SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

MAY 8, 2018

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Acosta, P.J., Richter, Kapnick, Kahn, Gesmer, JJ.

5993-
5993A The People of the State of New York, Respondent, Ind. 3582/04 848/06

-against-

Sean Lopes,
Defendant-Appellant.

_____

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

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

_____

Judgment, Supreme Court, New York County (Robert M. Stolz, J.), rendered July 21, 2005, convicting defendant, after a jury trial, of kidnapping in the second degree and criminal possession of a weapon in the second degree (two counts), and sentencing him to an aggregate term of 15 years, and judgment, same court (Ann M. Donnelly, J.), rendered August 19, 2015, as amended September 17, 2015, convicting him, upon his plea of guilty, of bail jumping in the first degree, and sentencing him to a consecutive term of 1 to 3 years, unanimously affirmed.

Initially, we decline to revisit this Court's prior order,

which denied the People's motion to dismiss the appeal from the 2005 judgment.

We reject defendant's claim that his kidnapping conviction was against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348 [2007]). There is no basis for disturbing the jury's credibility determinations. The fact that the jury acquitted defendant of some other counts does not warrant a different conclusion (*see People v Rayam*, 94 NY2d 557 [2000]). The victim's account, which was corroborated by bystanders, police witnesses, and physical evidence, abundantly established that defendant intended to prevent the victim's liberation by using or threatening to use deadly physical force (*see People v Dodt*, 61 NY2d 408, 414-415 [1984]).

Defendant's contention that the court's response to a jury note seeking readback of the victim's testimony failed to adhere to CPL 310.30 (*see generally People v O'Rama*, 78 NY2d 270 [1991]) is unpreserved (*see People v Williams*, 21 NY3d 932, 935 [2013]), and we decline to review it in the interest of justice. Contrary to defendant's argument, there was no mode of proceedings error. The record establishes that counsel had "meaningful notice" of the specific contents of the jury note (*People v Mack*, 27 NY3d 534, 538 [2016]). After the court was made aware of the jury note, defense counsel stated on the record that he had seen the

note and that "it [was] a duplicate." The court then confirmed on the record with both the prosecutor and defense counsel that the note had been responded to by an earlier readback, and both replied, "Yes." Although it would have been better if the court followed the *O'Rama* procedures, defense counsel saw the note and "failed to object. . .when the [claimed] error could have been cured" (*People v Nealon*, 26 NY3d 152, 159 [2015] [internal quotation marks omitted]). Thus, no mode of proceedings error occurred and preservation was required.

Defendant did not preserve his contention that the kidnapping count should be dismissed pursuant to the merger doctrine, or his challenges to the People's summation, and we decline to review any of these claims in the interest of justice. As an alternative holding, we find that the protracted and brutal abduction did not merge with any other crimes (*see People v Leiva*, 59 AD3d 161, 161 [1st Dept 2009], *lv denied* 12 NY3d 818 [2009]), and that any improprieties in the prosecutor's summation were not so egregious or pervasive as to deprive defendant of a fair trial (*see People v D'Alessandro*, 184 AD2d 114 [1st Dept 1992], *lv denied* 81 NY2d 884 [1993]).

We have considered and rejected defendant's ineffective assistance of counsel claims relating to the issues we have found to be unpreserved (*see People v Caban*, 5 NY3d 143, 152 [2005]

Strickland v Washington, 466 US 668 [1984]). Accordingly, we do not find that any lack of preservation may be excused on the ground of ineffective assistance.

Defendant's excessive sentence claim is unreviewable because the sentencing minutes cannot be located. Insofar as the issue is reviewable, we perceive no basis for reducing the sentence. Defendant does not raise any issues concerning the 2015 judgment on appeal.

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

ENTERED: MAY 8, 2018

CLERK

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

6248 Luis A. Martinez, Index 24940/15E
Plaintiff-Appellant,

-against-

WE Transport Inc., et al.,
Defendants-Respondents.

_____

Law Office of Marshall S. Bluth, P.C., New York (Marshall S. Bluth of counsel), for appellant.

Lewis Johs Avallone & Aviles, LLP, Islandia (Robert A. Lifson of counsel), for respondents.

_____

Order, Supreme Court, Bronx County (Donna M. Mills, J.), entered January 30, 2017, which denied plaintiff's motion for partial summary judgment on the issue of liability, unanimously reversed, on the law, without costs, and the motion granted.

The motion court should have granted plaintiff's motion in this action for personal injuries sustained in a collision between two buses.

The Vehicle and Traffic Law (§ 1180[a]) imposes a duty to drive at a safe rate of speed under existing conditions. In addition, "drivers have a 'duty to see what should be seen and to exercise reasonable care under the circumstances to avoid an accident'" (*Johnson v Phillips*, 261 AD2d 269, 271 [1st Dept 1999], quoting *DeAngelis v Kirschner*, 171 AD2d 593, 595 [1st Dept 1991]).

Here, plaintiff submitted an affidavit in which he swore that the road was wet and slippery, that puddles had formed, and that the driver of defendants' bus was traveling at too fast a rate of speed under these circumstances, lost control, and struck plaintiff's bus in the neighboring lane. In defendants' accident report, relied on by plaintiff before the motion court and by defendants in their appellate brief, the driver of defendants' bus stated that, as he drove over a puddle of water, the back wheels "beg[a]n to slide and the bus hit the wall and rolled into the middle lane," striking plaintiff's bus. Together, plaintiff's affidavit, and defendants' accident report, the authenticity and accuracy of which are not disputed, established plaintiff's prima facie entitlement to judgment as a matter of law on the issue of liability (*see Czekala v Meehan*, 27 AD2d 565 [1st Dept 1966], *affd* 20 NY2d 686 [1967] [evidence establishing that car moved off road and hit barrier was prima facie evidence of driver's negligence]).

In opposition, defendants failed to raise a triable issue of fact. Defendant driver submitted an affidavit in which he claimed that he was operating his bus at a reasonable speed "considering the conditions then existing." At the same time, he did not deny that the roads were wet and slippery, but claimed that he did not "observe any accumulation of water or other

slippery roadway condition," even though in his accident report he admitted to having driven over a puddle. He alleged, in conclusory terms, that plaintiff had failed to take evasive action after he lost control of defendants' bus and skidded into plaintiff's lane. He did not claim that plaintiff was driving at an inappropriate speed under the circumstances. In any event, "[t]o be entitled to partial summary judgment a plaintiff does not bear the double burden of establishing a prima facie case of defendant's liability and the absence of his or her own comparative fault" (*Rodriguez v City of New York*, __ NY3d __, 2018 NY Slip Op 02287, *6 [2018]). Defendant driver's affidavit "appears to have been submitted to avoid the consequences of his prior admission . . . and, thus, is insufficient to defeat plaintiff's motion for partial summary judgment" (*Garzon-Victoria v Okolo*, 116 AD3d 558, 558 [1st Dept 2014]).

We reject defendants' arguments concerning the emergency doctrine, since defendant driver admitted to driving over a puddle and never denied that wet and slippery road conditions existed (*see Caristo v Sanzone*, 96 NY2d 172, 175 [2001]).

On this record, we do not find plaintiff's motion to be premature (*see Johnson*, 261 AD2d at 272).

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

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

ENTERED: MAY 8, 2018

CLERK

Richter, J.P., Gesmer, Oing, Singh, Moulton, JJ.

6429-
6430 In re Michael H.,

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

_____

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

Zachary W. Carter, Corporation Counsel, New York (Carolyn Walther of counsel), for presentment agency.

_____

Order of disposition, Family Court, Bronx County (Sidney Gribetz, J.), entered on or about March 15, 2017, which adjudicated appellant a juvenile delinquent upon a fact-finding determination that he committed an act that, if committed by an adult, would constitute the crime of possession or sale of a toy or imitation firearm, and placed him on probation for 12 months, unanimously affirmed, without costs.

The court properly denied defendant's suppression motion. Initially, we find that the police had a founded suspicion of criminality warranting a common-law inquiry, based on an anonymous report describing an armed suspect. The minor discrepancies between the radioed description and appellant's appearance were satisfactorily explained (*see Matter of Dominique*

W., 84 AD3d 657 [1st Dept 2011]).

The initial encounter was not a seizure requiring reasonable suspicion, notwithstanding that it involved a direction to stop, where the police did not display weapons, physically restrain appellant or do anything else to convey a seizure (*see People v Reyes*, 83 NY2d 945 [1994], *cert denied* 513 US 991 [1994]; *People v Bora*, 83 NY2d 531, 535-536 [1994]; *Matter of Jamaal C.*, 19 AD3d 144 [2005]). Within the scope of their common-law inquiry, the police were entitled to ask appellant if he had a weapon (*see People v Ward*, 22 AD3d 368 [1st Dept 2005], *lv denied* 6 NY3d 782 [2006]), and his affirmative response provided probable cause for his arrest.

The totality of the hearing evidence supports a finding that exigent circumstances justified the warrantless search of appellant's backpack (*see generally People v Jimenez*, 22 NY3d 717 [2014]). Appellant's admission that he had an unspecified "gun" (only later determined to be an air pistol) gave the police a high level of certainty that the backpack contained a firearm (*see Matter of Kenneth S.*, 121 AD3d 593, 594 [2014], *affd* 27 NY3d 926 [2016]). Furthermore, the bag was in appellant's grabbable

area, and the police opened the bag almost simultaneously with handcuffing appellant (*see People v Smith* 59 NY2d 454, 458-459 [1983]; *People v Velez*, 154 AD3d 527 [1st Dept 2017], *lv denied* 30 NY3d 1109 [2018]).

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

ENTERED: MAY 8, 2018

CLERK

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

6471 The People of the State of New York, Respondent, Ind. 1905/11

-against-

Shawn Johnson, Defendant-Appellant.

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

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

Judgment, Supreme Court, New York County (Bruce Allen, J.), rendered April 8, 2013, convicting defendant, after a jury trial, of two counts of promoting prostitution in the third degree, and sentencing him to five years' probation, unanimously affirmed.

Defendant's argument concerning a witness's invocation of her privilege against self-incrimination in response to certain questions is essentially the same as an argument we rejected on a codefendant's appeal (*People v Roseboro*, 151 AD3d 526 [1st Dept 2017], *lv denied* 30 NY3d 983 [2017]), and we find no reason to revisit that determination or reach a different conclusion as to this defendant.

On the codefendant's appeal, we also rejected, by way of an alternative holding, a procedurally defaulted claim that the court should have granted a missing witness charge. Although

this defendant, unlike the codefendant, preserved the issue, and although the uncalled witness may have shared a closer relationship with the codefendant than with this defendant, we likewise find no reason to reach a different result. There is no basis to have expected the uncalled witness to provide testimony favorable to the People as to either defendant.

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

ENTERED: MAY 8, 2018

CLERK

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

6472 Anthony Lilly, Index 113800/10
Plaintiff-Appellant,

-against-

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

New York City Housing Authority,
Defendant-Respondent.

_____

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

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

_____

Order, Supreme Court, New York County (Paul Wooten, J.), entered January 27, 2016, which granted the motion of defendant New York City Housing Authority for summary judgment dismissing the complaint as against it, unanimously reversed, on the law, without costs, and the motion denied.

Summary judgment was improperly granted in this action where plaintiff was injured when the elevator door in defendant's building unexpectedly closed on him as he attempted to enter the elevator. Contrary to the finding of the motion court, the evidentiary doctrine of res ipsa loquitur is applicable under the circumstances presented since plaintiff testified that the elevator door, which was closed by electronic sensors and did not

have rubber safety bumpers, suddenly and unexpectedly closed (*see Barkley v Plaza Realty Invs. Inc.*, 149 AD3d 74, 77-78 [1st Dept 2017]; *Ianotta v Tishman Speyer Props., Inc.*, 46 AD3d 297, 298-299 [1st Dept 2007]; *compare Feblot v New York Times Co.*, 32 NY2d 486, 496 [1973]).

In addition, plaintiff testified that the elevator door was malfunctioning for several months and proferred an affidavit by a tenant who averred to the elevator doors malfunctioning. This is sufficient evidence of constructive notice to defeat defendant's showing that the elevator was regularly maintained (*see Ardolaj v Two Broadway Land Co.*, 276 AD2d 264 [1st Dept 2000]).

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

ENTERED: MAY 8, 2018

CLERK

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

6473-
6474 In re Toumani D.,

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

_____

Larry S. Bachner, New York, for appellant.

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

_____

Order of disposition, Family Court, Bronx County (Peter J. Passidomo, J.), entered on or about June 5, 2017, which adjudicated appellant a juvenile delinquent upon a fact-finding determination that he committed acts that, if committed by an adult, would constitute the crimes of sexual abuse in the first and third degrees, and placed him on probation for a period of 12 months, unanimously modified, on the law, to the extent of vacating the finding as to third-degree sexual abuse, and dismissing that count, and otherwise affirmed, without costs.

The court's finding was based on legally sufficient evidence and was not against the weight of the evidence. There is no basis for disturbing the court's credibility determinations. The record supports inferences that when appellant grabbed the victim's vagina, he did so for the purpose of sexual

gratification, and that he used forcible compulsion (*see e.g. People v Fuller*, 50 AD3d 1171, 1174-1175 [3d 2008], *lv denied* 11 NY3d 788 [2008]).

However, as the presentment agency concedes, the third-degree sexual abuse count should be dismissed as a lesser included offense.

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

ENTERED: MAY 8, 2018

CLERK

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

6475 Mark Hessing, Index 20857/12E
Plaintiff-Appellant,

-against-

Katherine L. Carroll,
Defendant-Respondent.

_____

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

Law Offices of John Trop, Yonkers (David Holmes of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (Lizbeth Gonzalez, J.), entered January 19, 2017, which granted defendant's motion for summary judgment dismissing the complaint based on plaintiff's inability to meet the serious injury threshold of Insurance Law § 5102(d), unanimously affirmed, without costs.

Defendant met her initial burden of showing the absence of a triable issue on whether plaintiff had suffered a "permanent consequential" or "significant" limitation of use of his cervical spine, by submitting the affirmed report of her radiologist who found that plaintiff's MRI revealed degenerative disc disease and no evidence of traumatic injury. Moreover, defendant relied on plaintiff's own medical records, which also reflected findings of degenerative disc disease or cervical arthrosis. His medical records further showed that he had full range of motion and

resumed rigorous daily cross-training shortly after the accident, and, after several months of physical therapy, did not seek any treatment for his cervical spine condition in the following four years. The burden thus shifted to plaintiff to address the evidence of a preexisting degenerative condition (*see Rivera v Fernandez & Ulloa Auto Group*, 123 AD3d 509, 510 [1st Dept 2014], *affd* 25 NY3d 1222 [2015]; *Alvarez v NYLL Mgt. Ltd.*, 120 AD3d 1043, 1044 [1st Dept 2014], *affd* 24 NY3d 1191 [2015]), and to provide a reasonable explanation for his cessation of treatment (*Pommells v Perez*, 4 NY3d 566, 576-577 [2005]).

In opposition to defendant's prima facie showing, plaintiff failed to raise an issue of fact as to whether his cervical spine condition was causally related to the accident or constituted a serious injury. Plaintiff presented the opinion of a physician who examined him years after the accident and found range of motion deficits, which he attributed to cervical disc herniations caused by the accident. However, plaintiff's expert failed to causally connect these limitations or injuries to the accident, since he did not address or contest the findings in plaintiff's own medical records that he suffered from cervical arthrosis, or degenerative disc disease (*see Franklin v Gareyua,* 136 AD3d 464, 465 [1st Dept 2016], *affd* 29 NY3d 925 [2017]). Faced with these findings, plaintiff's examining physician's failure to explain

why the accident, and not the degeneration, caused his condition, renders the opinion speculative, and entitles defendant to summary judgment (*see Rivera* at 510). Plaintiff also failed to provide a reasonable explanation for his cessation of treatment, which supports the conclusion that he did not sustain a serious injury to his cervical spine (*see Cattouse v Smith*, 146 AD3d 670, 672 [1st Dept 2017]).

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

ENTERED: MAY 8, 2018

CLERK

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

6476-
6477 Index 104059/11

Wang Jia,
Plaintiff-Appellant,

-against-

Edward Kang also known as Chih Shien Kang, et al.,
Defendants-Respondents,

Trigem Realty LLC,
Defendant.

_____

Held & Hines LLP, New York (Scott B. Richman of counsel), for appellant.

Donald Eng, New York, for respondents.

_____

Judgment, Supreme Court, New York County (Arthur F. Engoron, J.), entered January 9, 2017, after a nonjury trial, dismissing the complaint, awarding damages to the individual defendants on their counterclaim for wilful exaggeration of a mechanic's lien pursuant to Lien Law § 39-a, and referring the matter for a determination of the amount of attorneys' fees to be awarded to defendants in connection with that counterclaim, and order, same court and Justice, entered February 2, 2017, which denied plaintiff's pro se motion to set aside the posttrial order directing the entry of a judgment dismissing the complaint, unanimously modified, on the law, to vacate the award of damages and the referral for a determination of the amount of attorneys'

fees, and to dismiss the mechanic's lien counterclaim, and otherwise affirmed, without costs.

We see no reason to disturb the trial court's determination, based largely on its assessment of witness credibility, that there was no agreement between plaintiff and the individual defendants that plaintiff would clean the premises at issue (*see Thoreson v Penthouse Intl.*, 80 NY2d 490, 495 [1992]). However, contrary to the court's determination that there was no agreement that plaintiff would perform renovations, defendant Kang acknowledged that he agreed to plaintiff's offer to tear down partition walls, and, while plaintiff may have undertaken further renovations of her own accord, emails in evidence show that Kang directed her to complete the renovations of the bathrooms. Nevertheless, plaintiff's quantum meruit claim was correctly dismissed, because she failed to prove the reasonable value of the renovation services (*see Lazard Freres & Co. v First Natl. Bank of Md.*, 268 AD2d 294 [1st Dept 2000]).

Defendants' argument that the mechanic's lien was wilfully exaggerated in its entirety is without merit. The evidence shows that plaintiff was entitled to recover the reasonable value of her services in removing the partition walls and performing the bathroom renovations (but for her failure to prove the reasonable value of those services). By failing to take into account the

reasonable value of those services, defendants failed to prove the amount by which the lien was wilfully exaggerated (*see Goodman v Del-Sa-Co Foods*, 15 NY2d 191, 194 [1965]). Moreover, since the amount of defendants' attorneys' fees incurred in securing the discharge of the lien may be determined according to the percentage of the total amount of the lien represented by the wilfully exaggerated portion (*see A & E Plumbing v Budoff*, 66 AD2d 455, 457 [3d Dept 1979]), the failure to prove the amount by which the lien was wilfully exaggerated makes it impossible to determine the amount of attorneys' fees, and therefore attorneys' fees cannot be awarded.

Plaintiff argues that defendant Trigem Realty LLC's payments of $30,000 to defendants were not rent but dividends, of which she is entitled to a share. She contends that, pursuant to the statute of frauds, the lease is void because it is not in writing. This argument reflects a misreading of General Obligations Law §§ 5-701 and 5-703. The indefinite duration of Trigem's existence contemplated by its operating agreement notwithstanding, if there was a possibility that the term of Trigem's oral lease would end within a year, the lease would not run afoul of the statutes (*see Foster v Kovner*, 44 AD3d 23, 26 [1st Dept 2007]; *City of New York v Heller*, 127 Misc 2d 814, 816

[Civ Ct, NY County 1985], *affd* 131 Misc 2d 485 [App Term, 1st Dept 1986]). Plaintiff failed to identify anything in the lease that made it impossible for the term to end within a year.

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

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

ENTERED: MAY 8, 2018

CLERK

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

6478-
6478A AMT Capital Holdings, S.A., Index 654756/16
Plaintiff-Appellant,

-against-

Sun Life Assurance Company of Canada,
Defendant-Respondent.

_____

Lipsius-Benhaim Law, LLP, Kew Gardens (Ira S. Lipsius of counsel), for appellant.

Drinker Biddle & Reath LLP, New York (Joseph M. Kelleher of the bar of the State of Pennsylvania and the State of New Jersey, admitted pro hac vice, of counsel), for respondent.

_____

Judgment, Supreme Court, New York County (Charles E. Ramos, J.), entered on or about April 12, 2017, dismissing the action, unanimously affirmed, with costs. Appeal from order, same court and Justice, entered February 16, 2017, which granted defendant's motion to dismiss the action for lack of personal jurisdiction, unanimously dismissed, without costs, as subsumed in the appeal from the judgment.

Neither CPLR 302(a)(1) nor Insurance Law § 1213(b)(1) provides a basis on which New York courts may exercise personal jurisdiction over defendant, which, as plaintiff acknowledges, is incorporated in Canada, has its principal place of business in Canada, and is not authorized to do business in New York. Defendant issued a $10 million life insurance policy to a trust,

designated on the policy application as the policy owner and beneficiary, which the record shows has its situs in New Jersey. The policy application was signed in New Jersey, and the receipt reflecting delivery of the policy identifies New Jersey as the place of execution. While the trustee may be a New York resident, he is neither the designated owner nor a beneficiary of the policy.

Plaintiff cites no authority to support its argument that New York courts may exercise jurisdiction over defendant because the policy insured the life of a New York resident. Nor do defendant's purported ties to New York suffice. Plaintiff points out that the medical portion of the application was signed in New York by the insured and the medical examiner and that, before it was delivered to the trustee, the policy passed through two New York intermediaries. These transactions are not only too fleeting to provide a jurisdictional foundation, but are also not the acts from which plaintiff's claims arise (*see* CPLR 302[a][1]; *see also Kasprzak v Mut. Life Assur. Co. of Canada*, 1 F Supp 915 [WD NY 1932]; 1 *Couch on Ins.* § 3:14 [3d ed 2017]; *McKee Elec. Co. v Rauland-Borg Corp.*, 20 NY2d 377 [1967]). Even assuming, as the record suggests, that defendant assured plaintiff (which acquired ownership of the policy) of the incontestability of the policy by a letter faxed to a New York number, this is not

sufficient to establish New York jurisdiction over defendant (*see America/Intl. 1994 Venture v Mau*, 146 AD3d 40 [2d Dept 2016]).

Insurance Law § 1213 is inapplicable, because its purpose is to protect the interests of New York residents who "hold" policies "delivered in this state" (subsection [a]). The record does not support jurisdiction under subsection (b)(1)(A), (B) or (C). As Insurance Law § 1213(b)(1)(D) has been interpreted as analogous to CPLR 302(a)(1) (*see Karl Andersen v Sun Life Assur. Co. of Canada*, SD NY, 15 Civ. 4422 [AKH], November 13, 2015, citing *Farm Family Mut. Ins. Co. v Nass*, 126 Misc 2d 329 [Sup Ct, Suffolk County 1984], *affd* 121 AD2d 498 [2d Dept 1986]; *Ringers' Dutchocs, Inc. v S.S.S.L. 180*, 494 F2d 678 [2d Cir 1974]), it, too, is inapplicable.

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

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

ENTERED: MAY 8, 2018

CLERK

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

6479 The People of the State of New York, Respondent, Ind. 3748/15

-against-

Christopher Brooks, Defendant-Appellant.

_____

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

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

_____

Judgment, Supreme Court, New York County (Jill Konviser, J.), rendered June 29, 2016, convicting defendant, upon his guilty plea, of attempted criminal possession of a weapon in the second degree, and sentencing him to a term of three years, unanimously affirmed.

Upon our in camera review of search warrant documents, we find that there was probable cause to issue the warrant (*see*

Spinelli v United States, 393 US 410 [1969]; *Aguilar v Texas*, 378 US 108 [1964]).

We perceive no basis for reducing the sentence.

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

ENTERED: MAY 8, 2018

CLERK

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

6480-
6481 Index 117926/09

Viola Pugh,
Plaintiff-Appellant,

-against-

The City of New York,
Defendant-Respondent,

Shavon Keith,
Defendant-Appellant.

_____

Miller Eisenman & Kanuck, LLP, New York (Michael P. Eisenman of counsel), for Viola Pugh, appellant.

Maura Lilling Naparty, LLP, Woodbury (Seth M. Weinberg of counsel), for Shavon Keith, appellant.

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

_____

Judgment, Supreme Court, New York County (Margaret A. Chan, J.), entered June 29, 2017, upon a jury verdict, which, insofar as appealed from, found in favor of defendant The City of New York and dismissed the action as against it, unanimously affirmed, without costs. Appeal from order, same court and Justice, entered October 19, 2016, which denied plaintiff's and defendant-appellant's motions to set aside the jury's liability verdict as against the weight of the evidence, unanimously dismissed, without costs, as subsumed in the appeal from the judgment.

Plaintiff passenger, who was seated in defendant driver Shavon Keith's double-parked car, on a one-way, single traffic-lane street in Manhattan, was injured when a New York City fire truck, en route to an emergency call, attempted to maneuver around Keith's vehicle, but scraped its left rear panel. Keith was admittedly in a nearby laundromat collecting her laundry. From the vantage point of the operator of the fire truck, the driver's seat of Keith's car appeared unoccupied, and the double-parked car remained stationary despite the fire truck's activation of its siren, emergency lights, and horn. The fire truck operator evaluated the situation before attempting to move the truck around the double-parked car, and he was successful in getting 75% of the fire truck safely past the back end of Keith's car before there was contact.

On these facts, the trial court appropriately ruled that plaintiff and defendant Keith were not entitled to a directed verdict on the issue of the fire truck operator's negligence, inasmuch as the typical rear-end collision cases had no application here (*see generally Bajrami v Twinkle Cab Corp.*, 147 AD3d 649 [1st Dept 2017]); rather, the ordinary negligence standard governed, grounded in the reasonableness of the fire truck operator's actions in light of the circumstances presented (*see generally Andre v Pomeroy*, 35 NY2d 361 [1974]; *S & S Mach.*

Corp. v Manufacturers Hanover Trust Co., 219 AD2d 249 [1st Dept 1996]; *La Rose v Amazon Assoc.*, 139 AD2d 568 [2d Dept 1988]; *see also* Vehicle and Traffic Law §§ 1144 [a]; 1202 [a][1][a]). The trial court correctly denied the motion and cross motion by plaintiff and defendant Keith, respectively, to set aside the verdict as against the weight of the evidence (*see Lolik v Big V Supermarkets*, 86 NY2d 744, 746 [1995]).

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

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

ENTERED: MAY 8, 2018

CLERK

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

6482 Gadi Wolberg, Index 653621/16
Plaintiff-Respondent,

-against-

IAI North America, Inc., et al.,
Defendants-Appellants.

_____

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

Resiman, Rubeo, McClure & Altman, LLP, Hawthorne (Sharman T. Propp of counsel), for respondent.

_____

Order, Supreme Court, New York County (Nancy M. Bannon, J.), entered on or about November 27, 2017, which, insofar as appealed from, denied defendants' motion to dismiss the complaint as against Israel Aerospace Industries, Ltd. (IAI) for lack of personal jurisdiction and to dismiss the causes of action for breach of a non-disparagement clause and tortious interference with prospective business relations pursuant to CPLR 3211(a)(1) and (7), unanimously modified, on the law, to grant the motion as to IAI and as to the cause of action for tortious interference with prospective business relations, and otherwise affirmed, without costs.

Defendants established that IAI North America, Inc. (IAINA), which does business in the State of New York, is not a mere department of IAI, which operates primarily in Israel, and

therefore that jurisdiction over IAINA is not jurisdiction over IAI (*see Taca Intl. Airlines, S.A. v Rolls-Royce of England*, 15 NY2d 97 [1965]). The key executive personnel of the subsidiary were not assigned to their positions by the foreign parent, the subsidiary trained its own personnel, the parent did not write and publish all of the sales literature used by the subsidiary, and the subsidiary prepared its own financial statements (*cf. id.* at 101-102). Moreover, the factors mentioned in *Volkswagenwerk AG. v Beech Aircraft Corp.* (751 F2d 117 [2d Cir 1984]), which we have adopted (*see e.g. FIA Leveraged Fund Ltd. v Grant Thornton LLP*, 150 AD3d 492, 493 [1st Dept 2017]), do not show that IAI may be subjected to New York jurisdiction. While IAINA is a wholly owned subsidiary of IAI, common ownership is "intrinsic to the parent-subsidiary relationship and, by [itself], not determinative" (*Porter v LSB Indus.*, 192 AD2d 205, 213-214 [4th Dept 1993]). IAINA showed that it observed corporate formalities. Nothing in plaintiff's affirmation indicates that IAI interferes in the selection and assignment of IAINA's executive personnel, and the CEO of IAINA denied this. He also denied that IAI controlled IAINA's marketing and operational policies. Plaintiff claimed that IAI had control over the approval of IAINA's annual budget during the 11 years he worked at IAINA. However, this does not suffice (*see id.* at 210, 213-

214).

IAINA (the only remaining defendant in this case) contends that the cause of action for breach of a non-disparagement clause should be dismissed because, even if it made disparaging remarks about plaintiff (its former employee), the remarks were privileged. However, the common interest privilege it relies on – which is part of the law of defamation – does not apply to a claim for breach of a non-disparagement clause (*see Arts4All, Ltd. v Hancock*, 25 AD3d 453, 454 [1st Dept 2006], *lv dismissed* 6 NY3d 891 [2006]). The mere fact that the absolute witness privilege applies to a claim for breach of a non-disparagement clause (*see Arts4All, Ltd. v Hancock*, 5 AD3d 106, 108 [1st Dept 2004]) does not mean that the qualified common interest privilege also applies to such a claim. An absolute privilege protects a greater public interest than a qualified privilege (*see Rosenberg v MetLife, Inc.*, 8 NY3d 359, 365 [2007]).

In any event, the common interest privilege defense would not dispose of the entire cause of action. While the privilege might apply to IAINA's statements to nonparty ELTA North America, Inc. (the subsidiary of IAINA that was going to hire plaintiff) (*see Sborgi v Green*, 281 AD2d 230 [1st Dept 2001]; *Amato v New York City Dept. of Parks & Recreation*, 110 AD3d 439 [1st Dept 2013]), IAINA failed to show that remarks made to *vendors* of IAI,

IAINA, or their subsidiaries or divisions are covered by that privilege. Indeed, we have cautioned, "There . . . is no general qualified privilege to issue . . . a defamatory statement . . . merely because it may serve to protect a business interest" (*Shenkman v O'Malley*, 2 AD2d 567, 577 [1st Dept 1956] [internal quotation marks omitted]).

The complaint fails to state a claim for tortious interference with prospective business relations, because it does not sufficiently allege that IAINA "acted solely out of malice or used improper or illegal means that amounted to a crime or independent tort" (*Amaranth LLC v J.P. Morgan Chase & Co.*, 71 AD3d 40, 47 [1st Dept 2009], *lv dismissed in part, denied in part* 14 NY3d 736 [2010]), i.e., that it acted "for the sole purpose of inflicting intentional harm on plaintiff[]" (*Carvel Corp. v Noonan*, 3 NY3d 182, 190 [2004] [internal quotation marks omitted]). IAINA showed that it had an economic self-interest (*see id.*) in preventing ELTA (its wholly owned subsidiary) from paying plaintiff $4,000 a month for four days' work while IAINA was paying plaintiff a salary and benefits for no work (*see generally Steiner Sports Mktg., Inc. v Weinreb*, 88 AD3d 482, 483 [1st Dept 2011]).

The complaint also fails to allege improper or illegal means. While defamation would suffice (*see Amaranth*, 71 AD3d at

47), the complaint fails to state a claim for defamation based on IAINA's statements to ELTA. The alleged statements that plaintiff was "dangerous" and had "chutzpah" are expressions of opinion (*see Mann v Abel*, 10 NY3d 271, 276 [2008], *cert denied* 555 US 1170 [2009]) or "[l]oose, figurative or hyperbolic statements" (*Dillon v City of New York*, 261 AD2d 34, 38 [1st Dept 1999]). The allegation that any of four named individuals made statements to another named individual and to "all IAINA employees" "in or about Spring 2016" or "in April or May 2016" is insufficiently specific (*see e.g. Dillon*, 261 AD2d at 38; *Simpson v Village Voice, Inc.*, 2007 NY Slip Op 32532[U], *9-10 [Sup Ct, NY County], *affd* 58 AD3d 421 [1st Dept 2009], *lv denied* 12 NY3d 710 [2009]). IAINA's statements to ELTA are protected by the common interest privilege (*see e.g. Miller v Mount Sinai Med. Ctr.*, 288 AD2d 72 [1st Dept 2001]).

Although the complaint does not contain a cause of action for tortious interference with contract, plaintiff contends that the cause of action for tortious interference with prospective business relations can be sustained as such a claim because the complaint alleges that he and ELTA had entered into an agreement. However, the only agreement mentioned in the complaint is an oral one for an indefinite term, which therefore was terminable at

will and, "as such, contemplated prospective contractual relations only" and "cannot support a claim for tortious interference with an existing contract" (*see Miller*, 288 AD2d at 72).

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

ENTERED: MAY 8, 2018

CLERK

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

6483 Christina Maynard-Keeler, Index 155950/15
Plaintiff-Respondent,

-against-

New York City Housing Authority,
Defendant-Appellant.

_____

Herzfeld & Rubin, P.C., New York (Linda M. Brown of counsel), for appellant.

Daniella Levi & Associates, P.C., Fresh Meadows (Steven L. Sonkin of counsel), for respondent.

_____

Order, Supreme Court, New York County (Nancy M. Bannon, J.), entered November 20, 2017, which denied defendant's motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

Although, under Administrative Code of City of NY § 16-123(a), defendant had no duty to remove snow and ice from the accident location, the court properly denied defendant's motion since it failed to demonstrate, as a matter of law, that it did not cause, create, or exacerbate the icy condition after it undertook to clean the sidewalk during the winter storm. Neither the testimony of the property's caretaker nor the affidavit of the supervisor of caretakers's indicates that they inspected the location before the accident and saw that it was properly treated with salt or sand (*see Pipero v New York City Tr. Auth.*, 69 AD3d

493 [1st Dept 2010]; *Renjifo v Bay Shore Estadio Rest., Inc.*, 55AD3d 485, 486 [1st Dept 2008]).

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

ENTERED: MAY 8, 2018

CLERK

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

6484-
6484A In re Angelica A.,

A Child Under Eighteen Years
of Age, etc.,

Carlos A.,
Respondent-Appellant,

Administration for Children's Services,
Petitioner-Respondent.

_____

Steven N. Feinman, White Plains, for appellant.

Zachary W. Carter, Corporation Counsel, New York (Carolyn Walther of counsel), for respondent.

Dawne A. Mitchell, The Legal Aid Society, New York (John A. Newbery of counsel), attorney for the child.

_____

Order of disposition, Family Court, Bronx County (Sarah P. Cooper, J.), entered on or about September 7, 2017, to the extent it brings up for review a fact-finding order, same court and Judge, entered on or about September 6, 2017, which found that respondent father neglected the subject child, unanimously affirmed, without costs. Appeal from fact-finding order, unanimously dismissed, without costs, as subsumed in the appeal from the order of disposition.

The finding that the father neglected the subject child is supported by a preponderance of the evidence. The record shows that the father inflicted excessive corporal punishment on the

child by striking her with the handle of a sword on the back of her head while chasing her down a flight of stairs, causing her to sustain, among other things, cuts and lacerations on and around her ear, a concussion, and swelling to her right finger. The child's out-of-court statements were sufficiently corroborated by the agency caseworker and hospital staff's observations of the child's injuries, photographs depicting the injuries, and medical records (*see Matter of Tyson T. [Latoyer T.]*, 146 AD3d 669 [1st Dept 2017]; *Matter of Harrhae Y. [Shy-Macca Ernestine B.]*, 112 AD3d 512 [1st Dept 2013]). Although the child's repetition of the same allegations that the father hit her in the back of the head with the sword handle did not provide corroboration for the out-of-court statements, the consistency of her reported statements enhanced her credibility (*see Matter of David R. [Carmen R.]*, 123 AD3d 483, 484 [1st Dept

2014]).

There exists no basis to disturb the court's credibility determinations (*see Matter of Irene O.*, 38 NY2d 776, 777 [1975]).

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

ENTERED: MAY 8, 2018

CLERK

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

6485 The People of the State of New York, Respondent, Ind. 5140/12

-against-

Marvin Alston, Defendant-Appellant.

_____

Seymour W. James, Jr., The Legal Aid Society, New York (David Crow of counsel), and Cahill Gordon & Reindel LLP, New York (Frederick Glasgow of counsel), for appellant.

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

_____

Judgment, Supreme Court, New York County (Patricia M. Nuñez, J.), rendered May 30, 2013, convicting defendant, upon his plea of guilty, of criminal sale of a controlled substance in the third degree, and sentencing him to a conditional discharge for a period of three years, unanimously modified, on the law and as an exercise of discretion, to the extent of vacating the sentence and remanding for judicial diversion consistent with this opinion, and otherwise affirmed.

The court improvidently exercised its discretion in denying defendant's request to participate in the judicial diversion program. The court based this determination on the erroneous ground that defendant had failed to establish that his "substance abuse or dependence [wa]s a contributing factor to [his] criminal

behavior" (CPL 216.05[3][b][iii]). "The statute does not require that a defendant's . . . substance abuse or dependence be the exclusive or primary cause of the defendant's criminal behavior," but "only requires that it be a contributing factor" (*People v DeYoung*, 95 AD3d 71, 79 [2d Dept 2012]). In this case, defendant pleaded guilty to selling cocaine to an undercover police officer for $300, and was found carrying that amount in prerecorded buy money, an additional $880 in cash, and three cell phones. Defendant reported that his heavy use of marijuana cost him about $50 to $60 per day. In light of these facts and other particular circumstances of this case, defendant's need for enough money to fund that habit evidently contributed to his criminal behavior of selling cocaine.

Accordingly, the court should order judicial diversion pursuant to CPL article 216, giving due recognition to the drug treatment program defendant has already completed. This result is consistent with one of the purposes of judicial diversion,

which is to permit a defendant to achieve a disposition other than a felony conviction, where appropriate.

We have considered and rejected the People's contentions regarding preservation.

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

ENTERED: MAY 8, 2018

CLERK

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

6486-
6487 Index 154225/16

John L. Barrett,
Plaintiff-Appellant,

-against-

Lori H. Goldstein, Esq., et al.,
Defendants-Respondents.

_____

Law Offices of Paul J. Giacomo, Jr., New York (Paul J. Giacomo, Jr. of counsel), for appellant.

Traub Lieberman Straus & Shrewsberry LLP, Hawthorne (Jonathan Harwood of counsel), for Lori H. Goldstein, respondent.

Lewis Brisbois Bisgaard & Smith LLP, New York (Jake Bedor of counsel), for Evan D. Schein, Marc Fleischer, and Berkman Bottger Newman & Rodd, LLP, respondents.

_____

Orders, Supreme Court, New York County (Arlene P. Bluth, J.), entered on or about January 3 and January 4, 2017, which granted the defendants' respective motions to dismiss the complaint, unanimously affirmed, without costs.

Plaintiff failed to state a claim for legal malpractice against defendant Lori H. Goldstein (*Ulico Cas. Co. v Wilson, Elser, Moskowitz, Edelman & Dicker*, 56 AD3d 1, 10 [1st Dept 2008]). The documentary evidence conclusively establishes that she was not acting as plaintiff's attorney. Rather, the terms of the post-nuptial agreement which plaintiff now challenges, as well as numerous emails between plaintiff, his former wife, and

Goldstein, reflect the parties' understanding and agreement that Goldstein would draft the post-nuptial agreement, and the spouses' separate counsel would review it before execution. Accordingly, plaintiff has not sufficiently alleged an attorney-client relationship between him and Goldstein, or that she was negligent and that her negligence was the "but for" cause of his alleged injuries (*id.*).

Neither has plaintiff stated a legal malpractice claim against the remaining defendants, who reviewed the post-nuptial agreement and/or served as his counsel in the divorce action. He cannot explain how their failure to challenge the terms of the post-nuptial agreement in the divorce action was the "but for" cause of his alleged damages, given that his subsequent counsel also did not challenge the terms of the agreement (*id.*). In any event, plaintiff concedes that he made a strategic decision not to challenge the terms of the agreement in the divorce action.

The claims for fraud and breach of fiduciary duty are

duplicative of the legal malpractice claim, since they all arose from identical facts and allege the same damages (*Voutsas v Hochberg*, 103 AD3d 445, 446 [1st Dept 2013], *lv denied* 22 NY3d 853 [2013]).

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

ENTERED: MAY 8, 2018

CLERK

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

6488 Edna Fernandez, et al., Index 20951/12
Plaintiffs-Respondents,

-against-

Willi F. Santos,
Defendant,

Vigor Leasing Corp, et al.,
Defendants-Appellants.

_____

Cartafalsa, Slattery, Turpin & Lenoff, New York (Patricia A. Hughes of counsel), for Vigor Leasing Corp, appellant.

Picciano & Scahill, P.C., Bethpage (Keri A. Wehrheim of counsel), for Jill J. Williams, appellant.

Belushin Law Firm, P.C., Brooklyn (Georgette Hamboussi of counsel), for respondents.

_____

Order, Supreme Court, Bronx County (Kenneth L. Thompson Jr., J.), entered on or about November 30, 2016, which, inter alia, granted plaintiffs' motion to vacate a prior order, same court and Justice, entered May 29, 2015, granting the motion of defendant Jill J. Williams and the cross motion of defendant Vigor Leasing Corp. (Vigor) for summary judgment dismissing the complaint and all cross claims as against them, upon plaintiffs' default, unanimously reversed, on the law and the facts, without costs, and the motion to vacate denied.

In 2015, defendants Williams and Vigor separately moved for summary judgment dismissing the complaint as against them. The

court granted the motions on plaintiffs' default, and the order was entered May 29, 2015. According to affidavits of service, both defendants served plaintiffs with the default order and notice of entry. More than one year later, by notice dated July 27, 2016, plaintiffs moved to vacate the default, and to serve their opposition papers to the motions for summary judgment.

In support of the motion to vacate, plaintiffs' counsel affirmed that he had timely prepared opposition papers, but due to law office failure, the nature of which counsel failed to describe in any detail, the papers were never filed. Counsel affirmed that he was under the impression the motion was still being considered by the court when he happened to discover the default order. He further affirmed that, despite defendants' sworn affidavits of service, he was never served with the notices of entry of the default order.

Here, in addition to the untimeliness of this CPLR 5015 motion to vacate, the bare and unsubstantiated assertions of law office failure are insufficient to establish a reasonable excuse for the default (*see Galaxy Gen. Contr. Corp. v 2201 7th Ave. Realty LLC*, 95 AD3d 789, 790 [1st Dept 2012]). Moreover, the record shows that plaintiffs had a prior pattern of dilatory conduct, indicating that the default was not an excusable isolated event or inadvertent error (*see Roussodimou v*

Zafiriadis, 238 AD2d 568 [2d Dept 1997]; *compare Chevalier v 368 E. 148th St. Assoc., LLC*, 80 AD3d 411 [1st Dept 2011]). Because plaintiffs failed to provide an acceptable excuse for the default, it is unnecessary to address whether they demonstrated a meritorious cause of action (*see Gonzalez v Praise the Lord Dental*, 79 AD3d 550 [1st Dept 2010]). However, were we to reach this issue, we would also find that plaintiffs lacked a meritorious cause of action.

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

ENTERED: MAY 8, 2018

CLERK

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

6489 Alfredo Cianfano, Index 25081/14E
Plaintiff-Appellant,

-against-

Angelina's Ristorante & Brick Oven Pizza, et al.,
Defendants,

Angelina's of Tuckahoe Inc.,
Defendant-Respondent.

_____

Michael Konopka & Associates, P.C., New York (Michael Konopka of counsel), for appellant.

Law Office of James J. Toomey, New York (Jason Meneses of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (Mary Ann Brigantti, J.), entered December 5, 2017, which granted the motion of defendant Angelina's of Tuckahoe Inc. (Angelina's) for summary judgment dismissing the complaint and all cross claims as against it, unanimously affirmed, without costs.

Plaintiff pedestrian was injured when, while crossing the street, he was struck by a vehicle driven by defendant Elvis Ramirez, who worked as a delivery person for Angelina's. The court properly found that Angelina's established its entitlement to judgment as a matter of law by showing that Ramirez was not acting within the scope of his employment at the time of the accident. Both Ramirez and of an owner of Angelina's testified

that at the time of the accident, Ramirez was not going to or returning from a delivery, as he was on his way home, and had no food in the car (*see Weimer v Food Merchants*, 284 AD2d 190 [1st Dept 2001]).

In opposition, plaintiff failed to raise a triable issue of fact. Plaintiff's argument that Ramirez was acting within the scope of his employment because he turned left rather than right to head home, is unavailing since Ramirez testified that he used a variety of routes to travel home.

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

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

ENTERED: MAY 8, 2018

CLERK

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

6490 The People of the State of New York, Respondent, Ind. 1319/13

-against-

Michael Tammaro, Defendant-Appellant.

_____

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

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

_____

Judgment, Supreme Court, New York County (A. Kirke Bartley, Jr., J.), rendered May 8, 2015, convicting defendant, after a jury trial, of forgery in the in the second degree (three counts), criminal possession of a forged instrument in the second degree (three counts), identity theft in the first degree and grand larceny in the fourth degree, and sentencing him to an aggregate term of 2⅓ to 7 years, unanimously affirmed.

The court providently exercised its discretion in denying defense counsel's application to replace as grossly unqualified a sworn juror whose conduct and statements initially raised questions about his ability to deliberate fairly in light of pressures related to his work and his willingness to join other jurors in deliberation. The juror's responses to the court's thorough inquiry provided unequivocal and credible assurances

that he did not possess a state of mind that would prevent him from deliberating fairly and rendering an impartial verdict (*see People v Buford*, 69 NY2d 290, 299 [1987]). After the inquiry, his ability to serve impartially was no longer questionable.

Defendant's challenges to the prosecutor's summation are unpreserved and we decline to review them in the interest of justice. As an alternative holding, we find no basis for reversal. To the extent the existing record permits review of defendant's argument that his attorney was ineffective for failing to make appropriate objections to the summation, we find that defendant received effective assistance under the state and federal standards (*see People v Benevento*, 91 NY2d 708, 713-714 [1998]; *Strickland v Washington*, 466 US 668 [1984]). The challenged remarks generally constituted fair comment on the evidence and reasonable inferences to be drawn therefrom (*see People v Overlee*, 236 AD2d 133 [1st Dept 1997], *lv denied* 91 NY2d 976 [1992]; *People v D'Alessandro*, 184 AD2d 114, 118-119 [1st Dept 1992], *lv denied* 81 NY2d 884 [1993]). The prosecutor was entitled to argue, among other things, that the defense theory of

the case was implausible, and any rhetorical excesses were harmless in light of the overwhelming evidence of guilt (*see People v Crimmins*, 36 NY2d 230 [1975]).

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

ENTERED: MAY 8, 2018

CLERK

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

6491 Michael Skelly, Index 22361/16E
Plaintiff-Appellant,

-against-

New York City Health & Hospitals Corporation, et al.,
Defendants-Respondents.

_____

Filosa Law Firm, PLLC, New York (Gregory N. Filosa of counsel), for appellant.

Zachary W. Carter, Corporation Counsel, New York (Jonathan A. Popolow of counsel), for respondents.

_____

Order, Supreme Court, Bronx County (Mary Ann Brigantti, J.), entered December 19, 2016, which granted defendants' CPLR 3211 (a)(7) motion to dismiss plaintiff's complaint alleging violation of Labor Law § 741, unanimously reversed, on the law, without costs, and the motion denied.

Plaintiff Michael Skelly, a former attending physician in Lincoln Hospital's Department of Infectious Diseases, alleges that he was terminated from his position in retaliation for his objection to or refusal to comply with defendants' alleged policy or practice of not testing the residential drinking water of patients diagnosed with Legionnaire's disease for the Legionella bacteria during an outbreak of the disease in the summer of 2015 (Labor Law § 741[2][b]). He disagrees with the public position

taken by the New York City Department of Health and Mental Hygiene that the bacteria was found only in cooling towers and not in residential drinking water, and reasonably believes that the practice of not testing the residential drinking water of the patients constituted "improper quality of patient care."

Plaintiff has sufficiently pleaded the notice requirement set forth in Labor Law § 741(3). Under that provision, an employee may not bring an action "unless the employee has brought the improper quality of patient care to the attention of a supervisor and has afforded the employer a reasonable opportunity to correct such activity, policy or practice" (Labor Law § 741[3]). Although the statutory language expressly contemplates an affirmative act of objection to a policy or practice, strict compliance with the requirement here "would not serve the purpose of the statute" (*Tipaldo v Lynn*, 26 NY3d 204, 212 [2015]). In view of the allegations that plaintiff's supervisors had directed him to stop testing residential drinking water of the patients, and to not associate himself with the hospital if he insisted on continuing to do so, any express objections to the practice or policy would have been futile. Further, the fact that plaintiff insisted on testing the water despite directives to stop shows that his supervisors were aware, and therefore had notice, of his objection.

Defendants argue, in the alternative, that plaintiff cannot show that their alleged policy or practice of not testing residential drinking water constituted "improper quality of patient care." They contend that because they had no authority to test the patients' residential drinking water – a responsibility that was entrusted to the Department of Health and Mental Hygiene under the New York City Charter – their failure to engage in such testing cannot constitute "improper quality of patient care." However, dismissal on this ground would be premature at this juncture. Even if it is true that the Department of Health and Mental Hygiene is responsible for testing the City's drinking water, such does not necessarily mean that defendants have no separate and independent obligation to do so. Discovery should be allowed to proceed on this point. Further, the complaint has sufficiently pleaded the requirements of Labor Law §§ 741(2)(b) and 741(1)(d), as the allegations show that defendants engaged in a policy or practice of not testing residential drinking water of patients diagnosed with Legionnaire's disease, that plaintiff had objected to or refused

to participate in such policy or practice, and that he reasonably believed the policy or practice may present a substantial and specific danger to public health or safety.

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

ENTERED: MAY 8, 2018

CLERK

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

6495 Joel Polanco, Index 305993/10
Plaintiff-Appellant,

-against-

Mandez Holkmann,
Defendant-Respondent.

_____

Mitchell Dranow, Sea Cliff, for appellant.

Richard T. Lau & Associates, Jericho (Gene W. Wiggins of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (Joseph E. Capella, J.), entered on or about April 6, 2017, which, to the extent appealed from as limited by the briefs, granted defendant's motion for summary judgment dismissing the complaint based on plaintiff's inability to establish that he suffered a serious injury to his lumbar spine within the meaning of Insurance Law § 5102(d), unanimously affirmed, without costs.

Defendant satisfied his prima facie burden of demonstrating that plaintiff did not sustain a serious injury to his lumbar spine as a result of the subject 2009 motor vehicle accident. Defendant submitted plaintiff's medical records, which included reports of MRIs of his lumbar spine, taken after a prior accident in 2000 and the subject accident in 2009, showing the same herniated disc (*see Nakamura v Montalvo*, 137 AD3d 695, 696 [1st

Dept 2016] *Alvarez v NYLL Mgt. Ltd.*, 120 AD3d 1043 [1st Dept 2014], *affd* 24 NY3d 1191 [2015]). Defendant also submitted the report of an orthopedist, who found that plaintiff had full range of motion and negative test results in his lumbar spine (*see Vishevnik v Bouna*, 147 AD3d 657, 658 [1st Dept 2017]).

In opposition, plaintiff failed to raise an issue of fact as to whether his claimed lumbar spine injury was causally related to the 2009 accident. Plaintiff submitted, inter alia, the report of a doctor who examined him over five years after the accident, and provided only a conclusory opinion that plaintiff's limitations in range of motion were caused by the subject accident, without sufficiently addressing the preexisting conditions documented in plaintiff's medical records (*see Nakamura* at 696; *McArthur v Act Limo, Inc.*, 93 AD3d 567, 568 [1st Dept 2012]).

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

ENTERED: MAY 8, 2018

CLERK

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

6496N Anastasia Frangiadakis, as Administratrix of the Estate of Constantine Bazas, Deceased, et al.,
Plaintiffs-Respondents,

-against-

51 West 81st Street Corp., et al.,
Defendants-Appellants,

Midboro Management Inc., et al.,
Defendants.

- - - - -

[And Third-Party Actions]

Index 150538/14

_____

Mauro Lilling Naparty, LLP, Woodbury (Matthew W. Naparty of counsel), for appellants.

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

_____

Order, Supreme Court, New York County (Kelly O'Neill Levy, J.), entered August 29, 2017, which granted plaintiffs' motion to amend the complaint to add a cause of action for wrongful death, unanimously affirmed, without costs.

The motion court properly granted plaintiffs' motion to amend the complaint to include a cause of action for wrongful death. CPLR 3025(b) governs permissive leave to amend a pleading, and it states that leave "shall be freely given upon such terms as may be just including the granting of costs and continuances." Further, as we have stated, to support amending a

personal injury complaint to add a cause of action for wrongful death, plaintiffs were required to submit "competent medical proof of the causal connection between the alleged malpractice and the death of the original plaintiff" (*Gambles v Davis*, 32 AD3d 224, 225 [1st Dept 2006]). The affirmation of plaintiffs' expert, which stated that to a reasonable degree of medical certainty the decedent's injury led to his death, was sufficient, for the purposes of CPLR 3025(b), to establish a causal connection between the decedent's death and the originally alleged negligence by defendants (*see Pier 59 Studios, L.P. v Chelsea Piers, L.P.*, 40 AD3d 363, 366 [1st Dept 2007]; *see also Matter of Tobin v Steisel*, 64 NY2d 254, 259 [1985]). Plaintiff's submission of the expert's affirmation on reply is not fatal to the motion, because defendant was permitted to submit a surreply.

We have considered and rejected defendants' remaining arguments.

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

ENTERED: MAY 8, 2018

CLERK

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

6497N Oumar Diakhite, Index 111248/08
Plaintiff,

-against-

The City of New York, et al.,
Defendants.
- - - - -
Raymond Schwartzberg & Associates, PLLC,
Nonparty Appellant,

-against-

Edelman, Krasin & Jaye PLLC,
Nonparty Respondent.

Raymond Schwartzberg & Associates, PLLC, New York (Steven I. Brizel of counsel), for appellant.

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

Order, Supreme Court, New York County (Margaret A. Chan, J.), entered January 25, 2017, which denied the motion of non-party appellant Raymond Schwartzberg & Associates, PLLC to reject the report of the Special Referee, dated August 31, 2015, granted the motion of nonparty respondent Edelman, Krasin & Jaye PLLC to confirm the referee's report, and directed that the Edelman firm was entitled to 95% of the net contingency fee earned in this action and that appellant was entitled to 5% of the fee, unanimously affirmed, without costs.

The referee's findings are supported by the record (*see Lai Ling Cheng v Modansky Leasing Co.*, 73 NY2d 454, 458 [1989]; *Board of Mgrs. of Boro Park Vil.-Phase I Condominium v Boro Park Townhouse Assoc.*, 284 AD2d 237, 238 [1st Dept 2001]). He considered the relevant factors including the amount of time spent by the attorneys on the case, the nature and quality of the work performed and the relative contributions of counsel toward achieving the outcome (*Lai Ling Cheng*, 73 NY2d at 458; *Board of Mgrs.*, 284 AD2d at 237).

We have considered appellant's remaining arguments, including that the motion court should have rejected respondent's cross motion as untimely, and find them unavailing.

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

ENTERED: MAY 8, 2018

CLERK

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

6498N Ronald Janis, et al., Index 152962/17
Plaintiffs-Appellants,

-against-

Janson Supermarkets LLC, et al.,
Defendants-Respondents,

Innovasion Cuisine Enterprises Inc., et al.,
Defendants.

_____

Michael G. O'Neill, New York, for appellants.

Ahmuty, Demers & McManus, Albertson (Nicholas M. Cardascia of counsel), for respondents.

_____

Order, Supreme Court, New York County (Erika M. Edwards, J.), entered September 11, 2017, which, inter alia, granted the motion of defendants Janson Supermarkets LLC, Janson Supermarkets II LLC and Wakefern Food Corp. (Wakefern) to change venue from New York County to Suffolk County, unanimously reversed, on the law, without costs, and the motion denied.

Wakefern, a foreign corporation, submitted a copy of its application for authorization to conduct business filed with the Secretary of State, in which it identified New York County as "[t]he county within this state where its office is to be located" (Business Corporation Law § 1304[a][5]). Wakefern's designation of New York County in its application is controlling

for venue purposes, even if it does not actually have an office in New York County (*see Crucen v Pepsi-Cola Bottling Co. of N.Y., Inc.*, 139 AD3d 538 [1st Dept 2016]; *Shetty v Volvo Cars of N. Am., LLC*, 38 AD3d 202 [1st Dept 2007]; *Job v Subaru Leasing Corp.*, 30 AD3d 159 [1st Dept 2006]; CPLR 503[c]).

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

ENTERED: MAY 8, 2018

CLERK