury B. Josephson of counsel), for appellant.

Zachary W. Carter, Corporation Counsel, New York (Susan Paulson of counsel), for respondents.

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Order, Supreme Court, Bronx County (Eddie J. McShan, J.), entered September 19, 2016, which, in this employment discrimination action, granted defendants' motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

The failure of plaintiff's decedent to file any notice of the discrimination claims which are asserted in this action was fatal to the claims against defendants (*see* Education Law § 3813[1]). Defendants did not waive this defense, as they raised it before the court of original jurisdiction (*see Flanagan v Board of Educ., Commack Union Free School Dist.*, 47 NY2d 613, 617 [1979]; *Robinson v Board of Educ. of City Sch. Dist. of City of*

*N.Y.*, 104 AD3d 666, 667 [2d Dept 2013]), and plaintiff's contention that the cursory form notice of administrative appeal from the unsatisfactory rating on the decedent's annual performance evaluation for the 1995-1996 school year satisfied the Education Law's notice of claim requirement, is unavailing. The notice of administrative appeal informed defendants only that the decedent was appealing the unsatisfactory rating and gave no notice of her claims that she was discriminated against (*see Parochial Bus Sys. v Board of Educ. of City of N.Y.*, 60 NY2d 539, 547 [1983]; *Gastman v Department of Educ. of City of N.Y.*, 60 AD3d 444 [1st Dept 2009], *lv denied* 12 NY3d 711 [2009]).

It is further noted that the action was untimely. The decedent received her unsatisfactory rating in 1996 and the action was not commenced until 1999, well beyond the applicable

one-year statute of limitations (*see Stembridge v New York Dept. of Educ.*, 88 AD3d 611 [1st Dept 2011], *lv denied* 19 NY3d 802 [2012]; Education Law § 3813[2-b]).

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

ENTERED: MARCH 29, 2018

DEPUTY CLERK

Friedman, J.P., Tom, Kapnick, Singh, JJ.

6121-
6122-
6123-
6124 In re Bilet M., etc., and Others,

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

Luciano M.-R., etc.,
Respondent-Appellant.

The New York Foundling Hospital,
Petitioner-Respondent.

_____

Geoffrey P. Berman, Larchmont, for appellant.

Daniel Gartenstein, Long Island City, for respondent.

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

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Orders of fact-finding and disposition (one for each child), Family Court, Bronx County (Sara P. Cooper, J.), entered on or about January 24, 2017, which, to the extent appealed from, upon a finding of permanent neglect, terminated respondent father's parental rights to the subject children, and committed their custody and guardianship to petitioner agency and the New York City Children's Services for the purpose of adoption, unanimously affirmed, without costs.

The finding of permanent neglect is supported by clear and

convincing evidence that despite the agency's diligent efforts to encourage and strengthen the parental relationship, the father failed to plan for the children's future (*see* Social Services Law § 384-b[7][a]). The agency expended diligent efforts to encourage and strengthen the parental relationship by exploring the planning resources suggested by the father, inviting and attempting to arrange for him to appear for agency meetings, forwarding his letters to the children's therapist pursuant to the neglect order and keeping him apprised of the children's progress (*see Matter of Eddie Christian S.*, 44 AD3d 504, 504-505 [1st Dept 2007], *lv denied* 9 NY3d 818 [2008]).

Contrary to the father's claim, the caseworker testified that the children's paternal grandfather was cleared by the agency by utilizing the U.S. address he provided but that he failed to submit his address in Mexico where he had indicated that he wanted to take the children. In addition, his unpreserved claim that the agency did not meet its information obligations is belied by the record, because the father testified at the fact-finding hearing that the agency told him what he needed to do in order to plan for the children.

In addition, the finding that the father permanently neglected the children is supported by clear and convincing

evidence that he cannot offer the children a normal home due to the fact that he is serving a 21-year prison term and is not scheduled to be released from custody until after the youngest child has reached the age of majority (*see Matter of Sasha R.*, 246 AD2d 1, 7-8 [1st Dept 1998]). Although the father maintained contact with the children, none of the resources he provided were viable and his inability to provide a realistic and appropriate alternative to foster care until his release from prison constituted a failure to plan for the children's future warranting a finding of permanent neglect (*see Matter of Danyel Ramona C.*, 306 AD2d 127, 128 [1st Dept 2003]).

The evidence presented at the dispositional hearing that the children were doing well with the stable foster families with whom they have been living for the past four years and that the respective foster parents want to adopt them established that it

is in the children's best interest to terminate the father's parental rights (*see Matter of Nicole Monique H.*, 270 AD2d 205 [1st Dept 2000], *lv denied* 95 NY2d 761 [2000]).

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

ENTERED: MARCH 29, 2018

DEPUTY CLERK

Friedman, J.P., Tom, Kapnick, Singh, JJ.

6125 John Bermingham, Index 102409/11
Plaintiff-Appellant,

-against-

Atlantic Concrete Cutting, et al.,
Defendants-Respondents,

National September 11 Memorial
and Museum of the World Trade Center
Foundation, Inc.,
Defendant.

_____

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

Segal McCambridge Singer & Mahoney, Ltd., New York (Simone Lee of counsel), for respondents.

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Order, Supreme Court, New York County (Margaret A. Chan, J.), entered January 17, 2017, which granted defendants Atlantic Concrete Cutting, Bovis Lend Lease LMB, Inc., and Port Authority of New York and New Jersey's motion to set aside the jury verdict awarding plaintiff $100,000 for past pain and suffering, $200,000 for future pain and suffering, $225,000 for past lost earnings, and $1,300,000 for future lost earnings, and directed a new trial on liability and damages unless the parties stipulated to reduce the awards to $50,000 for past pain and suffering, $100,000 for future pain and suffering, and $595,000 for past and future lost

earnings, unanimously modified, on the law and the facts, to deny the motion insofar as addressed to the verdict as to liability, the liability verdict reinstated, and to direct that there be a new trial solely on the issue of damages unless the parties stipulate, within 30 days of the date hereof, to accept awards of $100,000 for past pain and suffering, $100,000 for future pain and suffering, and $700,000 for past and future lost earnings, and otherwise affirmed, without costs.

Because defendants did not request a mistrial before the jury rendered its verdict, their post-verdict CPLR 4404(a) motion for an order setting aside the verdict and ordering a new trial, on the ground that the cumulative misconduct of plaintiff's counsel likely affected the verdict, should have been denied (*see Virgo v Bonavilla*, 49 NY2d 982, 984 [1980]; *Bertram v Columbia Presbyt./N.Y. Presbyt. Hosp.*, 126 AD3d 473 [1st Dept 2015], *lv denied* 26 NY3d 905 [2015]; *Selzer v New York City Tr. Auth.*, 100 AD3d 157, 162 [1st Dept 2012]; *Boyd v Manhattan & Bronx Surface Tr. Operating Auth.*, 79 AD3d 412, 413 [1st Dept 2010]). While we do not condone the misconduct revealed by the present record, this is not the rare case in which the misconduct of counsel for the prevailing party was so wrongful and pervasive as to constitute a fundamental error and a gross injustice warranting

the exercise of the trial court's discretionary power under CPLR 4404(a) to set aside a verdict in the interest of justice, in spite of the aggrieved party's failure to make a timely mistrial motion (*see Boyd*, 79 AD3d at 413; *cf. Smith v Rudolph*, 151 AD3d 58 [1st Dept 2017]; *Heller v Louis Provenzano, Inc.*, 257 AD2d 378, 379 [1st Dept 1999]).

With respect to damages, we modify to direct that there be a new trial solely on the issue of damages unless the parties stipulate to the awards, as indicated, since the noted awards deviated materially from what would be reasonable compensation (*see* CPLR 5501[c]).

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

ENTERED: MARCH 29, 2018

DEPUTY CLERK

Friedman, J.P., Tom, Kapnick, Singh, JJ.

6126 In re Karl Ragland, Index 102006/16
Petitioner-Appellant,

-against-

City of New York Department of Finance,
Respondent-Respondent.

_____

Karl Ragland, appellant pro se.

Zachary W. Carter, Corporation Counsel, New York (Scott Shorr of counsel), for respondent.

_____

Order, Supreme Court, New York County (Arthur F. Engoron, J.), entered February 2, 2017, which denied the petition to annul the determination of respondent's Appeals Board, dated October 19, 2016, denying petitioner's application to vacate the default entered against him, and dismissed the proceeding brought pursuant to CPLR article 78, unanimously affirmed, without costs.

The determination denying petitioner's application to vacate his default has a rational basis in the record, as petitioner provided neither a reasonable excuse for his failure to appear at the hearing nor a potentially meritorious defense (*see Matter of Daniels v Popolizio,* 171 AD2d 596 [1st Dept 1991]). Petitioner's assertion that he did not receive notice of the hearing, without more, does not establish a reasonable excuse for failing to

appear (*see Centennial El. Indus., Inc. v Ninety-Five Madison Corp.*, 90 AD3d 689, 690 [2d Dept 2011], *lv dismissed* 19 NY3d 936 [2012]).

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

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

ENTERED: MARCH 29, 2018

DEPUTY CLERK

Friedman, J.P., Tom, Kapnick, Singh, JJ.

6127 The People of the State of New York, Ind. 2355/15
Respondent,

-against-

Leonardo Rios,
Defendant-Appellant.

_____

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

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

_____

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Charles Solomon, J.), rendered September 12, 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: MARCH 29, 2018

_____
DEPUTY CLERK

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

Friedman, J.P., Tom, Kapnick, Singh, JJ.

6128 Independent Temperature Control Services, Inc.,
Plaintiff,

-against-

Parsons Brinckerhoff, Inc. formerly known as PB Americas, Inc.,
Defendant-Appellant,

The Power Authority of the State of New York, et al.,
Defendants,

Travelers Casualty and Surety Company of America,
Defendant-Respondent.

Index 652412/14

_____

Zetlin & De Chiara LLP, New York (Loryn P. Riggiola of counsel), for appellant.

Torre, Lentz, Gamell, Gary & Rittmaster, LLP, Jericho (Benjamin D. Lentz of counsel), for respondent.

_____

Order, Supreme Court, New York (Saliann Scarpulla, J.), entered January 23, 2017, which, to the extent appealed from as limited by the briefs, granted defendant Travelers Casualty and Surety Company of America's motion for summary judgment dismissing defendant Parsons Brinckerhoff, Inc.'s cross claim against it for breach of a performance bond, unanimously affirmed, with costs.

Travelers established prima facie that it is not liable

under the performance bond it issued to construction manager Parsons Brinckerhoff (PB) for plaintiff subcontractor's work, because PB failed to mail it notice of the termination of the subcontract, as required by sections 3.2 and 12 of the performance bond, before paying a replacement contractor pursuant to section 3.3 (*see Granger Constr. Co., Inc. v TJ, LLC*, 134 AD3d 1329, 1331 [3d Dept 2015]). In opposition, PB failed to raise an issue of fact as to whether it mailed such notice. The affidavits it submitted were unaccompanied by either an affidavit of service or actual proof of mailing or a description of the practices or procedures it has in place to insure proper mailing (*DeLuca v Smith*, 146 AD3d 732 [1st Dept 2017]).

Contrary to PB's argument, Travelers was not required to show "actual prejudice" arising from the lack of notice, but in any event it claims actual prejudice from being deprived of its completion options under section 5 of the performance bond (*see generally Tishman Westwide Constr. LLC v ASF Glass, Inc.*, 33 AD3d 539, 540 [1st Dept 2006]).

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

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

ENTERED: MARCH 29, 2018

DEPUTY CLERK

Friedman, J.P., Tom, Kapnick, Singh, JJ.

6129-
6130 Index 652109/16E

Law Offices of Paul A. Chin, P.C.,
Plaintiff-Respondent,

-against-

Seth A. Harris, PLLC doing business
as Burns & Harris,
Defendant-Appellant.

_____

Burns & Harris, New York (Jason S. Steinberg of counsel), for appellant.

Paul A. Chin, New York, for respondent.

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Judgment, Supreme Court, New York County (Arthur F. Engoron, J.), entered December 16, 2016, in favor of plaintiff, in the amount of $8,400 plus costs and disbursements, and dismissing defendant's counterclaim, and bringing up for review an order, same court and Justice, entered December 12, 2016, which granted plaintiff's motion for summary judgment holding defendant liable on plaintiff's claim for unpaid hourly fees in the principal amount of $8,400, dismissing defendant's counterclaim, and declaring that the July 2015 memorandum prepared by plaintiff was a valid and enforceable contract, and denied defendant's cross motion for summary judgment on its counterclaim, unanimously affirmed, without costs, and plaintiff's motion denied insofar as

it sought declaratory relief. Appeal from the aforementioned order, unanimously dismissed, without costs, as subsumed in the appeal from the judgment.

Plaintiff and defendant are both engaged in the practice of law. Plaintiff prepared and sent to defendant a memorandum, dated July 28, 2015, setting forth terms for defendant's contemplated part-time employment of plaintiff, "between 15-25 hours per week," for a term of six months, commencing on August 24, 2015. The memorandum set forth an hourly rate of $100 for plaintiff's services, to be billed on a monthly basis and offset against $2,100 rent for plaintiff's office space, "up to a maximum of 350 hours." However, if plaintiff was not charged for rent, the memorandum provided that plaintiff would bill for its services at an hourly rate of $50, again, "up to a maximum of 350 hours." While defendant did not indicate its acceptance of the memorandum in writing, the parties appear to have operated under its terms through the end of January 2016, although plaintiff billed, and defendant paid, for more than 460 hours, in aggregate, up to that point.

It is undisputed that plaintiff continued to perform services for defendant through March 10, 2016. Plaintiff billed for 136 hours of work in February 2016 and for 32 hours in March

2016, at an hourly rate of $50, without deduction for rent. When defendant declined to pay the invoices for these months, plaintiff commenced this action, seeking to recover, as relevant to this appeal, $8,400 for its work during February and March 2016. Defendant answered and asserted a counterclaim to recover the amounts it had paid for plaintiff's work in December 2015 and January 2016.

On the parties' competing motions for summary judgment, Supreme Court correctly granted summary judgment to plaintiff on its claim for damages for unpaid legal work. Defendant does not deny that plaintiff performed the work reflected on the bills for February and March 2016, nor does defendant allege that this work was performed without its knowledge or contrary to its instructions. Whether or not plaintiff's July 2015 memorandum reflects the terms of an actual agreement between the parties, and even if the parties did not reach an express agreement covering the work plaintiff performed in February and March 2016 (by which time plaintiff had already billed for more than the 350 hours contemplated in the memorandum), the record, including defendant's admissions, establishes that, if no deduction is to be made for rent, plaintiff is entitled to be compensated for

that work on a quantum meruit basis at the hourly rate of $50.[1]

Defendant's counterclaim to recover its payments of approximately $20,750 for the previous December and January, which it seeks to have offset against plaintiff's $8,400 claim, is barred by the voluntary payment doctrine, since defendant fails to present any evidence that it made the payments while laboring under any material mistake of fact or law concerning the invoiced services or the basis for the billing (*see Dillon v U-A Columbia Cablevision of Westchester, Inc.*, 100 NY2d 525, 526 [2003] [the voluntary payment doctrine "bars recovery of payments voluntarily made with full knowledge of the facts, and in the absence of fraud or mistake of material fact or law"]). While defendant alleges that the payments were made by its office manager (who had check-signing authority), without the approval of defendant's principal, this would not constitute a mistake of

[1]In his affirmation, defendant's principal asserts, in conclusory fashion, that the parties agreed that plaintiff would be paid $100 per hour with a $2,100 rent deduction, or $50 per hour without a rent deduction, "whichever was less." The claim that plaintiff's compensation was to be calculated by "whichever [formula] was less" is belied by the documented fact that defendant, without protest, paid plaintiff for September, October and November of 2015 according to the former formula ($100 per hour with a rent deduction) even though the latter formula ($50 per hour without a rent deduction) would have yielded lesser amounts for those months.

material fact affording grounds to recover a voluntarily made payment. We also note that the same office manager signed the checks in payment of plaintiff's invoices for September, October and November of 2015.

Finally, we vacate the declaration concerning the contractual status of plaintiff's July 2015 memorandum. Given that plaintiff is afforded complete relief by its recovery of damages — to which it is entitled, on this record, even if the memorandum does not constitute a contract governing the rendition of the services at issue — the claim for declaratory relief is superfluous (*see Ramos v Madison Square Garden Corp.*, 257 AD2d 492, 492 [1st Dept 1999] [a claim for declaratory relief based on an alleged defamation "fails because plaintiff has an adequate remedy at law, i.e., post-publication damages"]; *Automated Ticket Sys., Ltd. v Quinn*, 90 AD2d 738, 739 [1st Dept 1982] [dismissing a claim for a declaratory judgment where "(t)he only practical effect of the declaration is in its bearing on the claim for

damages"], *affd* 58 NY2d 949 [1983]; *Bartley v Walentas*, 78 AD2d 310, 312 [1st Dept 1980] [a claim for declaratory relief "is unnecessary where an action at law for damages will suffice"]).

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

ENTERED: MARCH 29, 2018

DEPUTY CLERK

Friedman, J.P., Tom, Kapnick, Singh, JJ.

6131 The People of the State of New York Ind. 5333/14
Respondent,

-against-

Thomas Grant,
Defendant-Appellant.

_____

Law Office of Eric Nelson, Staten Island (Eric Nelson of counsel), for appellant.

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

_____

Judgment, Supreme Court, New York County (Edward J. McLaughlin, J. at initial suppression motion; Laura A. Ward, J. at further motions, suppression hearings, plea and sentencing), rendered October 5, 2016, convicting defendant of criminal possession of a weapon in the first degree and criminal possession of a controlled substance in the second degree, and sentencing him to an aggregate term of 10 years, unanimously affirmed.

The hearing court properly reopened the suppression hearing to permit the People to present evidence on the theory of inevitable discovery, because the People were not afforded a full and fair opportunity to litigate that issue during the initial hearing (*see generally People v Kevin W.*, 22 NY3d 287 [2013]).

Because of the complex history of the suppression proceedings, and through no fault of the People, that issue was outside the scope of the initial hearing.

During the reopened hearing, the People demonstrated a "very high degree of probability" that "normal police procedures" would inevitably have resulted in recovery of the firearms found in a storage locker even without the business cards obtained from an illegal search of defendant's wallet (*People v Turriago*, 90 NY2d 77, 86 [1997]). The evidence shows that during a lawful search of defendant's van, the police also recovered business cards to the same storage facility in which the firearms were kept, and, like the ones found in defendant's wallet, those cards contained handwritten notes referring to the storage unit in which the firearms were found. Based on this, normal police investigation would have resulted in discovery of the storage facility ledgers, which, along with comments defendant made during an overheard

phone conversation, would have connected the lockers to the drug activities for which defendant was initially arrested.

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

ENTERED: MARCH 29, 2018

DEPUTY CLERK

Friedman, J.P., Tom, Kapnick, Singh, JJ.

6132 In re Marc Conte, Index 101058/16
Petitioner-Appellant,

-against-

City of New York Department of Sanitation (DSNY), et al.,
Respondents-Respondents,

_____

Marc Conte, appellant pro se.

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

_____

Order and judgment (one paper), Supreme Court, New York County (Barbara Jaffe, J.), entered June 21, 2017, inter alia, denying the petition and dismissing the proceeding brought to annul the determination of respondent New York State Division of Human Rights (DHR) finding no probable cause to believe that respondent City of New York Department of Sanitation (DSNY) had engaged in the unlawful discriminatory employment practice complained of, unanimously affirmed, without costs.

DHR's finding of no probable cause was rationally based and was not arbitrary and capricious (*see Matter of McFarland v New York State Div. of Human Rights*, 241 AD2d 108, 111 [1st Dept 1998]). Petitioner, a probationary employee, was terminated upon a unanimous vote by DSNY's Employee Review Board, after receiving

four "unsatisfactory" quarterly performance reviews and nine written warnings. Petitioner failed to produce evidence that the proffered reason for his termination was false or pretextual and that discrimination and/or retaliation was the real reason (*see Stephenson v Hotel Empls. & Rest. Empls. Union Local 100 of AFL-CIO*, 6 NY3d 265, 270-271 [2006]). DHR "has broad discretion in determining the method to be employed in investigating a claim, and its determination will not be overturned unless the record demonstrates that its investigation was abbreviated or one-sided" (*Matter of Pascual v New York State Div. of Human Rights*, 37 AD3d 215, 216 [1st Dept 2007]). No such showing has been made here as petitioner was given a full and fair opportunity to present his claim via written submissions (*see Matter of Chirgotis v Mobil Oil Corp.*, 128 AD2d 400, 403 [1st Dept 1987], *lv denied* 69 NY2d 612 [1987]).

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

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

ENTERED: MARCH 29, 2018

DEPUTY CLERK

Friedman, J.P., Tom, Kapnick, Singh, JJ.

6133 The People of the State of New York, Ind. 3573/12
Respondent,

-against-

Jessica Mitcham,
Defendant-Appellant.

_____

Seymour W. James, Jr., The Legal Aid Society, New York (Andrea Yacka-Bible of counsel), for appellant.

Darcel D. Clark, District Attorney, Bronx (Jennifer Lynn Watson of counsel), for respondent.

_____

Judgment, Supreme Court, Bronx County (James M. Kindler, J.), rendered December 23, 2013, convicting defendant, after a jury trial, of robbery in the first and second degrees, burglary in the first and second degrees and assault in the second degree, and sentencing her to an aggregate term of five years, unanimously affirmed.

The verdict was not against the weight of the evidence. During a robbery perpetrated by defendant and a companion, the victim, while asleep in bed, was struck on the head with a heavy ceramic statue. The force of the blow caused the statue to shatter, and the victim sustained four deep cuts to his scalp, as well as bruises and swelling around his right eye, bled profusely, and sought medical attention at a hospital, where

doctors used staples to close the lacerations to his skull. His pain was treated with Percocet and acetaminophen. Moreover, he continues to suffer substantial pain and is unable to return to work because of dizzy spells that are directly related to this attack.

The three convictions requiring proof of use of a dangerous instrument were not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). "Dangerous instrument" is defined as "any instrument, article or substance . . . which, *under the circumstances in which it is used*, attempted to be used or threatened to be used, is readily capable of causing death or other serious physical injury" (Penal Law § 10.00[13]). "'Serious physical injury' means physical injury which creates a substantial risk of death, or which causes . . . protracted impairment of health . . ." (Penal Law § 10.00[10]). "The object itself need not be inherently dangerous. It is the temporary use rather than the inherent vice of the object which brings it within the purview of the statute" (*People v Carter*, 53 NY2d 113, 116 [1981]).

"Thus, although the [statue] in issue [is] not inherently dangerous, we must determine whether the [weight of the] evidence in this case . . . support[s] the jury's conclusion that [it] was

readily capable of causing serious physical injury in the way in which [it] was used" (*id.* at 116-117). On this record, the jury's conclusion that the statue as used was a dangerous instrument was not against the weight of the evidence (*id.*; Penal Law § 10.00[13]).

We have considered and rejected defendant's arguments regarding such matters as credibility, intent, accessorial liability and physical injury.

Supreme Court properly found that no reasonable view of the evidence supported a finding that defendant committed the lesser included offenses of third-degree robbery, third-degree burglary, and third-degree assault. As defendant used a dangerous instrument that caused serious physical injury to the victim, there is no reasonable view of the evidence, viewed in the light most favorable to defendant, that supports a finding that she committed the lesser but not the greater crimes (*see* Criminal Procedure Law 300.50[1]; *People v Rivera*, 23 NY3d 112, 120 [2014]).

We find it unnecessary to reach any other issues.

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

ENTERED: MARCH 29, 2018

DEPUTY CLERK

Friedman, J.P., Tom, Kapnick, Singh, JJ.

6134 Clayton H. Pugh, Index 156875/14
Plaintiff–Respondent-Appellant,

-against-

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

_____

Wison Elser Moskowitz Edelman & Dicker LLP, New York (Patrick J. Lawless of counsel), for appellants-respondents.

Gordon & Gordon, P.C., Forest Hills (Jason S. Matuskiewicz of counsel), for respondent-appellant.

_____

Order, Supreme Court, New York County (Paul A. Goetz, J.), entered on or about March 30, 2017, which, denied the motion of defendants, New York City Housing Authority (NYCHA) and Salvadore Oddo, for summary judgment dismissing the complaint, and denied plaintiff's cross motion to strike the twelfth affirmative defense, unanimously affirmed, without costs.

The motion court properly denied defendants' motion for summary judgment, as they did not establish their entitlement to application of the emergency doctrine as a matter of law (*see Powers v Kyong Kwan Min*, 147 AD3d 401 [1st Dept 2017]). On the contrary, defendants' moving papers presented inconsistent accounts of the alleged accident; thus, whether the individual defendant was presented with an emergency beyond his control is

not an issue that can be resolved on summary judgment (*see Moreno v Golden Touch Transp.*, 129 AD3d 581 [1st Dept 2015]; *Powers*, 147 AD3d at 404).

Likewise, regardless of whether the motion court providently exercised its discretion to consider plaintiff's expert affidavit, it nonetheless correctly denied plaintiff's motion to strike defendants' twelfth affirmative defense asserting the emergency doctrine. On such a motion, the allegations set forth in the answer must be viewed in the light most favorable to the defendants (*182 Fifth Ave. v Design Dev. Concepts*, 300 AD2d 198, 199 [1st Dept 2002]), and "the defendant is entitled to the benefit of every reasonable intendment of the pleading, which is to be liberally construed" (*534 E. 11th St. Hous. Dev. Fund Corp. v Hendrick*, 90 AD3d 541, 542 [1st Dept 2011]). Given the lack of consistency in the accounts of the alleged accident, plaintiff did not sustain his "heavy burden of showing that the defense is without merit as a matter of law" (*Granite State Ins. Co. v*

*Transatlantic Reins. Co.*, 132 AD3d 479, 481 [2015]; *Calpo-Rivera v Siroka*, 144 AD3d 568 [1st Dept 2016]).

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

ENTERED: MARCH 29, 2018

DEPUTY CLERK

Friedman, J.P., Tom, Kapnick, Singh, JJ.

6135 J. C., Jr., etc., et al., Index 350005/14
Plaintiffs-Respondents,

-against-

Jerzey Wear, LLC doing business as
Ronnie's Shore Store, et al.,
Defendants-Respondents,

JCK Construction Corp., et al.,
Defendants-Appellants.

- - - - -

Jerzey Wear, LLC doing business as
Ronnie's Shore Store, et al.,
Third-Party Plaintiffs-Respondents,

-against-

JCK Construction Corp., et al.,
Third-Party Defendants-Appellants.

_____

Congdon, Flaherty, O'Callaghan, Reid, Donlon, Travis & Fishlinger, Uniondale (Michael T. Regan of counsel), for appellants.

Simon Lesser PC, New York (Leonard F. Lesser of counsel), for J.C., Jr. and Georgena Cosentino, respondents.

Milber Makris Plousadis & Seiden, LLP, Woodbury (Samantha B. Lansky of counsel), for Exit 82 LLC, respondent.

Pillinger Miller Tarallo, LLP, New York (Patrice M. Coleman of counsel), for Jerzey Wear, LLC and Ronnie Ortiz-Magro, respondents.

_____

Order, Supreme Court, Bronx County (Kenneth L. Thompson Jr., J.), entered December 27, 2016, which, insofar as appealed from

as limited by the briefs, denied the motion of defendants/third-party defendants JCK Construction Corp., Silvio Corridori, and Graciela Corridori (the JCK defendants) for summary judgment dismissing the complaint and all claims as against them, unanimously affirmed, without costs.

Plaintiffs commenced this action to recover for personal injuries that the infant plaintiff sustained when the entrance door to premises owned and/or operated by defendants/third-party plaintiffs Jerzey Wear, LLC d/b/a Ronnie's Shore Shop, Ronnie Ortiz-Magro, and Exit 82 LLC swung shut, pinching his finger with the side of the door. The JCK defendants established their entitlement to judgment as a matter of law through the testimony of Silvio Corridori that he had more than 20 years of experience working with door closing mechanisms, consulted with the manufacturer to determine the proper door closing mechanism for this location, followed the manufacturer's specifications and instructions in installing the door closing mechanism, and tested the door's closing speed to ensure that it complied with the manufacturer's instructions (*see e.g. Lezama v 34-15 Parsons Blvd.*, 16 AD3d 560 [2d Dept 2005]).

In opposition, plaintiffs raised an issue of fact as to whether the door closing mechanism was properly installed,

through the affidavit of their expert engineer, who stated that the closing speed of the door was less than two seconds, which failed to comply with the Americans with Disabilities Act (36 CFR Part 1191, app D § 404.2.8.1), and the manufacturer's instructions. While the expert inspected the door more than two years after the accident, contrary to the JCK defendants' contention that his opinion is speculative, he opined that the closer mechanism was designed to not require adjustments once set in the absence of a structural defect or intentional adjustment, which the owner of Exit 82 stated never occurred. Such an opinion is sufficient to raise a triable issue of fact regarding whether the closer mechanism was properly installed (*see generally Matott v Ward*, 48 NY2d 455, 458-462 [1979]). Moreover, whether the closing speed of the door was a proximate cause of the infant plaintiff's injuries is an issue of fact.

Because Exit 82 failed to appeal from Supreme Court's order, which denied its motion for summary judgment, this Court cannot grant it affirmative relief on its claim, unrelated to this appeal, that it is an out-of-possession landlord that cannot be liable (*see Taveras v 1149 Webster Realty Corp.*, 134 AD3d 495,

497 [1st Dept 2015], *affd* 28 NY3d 958 [2016]). In any event, on this record it failed to establish either that it was out-of-possession or that it was not obligated to make repairs.

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

ENTERED: MARCH 29, 2018

DEPUTY CLERK

Friedman, J.P., Tom, Kapnick, Singh, JJ.

6136 Thomas Valenti Sr., individually and as Nominee of Krunch Pizza Bar, LLC,
Plaintiff-Respondent,

-against-

Going Grain, Inc., et al.,
Defendants-Appellants.

Index 155293/12

_____

Moulinos & Associates LLC, New York (Peter Moulinos Of counsel), for appellants.

Conway & Conway, New York (Kevin P. Conway of counsel), for respondent.

_____

Order, Supreme Court, New York County (Ellen M. Coin, J.), entered May 24, 2017, which, to the extent appealed from as limited by the briefs, granted plaintiff's motion for summary judgment on the complaint, unanimously modified, on the law, to deny the motion as to damages arising from the failure to place funds into escrow pursuant to the contract, to dismiss plaintiff's claims for conversion and breach of the implied covenant of good faith and fair dealing, and to dismiss defendants' counterclaims, and the matter is remanded for an inquest on damages arising from the failure to place funds into escrow, and otherwise affirmed, without costs.

Plaintiff made a prima facie showing of his entitlement to

summary judgment on the second contract of sale by submitting the contract and related promissory note and evidence of Krunch Pizza Bar, LLC's performance, defendants' breach, and the resulting damages (*see Harris v Seward Park Hous. Corp.*, 79 AD3d 425, 426 [1st Dept 2010]). In opposition, defendants failed to raise a triable issue. At the outset, we note that defendants caused the breach by failing to pay rent immediately upon taking possession of the premises. Defendants further argue that the contract was "impossible" to perform due to an eviction proceeding. However, the contract anticipated an eviction proceeding (*see Kel Kim Corp. v Central Mkts.*, 70 NY2d 900 [1987]). Moreover, performance of a contract is not excused where impossibility is occasioned by financial difficulty or economic hardship (*407 E. 61st Garage v Savoy Fifth Ave. Corp.*, 23 NY2d 275, 281 [1968]). Defendants argue that Krunch waived the remaining balance pursuant to a contract waiver provision. However, their failure to make monthly payments under the promissory note and to place $60,000 in escrow in anticipation of the accounting constituted a material breach, justifying plaintiff's termination of the contract (*see Awards.com v Kinko's, Inc.*, 42 AD3d 178, 187 [1st Dept 2007], *affd* 14 NY3d 791 [2010]). Thus, the payment waiver provision was no longer enforceable against plaintiff when

defendants were ultimately evicted (*see Conergics Corp. v Dearborn Mid-W. Conveyor Co.*, 144 AD3d 516, 530-531 [1st Dept 2016], citing *Unigard Sec. Ins. Co. v North Riv. Ins. Co.*, 79 NY2d 576, 584 [1992]). Nevertheless, defendants raised a triable issue as to whether they had made payments toward the "outstanding judgments," which payments should be deducted from the amount that was to be placed in escrow.

The promissory note requires defendants to pay plaintiff's attorneys' fees in connection with collection or enforcement of the note. Because repayment of the note has been heavily intertwined with repayment of other obligations under the contract of sale, defendants are liable for attorneys' fees in this litigation through the instant summary judgment motion. However, as the inquest on damages that we have ordered relates only to the amounts owed under the contract of sale, defendants are not liable for plaintiff's attorneys' fees in connection with the inquest.

The conversion and breach of the implied covenant of good faith and fair dealing claims should be dismissed as duplicative of the breach of contract claim (*see Ullmann-Schneider v Lacher & Lovell-Taylor, P.C.*, 121 AD3d 415, 416 [1st Dept 2014]).

Plaintiff is entitled to the further relief of the dismissal of

defendants' counterclaims, which allege breach of contract and fraudulent inducement, since he presented evidence that he performed under the second contract and that defendants had knowledge of the eviction proceedings, rental arrears, real estate tax arrears, and outstanding judgments before entering into that contract, and defendants failed to raise a triable issue of fact as to either counterclaim.

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

ENTERED: MARCH 29, 2018

DEPUTY CLERK

Friedman, J.P., Tom, Kapnick, Singh, JJ.

6137 The People of the State of New York, Ind. 3184/00
Respondent,

-against-

Marcos Rodriguez,
Defendant-Appellant.

_____

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

Marcos Rodriguez, appellant pro se.

Darcel D. Clark, District Attorney, Bronx (Robert C. McIver of counsel), for respondent.

_____

Judgment, Supreme Court, Bronx County (William C. Donnino, J.), rendered October 10, 2002, convicting defendant, after a jury trial, of two counts of murder in the second degree, and sentencing him to concurrent terms of 25 years to life, unanimously affirmed.

Initially, we decline to revisit this Court's prior order, which denied the People's motion to dismiss the appeal from the judgment.

In this case involving the kidnapping of a victim in Rhode Island, whose body was found two days later in Bronx County, we find that territorial jurisdiction in New York was established beyond a reasonable doubt. In a homicide case where the body of

the victim is found in New York, "it is presumed that the result, namely the death of the victim, occurred within this state," thereby establishing jurisdiction (CPL 20.20[2][a]). Here, in addition to the statutory presumption, there was extensive proof that the victim died in New York. There was circumstantial evidence, such as evidence that defendant's plan was to take the victim to New York and kill him there. There was also convincing forensic evidence supporting the same conclusion. In claiming that the presumption was rebutted, defendant offers little more than speculation that the victim may have died on the way to New York.

We find that defendant received the effective assistance of counsel under state and federal standards (*see People v Benevento*, 91 NY2d 708, 713-714 [1998]; *Strickland v Washington*, 466 US 668 [1984]). Regardless of whether trial counsel should have moved to dismiss for lack of territorial jurisdiction and requested a jury instruction on that issue, defendant has not shown that either or both of these omissions fell below an objective standard of reasonableness, or that, viewed individually or collectively, they deprived defendant of a fair trial or affected the outcome of the case. As noted, the evidence, viewed in light of the presumption, plainly established

territorial jurisdiction, and neither of these alleged omissions by counsel could have prejudiced defendant.

With regard to defendant's other claims of ineffective assistance, he has likewise failed to satisfy either the reasonableness or prejudice prongs contained in either the state or federal standards. There was no basis for counsel to request an accomplice-in-fact charge regarding a prosecution witness, because there was no evidence to support an inference that she participated in this crime (*see People v Jones*, 73 NY2d 902, 903 [1989}). Under the law prevailing at the time of defendant's trial, which predated *Crawford v Washington* (541 US 36 [2004]), there was also no basis to challenge the admission of the autopsy report.

To the extent that, independent of his ineffective assistance claims, defendant seeks review of any of the above-discussed issues, we find them to be unpreserved, and we decline to review them in the interest of justice. Defendant's pro se

claims are also procedurally defective, because they involve matters outside the record.

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

ENTERED: MARCH 29, 2018

DEPUTY CLERK

Friedman, J.P., Tom, Kapnick, Singh, JJ.

6138- Index 652017/13
6139 The Empire Room, LLC,
Plaintiff-Appellant-Respondent,

-against-

Empire State Building Company LLC,
Defendant-Respondent-Appellant.

_____

Rosenberg Feldman Smith, LLP, New York (Michael H. Smith of counsel), for appellant-respondent.

Stern Tannenbaum & Bell LLP, New York (Karen S. Frieman of counsel), for respondent-appellant.

_____

Order, Supreme Court, New York County (O. Peter Sherwood, J.), entered May 18, 2017, which granted defendant's summary judgment motion to the extent of dismissing allegations that defendant breached the lease by erecting scaffolding that materially impaired free access to the demised premises; dismissed plaintiff's constructive eviction defense; granted summary judgment as to liability on defendant's second counterclaim for rent arrears and third counterclaim for attorneys' fees; and denied defendant's motion to the extent of finding an issue of fact as to whether defendant made commercially reasonable efforts to cause the scaffolding to be removed as soon as reasonably practicable; declined to dismiss

plaintiff's claim seeking the return of its letter of credit, pending determination of whether defendant breached the lease; and denied summary judgment on defendant's first counterclaim for breach of the lease, unanimously modified, on the law, to the extent of (i) dismissing plaintiff's claim for breach of Article 4(N) of the lease in its entirety; (ii) granting defendant summary judgment on the first counterclaim insofar as based on allegations that plaintiff breached the lease by vacating without defendant's prior consent and failing to pay rent for the full lease term; and (iii) directing a hearing to determine defendant's damages on its second counterclaim, and otherwise affirmed, without costs. Order, same court and Justice, entered October 3, 2017, which, to the extent appealed from, denied plaintiff's motion for leave to renew, unanimously affirmed, without costs.

Viewing the evidence in the light most favorable to plaintiff (*Branham v Loews Orpheum Cinemas, Inc.*, 8 NY3d 931, 932 [2007]), it has failed to raise an issue of fact as to whether defendant made commercially reasonable efforts to cause the scaffolding to be removed as soon as reasonably practicable before plaintiff vacated the demised premises on May 30, 2013, or thereafter. As such, defendant is entitled to summary judgment

dismissing this part of the breach of lease claim (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980] [mere conclusions, expressions of hope or unsubstantiated allegations are insufficient to defeat summary judgment]).

Plaintiff's constructive eviction defense is barred by the exculpatory language in Article 4(N), which provides that "there shall be no liability of Landlord to Tenant in connection" with the installation of scaffolding or a sidewalk bridge (*see Board of Mgrs. of the Saratoga Condominium v Shuminer*, 148 AD3d 609, 610 [1st Dept 2017]). Article 5(A) is inapplicable, since plaintiff has not established that defendant breached the lease.

Defendant has established that plaintiff breached Article 3(F) of the lease by vacating the demised premises without its prior written consent. Moreover, the parties stipulated that plaintiff's surrender of the premises was without prejudice to defendant's right to assert any claim against plaintiff, including for breach of the lease, and to seek the payment of rent for the entire lease term.

As to the letter of credit, a hearing should be held to determine defendant's damages.

On its motion to renew, plaintiff failed to raise "new facts not offered on the prior motion that would change the prior determination" (CPLR 2221[e][2]).

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

ENTERED: MARCH 29, 2018

DEPUTY CLERK

Friedman, J.P., Tom, Kapnick, Singh, JJ.

6140 The People of the State of New York, Ind. 1869/14
Respondent,

-against-

Karen Johnson,
Defendant-Appellant.

_____

Christina A. Swarns, Office of the Appellate Defender, New York (Rosemary Herbert of counsel), for appellant.

_____

Judgment, Supreme Court, Bronx County (Miriam R. Best, J.), rendered January 29, 2016, unanimously affirmed.

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

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

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

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

ENTERED: MARCH 29, 2018

DEPUTY CLERK

Friedman, J.P., Tom, Kapnick, Singh, JJ.

6141-
6142 In re Hannah O., etc., and Another,

Children Under the Age of
Eighteen Years, etc.,

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

Waheedah S.,
Respondent.

_____

Tamara A. Steckler, The Legal Aid Society, New York (Marcia Egger of counsel), attorney for the children, appellant.

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

_____

Purported appeal from decision of fact-finding, Family Court, New York County (Clark V. Richardson, J.), entered on or about December 15, 2014, which found, after a hearing, that respondent mother derivatively neglected her son, unanimously dismissed, without costs.

The appeal is taken from a nonappealable decision (*see Matter of Toussaint E. [Angeline M.]*, 151 AD3d 417 [1st Dept 2017]).

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

ENTERED: MARCH 29, 2018

DEPUTY CLERK

Friedman, J.P., Tom, Kapnick, Singh, JJ.

6143 The People of the State of New York, Ind. 401/14
Respondent,

-against-

Jose Luis Mercado,
Defendant-Appellant.

_____

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

Cyrus R. Vance, Jr., District Attorney, New York (R. Jeannie Campbell-Urban of counsel), for respondent.

_____

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Jill Konviser, J.), rendered July 21, 2015,

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

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

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

ENTERED: MARCH 29, 2018

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DEPUTY CLERK

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

Friedman, J.P., Tom, Kapnick, Singh, JJ.

6144N Jay Brown, deceased, by the Administrator of his Estate, Sherlane Peck, Plaintiff-Appellant, -against- New York City Health & Hospitals Corp., et al., Defendants-Respondents. Index 24541/15E

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

Zachary W. Carter, Corporation Counsel, New York (Megan E.K. Montcalm of counsel), for NYC Health + Hospitals, respondent.

Martin Clearwater & Bell LLP, New York (Jean M. Post of counsel), for Emergacare NY, LLC, respondent.

Order, Supreme Court, Bronx County (Douglas E. McKeon, J.), entered August 5, 2016, which, to the extent appealed from, granted defendants' motions to change venue from Bronx County to New York County, unanimously reversed, on the law, without costs, and the motions denied.

Plaintiff originally commenced this action asserting causes of action for malpractice, negligence and wrongful death against defendant New York City Health & Hospitals Corporation (HHC) based on HHC's ownership and control of Jacobi Medical Center in the Bronx. The notice of claim indicates that Jacobi's

negligence relates to the decision to transfer plaintiff's decedent from Jacobi to a rehabilitation facility in New York County. As the causes of action against HHC necessarily arose at Jacobi in Bronx County, venue was properly placed in Bronx County (*see* McKinney's Uncons Laws of NY § 7401[3] [New York City Health and Hospitals Corporation Act § 20(3) (L 1969, ch 1016, § 1, as amended)] ["All actions against the corporation ... shall be brought in the city of New York, in the county within the city in which the cause of action arose"]).

Plaintiff's amendment of the complaint to add causes of action against HHC based on its ownership and control of the rehabilitation facility in New York County does not mandate a change of venue to New York County, since the amended complaint continues to assert distinct causes of action against HHC arising out of alleged negligence and malpractice that occurred at Jacobi (*see Thames v New York City Police Dept.*, 105 AD3d 481 [1st Dept 2013]*; Ocasio-Gary v Lawrence Hosp.*, 69 AD3d 403, 405 [1st Dept 2010]; *Rose v Grow-Perini*, 271 AD2d 210, 210–11 [1st Dept 2000]).

Defendants made no showing that a discretionary change of

venue would be warranted based on the convenience of material witnesses (*see* CPLR 510; *Cardona v Aggressive Heating*, 180 AD2d 572 [1st Dept 1992]).

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

ENTERED: MARCH 29, 2018

DEPUTY CLERK

Friedman, J.P., Tom, Kapnick, Singh, JJ.

6145 In re Carl D. Wells, Ind. 6548/06
[M-6508] Petitioner, 41/07
O.P. 134/17

-against-

Warden Ada Pressley, et al.,
Respondents.

_____

Carl D. Wells, petitioner pro se.

Eric T. Schneiderman, Attorney General, New York (Michael J. Siudzinski of counsel), for Hon. Kevin McGrath, respondent.

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

_____

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

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

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

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

ENTERED: MARCH 29, 2018

DEPUTY CLERK

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

6146 The People of the State of New York, Ind. 12011/92
Respondent,

-against-

Ramon Padro,
Defendant-Appellant.

_____

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

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

_____

Order, Supreme Court, New York County (Abraham L. Clott, J.), entered on or about December 22, 2016, which adjudicated defendant a level three sexually violent offender pursuant to the Sex Offender Registration Act (Correction Law art 6-C), unanimously affirmed, without costs.

The court properly assessed points under the risk factor for multiple victims. The strong similarities between the incident for which defendant was convicted of rape and other crimes, and a second incident in which the victim escaped unharmed, support the inference that defendant intended to sexually assault the second victim as well (*see People v Coleman*, 85 AD3d 690, 690-691 [1st Dept 2011] *lv denied* 17 NY3d 713 [2011]). Defendant's conduct demonstrated a high risk to reoffend.

The court providently exercised its discretion when it declined to grant defendant's request for a downward departure (*see People v Gillotti*, 23 NY3d 841 [2014]). There were no mitigating factors that were not adequately taken into account by the risk assessment instrument, or that outweighed the seriousness of the underlying predatory sexual conduct. Although defendant asserts that his level of rehabilitation has been exceptional, we note that he incurred prison disciplinary infractions and violated his parole.

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

ENTERED: MARCH 29, 2018

DEPUTY CLERK

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

6147 Dexter Stinson, Index 301580/08
Plaintiff-Respondent,

-against-

Menoe Luederes, M.D., et al.,
Defendants-Appellants.
- - - - -
[And a Third Party Action]

DeCorato Cohen Sheehan & Federico, LLP, New York (Timothy J. Sheehan of counsel), for appellants.

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

Order, Supreme Court, Bronx County (Douglas E. McKeon, J.), entered on or about April 6, 2017, which denied defendants' motion for summary judgment dismissing the complaint, unanimously reversed, on the law, without costs, and the motion granted. The Clerk is directed to enter judgment accordingly.

Defendants established entitlement to judgment as a matter of law through expert affirmations of a neuroradiologist, orthopedic surgeon and neurosurgeon, who opined that defendants did not deviate from the accepted standard of medical practice in deferring further imaging studies of plaintiff's spine, to confirm a suspected spinal fracture, in light of his impending transfer to Westchester Medical Center (WMC) to treat a complex

pelvic fracture (*see Anyie B. v Bronx Lebanon Hosp.*, 128 AD3d 1 [1st Dept 2015]). Defendants informed WMC in plaintiff's discharge notes that he suffered from possible spinal fractures, and the surgeon at WMC was aware of these additional injuries prior to operating on plaintiff's pelvic fracture. Defendants further established that the deferral of imaging studies was not a proximate cause of plaintiff's spinal cord injury and paraplegia where such injury, which usually manifests within minutes to hours of the precipitating event, did not occur until almost two weeks after his transfer to WMC (*id.*).

In opposition, plaintiff failed to raise an issue of fact through the redacted affidavit of an expert whose opinions failed to controvert several points made by defendants' experts (*see Rodriguez v Waldman*, 66 AD3d 581, 582 [1st Dept 2009]), or were unsupported by the record (*see Diaz v New York Downtown Hosp.*, 99 NY2d 542, 544 [2002]). Plaintiff's expert opined that defendants departed from accepted practice in failing to confirm plaintiff's spinal fractures prior to his transfer. The expert, however, failed to address the opinions of defendants' experts that it was accepted practice for a receiving institution to perform their own studies, and it was thus not worth the attendant risk of moving plaintiff to perform these studies before transfer, only

to have them repeated after transfer. The contention of plaintiff's expert that defendants did not properly apprise WMC of plaintiff's possible spinal fractures was contradicted by the discharge notes contained in the record, and the expert's contention that defendants gave WMC inaccurate information about plaintiff's weight crucial to his care also finds no basis in the record. According to plaintiff's medical records, his weight provided defendants with no reason to believe that WMC's scanners would be unable to accommodate him. Plaintiff's expert also failed to address defendants' experts' opinion that defendants effectively stabilized plaintiff's condition, and that his spinal cord injury occurred while he was under the care of WMC.

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

ENTERED: MARCH 29, 2018

DEPUTY CLERK

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

6148 The People of the State of New York, Ind. 3262N/16
Respondent,

-against-

Hector Santiago,
Defendant-Appellant.

_____

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

_____

Judgment, Supreme Court, New York County (Richard Weinberg, J.), rendered January 14, 2016, unanimously affirmed.

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

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

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

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

ENTERED: MARCH 29, 2018

DEPUTY CLERK

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

6149 Lawrence Thompson, Index 303003/13
Plaintiff-Respondent,

-against-

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

_____

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

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

_____

Order, Supreme Court, Bronx County (Mitchell J. Danziger, J.), entered January 13, 2016, which denied defendants' motion for summary judgment dismissing the complaint, unanimously reversed, on the law, without costs, and the motion granted. The Clerk is directed to enter judgment in favor of defendants dismissing the complaint.

Plaintiff alleges that he was unlawfully arrested and charged with criminal possession of a forged instrument in the third degree (Penal Law § 170.20) due to the erroneous conclusion that the temporary license plate on his vehicle was forged. Plaintiff cannot prevail on his false arrest, false imprisonment, and malicious prosecution claims because the police officer's observations, based on his training and experience with similar

license plates, provided a reasonable basis for him to conclude that plaintiff's temporary plate was forged, granting him 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]). To establish probable cause, it was not necessary for the police to show that plaintiff had the intent necessary to secure a conviction of third-degree criminal possession of a forged instrument (*see Jenks v State of New York*, 213 AD2d 513, 514 [2d Dept 1995], *lv denied* 86 NY2d 702 [1995]).

The claim brought under 42 USC § 1983 must be dismissed because plaintiff failed to adequately allege that the challenged acts of the police were the result of an official municipal policy or custom (*see Monell v New York City Dept. of Social Servs.*, 436 US 658, 690-691 [1978]; *Leftenant* at 597). Furthermore, because the police were acting within the scope of their employment, plaintiff's claim for negligent hiring, training, and supervision must be dismissed (*Boyd v City of New*

*York*, 143 AD3d 609 [1st Dept 2016]; *Leftenant* at 597), and there is no claim in New York for general negligence (*see Medina v City of New York*, 102 AD3d 101, 108 [1st Dept 2012]).

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

ENTERED: MARCH 29, 2018

DEPUTY CLERK

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

6150 Derek Conlon, et al., Index 24165/13E
Plaintiffs-Respondents-Appellants,

-against-

The Carnegie Hall Society, Inc., et al.,
Defendants-Appellants-Respondents.

_____

Cornell Grace, P.C., New York (Keith D. Grace of counsel), for appellants-respondents.

O'Dwyer & Bernstien, LLP, New York (Steven Aripotch of counsel), for respondents-appellants.

_____

Order, Supreme Court, Bronx County (Ben R. Barbato, J.), entered October 4, 2016, which, insofar as appealed from as limited by the briefs, denied plaintiffs' cross motion for partial summary judgment on their Labor Law § 240(1) claim, denied defendants' motion for summary judgment dismissing the Labor Law § 240(1) claim, and granted defendants' motion for summary judgment dismissing the Labor Law § 241(6) claim, unanimously modified, on the law, to grant plaintiffs' cross motion, and otherwise affirmed, without costs.

Plaintiff Derek Conlon was injured when, while installing sheetrock in a stairwell, he tripped on an extension cord and fell down the stairs. Because the stairway was an elevated surface on which plaintiff was required to work, and also the

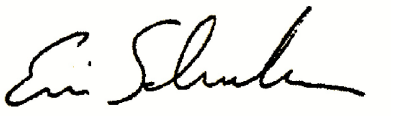
sole means of access to his work area, it constituted a safety device within the meaning of the statute (*see Ramirez v Shoats*, 78 AD3d 515, 517 [1st Dept 2010]), as well as an elevated work platform that required provision of an adequate safety device (*see Gory v Neighborhood Partnership Hous. Dev. Fund Co., Inc.*, 113 AD3d 550 [1st Dept 2014]; *Oliveira v Dormitory Auth. Of State of N.Y.*, 292 AD2d 224 [1st Dept 2002]). Under either theory, it is clear that plaintiff's fall was the direct result of absence of an adequate safety device, and thus, plaintiffs are entitled to partial summary judgment on the section 240(1) cause of action. That plaintiff tripped on an extension cord does not take the case out of the ambit of Labor Law § 240(1) (*see e.g. Nunez v Bertelsman Prop.*, 304 AD2d 487 [1st Dept 2003]; *Murphy v Islat Assoc. Graft Hat Mfg. Co.*, 237 AD2d 166 [1st Dept 1997]), and the fact that the staircase from which plaintiff fell was a permanent structure of the building does not remove this case from the coverage of Labor Law § 240(1) (*see Gory* at 550).

The court properly dismissed the Labor Law § 246(1) claim. Contrary to plaintiff's contention, the "integral part of work" defense applies to 12 NYCRR 23-1.7(e)(1) (*see O'Sullivan v IDI Constr. Co., Inc.*, 7 NY3d 805 [2006]), and even if it did not, 12 NYCRR 23-1.7(e)(1) would still be inapplicable, as the subject

staircase was not a serving as a "passageway" within the meaning of that provision, but a "working area" under 12 NYCRR 23-1.7(e)(2).

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

ENTERED: MARCH 29, 2018



DEPUTY CLERK

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

6151 The People of the State of New York, Respondent, Ind. 3331/14 1437/15

-against-

Jonathan Suero, Defendant-Appellant.

_____

Gallet Dreyer & Berkey LLP, New York (Roger L. Stavis of counsel), for appellant.

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

_____

Judgment, Supreme Court, New York County (Juan M. Merchan, J.), rendered October 12, 2016, convicting defendant, after a jury trial, of murder in the second degree, attempted murder in the second degree, assault in the first degree, and two counts of criminal possession of a weapon in the second degree, and sentencing him to an aggregate term of 46 years to life, unanimously affirmed.

The People should not have been permitted to introduce, as evidence of defendant's consciousness of guilt, a text exchange the day after the crime in which defendant indicated that he needed money "just in case for a lawyer." This evidence was an improper infringement of defendant's right to counsel (*see People v Collins*, 140 AD2d 186 [1st Dept 1988]; *People v Perez*, 90 AD2d

468 [1st Dept 1982]). However, under all the circumstances, including the overwhelming evidence of defendant's guilt, which included the testimony of one of the victims, any error in the admission of the text exchange and related summation comment on it was harmless beyond a reasonable doubt (*see People v Crimmins*, 36 NY2d 230 [1975]). The circumstantial evidence was compelling, and it led to an inescapable inference that the deceased and surviving victims were shot by defendant, the only other occupant of the car in which the shootings took place.

Defendant did not preserve his challenge to testimony by a prosecution witness about another witness's emotional condition following the shooting, and we decline to review it in the interest of justice. As an alternative holding, we find that the evidence should have been excluded, but that the error was likewise harmless.

The court providently exercised its discretion in denying defendant's mistrial motion based on a portion of the prosecutor's summation that allegedly shifted the burden of proof. This comment was responsive to an argument made in defendant's summation argument. Moreover, when the prosecutor made a similar comment later in the summation, the court sustained defendant's objection and gave an instruction that was

sufficient to prevent either the earlier or later remarks from causing any prejudice. In any event, any error regarding the prosecutor's summation was also harmless.

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

ENTERED: MARCH 29, 2018

DEPUTY CLERK

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

6155 The People of the State of New York, Ind. 1946/12
Respondent,

-against-

Richard Paul,
Defendant-Appellant.

_____

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

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

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Judgment, Supreme Court, New York County (Cassandra M. Mullen, J.), rendered March 6, 2014, convicting defendant, after a jury trial, of grand larceny in the first degree and defrauding the government, and sentencing him to an aggregate term of 6 to 18 years, with $2,011,692.44 in restitution, unanimously affirmed.

The record establishes that defendant knowingly, intelligently, and voluntarily waived his right to conflict-free counsel (*People v Cortez*, 22 NY3d 1061, 1064, *cert denied Cortez v New York*, __ US __, 135 S Ct 146 [2014]; *People v Gomberg*, 38 NY2d 307, 313-315 [1975]). The court appropriately "rel[ied] upon counsel's assurances that he had fully discussed the potentiality of conflict with his client[] and received [his]

continued approbation" (*id.* at 314 [citations omitted]). In addition, the court was entitled to place "great weight" on counsel's representation that he did not perceive any conflict (*People v Watson*, 26 NY3d 620, 625 [2016]). The court then conducted an adequate inquiry of defendant, who confirmed that he understood what was said, that he was certain that he wanted to waive the conflict, and that he had no questions (*see id.*; *Gomberg* at 313).

Moreover, while defendant need not show "specific prejudice," he failed to meet his "heavy burden ... to show that a potential conflict actually operated on the defense" (*People v Sanchez*, 21 NY3d 216, 223 [2013] [internal quotation marks and citation omitted]; *see People v Ennis*, 11 NY3d 403 [2008], *cert denied* 556 US 1240 [2009]). This case involved defendant's thefts from his employer, the Kings County Public Administrator. Although defendant's counsel was involved in ongoing litigation stemming from his own misconduct at the same agency, counsel was terminated years before the conduct at issue in this case. Furthermore, counsel put on a zealous, albeit unsuccessful, defense by eliciting that others had access to defendant's username and password and thus could have produced the fraudulent checks in question. He also attacked the agency as having been

grossly mismanaged, and cited prior corruption that occurred there.

Although the court properly admitted evidence of the free transfer of a condominium from a codefendant to defendant, as it was probative of their common scheme or plan and other matters, the court should have excluded defendant's misrepresentation in one document that the codefendant was his sister, as well as the initial erroneous classification of the property as commercial, and the resulting need for an audit. Nevertheless, the court's limiting instruction avoided any prejudice from admission of this additional evidence.

The court also properly admitted a one-minute video that depicted, among other things, a logo defendant used for his business, and depicted one of the accomplices wearing a shirt containing the same logo as one found on defendant's computer. The video was probative to the extent that it linked defendant to that accomplice during the relevant time period, and corroborated a prosecution witness's testimony that the accomplice knew defendant. Defendant failed to preserve his contention that, in order to redact allegedly inflammatory matters from the video, only a still frame from the video showing the accomplice should have been admitted, and we decline to review it in the interest

of justice. As an alternative holding, we find that to the extent any failure to redact the video or introduce only a still image was error, it was harmless (*People v Crimmins*, 36 NY2d 230, 242 [1975]).

Defendant's challenge to the manner in which the amount of restitution was determined is unpreserved, and we decline to review it in the interest of justice. In any event, there was no need to conduct a restitution hearing, because defendant and his counsel consented to the restitution ordered (*People v Horne*, 97 NY2d 404, 414 n 3 [2002]; *People v Suros*, 209 AD2d 203 [1st Dept 1994], *lv denied* 85 NY2d 943 [1995], *cert denied* 516 US 862 [1995]).

We perceive no basis for reducing the sentence.

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

ENTERED: MARCH 29, 2018

DEPUTY CLERK

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

6156-
6157-
6158 In re Kaylin P., and Another,

Children Under the Age of Eighteen Years, etc.,

Derval S.,
Respondent-Appellant/Respondent,

Administration for Children services,
Petitioner-Respondent.

_____

Tamara A. Steckler, The Legal Aid Society, New York (Judith Stern of counsel), attorney for the child Mason S. appellant.

Law Offices of Randall S. Carmel, Jericho (Randall S. Carmel of counsel), for appellant/respondent.

Zachary W. Carter, Corporation Counsel, New York (Antonella Karlin of counsel), for respondent.

Dawne Mitchell, The Legal Aid Society, New York (Judith Stern of counsel), attorney for the child Kaylin P.

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Order of fact-finding, Family Court, New York County (David J. Kaplan, J.), entered on or about September 27, 2016, which determined, after a hearing, that respondent sexually abused and neglected Kaylin P., a child for whom he was legally responsible, and that he did not derivatively abuse or neglect his biological child, Mason S., unanimously modified, on the law, to determine that respondent derivatively abused and neglected Mason S., and

otherwise affirmed, without costs.

The finding that respondent sexually abused and neglected Kaylin is supported by a preponderance of the evidence (*see* Family Court Act §§ 1012[e][iii], [f][i][B]; 1046[b][i]). Kaylin testified in detail as to respondent's conduct in touching her in a sexual manner; her testimony remained consistent under cross-examination and was consistent with her earlier disclosures to her teacher, her caseworker and the police. We see no basis for disturbing the court's determination, which is entitled to deference, that Kaylin's testimony was credible (*see Matter of Alejandra B. [Alejandro A.]*, 135 AD3d 480 [1st Dept 2016]).

The court also properly credited Kaylin's testimony as to the fear and emotional distress she suffered as a result of her exposure to the escalating domestic violence between respondent and her mother in the home and the frightening sight of her mother's bruised face and eye and cut lip resulting from a physical assault by respondent in September 2014 (*see Nicholson v Scoppetta*, 3 NY3d 357, 368 [2004]; *Matter of Serina C. [Ishmael M.]*, 150 AD3d 463 [1st Dept 2017]).

In view of these findings, the court erred in concluding that derivative abuse and neglect of Mason had not been established. Respondent's sexual abuse of Kaylin and his acts of

domestic violence against her mother demonstrate "such an impaired level of parental judgment as to create a substantial risk of harm for any child in [his] care" (*Matter of Vincent M.*, 193 AD2d 398, 404 [1st Dept 1993]). That Mason was not present when respondent attacked his mother does not preclude a finding of derivative neglect (*see Matter of Kylani R. [Kyreem B.]*, 93 AD3d 556, 557 [1st Dept 2012]).

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

ENTERED: MARCH 29, 2018

DEPUTY CLERK

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

6159 & M-5747 — Index 453153/15

Michael R. Gianatasio, PE, P.C. doing business as MRG Engineering & Construction,
Plaintiff-Appellant,

-against-

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

_____

The Law Offices of Michael James Mauro, P.C., New Rochelle (Michael James Mauro of counsel), for appellant.

Zachary W. Carter, Corporation Counsel, New York (John Moore of counsel), for The City of New York and Administration for Children's Services, respondents.

Sher Tremonte LLP, New York (Theresa Trzaskoma of counsel), for Leake & Watts Services Inc., respondent.

_____

Order, Supreme Court, New York County (Shirley Werner Kornreich, J.), entered August 29, 2016, which, inter alia, granted defendants' motions to dismiss the complaint pursuant to CPLR 3211, unanimously affirmed, without costs.

Supreme Court properly found that because the contract at issue never met the requirements of the Procurement Policy Board and Chapter 13 of the New York City Charter, it was not a final and legally binding contract, and thus both plaintiff's contractual and noncontractual based causes of actions, including the claim of promissory estoppel, should be dismissed (*see*

*Casa Wales Hous. Dev. Fund Corp. v City of New York*, 129 AD3d 451 [1st Dept 2015], *lv denied* 26 NY3d 917 [2016]). This case does not present the type of unusual circumstances warranting application of an equitable exception, such as the rule fashioned in *Gerzof v Sweeney* (22 NY2d 297 [1968]) (*see S.T. Grand, Inc. v City of New York*, 32 NY2d 300 [1973]).

The court also correctly found that, as to defendant Leake & Watts Services, Inc., the contracts are clear and unambiguous, and it was only a financial conduit, with no independent financial obligations (*see Greenfield v Philles Records*, 98 NY2d 562, 569 [2002]; *Regal Realty Servs., LLC v 2590 Frisby, LLC*, 62 AD3d 498, 501 [1st Dept 2009]).

Lastly, we deny plaintiff's motion seeking judicial notice of a petition filed by the municipal defendants with the Office of Administrative Trials and Hearings, concerning alleged violations of Labor Law § 220 (the Prevailing Wage Law). It is inappropriate to take judicial notice of a fact that is controverted (*Walker v City of New York*, 46 AD3d 278, 282 [1st Dept 2007]; *see also Pua v Lam*, 155 AD3d 487 [1st Dept 2017]). Even if we were to consider those proceedings, nothing in the City's filings evidences any admissions as to the validity of the contracts.

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

**M-5747 - *Gianatasio v The City of New York***

Motion to take judicial notice denied.

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

ENTERED: MARCH 29, 2018

DEPUTY CLERK

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

6160 Francine Luck, Index 303132/09
Plaintiff-Respondent, 84132/12
83755/15

-against-

Rockledge Scaffold Corp.,
Defendant-Appellant,

Chedward Realty Corp.,
Defendant.

- - - - -

Rockledge Scaffold Corp.,
Third-Party Plaintiff-Respondent-Appellant,

-against-

Statecourt Enterprises, Inc.,
Third-Party Defendant,

GVA Williams Real Estate Co., et al.,
Third-Party Defendants-Appellants-Respondents.

- - - - -

[And a Second Third-Party Action]

_____

Cozen O'Connor, New York (Amanda L. Nelson of counsel), for appellant/respondent-appellant.

Varvaro, Cotter & Bender, White Plains (Rose M. Cotter of counsel), for appellants-respondents.

Kelner & Kelner, New York (Joshua D. Kelner of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (Norma Ruiz, J.), entered October 7, 2016, which, to the extent appealed from, denied defendant Rockledge Scaffold Corp.'s motion for summary judgment

dismissing the complaint and all cross claims against it, and denied defendants GVA Williams Real Estate Co. and Williams Real Estate Co., Inc.'s (the Williams defendants) motion to dismiss the third-party complaint and cross claims against them, unanimously affirmed, without costs.

Plaintiff raised an issue of fact whether defendant Rockledge launched an instrument of harm by placing a wooden plank on the ground to support the sidewalk bridge without installing a crossbar over the plank to prevent people from walking over it (*see Espinal v Melville Snow Contrs.*, 98 NY2d 136, 140 [2002]; *Heard v City of New York*, 82 NY2d 66, 72 [1993]). Rockledge's foreman testified that he specifically recalled installing the crossbar and inspecting the job after it was completed. However, he also gave contradictory testimony about whether he was present at the site on the final day of the job. He said in his affidavit that he had inspected the bridge on completion, but he had testified at deposition that he did not know if he had inspected it. Issues of credibility also exist as to the foreman's ability to remember this particular job after so many months and so many similar installations. A photograph of the sidewalk where plaintiff fell taken two weeks after the accident shows the plank on the ground with no crossbar over it;

all parties denied removing it or having knowledge of its removal.

The Williams defendants failed to establish prima facie that they had no role in the creation of the dangerous condition and no obligation to inspect, maintain, or repair the sidewalk bridge, or that in any event they had no notice of the condition. As the motion court found, their management agreement with the building owner authorized them to make necessary repairs to the premises, and the employee who signed the contract with Rockledge visited the premises a few times a month. Moreover, their contract with Rockledge obligated them to inspect the bridge when it was completed.

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

ENTERED: MARCH 29, 2018

DEPUTY CLERK

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

6161 The People of the State of New York, Ind. 624/08
Respondent,

-against-

Eric Raosto,
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 (Ross D. Mazer of counsel), for respondent.

_____

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Charles H. Solomon, J.), rendered June 7, 2011,

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: MARCH 29, 2018

DEPUTY CLERK

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

6162 Avelo Mortgage, LLC, Index 18013/07
Plaintiff-Appellant,

-against-

Ainsley McFarlane, et al.,
Defendants-Respondents.

_____

Leopold & Associates, PllC, Armonk (Erin E. Wietecha of counsel), for appellant.

Kenneth R. Berman, Forest Hill, for respondents.

_____

Appeal from order, Supreme Court, Bronx County (Betty Owen Stinson, J.), entered July 29, 2016, which denied plaintiff's motion to vacate the dismissal of the action and restore the action to the calendar and to appoint a referee to compute and for related relief, unanimously dismissed, without costs.

This motion to vacate a dismissal order was brought pursuant to CPLR 2221(a) and is in fact a motion for reargument. No

appeal lies from the denial of reargument (*McCoy v Metropolitan Transp. Auth.*, 75 AD3d 428, 430 [1st Dept 2010]).

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

ENTERED: MARCH 29, 2018

DEPUTY CLERK

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

6163 Nationstar Mortgage LLC, Index 850262/14
Plaintiff-Respondent,

-against-

Agostino Accardo,
Defendant-Appellant,

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

_____

Solomon Rosengarten, Brooklyn, for appellant.

Akerman LLP, New York (Jordan M. Smith of counsel), for respondent.

_____

Order, Supreme Court, New York County (Carol R. Edmead, J.), entered February 1, 2017, which, insofar as appealed from, granted plaintiff's motion to restore the action to active status, for summary judgment, and for the appointment of a referee to compute the amount due, unanimously affirmed, without costs.

This foreclosure action was properly restored to active status pursuant to the terms of the dismissal order. The cases relied on by defendant are inapposite, because they involved failures to comply with discovery obligations, not a failure to timely file a dispositive motion.

Plaintiff established prima facie its standing to enforce the note, on which is it undisputed that defendant defaulted, by attaching the note to the complaint (*see Bank of N.Y. Mellon v Knowles*, 151 AD3d 596 [1st Dept 2017]). Plaintiff also submitted an affidavit by its vice president saying that plaintiff was in possession of the note as of October 3, 2012 (the action was commenced in August 2014), and attached corroborating documentary evidence.

In opposition, defendant failed to raise an issue of fact. Contrary to his contention, plaintiff's affidavit and attached documents are not hearsay; the affiant said that he personally reviewed loan records kept in the ordinary course of business and that he was personally familiar with plaintiff's record-keeping practices (*see Bank of Am., N.A. v Brannon*, 156 AD3d 1, 8 [1st Dept 2017]). Inconsistent statements in a prior affidavit submitted by plaintiff do not suffice, because they are contradicted by documentary evidence (*see Bank of N.Y. v 125-127 Allen St. Assoc.*, 59 AD3d 220 [1st Dept 2009]). Having submitted

proof that it was in physical possession of the note, plaintiff was not required to present proof of assignment (*see U.S. Bank N.A. v Askew*, 138 AD3d 402 [1st Dept 2016]).

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

ENTERED: MARCH 29, 2018

DEPUTY CLERK

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

6164 The People of the State of New York, Ind. 464/11
Respondent,

-against-

Keith Bailey,
Defendant-Appellant.

_____

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

Darcel D. Clark, District Attorney, Bronx (Paul A. Anderson 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 (Barbara F. Newman, J.), rendered June 10, 2013,

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

It is unanimously ordered that the 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: MARCH 29, 2018

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DEPUTY CLERK

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

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

6165 The People of the State of New York, Ind. 1376/15
Respondent,

-against-

Antonio Cruz,
Defendant-Appellant.

_____

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

Cyrus R. Vance Jr., The Legal Aid Society, New York (Alan Gadlin of counsel), for respondent.

_____

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Charles H. Solomon, J.), rendered February 23, 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: MARCH 29, 2018

_____
DEPUTY CLERK

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

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

6166N In re Rosa Gertrudis Diaz Heredia, etc., Petitioner-Respondent, Index 21857/14

-against-

New York City Health & Hospitals Corporation, Respondent-Appellant.

Zachary W. Carter, Corporation Counsel, New York (Diana Lawless of counsel), for appellant.

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

Order, Supreme Court, Bronx County (Douglas E. McKeon, J.), entered April 12, 2016, which granted petitioners' application for leave to file a late notice of claim, unanimously affirmed, without costs.

The court providently exercised its discretion in granting the application for leave to file a late notice of claim (General Municipal Law § 50-e [5]). Petitioner, who is now claimant's guardian ad litem, set forth a reasonable excuse for the failure to serve a timely notice of claim, since claimant was in a coma and, when she awoke, had severe brain injury stemming from the alleged malpractice provided at respondent HHC's facility, Jacobi Medical Center (*see Matter of Hubbard v County of Madison*, 71

AD3d 1313, 1315 [3rd Dept 2010]).

Petitioner also submitted the affirmation of a physician who opined that Jacobi had actual knowledge of the pertinent facts constituting the claimed malpractice, through its medical records (*see Bowser v New York Health & Hosps. Corp.*, 93 AD3d 608 [1st Dept 2012]). However, in opposition, HHC submitted the affirmation of a physician who opined that the records did not demonstrate malpractice at all, and argued that "mere assertions that a different course of treatment could have been followed do not address whether HHC had actual knowledge of the essential facts necessary to properly defend itself in the underlying action" (*Wally G. v New York City Health & Hosps. Corp [Metro. Hosp.]*, 27 NY3d 672, 677 [2016]). Regardless of whether HHC had actual notice of the claim within 90 days of its accrual, its

possession of the relevant medical records belies HHC's contention that it would be substantially prejudiced by the delay (*see Bowser* at 608).

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

ENTERED: MARCH 29, 2018

DEPUTY CLERK

Tom, J.P., Kapnick, Oing, Singh, JJ.

5404 The People of the State of New York, Ind. 1311/13
Respondent,

-against-

Darryl T. (Anonymous),
Defendant-Appellant,

_____

Michael D. Neville, Mental Hygiene Legal Service, Mineola (Ana Vuk-Pavlovic of counsel), for appellant.

Darcel D. Clark, District Attorney, Bronx (Shannon Henderson of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (Ralph Fabrizio, J.), entered on or about May 31, 2016, reversed, on the law, and the matter remanded for a new initial hearing.

Opinion by Tom, J.P. All concur.

Order filed.

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

Peter Tom, J.P.
Barbara R. Kapnick
Jeffrey K. Oing
Anil C. Singh, JJ.

5404
Index 1311/13

_____x

The People of the State of New York,
Respondent,

-against-

Darryl T. (Anonymous),
Defendent-Appellant,
_____x

Defendant appeals from the order of the Supreme Court, Bronx County (Ralph Fabrizio, J.), entered on or about May 31, 2016, insofar as it denied defendant a new initial hearing pursuant to CPL 330.20 in connection with his plea of not responsible by reason of mental disease or defect.

Michael D. Neville, Mental Hygiene Legal Service, Mineola (Ana Vuk-Pavlovic and Dennis B. Feld of counsel), for appellant.

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

TOM, J.P.

In this appeal, we must consider whether defendant was deprived of the effective assistance of counsel when, following his plea of not responsible by reason of mental disease or defect to robbery in the first degree, his counsel conceded that defendant had a dangerous mental disorder, and effectively waived defendant's right to an initial hearing concerning his civil confinement pursuant to Criminal Procedure Law 330.20(6).

Defendant Daryl T., now nearly 50 years old, has a history of mental illness that began at age 10 and a history of committing larceny during psychiatric episodes that occurred when his medication had worn off. He has been diagnosed repeatedly with bipolar disorder and schizoaffective disorder, a combination of schizophrenia and mood disorders, and has been hospitalized repeatedly as a danger to himself and others, due to his auditory hallucinations and voices telling him to kill himself and others. He has also been treated with several different antipsychotics and mood stabilizers.

When defendant was between 14 and 16 years old, he stabbed a man with intent to kill, and then stabbed himself. In 1994, he tried to hurt himself by taking his friend's gun and was confined at the Creedmoor Psychiatric Center for observation from October 1994 to March 1995; he told medical personnel that he had heard

voices in his head since age six, that the voices told him to kill, and that he had previously stabbed himself because of those voices.

Defendant was confined in institutions for periods of a few days to a week at a time in March 2003, January 2005, January 2006, May-June 2010, October 2010, May 2011, June 2011, July-August 2011, and January 2012. During those confinements, he said that he heard voices and that he wanted to kill himself and others, and throughout his medical history, he has tested positive for alcohol and cocaine on numerous occasions.

In August 2012, defendant tried to jump off the George Washington Bridge. Some days before that, five security officers had escorted him out of Mount Sinai Hospital after he threw monitor cords at the staff and threatened to hurt staff outside of the hospital. On March 19, 2013, while hospitalized at Bellevue, defendant said he heard voices in his head that told him he was worthless and should kill himself. One week after his release from Bellevue, he committed the offense to which he pleaded not guilty by reason of mental disease or defect.

It was alleged that in the late evening of March 27, 2013, defendant was seen shoplifting items from a Pathmark grocery store, and that when Pathmark employees confronted him, he took out a knife and said, in sum and substance, "I'm going to shoot

you." Defendant was arrested and charged with robbery in the first degree, robbery in the third degree, petit larceny, criminal possession of stolen property in the fifth degree, and criminal possession of a weapon in the fourth degree.

From March 31, 2014 to April 15, 2014, he was confined, and treated for hearing voices telling him to kill himself and others, and between April 17, 2014 and April 25, 2014, he was again diagnosed with schizoaffective disorder and a history of alcohol and cocaine abuse.

On February 27, 2015, while represented by an attorney from the 18-B panel, defendant pleaded not responsible by reason of mental disease or defect to robbery in the first degree. The People acknowledged that they had received the psychiatric evidence in the case, including defendant's medical records from October 12, 1994 to April 15, 2014, and more than 3,400 pages pertaining to defendant's placement in eight institutions, not including the approximately 10 times that he was seen by the New York City Correctional Health Services in Rikers Island. Those records were admitted into evidence.

Defense counsel confirmed that defendant understood the proceedings, that he had discussed the case with defendant, that defendant understood the consequences of his plea, and that there were no other viable defenses to the charges.

The court asked defendant whether he was aware that the charge to which he was pleading not responsible by reason of mental disease or defect was robbery in the first degree, and defendant said yes. The court asked, "Do you understand the consequences of such plea?," and defendant said he did. Defendant also confirmed that he understood that he had a right to plead not guilty, a right to a trial at which the People would have to call witnesses, the right to cross-examine those witnesses, and the right not to incriminate himself. He also said that he understood that by entering his plea of not responsible there would not be a trial, and that he was waiving his right to a trial. He further acknowledged the truth of the People's allegations, as previously described, regarding his conduct on March 27, 2013, at Pathmark. At the court's request, the prosecutor summarized the psychiatric evidence and history set forth above.

Based on the history and psychiatric evidence, the prosecutor said that defense counsel had conceded that defendant was a danger to himself and society. Defense counsel agreed that he conceded that defendant was a danger to himself and society. He noted that defendant's conduct arose when he was not on his medication, and that when he took his medication, he was "highly functional, ... intelligent, [and] cooperative." Nevertheless,

defense counsel confirmed that he was not disputing the medical testimony or the statements made by the prosecutor about defendant's psychiatric history.

Defense counsel also said that defendant had the capacity to understand the plea proceeding, but did not have the capacity to understand what he was doing at the time of the robbery.

The court, referring to a CPL 330.20(6) initial hearing, confirmed that both parties were "not requesting that any hearing be held, because the hearing would not establish anything further than what has been presented here today." Both the prosecutor and defense counsel agreed.

The court asked defendant whether he understood "what's going on," and defendant said he did, and confirmed that he had taken his prescribed medications on that day. Defendant also confirmed that he had not taken his medication on March 27, 2013, the day of the robbery.

Defendant further confirmed that no one had threatened him or forced him to plead not responsible. Defense counsel said that he had numerous conversations with defendant about the plea and that he was satisfied that defendant had the capacity to understand the consequences of a plea of not responsible.

The court then concluded that it was satisfied that each element of robbery in the first degree as alleged in the

indictment would be proved beyond a reasonable doubt at trial, that the defense would prove by a preponderance of the evidence the affirmative defense of lack of criminal responsibility by reason of mental disease or defect, that defendant had the capacity to understand the proceedings and assist in his defense, and that defendant's plea was knowing and voluntary.

Pursuant to CPL 330.20, the court issued a written examination order requiring a psychiatric examination to determine whether defendant had a dangerous mental disorder or was mentally ill. The court adjourned to await completion of the examination and report on defendant's mental condition.

Defendant was admitted to the Mid-Hudson Forensic Psychiatric Center (Mid-Hudson) for the examinations. Dr. Mark Bernstein and Dr. Nancy Flores-Migenes examined defendant and issued reports that concluded that defendant had a dangerous mental disorder and was a danger to himself and others and that he needed inpatient care with the highest available level of security.

Dr. Bernstein opined that defendant suffered from "chronic Schizoaffective thought disorder ... complicated by alcohol, cocaine and cannabis abuse with an underlying Antisocial Personality." He found that defendant had previously threatened staff at hospitals, and had a history of poor compliance with

treatment recommendations.

Dr. Flores-Migenes similarly diagnosed defendant with "Schizophrenia, Chronic, Paranoid-Type," with a history of alcohol and cocaine abuse, which led to conduct dangerous to himself and others. Dr. Flores-Migenes noted that defendant had told her that all of the information he had given to other facilities were "lies," and that he had been taking his medication at the time of his arrest. He alternated between acknowledging that he was noncompliant and saying that he was always compliant with his medication requirements.

In various letters to the court, defendant asked to withdraw his plea, saying that defense counsel had misinformed him and told him not to ask questions during the plea proceeding, that he had been hearing voices before the proceeding, and that he had lied in the past about having suicidal thoughts. He also said that defense counsel had told him that he would prefer a 1 to 30-day commitment in a civil hospital to the program the court had previously offered. Defendant claimed both that he had been on cocaine on the night of the offense and that he had been on his medications.

At a proceeding on May 28, 2015, defendant addressed the court directly in an effort to take back his plea; he told the court that defense counsel had told him on February 20, 2015 that

he had gotten him a deal of 1 to 30 days in a civil hospital, and that counsel had told him "to come into the courtroom and say [] yes to everything.... [T]hey confirmed that I was on medicine during the time of the crime. He [defense counsel] told me to say that I wasn't." Defendant thus asked to "withdraw this plea." He added, "I know I don't belong in a one day to life plea for this charge." Defendant denied being dangerously mentally ill. He explained that he had a "bad cocaine history" in 1989 or 1998, and that he had cut or stabbed himself, and that when he wanted to detox he would lie and say he wanted to kill himself, and he would be admitted immediately to the psych ward, where he would detox and get clean.

The court said, "I would not have thought that they would have made a determination that you were suffering from an affliction and also that you constitute a danger to yourself and to others. However, obviously I'm not an expert in . . . psychiatric evaluations." The court noted that two experts had determined that defendant was a danger to himself. The court also explained that the determinations were not based solely on defendant's statements, but also on his medical records, prior diagnoses, and approximately 20 earlier hospitalizations. Defendant said that he hospitalized himself, that a dangerously mentally ill person would not do that, and that the finding that

he suffered from a dangerous mental disorder was a lie. The court replied that it was bound by the findings in the reports.

The People argued that defendant should be committed because he had been found to be a danger to himself or society. Defense counsel said that he relied on the psychiatrist's reports and plea allocution and otherwise deferred to the court's discretion.

The court denied defendant's oral request to withdraw his plea. Defendant protested: "If I had known this was a 330.20, I wouldn't have accepted this plea. That is why [defense counsel] didn't tell me that that's what it was. He told me one to 30 days in civil hospital." The court responded, "I told you it was 330.20." Defendant said that he "didn't know anything about a 330.20" and that defense counsel had told him to say yes to everything. The court said, "I explained to you exactly what was going on. You took the plea." Defendant said, "If I had understood, I wouldn't have taken it." The court repeated that it had explained it to defendant and added that if defendant was released, then he could avail himself of the program.

The court issued an order of commitment upon its finding that defendant was not responsible by reason of mental disease or defect, and defendant was committed to Mid-Hudson. On October 6, 2015, defendant was transferred to the Rochester Psychiatric Center, where he is currently hospitalized.

In March 2016, defendant moved, through Mental Hygiene Legal Services, to withdraw or vacate his plea or, in the alternative, for a new initial hearing pursuant to CPL 330.20(6). Defendant argued that Supreme Court did not sufficiently advise him of, and ensure he understood, the consequences of his plea, specifically, that his plea could result in his commitment in a secure psychiatric facility, potentially for life. He also contended that he received ineffective assistance of counsel when his attorney conceded that he had a dangerous mental disorder and effectively waived his right to a hearing on his mental status. In the alternative, defendant argued that he was deprived of a proper initial hearing in light of counsel's concession, and sought a new initial hearing.

The People opposed the motion, arguing that the record established that defendant's plea was knowing, intelligent and voluntary, and that he received the effective assistance of counsel. In an affirmation, defendant's plea counsel maintained that he had explained defendant's sentence exposure, his option of completing a program, and his option of a not responsible plea, which could result in "his initial commitment to a secure facility to be followed by all necessary treatment in a secure facility." Counsel also said that "[a]fter review[ing] . . . all the facts in this matter" he believed that defendant was a danger

to himself and others and in need of commitment, and thus he "deferred to the appropriate psychiatric experts."

Supreme Court denied defendant's motion, reasoning that the earlier denial of the oral application to withdraw the plea on the same grounds was the law of the case. The court separately concluded that the motion should be denied because the record established that defendant was advised about the consequences of a not responsible plea, and that the plea was made knowingly and voluntarily.

The court also denied defendant's request for a new initial hearing pursuant to CPL 330.20(6) because defendant had had an opportunity to be heard via his letters to the court. Thus, the court found that defendant had been afforded an opportunity to challenge the findings of the psychiatrists, and had been afforded due process. The court further found that counsel had not been ineffective for conceding the accuracy of those findings or waiving defendant's right to an initial hearing, as he could not raise meritorious challenges to the extensive psychiatric records. In this regard, the court said that attorneys were not required to challenge unanimous documented psychiatric findings that a defendant was a danger to him or herself or others, especially where arguments would be futile, citing *Matter of Brian HH.* (39 AD3d 1007, 1009 [3d Dept 2007]).

On October 19, 2016, a Justice of this Court granted defendant leave to appeal pursuant to CPL 330.20(21)(a)(ii), to the extent the May 31, 2016 order "denied the alternate relief requested in [defendant's] motion to withdraw or vacate his plea ..., namely, a new initial hearing under CPL 330.30." We now reverse and remand for an initial hearing.

As occurred here, after a court accepts a not responsible plea, it must issue an examination order for the defendant to be examined by two qualified psychiatric examiners (CPL 330.20[2]), who must submit to the court a report of their findings and evaluation regarding defendant's mental condition (CPL 330.20[5]).

Critical to this procedure is the requirement that the court conduct an initial hearing within 10 days after receipt of the psychiatric examination reports, in order to classify the defendant as "track one," "track two," or "track three" based on the defendant's mental condition (CPL 330.20[6]; *Matter of Allen B. v Sproat*, 23 NY3d 364, 368 [2014]).

The track is significant because it determines the level of the defendant's confinement and treatment. Track one is based on a finding of "dangerous mental disorder," meaning that the defendant suffers from a "mental illness," and that "because of such condition he currently constitutes a physical danger to

himself or others" (CPL 330.20[1][c]; *see* Mental Hygiene Law § 1.03[20] [defining "mental illness"]). Track two is based on a finding of "mentally ill," without a dangerous mental disorder (CPL 330.20[1][d]). Track three is based on a finding of not mentally ill (CPL 330.20[7]).

"The track designation places more dangerous acquittees under the purview of the Criminal Procedure Law, while less dangerous, though still mentally ill, acquittees are committed to the custody of the Commissioner of Mental Health and come under the supervision of the Mental Hygiene Law" (*Matter of Norman D.*, 3 NY3d 150, 154 [2004]). Thus, track designation is "vitally important in determining the level of judicial and prosecutorial involvement in future decisions about an acquittee's confinement, transfer and release" (*id.*).

Upon making a track one determination, the court will issue a commitment order committing the defendant to the custody of the commissioner for confinement in a secure facility for treatment for six months (CPL 330.20[1][f], [6]). Track one defendants can be detained for longer than the initial six-month confinement if a court issues subsequent retention orders, lasting up to two years at a time, upon finding that the defendant's dangerous mental disorder persists (CPL 330.20[1][g], [h]). Such orders could, in theory, be issued repeatedly for two years at a time,

resulting in defendant's indefinite confinement (CPL 330.20[8]-[12]; *see Allen B.*, 23 NY3d at 369-70). Track two defendants, on the other hand, are ordered into the Commissioner's custody for detention in a nonsecure (civil) facility, subject to an order of conditions, while track three defendants are discharged either unconditionally or, in the court's discretion, with an order of conditions (CPL 330.20[7]). Thus, "track one status is significantly more restrictive than track two status" (*Norman D.*, 3 NY3d at 155).

At the initial hearing, the People bear the burden of proving "to the satisfaction of the court," i.e., by a fair preponderance of the credible evidence, that the defendant has a dangerous mental disorder or is mentally ill (CPL 330.20[6]; *People v Escobar*, 61 NY2d 431, 439-440 [1984]).

The initial hearing under CPL 330.20(6) is "a critical stage" of proceedings at which the defendant is entitled to the effective assistance of counsel (*Brian HH.*, 39 AD3d at 1009). To prove a claim of ineffective assistance of counsel under New York law, a defendant must prove that defense counsel's performance, viewed in totality, did not amount to meaningful representation (*People v Benevento*, 91 NY2d 708, 711-712 [1998]; *see also People v Turner*, 5 NY3d 476 [2005]). We agree with defendant that counsel's performance did not meet that standard.

As defendant argues, at the same proceeding at which he entered his not responsible plea, his counsel simply conceded that he had a dangerous mental disorder, and thus implicitly consented to his confinement in a secure facility. Counsel also confirmed that he was not requesting that any hearing be held. These concessions waived defendant's right to an initial hearing. There could be no legitimate strategy that warranted these actions, and failing to challenge the worst possible outcome of a track one designation under the circumstances of this case did not amount to meaningful representation.

Notably, counsel rendered ineffective assistance when he conceded at the plea proceeding that defendant was a danger to himself and society, and waived defendant's right to an initial hearing before reviewing the psychiatric examination reports which had not yet been prepared for the court. Further, at the proceeding that followed the issuance of the reports, counsel simply relied on the psychiatrists' reports and deferred to the court's discretion. He did not call any witnesses or seek to cross-examine the psychiatrists who prepared the reports. Nor did counsel consult an expert on defendant's behalf who might have offered a contrasting opinion.

In *Brian HH.* (39 AD3d 1007), the court found that counsel had not provided meaningful representation when he failed to

challenge the prosecutor's position that the evidence supporting the less restrictive track two status was not as credible as that supporting track one status. Counsel did not call witnesses, including a psychiatrist who had concluded that the respondent was mentally ill but not dangerous, and waived cross-examination of the psychiatrists supporting track one status. The court noted that there could be no valid strategy or legitimate explanation for counsel's conduct given that there were conflicting reports as to the respondent's condition (39 AD3d at 1009-1010). Similarly, in this case there could be no strategy or other proper explanation for waiving defendant's right to a hearing before any reports were issued to the court. In other words, counsel waived a hearing before even learning what the reports would conclude and whether they would offer conflicting opinions. Counsel's own review of the extensive medical records entered into evidence was not a sufficient substitute for reports prepared by psychiatrists for the CPL 330.20 proceeding.

Preserving defendant's right to an initial hearing was also critical in light of defendant's claims that he had lied about his mental condition and the court's acknowledgment that in its lay opinion defendant did not appear to be dangerous. In these circumstances, defense counsel should have consulted an independent psychologist or at least cross-examined the

psychiatrists regarding, in particular, defendant's claims told to Dr. Flores-Migenes, that he had previously lied about his mental health, to obtain admission to facilities that would treat his drug use. While defendant's medical records may appear to show that he is dangerous, it is not a legitimate strategy to concede his track one status without further investigation or inquiry, under the circumstances of this case and since defendant's confinement in a secured psychiatric institution could be indefinite.

Furthermore, in contrast to this case, in *People v Odell B.-P.* (154 AD3d 534 [1st Dept 2017], *lv denied* __NY3d__, 2018 NY Slip Op 63820 [2018]) we found that the defendant received effective assistance of counsel at the initial hearing when his counsel explained to the court that she would not challenge the psychiatrists' findings that the defendant was dangerously mentally ill because the defense psychologist who examined the defendant had told her that he would not contest the findings. Of course, when counsel consults a defense expert who has personally examined the defendant, and is advised that there is no basis for challenging a finding that the defendant is dangerously mentally ill, it is reasonable for counsel not to challenge the finding. However, no such consultation or reasonable strategy took place here. Rather, counsel conceded

defendant's status before any reports were issued and before any hearing was held.

Defendant's remaining claims, including whether the court abused its discretion in denying his motion to withdraw the plea, are beyond the scope of this Court's review pursuant to the grant of leave to appeal and therefore are not properly before us for consideration. In the alternative, to the extent these remaining claims are not rendered academic by our holding, we reject them on the merits. In any event, we find that defendant is entitled to a new initial hearing at which the People must prove, by a preponderance of the evidence, that he suffers from a dangerous mental disorder or is mentally ill (CPL 330.20[6]; *People v Escobar*, 61 NY2d at 440).

Accordingly, the order of the Supreme Court, Bronx County (Ralph Fabrizio, J.), entered on or about May 31, 2016, insofar as it denied defendant a new initial hearing pursuant to CPL

330.20 in connection with his plea of not responsible by reason of mental disease or defect, should be reversed, on the law, and the matter remanded for a new initial hearing.

All concur.

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

ENTERED: MARCH 29, 2018

DEPUTY CLERK