SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

JUNE 11, 2019

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Acosta, P.J., Manzanet-Daniels, Kapnick, Kahn, Oing, JJ.

8697 In re Lerone Washington, Index 101239/16
Petitioner-Appellant,

-against-

Shola Olatoye, etc., et al.,
Respondents-Respondents.

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Jeanette Zelhof, Mobilization for Justice, Inc., New York (Elizabeth Filatova of counsel), for appellant.

Kelly D. MacNeal, New York (Nabiha Rahman of counsel), for respondents.

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Judgment, Supreme Court, New York County (Arthur F. Engoron, J.), entered November 3, 2017, denying the petition to annul respondents' determination, dated April 1, 2016, which, after a hearing, placed petitioner tenant on probation for one year and required him to remove his dog from his apartment, and dismissing the proceeding brought pursuant to CPLR article 78, unanimously vacated, on the law, without costs, the proceeding treated as one transferred to this Court pursuant to CPLR 7804(g) for de novo review, and, upon such review, the matter held in abeyance and the proceeding remanded to respondent for further proceedings in

accordance with this order.

Since the petition raised a substantial evidence issue and could not be disposed of by other objections, the court should have transferred it to this Court pursuant to CPLR 7804(g) (*see Matter of Roberts v Rhea*, 114 AD3d 504 [1st Dept 2014]). Accordingly, we will "treat the substantial evidence issues de novo and decide all issues as if the proceeding had been properly transferred" (*Matter of Jimenez v Popolizio*, 180 AD2d 590, 591 [1st Dept 1992]).

In determining that petitioner's English bulldog, Onyx, did not qualify as a "service pet" and ordering its removal, the hearing officer failed to consider petitioner's evidence in support of his reasonable accommodation request for a service pet. We accordingly hold this petition in abeyance and remand for a determination of petitioner's request for a reasonable accommodation that he be allowed to register Onyx as an emotional support animal.

In terms of its procedural background, this proceeding stems from a dog bite incident that occurred in April 2015 when a NYCHA employee, Brenda Williams, was delivering a hotplate to petitioner's apartment. After petitioner's girlfriend, Mabel Rodriguez, opened the door to sign the employee's book for the hotplate, Onyx "shot past" her into the hallway, jumped on the

NYCHA employee, and allegedly bit her left arm. Petitioner was not in the apartment when the incident occurred.

By letter dated April 2, 2015, NYCHA informed petitioner that it was considering terminating his lease due to his having an unauthorized dog in the apartment, and offered him the opportunity to discuss the matter further. That same day, petitioner reported to the management office and was told to remove the dog, as it was unauthorized in violation of NYCHA's policy. Petitioner stated that he was disabled and needed the dog and refused to remove it.

On May 11, 2015, NYCHA notified petitioner that it would seek to terminate his tenancy for non-desirability and breach of its rules and regulations because: (1) petitioner possessed a "vicious" dog in the apartment, in violation of the lease and NYCHA's pet policy; (2) petitioner failed to register or maintain his dog, in violation of the lease and pet policy, and (3) petitioner failed to control his dog, which resulted in the dog roaming unleashed on NYCHA's premises and attacking another person.

On June 29, 2015, NYCHA referred petitioner to an outreach organization for a mental competence evaluation. The social worker who evaluated petitioner noted that he suffers from anxiety and depression and received services at Lighthouse Guild,

where he had been diagnosed with schizophrenia. Petitioner told the evaluator that he had a history of hearing voices and that walking his dog helped provide him comfort; he noted that he was in the process of registering Onyx as a service dog. It was recommended that petitioner be appointed a guardian ad litem, "given his fragile psychological state and tendency to decompensate under pressure."

On December 24, 2015, prior to the hearing, petitioner submitted a request that he be permitted to register Onyx as his emotional support dog as a reasonable accommodation for his mental disability. His request was supported by a letter dated December 7, 2015, signed by a doctor and social worker at Lighthouse, stating that petitioner has been diagnosed with schizophrenia, cognitive disorder, and a traumatic brain injury, as well as severe depression and anxiety, and that his dog provides him with emotional support.

In January of 2016, petitioner appeared for a hearing before Hearing Officer Desiree Miller-Beauvil. Petitioner, Ms. Williams, Ms. Rodriguez, and Sean Washington, a housing assistant, testified at the hearing. Documents including the income affidavit, petitioner's reasonable accommodation request, veterinary records, and the Lighthouse Guild letter were received into evidence.

On March 8, 2016, the Hearing Officer sustained the charges against petitioner, required him to remove the dog from his apartment immediately and placed him on probation for one year, so that compliance could be monitored. The hearing officer found that petitioner's dog was "vicious" and a source of danger to NYCHA employees and residents. She noted that the dog would cause financial hardship for NYCHA if he injured other residents or employees. While recognizing petitioner's mental health issues, the decision failed to address petitioner's reasonable accommodation request that he be allowed to register Onyx pursuant to NYCHA policies even though the request and petitioner's mental health records were entered into evidence at the hearing. It addressed only the charges against petitioner contained in NYCHA's May 2015 notice. The hearing officer's decision was adopted by NYCHA's corporate secretary on April 1, 2016.

By letter dated April 4, 2016, NYCHA, responding to petitioner's reasonable accommodation request, notified petitioner that there was a determination that "the dog presents a risk to residents and employees and has to be removed from the apartment immediately." A NYCHA Housing Assistant explained that the reasonable accommodation request was denied because it was based on the same "operative facts" before the Hearing Officer,

who had determined that the dog presents a risk to residents and employees and has to be removed.

Under the Fair Housing Amendments Act (FHAA), it is unlawful discrimination for a housing provider to "refus[e] to make reasonable accommodations in rules, policies, practices, or services, when such accommodations may be necessary to afford such person equal opportunity to use and enjoy a dwelling" (42 USC § 3604[f][3][B]). Federal regulations exempt "animals that assist, support, or provide service to persons with disabilities" from public housing authority pet rules (24 CFR § 960.705[a]). Accordingly, respondent is obligated by both federal law and its own rules to accommodate petitioner's request to maintain his emotional support animal, Onyx, so long as petitioner meets his burden of showing that his dog assists him with aspects of his disability.

Courts employ a balancing test to determine whether an accommodation is reasonable. Under the test, an accommodation is reasonable if it "imposes no undue financial or administrative hardships" on the respondent "and when it does not undermine the basic purpose of the [challenged] requirement" (*Hubbard v Samson Mgmt. Corp.*, 994 F Supp 187, 190 [SD NY 1998] [internal quotation marks and citations omitted]). The Hearing Officer conducted no such analysis. Instead, the Hearing Officer found that

petitioner's dog had to be removed immediately because it was alleged to have bitten a NYCHA employee on one occasion. Although the Hearing Officer appeared to rely on the "direct threat" exemption to the FHAA, she failed to undertake the requisite factual and legal analysis.

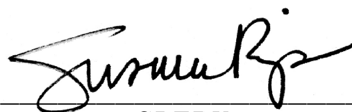
Federal regulations provide that a housing provider can only invoke the direct threat exception after conducting an individualized and objective assessment of the relevant factors, including (1) the nature, duration, and severity of the risk; (2) the probability that the potential injury will actually occur; and (3) whether any reasonable accommodations will mitigate the risk (24 CFR § 9.131[c]). The "direct threat" analysis has been applied to cases in which a person with a disability is seeking to maintain an emotional support pet as a reasonable accommodation (*see Warren v Delavista Towers Condominium Assn., Inc.*, 49 F Supp3d 1082, 1087-1088 [SD Fla 2014]; *Chavez v Aber*, 122 F Supp3d 581, 597-599 [WD Tex 2015]; *see also* Pet Ownership for the Elderly and Persons with Disabilities, Final Rule, 73 FR 63834-01, 63837 [2008] [a housing provider may exclude an assistance animal only when it "poses a direct threat and its owner takes no effective action to control the animal's behavior so that the threat is mitigated or eliminated"]).

Because the Hearing Officer failed to address petitioner's

reasonable accommodation request, the present record precludes adequate review by this Court (*see Matter of Porter v New York Hous. Auth.*, 169 AD3d 455, 463 [1st Dept 2019]; *A.F.C. Enters., Inc. v New York City Tr. Auth.*, 79 AD3d 514 [1st Dept 2010]). As such, we hold the petition in abeyance and remand the proceeding to NYCHA for a determination, on the existing record, in accordance with this decision.

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

ENTERED: JUNE 11, 2019



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Richter, J.P., Gische, Kapnick, Kahn, Kern, JJ.

4634 The People of the State of New York, Ind. 971/14
Respondent,

-against-

Darryl Brown,
Defendant-Appellant.

Koehler & Isaacs, LLP, New York (Joey Jackson of counsel), for appellant.

Darcel D. Clark, District Attorney, Bronx (Clara H. Salzberg of counsel), for respondent.

Upon remittitur from the Court of Appeals for determination of undecided issues (__NY3d__, 2019 NY Slip Op 03529 [2019]), judgment, Supreme Court, Bronx County (Robert A. Neary, J.), rendered November 2, 2016, convicting defendant, after a jury trial, of manslaughter in the first degree, and sentencing him to a term of 18 years, unanimously affirmed.

Defendant, who failed to object during the summation and who also declined any remedy after making a belated postsummation objection, failed to preserve his claim that the prosecutor committed misconduct by arguing to the jury that justification was not “a part of this case,” after the court had declined to give the jury an instruction to that effect, and we decline to review it in the interest of justice. As an alternative holding, we find that the challenged remarks did not deprive defendant of

a fair trial (*see People v Rodriguez*, 52 AD3d 399 [1st Dept 2008], *lv denied* 11 NY3d 834 [2008]; *People v D'Alessandro*, 184 AD2d 114, 118-120 [1st Dept 1992], *lv denied* 81 NY2d 884 [1993]).

Defendant's contention that the court sentenced him on the basis of misinformation is not supported by the record, and we perceive no basis for reducing the sentence.

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

ENTERED: JUNE 11, 2019

CLERK

Sweeny, J.P., Manzanet-Daniels, Kern, Singh, JJ.

8849 The People of the State of New York, Ind. 1221/13
Respondent,

-against-

Darryl Hemphill,
Defendant-Appellant.

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

Darcel D. Clark, District Attorney, Bronx (Jordan K. Hummel of counsel), for respondent.

Judgment, Supreme Court, Bronx County (Steven L. Barrett, J.), rendered January 6, 2016, convicting defendant, after a jury trial, of murder in the second degree, and sentencing him to a term of 25 years to life, affirmed.

Defendant was charged with two counts of second-degree murder in connection with an April 6, 2006 incident in which two-year-old David Pacheco, Jr. was shot and killed by a stray bullet that had entered his mother's minivan as they were driving on Tremont Avenue in the Bronx.

On the date of the incident, which was Easter Sunday, Ronell Gilliam, along with a black male who was wearing a blue sweater or blue shirt, got into a physical fight with a group of men and women in the street around Tremont Avenue. At some point shortly after that altercation, the fatal stray bullet was fired. The

police interviewed eyewitnesses, including Michelle Gist, who identified Gilliam as one of the men involved. Police searched Gilliam’s apartment and found a blue sweater in a plastic bag.

Soon thereafter, the police suspected that Gilliam’s best friend, Nicholas Morris, had been with Gilliam and had committed the shooting. Police searched Morris’s apartment and found guns and ammunition, including a 9 millimeter cartridge, the type of ammunition used in the shooting. The next day, Morris appeared on a television news broadcast on Bronx News 12, proclaiming his innocence. Morris was arrested, and police observed bruises on his knuckles consistent with his having been in a fistfight. At the time of Morris’s arrest, at least three witnesses had identified Morris to police as the shooter.

In 2008, Morris was indicted and the prosecution proceeded to trial against him. However, when Morris’s DNA was compared to DNA taken from the blue sweater recovered from Gilliam’s apartment in 2006, it was determined that there was no match. Thus, in April 2008, the court declared a mistrial in Morris’s case with the prosecution’s consent. In May 2008, after having served two years in prison, Morris pleaded guilty, against his counsel’s advice, to possessing a .357 caliber gun on the day of the shooting, in exchange for his immediate release from prison.

In 2011, the prosecution obtained the DNA of defendant,

Gilliam's cousin, and tested it against the DNA found on the blue sweater recovered from Gilliam's apartment in 2006. Defendant's DNA was a match for the DNA found on the sweater. Two years later, in 2013, defendant was arrested and indicted.

At defendant's trial in 2015, 29 witnesses testified for the People, including, among others, the group of people that were involved in the altercation before the shooting; Gist, an eyewitness who had known defendant from the neighborhood and saw him during the fight; three other eyewitnesses to the fight and shooting; Gilliam, defendant's cousin and accomplice; members of defendant's family and one of defendant's friends; and certain police officers and experts. Photographs, reports, ballistic evidence from the scene and the blue sweater containing defendant's DNA were admitted at trial. One of defendant's friends testified for the defense.

At the trial, the eyewitnesses all described the shooter as a thin African American man wearing a blue shirt or blue sweater and a hat. Some of the eyewitnesses also testified that they observed that the shooter had a tattoo on his right forearm. At some point after these witnesses testified, defendant displayed to the jury his arms revealing "D.A," defendant's nickname and "10453," a zip code, tattooed on his right arm. Additionally, the video of Morris's interview at the News 12 Bronx office was

introduced and played to the jury without sound to show that Morris had no tattoos on his arms.

One of the detectives testified that after the shooting, he spoke to Gist, who had recognized two men involved in the fight, Gilliam and Morris. The detective testified that the police gained access to Gilliam's apartment, where they recovered from a closet the blue sweater in a plastic bag. He testified that when he opened the plastic bag, he smelled burnt gunpowder residue. However, lab testing of the sweater was inconclusive as to whether it contained gunpowder residue.

Gist testified that she first told police that three people were present at the initial altercation with the other group - Gilliam, Morris and defendant - but that she only saw Gilliam and defendant involved in the fighting. She denied telling the police that only Gilliam and Morris were involved. She identified defendant in court and testified that she knew him from the neighborhood. Defendant's grandmother testified that on Easter Sunday in 2006, the date of the incident, defendant had been wearing a blue sweater.

Police officers testified that when they were searching Gilliam's apartment, an officer overheard a phone call between Gilliam's brother William, who was present in the apartment during the search, and Gilliam, who was evading the police, in

which Gilliam asked William if the police were there and told William to get rid of "the shirt."

Gilliam testified as follows. After the shooting, he saw Morris, his brother William, defendant and defendant's girlfriend in the lobby of his apartment building, and defendant took off the blue sweater once inside the apartment and told Gilliam to hold two guns, Morris's .357 caliber and defendant's 9 millimeter. A friend called Gilliam and told him that the police were looking for someone matching his description for a shooting, and Gilliam relayed this information to defendant. Defendant told him to get rid of the blue sweater and guns, so Gilliam took the guns to a nearby crack house but left the sweater behind in the apartment. Gilliam attempted to go home, but he learned that the police were at his building. When defendant later called to confirm that Gilliam had gotten rid of the sweater, Gilliam told him that he forgot. Gilliam then went to the home of one of defendant's friends, as directed by defendant, where defendant told him they would flee to North Carolina. That night, Gilliam, defendant, defendant's girlfriend and defendant's son went to North Carolina in a blue car. In North Carolina, they stayed in several hotels and homes, changing location each night. Gilliam cut his hair to alter his appearance and threw away his cell phone. Defendant later told Gilliam that he heard that Morris

had told police that Gilliam committed the shooting. He told Gilliam to return to New York and to tell police that Morris was the shooter. Defendant promised to hire Gilliam a lawyer. Gilliam then returned to New York.

Thereafter, Gilliam met with detectives and identified Morris as the shooter. However, Gilliam testified that this first identification of Morris was untrue and that when he learned that Morris had not implicated him in the crime, as defendant had suggested, Gilliam gave a second, truthful statement to detectives that defendant was the actual shooter, not Morris. Gilliam then made a third statement at the District Attorney's Office with his attorney present that defendant was the shooter and that Gilliam had disposed of the murder weapon. Gilliam was thereafter arrested and charged with hindering prosecution and tampering with physical evidence.

As an initial matter, we find that the verdict was supported by legally sufficient evidence and was not against the weight of the evidence. "A verdict is legally sufficient when, viewing the facts in the light most favorable to the People, 'there is a valid line of reasoning and permissible inferences from which a rational jury could have found the elements of the crime proved beyond a reasonable doubt'" (*People v Danielson*, 9 NY3d 342, 349 [2007]). "A sufficiency inquiry requires a court to marshal

competent facts most favorable to the People and determine whether, as a matter of law, a jury could logically conclude that the People sustained its burden of proof" (*id.*). When assessing a weight of the evidence claim, the appellate court must first ascertain "[i]f based on all the credible evidence a different finding would not have been unreasonable" (*People v Bleakley*, 69 NY2d 490, 495 [1987]). If so, then the court must, "like the trier of fact below, 'weigh the relative probative force of conflicting testimony and the relative strength of conflicting inferences that may be drawn from the testimony'" (*id*.). Although this Court has the authority to set aside the verdict if it determines that the jury "failed to give the evidence the weight it should be accorded," it should not substitute itself for the jury, as "[g]reat deference is accorded to the fact-finder's opportunity to view the witnesses, hear the testimony and observe demeanor" (*id*.).

The verdict was supported by legally sufficient evidence and was not against the weight of the evidence because the People proved, through their witnesses and forensic evidence, that defendant was correctly identified as the shooter, the only issue at trial. First, the People provided evidence that defendant was the shooter with the blue sweater containing DNA matching defendant's DNA and not the DNA of Morris or Gilliam. Several

different witnesses testified that the shooter was wearing a blue sweater during the fight and the shooting. Although there were slight variations in the description of that item of clothing, with one witness describing it as a blue short-sleeved shirt or polo, most of the eyewitnesses described it as a blue sweater. Both Gist and defendant's grandmother testified that on the day of the shooting, defendant was wearing a blue sweater. Finally, one of the detectives testified that the bag containing the blue sweater smelled of gunpowder residue when he recovered it from Gilliam's apartment several hours after the shooting and that he overhead Gilliam tell his brother to discard the sweater.

Further, the People provided evidence that defendant was the shooter with the overwhelming evidence demonstrating defendant's consciousness of guilt. This evidence included that defendant fled to North Carolina shortly after the incident with his girlfriend, his son and Gilliam; that the group stayed in several hotels and homes, changing location each night; that defendant leased a residence under a false name; that defendant sent Gilliam to New York to implicate Morris as the shooter; that defendant continued to hide out in North Carolina with his girlfriend, despite the fact that defendant owned a music studio in New York and defendant's girlfriend worked as a paramedic in New York; and that defendant was ultimately apprehended in North

Carolina avoiding law enforcement.

Additionally, the People provided evidence that defendant was the shooter with the testimony of multiple witnesses that the shooter had a tattoo on his right arm and showed the jury that defendant did indeed have a tattoo on his right arm. Moreover, the People introduced at the trial the video of Morris's interview at the News 12 Bronx office showing that Morris had no tattoos on his arms.

Finally, the People provided evidence that defendant was the shooter with Gilliam's testimony that he had identified defendant as the shooter and that defendant asked him to get rid of the blue sweater that was later found by police in Gilliam's apartment and that contained DNA matching that of defendant. Additionally, Gilliam provided credible testimony as to why he initially identified Morris as the shooter instead of defendant. He stated that he only identified Morris as the shooter at the behest of defendant after defendant told him that Morris had implicated him in the crime. However, once he learned that Morris had not implicated him in the crime, he told detectives the truth, that defendant was actually the shooter.

The assertion that Gilliam's testimony should be rejected because he was defendant's accomplice and a cooperating witness is without merit. An accomplice's testimony can be used to

support a defendant’s conviction if it is corroborated by other evidence (*see People v Besser*, 96 NY2d 136, 143-144 [2001]). “Independent evidence need not be offered to establish each element of the offense or even an element of the offense; the People’s burden is merely to offer some nonaccomplice evidence ‘tending to connect’ defendant to the crime charged” (*id*.). In addition to Gilliam’s testimony that defendant was the shooter, the People elicited testimony from other witnesses who identified defendant as being involved in the altercation and testified that the shooter wore a blue sweater, and provided physical and forensic evidence, including the blue sweater found in Gilliam’s apartment, which contained defendant’s DNA. All of this evidence corroborated Gilliam’s testimony and connected defendant to the crime charged.

The fact that Morris was initially mistakenly prosecuted for the murder and that several witnesses initially identified Morris as the shooter does not alter the conclusion that the verdict was supported by legally sufficient evidence. The misidentifications by the witnesses were explained by the circumstances, including that they may have seen Morris’s name and face through media coverage of the murder before they made their identifications. Moreover, at the trial, defense counsel emphasized the theory that Morris had committed the shooting and the jury properly

rejected that theory based on the trial evidence.

The court properly permitted the People to introduce portions of Morris's plea allocution, in which he pleaded guilty to weapon possession and admitted that at the time and place of the murder, he possessed a .357 caliber handgun. Morris did not testify at defendant's trial and his plea allocution would normally be inadmissible as testimonial hearsay. However, the admission of portions of Morris's plea allocution did not violate defendant's right of confrontation because defendant opened the door to this evidence (*see generally People v Reid*, 19 NY3d 382, 387 [2012]). During the trial, defendant created a misleading impression that Morris possessed a 9 millimeter handgun, which was consistent with the type used in the murder, and introduction of the plea allocution was reasonably necessary to correct that misleading impression.

Defense counsel failed to preserve any claim that the court precluded him from calling the court reporter who transcribed the 2007 grand jury minutes of the testimony of Brenda Gonzalez, a witness to the incident who had attempted to break up the fight between the shooter and her friend, and we decline to review it in the interest of justice. As an alternative holding, we find that the court properly precluded defense counsel from calling the 2007 grand jury reporter.

The facts as they relate to Gonzalez are as follows. Shortly after the shooting, Gonzalez identified Morris in a lineup. She testified as to her interactions with Morris in both a 2006 grand jury proceeding and a 2007 grand jury proceeding. During her testimony in the 2006 grand jury proceeding, Gonzalez did not mention Morris by name. However, during her testimony in the 2007 grand jury proceeding, Gonzalez did mention Morris by name.

At defendant's trial, during cross-examination by defense counsel, Gonzalez testified that she never previously identified Morris by name. Defense counsel then asked if she recalled answering a question in the grand jury "back in 2006" in which she identified Morris by name. Gonzalez responded that she "never said that" and claimed that someone must have inserted Morris's name into the transcript. Defense counsel then attempted to impeach her by reading from Gonzalez's 2007 grand jury testimony, in which Gonzalez had identified Morris by name. However, defense counsel never questioned Gonzalez about her 2007 grand jury testimony before attempting to impeach her testimony with the 2007 grand jury transcript. The prosecutor objected to defense counsel impeaching Gonzalez with the 2007 grand jury transcript, and the court sustained the objection at that time.

The prosecutor then stated that he was going to call the

court reporter who transcribed the 2006 grand jury minutes because those were the only grand jury minutes about which defense counsel questioned Gonzalez and the 2006 grand jury minutes did not make any reference to Gonzalez identifying Morris by name. Defense counsel then admitted on the record that perhaps he had made a mistake as to which grand jury proceeding he questioned Gonzalez about, but he asserted that the difference in dates did not matter. Defense counsel requested that the jury be told that the statements he read and that were attributed to the 2006 grand jury proceeding were actually made by Gonzalez during the 2007 grand jury proceeding. However, the prosecutor refused on the ground that Gonzalez had not been properly confronted with the 2007 transcript because defense counsel never questioned Gonzalez about her 2007 grand jury testimony.

The prosecutor then called the 2006 grand jury reporter, who testified that Gonzalez did not mention Morris at that proceeding. Thereafter, defense counsel made an application to the court to call the 2007 grand jury reporter. The court did not make a ruling on defense counsel's request. Instead, it advised the parties to prepare to address the issue at some point in the future. For the remainder of the trial, defense counsel never sought to obtain a ruling from the court on whether he could call the 2007 grand jury reporter and he also never made an

application to the court to recall Gonzalez as a witness to question her properly about her 2007 grand jury testimony.

During jury deliberations, the jurors requested a portion of the 2006 grand jury reporter's testimony. At that point, defense counsel argued that the jury was left with an inaccurate and unfair impression about Gonzalez's testimony because he was precluded from calling the 2007 grand jury reporter. The court noted defense counsel's "exception."

Based on the foregoing, we find that defendant abandoned and failed to preserve his claim that he was denied the right to call the 2007 grand jury reporter in order to properly confront Gonzalez (*see e.g. People v Martinez*, 257 AD2d 479, 480 [1st Dept 1999], *lv denied* 93 NY2d 876 [1999]). The court never actually ruled against defendant on the issue of whether he could call the 2007 grand jury reporter. Rather, the court stated that it would have to think about it. However, defense counsel did not seek a subsequent ruling on this issue during the testimonial portion of the trial. It was not until the jury asked a question about the 2006 grand jury reporter's testimony that defense counsel raised the issue again about wanting to call the 2007 grand jury reporter. Defendant's untimely request, during jury deliberations, to call the 2007 grand jury reporter did not preserve his claim (*see e.g. People v Guilliard*, 309 AD2d 673

[1st Dept 2003], *lv denied* 1 NY3d 597 [2004]).

Our alternative holding is that the court properly precluded defense counsel from calling the 2007 grand jury reporter in order to impeach Gonzalez because defendant never properly confronted Gonzalez with her 2007 grand jury testimony before seeking to call the 2007 grand jury reporter. Despite being made aware that he mistakenly questioned Gonzalez about her 2006 grand jury testimony, defense counsel never questioned Gonzalez about her 2007 grand jury testimony and never made an application to the court to recall Gonzalez to question her properly about her 2007 grand jury testimony.

None of the other evidentiary rulings challenged by defendant warrant reversal. These various rulings were provident exercises of the trial court's discretion in admitting and excluding evidence, in which the court exercised its discretion in accordance with the applicable legal standards relating to each issue. We find that none of these rulings deprived defendant of a fair trial, or of his right to present a defense.

Defendant failed to preserve his challenges to the prosecutor's opening statement and summation by failing to object, or by failing to request further relief after the court sustained an objection and gave a curative instruction, and we decline to review them in the interest of justice. As an

alternative holding, we find no basis for reversal (*see People v Overlee*, 236 AD2d 133 [1st Dept 1997], *lv denied* 91 NY2d 976 [1998]; *People v D'Alessandro*, 184 AD2d 114, 118-119 [1st Dept 1992], *lv denied* 81 NY2d 884 [1993]).

The court did not violate defendant's right to be present when, following his outburst upon hearing the guilty verdict, it immediately ordered him removed from the courtroom before the jury was polled. Earlier in the trial, the court had warned defendant that any further outbursts by him would result in his removal from the courtroom while his trial continued (*see People v Branch*, 35 AD3d 228, 228-229 [1st Dept 2006], *lv denied* 8 NY3d 919 [2007]).

The court properly declined to dismiss the indictment based on the People's decision not to present evidence to the grand jury about Morris, the person who had originally been charged with the murder. The prosecution has broad discretion in presenting its case to the grand jury and is not obligated to present exculpatory evidence (*People v Mitchell*, 82 NY2d 509, 515 [1993]).

The court properly declined to hold a hearing pursuant to *Franks v Delaware* (438 US 154 [1978]) to address the validity of statements made in the affidavit filed in support of the search warrant for defendant's DNA swab. Defendant failed to show that

the affidavit was "knowingly false or made in reckless disregard of the truth" (*People v Tambe*, 71 NY2d 492, 504 [1988]).

The court properly denied defendant's constitutional speedy trial motion after considering the factors enumerated in *People v Taranovich* (37 NY2d 442 [1975]).

The court providently exercised its discretion in denying defense counsel's request for an adjournment of sentencing to allow the defense to further investigate an alleged jury issue, and the ruling did not result in any prejudice (*see People v Rivera*, 157 AD3d 545 [1st Dept 2018], *lv denied* 31 NY3d 1016 [2018]).

We perceive no basis for reducing the sentence.

All concur except Manzanet-Daniels, J. who dissents in a memorandum as follows:

MANZANET-DANIELS, J. (dissenting)

I do not believe that defendant's identity as the shooter was proven beyond a reasonable doubt. At a minimum, he is entitled to a new trial. Defendant was prejudiced when he was prevented from cross examining an eyewitness concerning her prior identification of another man, Nicholas Morris, as the shooter, and the prosecution was allowed to elicit testimony from the grand jury reporter in 2006 that left the impression that the witness had never previously identified another man as the shooter. I therefore dissent.

Witnesses had occasion to observe Ronnell Gilliam, a/k/a "Burger," and another man, described as a "taller" and "slimmer" man, in broad daylight, at close range, for a 10-minute period during the initial encounter. Words were exchanged, and the men engaged in a fistfight. When the fight broke up, John Erik gave chase but was unable to catch up with the slender man. When he encountered Gilliam on the way back to his friends, he was threatened that he was "going to get shot for that." The slim man returned in a car with a gun. Witnesses testified that the slim man pointed the gun at Juan Carlos, who was just emerging from a store, and began shooting.

During a canvass following the shooting, detectives interviewed a witness who saw the altercation but not the initial

shooting. She identified Gilliam and Nicholas Morris as the two men she saw.

Three of the four witnesses present identified Nicholas Morris – who does not resemble defendant – as the shooter in a lineup two days after the shooting.[1] Another witness from the neighborhood who viewed a photo array stated that Morris "look[ed] like the shooter."

The eyewitness identifications, together with a 9 millimeter cartridge (of the same type recovered from the victim), recovered during a search of Morris' apartment, furnished probable cause to arrest Morris and charge him with the murder. Morris was observed to have bruising on his knuckles, indicating to detectives that he had recently been in a fight.

Defendant was not arrested until 2013, some seven years after the murder. He was never identified by any of the initial eyewitnesses as the shooter. The only witness who identified defendant as the shooter at trial was Gilliam, the accomplice. Accomplice testimony lacks the inherent trustworthiness of the testimony of a disinterested witness and must be viewed with a "suspicious eye," particularly where, as here, the accomplice hopes to receive immunity or lenient treatment (*see People v*

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[1]The fourth was unable to make an identification.

Berger, 52 NY2d 214, 218-219 [1981]). Such testimony must be regarded with "utmost caution" (*id.* at 219). Not only was Gillam a cooperating witness seeking to avoid a murder sentence,[2] but he also changed his story repeatedly. First, he identified Morris as the shooter. Later, and apparently at the behest of Morris,[3] his best friend, he identified defendant as the shooter. By Gilliam's own admission, he failed to tell the police that Morris had a .357 for fear of "implicating him." He admitted that he lied when he said defendant threw the gun in the river. He testified that he had "come clean" during his third interview with the police, but admitted on cross that he had lied about disposing of the gun in the river himself.

Significantly, while eyewitnesses described the shooter's sweater/shirt as blue, not one of them was able to identify the blue garment in evidence as the one worn by the shooter.[4] The sweater had been turned over by Gilliam's brother during a search of the apartment. The investigating detective testified that he

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[2]Gilliam was promised a five-year sentence in exchange for his cooperation.

[3]Witnesses testified that Morris called Gilliam and spoke to him while Gilliam was being interviewed at the police station.

[4]Details also varied by witness, from "polo shirt" to "sweater" and from long-sleeved to short-sleeved. Some described the shirt as having a logo or "embroiderment" design; others did not observe a logo or design.

smelled gunpowder when he opened the bag containing the sweater. Yet Gilliam's brother was never called as a witness, despite being available; no gunpowder or residue consistent with the discharge of a firearm was detected on the shirt, although it was examined for trace evidence shortly after the incident; and the detective did not record his observation in the contemporaneous DD-5 report or any of the paperwork in the case, despite what he agreed was its obvious significance.

In its recitation of the events of the day in question, the majority does not sufficiently differentiate the initial, 10-minute encounter from the subsequent, fatal encounter during which the shooter and his friends returned in a car. The sequence of events is critical, however, because none of the eyewitnesses was able to identify defendant as the shooter during the second, fast-moving encounter. They testified only that the shooter wore a blue sweater/shirt. The prosecution thus relied on a theory that the blue-shirted shooter was the same slim man as had been observed during the initial encounter. Enough time elapsed between the encounters, however, that he simply cannot be presumed to be the same person.

The majority also implies that Gist identified defendant as the shooter; however, she did no such thing. Gist admitted that she observed only the initial encounter and did not observe the

shooting. Further, during a canvass following the shooting, she identified Gilliam and Morris as the two individuals she saw during the initial encounter.

Defendant was denied his right to confrontation when the court prevented counsel from cross-examining a critical witness to establish that she had identified Morris unequivocally as the shooter in testimony before the grand jury in 2007. The witness had testified before the grand jury twice, in 2006 and 2007; the latter time she identified Morris by name as the shooter.

When the witness maintained at trial that she never identified Morris as the shooter before the grand jury, defense counsel attempted to impeach her with prior inconsistent statements she made to the grand jury in 2007. Defense counsel asked the witness whether she wouldn't agree that events were fresh in her mind when she testified before the grand jury in "2006," referring to the incorrect year, but reading verbatim from the transcript of the 2007 proceedings, in which the witness unequivocally identified Morris as the slender man involved in the shooting.

The People asked to call the grand jury reporter from 2006 so that the jury would be left with the mistaken impression that the witness had identified Morris by name as the shooter in 2006. Defense counsel asked that the jury be instructed that the

statements he cited during cross-examination of the witness had been made in the 2007 proceedings so as not to leave an unfair impression that the statements had never been made. The prosecutor objected and refused to so stipulate, asserting that defense counsel had "made specific reference to 2006, and that is what is in the record."

The People called the 2006 reporter as a witness, eliciting testimony via extended question-and-answer that left the jury with the distinct impression that the witness had never identified Morris as the shooter, as defense counsel had suggested during his cross examination. This testimony had the effect of vouching for an untruthful witness and subverting what was in fact the truth – that the witness had identified Morris, albeit in 2007 – and left the jurors with the impression that defense counsel himself was being disingenuous.

When proceedings reconvened, defense counsel again asked that the jury be instructed or informed that the passages he had read were accurate reflections of the witness's testimony before the grand jury in 2007. The prosecutor opposed, asserting that defense counsel had never properly confronted the witness with her 2007 statements. The court was inclined to agree, noting that "because the witness was not impeached by reference expressed to 2007 and because the questions could reasonably be

interpreted as being 2006 grand jury testimony, there is no basis for calling the stenographer from 2007."

The court's ruling left the jury with the impression that the witness had never previously identified Morris as the shooter and that the defense was fabricating evidence. The jury indeed appeared to be confused as it twice asked to rehear the 2006 court reporter's testimony concerning the witness's prior testimony.

While the court initially appeared to recognize that it would be unfair for the jury to hear only a portion of the eyewitness's prior testimony, that is exactly what transpired when the court allowed the testimony of the 2006, but not the 2007 court reporter. The prosecutor argued extensively during summation that defense counsel had attempted to mislead the jury when he "tried to get Brenda Gonzalez to admit she said things before a grand jury in 2006 that she never said . . . That's why [the People] had to call the grand jury reporter to prevent the facts from being manipulated." These arguments were designed to mislead the jury to conclude that the witness had never identified Morris under oath to the grand jury. Indeed, the jury never learned that the witness had identified Morris as the shooter under oath at the 2007 grand jury proceeding. The failure to allow cross-examination of the witness concerning her

prior identification of Morris as the shooter deprived defendant of a fair trial, which warrants reversal and remand for a new trial (*see People v McLeod*, 122 AD3d 16 [1st Dept 2014]).

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

ENTERED: JUNE 11, 2019

CLERK

Renwick, J.P., Manzanet-Daniels, Gesmer, Kern, Singh, JJ.

9579 The People of the State of New York, Ind. 6170/09
Respondent,

-against-

Bartholomew Crawford,
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 (Aaron Zucker of counsel), for respondent.

____

Judgment, Supreme Court, New York County (Daniel P. FitzGerald, J.), rendered November 6, 2015, convicting defendant, after a jury trial, of burglary in the second degree, and sentencing him, as a persistent violent felony offender, to a term of 25 years to life, unanimously affirmed.

The verdict was based on legally sufficient evidence and was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-49 [2007]). It is undisputed that defendant's DNA was on the stockings used by the burglar to tie up his victim, and that the only DNA found on the stockings came from defendant and the victim. There is no rational innocent explanation for the presence of defendant's DNA. Defendant's farfetched theory that he might have had contact with these stockings on some past occasion, and that another person somehow acquired them and

brought them with him when he committed the burglary, rests entirely on speculation (*see e.g. People v McKenzie*, 2 AD3d 348 [2003], *lv denied* 2 NY3d 764 [2004]; *People v Steele*, 287 AD2d 321, 322 [2001], *lv denied* 97 NY2d 682 [2001]; *Taylor v Stainer*, 31 F3d 907, 910 [9th Cir 1994]). Moreover, the evidence supported the inference that the burglar took the stockings from the victim's drawer, even though the victim could not actually "identify" the particular stockings. We have considered and rejected defendant's remaining arguments on this issue.

We perceive no basis for reducing the sentence.

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

ENTERED: JUNE 11, 2019

CLERK

Renwick, J.P., Manzanet-Daniels, Gesmer, Kern, Singh, JJ.

9580 In re Antonio Irace, Index 156160/16
Petitioner-Appellant,

-against-

Tony Williams, etc., et al.,
Respondents-Respondents.

____

Law Offices of Lee M. Nigen, Lake Success (Lee M. Nigen of counsel), for appellant.

Zachary W. Carter, Corporation Counsel, New York (Claibourne Henry of counsel), for respondents.

____

Judgment (denominated an order), Supreme Court, New York County (Arthur F. Engoron, J.), entered January 12, 2018, denying the petition to annul the determination, dated September 25, 2014, which terminated petitioner’s employment, and granting respondents’ cross motion to dismiss the proceeding brought pursuant to CPLR article 78 as time-barred, unanimously affirmed, without costs.

An article 78 proceeding challenging a petitioner’s termination from government employment must be brought within four months from the date the termination becomes final and binding (CPLR 217(1); *Matter of Zarinfar v Board of Educ. of the City School Dist. of the City of N.Y.*, 93 AD3d 466 [1st Dept 2012]). We reject petitioner’s argument that he was entitled to the longer limitations period available under Family Medical

Leave Act (FMLA), since the crux of petitioner's proceeding was to challenge and seek redress for the administrative decision to fire him, and not to make a claim under the FMLA (*see 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]).

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: JUNE 11, 2019

CLERK

Renwick, J.P., Manzanet-Daniels, Gesmer, Kern, Singh, JJ.

9582 Pamela Robinson, Index 153941/13
Plaintiff-Appellant,

-against-

The City of New York,
Defendant,

MTA New York City Transit Authority,
Defendant-Respondent.

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

Lawrence Heisler, Brooklyn (Timothy J. O’Shaughnessy of counsel), for respondent.

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Order, Supreme Court, New York County (Lisa A. Sokoloff, J.), entered May 31, 2018, which, to the extent appealed from, granted defendant MTA New York City Transit Authority’s motion for summary judgment dismissing the complaint as against it, unanimously affirmed, without costs.

Plaintiff failed to raise an issue of fact in opposition to defendant’s prima facie showing that it neither created nor had notice of the puddle on a staircase landing at a subway station that allegedly caused plaintiff to slip and fall (*see Rosario v Prana Nine Props., LLC*, 143 AD3d 409, 409 [1st Dept 2016]). Plaintiff submitted no evidence showing either that defendant had actual notice before plaintiff’s accident that the drain at the

bottom of the staircase on which plaintiff fell had become clogged or that the drain became clogged so frequently as to be a recurring condition (*see Early v Hilton Hotels Corp.*, 73 AD3d 559, 562 [1st Dept 2010]).

Under the circumstances of this case, the storm in progress doctrine did not apply (*see Toner v National Railroad Passenger Corp.*, 71 AD3d 454 [1st Dept 2010]; *Hilsman v Sarwil Assoc. LP*, 13 AD3d 692 [3rd Dept 2004]).

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: JUNE 11, 2019

CLERK

Renwick, J.P., Manzanet-Daniels, Gesmer, Kern, Singh, JJ.

9584-
9584A The People of the State of New York, Ind. 5606/13
Respondent, 4373/16

-against-

Taquan Anderson,
Defendant-Appellant.

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

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

Judgment, Supreme Court, New York County (Gregory Carro, J. at plea; Michael J. Obus, J. at sentencing), rendered February 16, 2017, convicting defendant of criminal possession of a controlled substance in the fifth degree, and sentencing him, as a second felony drug offender previously convicted of a violent felony, to a term of 2½ years, unanimously affirmed. Judgment, same court (Michael J. Obus, J.), rendered February 16, 2017, as amended March 1, 2017, convicting defendant, upon his plea of guilty, of possessing a sexual performance by a child, and sentencing him, as a second felony offender, to a concurrent term of 1½ to 3 years, unanimously affirmed.

The court properly denied defendant's suppression motion. The only issue raised by defendant on appeal is whether the

People sufficiently established that the search of his pant leg at the police precinct was incident to his arrest, rather than an unauthorized strip search. However, defendant did not raise this issue at the hearing, and the court "did not expressly decide, in response to protest, the issues now raised on appeal" (*People v Miranda*, 27 NY3d 931, 932 [2016]), notwithstanding its "mere reference" (*id.* at 933) to a search incident to a lawful arrest. Furthermore, by failing "to raise a particular legal argument before the court of first instance, [defendant] effectively deprive[d] the People of a fair opportunity to present their proof on that issue" (*People v Martin*, 50 NY2d 1029, 1031 [1980]). We decline to review this unpreserved issue in the interest of justice. As an alternative holding, we find that to the extent it permits review, the record supports a reasonable inference that the search of defendant's pant leg was an ordinary search incident to a valid arrest and not a strip search (*see People v Estevez*, 145 AD3d 578 [1st Dept 2016], *lv denied* 29 NY3d 1078 [2017]).

Defendant's ineffective assistance of counsel claim relating to the lack of preservation is unreviewable on direct appeal because it involves matters not reflected in, or fully explained by, the record (*see People v Rivera*, 71 NY2d 705, 709 [1988]). Accordingly, since defendant has not made a CPL 440.10 motion,

the merits of the ineffectiveness claim may not be addressed on appeal. In the alternative, to the extent the existing record permits review, we find that defendant received effective assistance under the state and federal standards (*see People v Benevento*, 91 NY2d 708, 713-714 [1998]; *Strickland v Washington*, 466 US 668 [1984]).

In light of the foregoing, there is no basis for vacating defendant's guilty plea to possessing a sexual performance by a child.

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

ENTERED: JUNE 11, 2019

CLERK

Renwick, J.P., Manzanet-Daniels, Gesmer, Kern, Singh, JJ.

9585 Hansen Realty Development Corporation, etc., Plaintiff, Index 656737/17 595991/17

-against-

Sapphire Realty Group, LLC, Yan Po Zhu also known as Andy Zhu, et al., Defendants.

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Sapphire Realty Group, LLC, derivatively on behalf of Triple Star Realty LLC and directly, Third-Party Plaintiff-Appellant,

-against-

Hansen Realty Development Corporation, et al., Third-Party Defendants,

Shu Sen Jia, Third-Party Defendant-Respondent.

____

Law Offices of Bing Li, LLC, New York (Bing Li of counsel), for appellant.

Law Office of Vincent D. McNamara, East Norwich (Helen M. Benzie of counsel), for respondent.

____

Order, Supreme Court, New York County (Charles E. Ramos, J.), entered on or about October 15, 2018, which granted third-party defendant Shu Sen Jia's motion to dismiss the third-party complaint as against him, unanimously reversed, on the law, with costs, and the motion denied.

Third-party plaintiff Sapphire Realty Group, LLC sufficiently stated a cause of action against third-party

defendant Shu Sen Jia (*see Philips Intl. Invs. LLC v Pektor*, 117 AD3d 1, 7-8 [1st Dept 2014]). Here, the amended third-party complaint alleges that Jia directed Triple Star to pay for his vacation expenses, which it did, and that such expenses had no legitimate business purpose. The relationship between the parties was sufficient to support an unjust enrichment claim, in that Jia allegedly attended Triple Star business meetings, exerted control over Triple Star, and communicated directly with individuals employed by Triple Star, and the payments were allegedly made at Jia's behest (*see id.*; *George Malone & Co., Inc. v Rieder*, 86 AD3d 406, 408-409 [1st Dept 2011], *affd* 19 NY3d 511 [2012]; *see Mandarin Trading Ltd. v Wildenstein*, 16 NY3d 173, 182-183 [2011]). Sapphire also sufficiently stated a cause of action against Jia for money had and received (*see Litvinoff v Wright*, 150 AD3d 714, 716 [2d Dept 2017]).

Jia is subject to this court's jurisdiction pursuant to our long arm statute (CPLR 302[a][1]). Jia's attendance at and participation in multiple business meetings in New York, one of which was held during the alleged unauthorized vacation, concerning the real estate development project, is sufficient to establish that he was transacting business in New York (*see Kreutter v McFadden Oil Corp.*, 71 NY2d 460, 467, 470 [1988]; *Home Box Off. v Baum*, 172 AD2d 222, 223 [1st Dept 1991]). Moreover,

there was a sufficient connection between Jia’s business transactions in New York and the causes of action alleged in the complaint to confer jurisdiction over him pursuant to CPLR 302(a)(1) (*see generally Pramer S.C.A. v Abaplus Intl. Corp.*, 76 AD3d 89, 95 [1st Dept 2010]).

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

ENTERED: JUNE 11, 2019

CLERK

Renwick, J.P., Manzanet-Daniels, Gesmer, Kern, Singh, JJ.

9586 Julia An-Jung, Index 152694/18
Plaintiff-Respondent,

-against-

Rower LLC, et al.,
Defendants-Appellants.

____

Mound Cotton Wollan & Greengrass, LLP, New York (Kenneth M. Labbate of counsel), for appellants.

Michael J. Redenburg, P.C., New York (Michael J. Redenburg of counsel), for respondent.

____

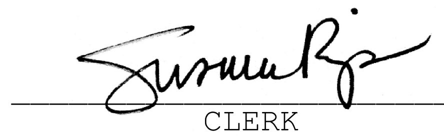
Order, Supreme Court, New York County (Francis A. Kahn III, J.), entered March 12, 2019, which, to the extent appealed from, denied defendants' motion to dismiss the breach of contract and breach of fiduciary duty claims, unanimously reversed, on the law, without costs, and the motion granted.

The breach of contract claim should be dismissed in light of defendants' account stated defense (*see Mintz & Gold LLP v Daibes*, 125 AD3d 488 [1st Dept 2015]). The retainer agreement required that objections to bills be raised within 30 days after receipt of the bills; plaintiff timely paid all the bills and did not object to any of them until two months after she received the last one. Moreover, the breach of fiduciary duty claim should be dismissed on the ground that it is duplicative of the breach of contract claim "since the claims are premised upon the same facts

and seek identical damages" (*Chowaiki & Co. Fine Art Ltd. v Lacher*, 115 AD3d 600, 600 [1st Dept 2014]).

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

ENTERED: JUNE 11, 2019



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Renwick, J.P., Manzanet-Daniels, Gesmer, Kern, Singh, JJ.

9587 Thomas P. Devlin, Index 156554/17
Plaintiff-Appellant,

-against-

Greenberg Traurig, LLP,
Defendant-Respondent.

____

FG McCabe & Associates, PLLC, New York (Gerard McCabe of counsel), for appellant.

Steptoe & Johnson LLP, New York (Justine Y.K. Chu of counsel), for respondent.

____

Order, Supreme Court, New York County (Eileen Bransten, J.), which, insofar as appealed from, granted defendant's motion to dismiss the causes of action for fraud and breach of fiduciary duty pursuant to CPLR 3211(a)(7), unanimously reversed, on the law, without costs, and the motion denied.

The court dismissed the fiduciary duty claim on the ground that there was no fiduciary relationship between the parties. However, plaintiff alleges that he – as well as Fiore Films LLC – was defendant's client. He does not base his claim of an attorney-client relationship solely on the fact that he paid the bills that defendant sent to Fiore Films (*see Matter of Priest v Hennessy*, 51 NY2d 62, 69-70 [1980]) and was a part owner of that entity (*see Eurycleia Partners, LP v Seward & Kissel, LLP*, 12 NY3d 553, 562 [2009]; *Mendoza v Akerman Senterfitt LLP*, 128 AD3d

480, 482 [1st Dept 2015]). The amended complaint alleges that defendant "knew that [plaintiff] was dependent and was relying on [it] . . . to provide honest and diligent advice with respect to escrow funds." In addition, the affirmation by plaintiff's lawyer Gerard Keogh, which plaintiff submitted in opposition to defendant's motion, says, "As early as 2011, Steven Beer [the partner at defendant responsible for the engagement] knew that he had to advise and counsel . . . Plaintiff individually."

Defendant suggests that it could not have represented plaintiff because he was already represented by Keogh. However, Keogh said, "Since I did not have experience in the Entertainment Sector, I advised [plaintiff] to secure the representation of an experienced Entertainment lawyer." It is certainly possible for a client to have more than one lawyer.

The fraud claim should not have been dismissed as this stage as the amended complaint adequately pleads the elements of fraud, including scienter (see *Houbigant, Inc. v Deloitte & Touche LLP*, 303 AD2d 92 [1st Dept 2003])

Although the fiduciary duty and fraud claims should be reinstated, plaintiff's damages should not include the $10 million in alleged damage to the film project, as opposed to the

$1.3 million that he lost via the escrow account.[1] The amended complaint alleges that Fiore Film's credibility was damaged. However, plaintiff has no individual cause of action against defendant for injuring Fiore Films (*see Serino v Lipper*, 123 AD3d 34, 39 [1st Dept 2014]).

We have considered the remaining arguments and find them unavailing.

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

ENTERED: JUNE 11, 2019

CLERK

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[1] Defendant submitted a July 28, 2011 letter that says that Junior 'G' Motion Picture, LLC, rather than plaintiff, deposited the money into the escrow account. However, as plaintiff alleges that it was procured by fraud, the letter does not conclusively refute his allegation that *he* deposited money into the escrow account.

Renwick, J.P., Manzanet-Daniels, Gesmer, Kern, Singh, JJ.

9588 Margit Frenk, Index 650298/13
Plaintiff-Appellant,

-against-

Yris Rabenou Solomon, etc., et al.,
Defendants-Respondents.

____

Tarter Krinsky & Drogin LLP, New York (Debra Bodian Bernstein of counsel), for appellant.

Pryor Cashman LLP, New York (William L. Charron of counsel), for respondents.

____

Order, Supreme Court, New York County (Andrea Masley, J.), entered September 10, 2018, which, inter alia, granted defendants' motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

The motion court correctly found that this action to recover certain stolen art is barred by the general release and stipulation of discontinuance in the 1973 action brought by plaintiff's mother, Mariana Frenk-Westheim, widow of Paul Westheim, a German art collector, critic, and publisher (*see Centro Empresarial Cempresa S.A. v America Movil, S.A.B. de C.V.*, 17 NY3d 269, 276 [2011]; *Matter of Hofmann*, 287 AD2d 119, 123 [1st Dept 2001]). Plaintiff failed to present evidence that her mother intended to release claims with regard to one single painting only; on its face, the release encompasses all claims of

any kind whatsoever, and the 1973 lawsuit sought the return of any and all works of art alleged to have been formerly owned by Westheim.

Plaintiff failed to present evidence in support of her contention that defendants are barred from relying on the release and stipulation by fraudulent inducement and the doctrine of equitable estoppel. The claim of fraudulent inducement is supported by the allegations that Charlotte Weidler, Westheim's former colleague, friend, and lover, had converted art entrusted to her by Westheim and lied about its whereabouts in the years after the Second World War. These allegations do not establish a fraud separate from the subject of the release but are the same facts as those alleged in the 1973 complaint (*see Centro Empresarial*, 17 NY3d at 276; *Pappas v Tzolis*, 20 NY3d 228, 233-234 [2012]). Moreover, plaintiff cannot establish reasonable reliance upon any statements allegedly given by Weidler to Frenk-Westheim that Weidler had no other knowledge of the Westheim art collection, in view of the fact that Weidler had advised Frenk-Westheim's counsel that she had additional works, but they were all either gifts from Westheim or purchased from him (*Centro Empresarial*, 20 NY3d at 276).

Plaintiff failed to present evidence of affirmative conduct or a failure to act that unmistakably manifests Weidler's waiver

or abandonment of her rights under the release (*see Fundamental Portfolio Advisors, Inc. v Toqueville Asset Mgt., L.P.*, 7 NY3d 96, 104 [2006]; *EchoStar Satellite L.L.C. v ESPN, Inc.*, 79 AD3d 614, 617-618 [1st Dept 2010]). Weidler's alleged agreement to split the proceeds of sale of another work with Frenk-Westheim, assuming there was such an agreement, is too doubtful or equivocal an act from which to infer an intention to waive those rights.

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

ENTERED: JUNE 11, 2019

CLERK

Renwick, J.P., Manzanet-Daniels, Gesmer, Kern, Singh, JJ.

9589 Wells Fargo Bank, N.A., Index 380676/13
Plaintiff-Respondent,

-against-

Reyes Merino,
Defendant-Appellant,

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

____

Petroff Amshen LLP, Brooklyn (James Tierney of counsel), for appellant.

Reed Smith LLP, New York (Andrew B. Messite of counsel), for respondent.

____

Judgment, Supreme Court, Bronx County (Ben R. Barbato, J.), entered on or about April 26, 2018, which granted plaintiff's motion for judgment of foreclosure and sale, unanimously reversed, on the law and the facts, with costs, the judgment vacated, plaintiff's motion denied, and defendant Reyes Merino's cross motion to dismiss the complaint granted.

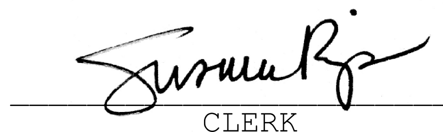
It was an improvident exercise of discretion to apply the law of the case doctrine and decline to reconsider whether plaintiff established that RPAPL 1304 notices were properly and timely sent as a condition precedent to the commencement of its foreclosure action (*Aurora Loan Servs., LLC v Weisblum*, 85 AD3d 95, 106 [2d Dept 2011]; see *Emigrant Mtg. Co. v Lifshitz*, 142

AD3d 755 [2d Dept 2016]). While defendant, who was initially pro se, raised the defense of plaintiff's noncompliance with the strict requirements of RPAPL 1304 90-day pre-foreclosure notices in her answer, she did not raise it in her opposition to plaintiff's motion for summary judgment, which was subsequently granted. This does not preclude her, however, from raising plaintiff's noncompliance prior to entry of judgment of foreclosure and sale (*Emigrant*, 142 AD3d at 755-756).

Plaintiff failed to establish strict compliance with RPAPL 1304, a condition precedent to the commencement of a foreclosure action (*see HSBC Bank USA v Rice*, 155 AD3d 443 [1st Dept 2017]). The affidavits submitted by plaintiff failed to demonstrate a familiarity with plaintiff's mailing practices and procedures (*HSBC Bank,* 155 AD3d at 444), and they did not suffice as affidavits of service.

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

ENTERED: JUNE 11, 2019



CLERK

Renwick, J.P., Manzanet-Daniels, Gesmer, Kern, Singh, JJ.

9590-
9591-
9592-
9593 In re Efrain T. Jr.,
Petitioner-Respondent,

-against-

Erika R.,
Respondent-Appellant.

Law Office of Thomas R. Villecco, P.C., Jericho (Thomas R. Villecco of counsel), for appellant.

Larry S. Bachner, New York, for respondent.

Order, Family Court, Bronx County (Tamara Schwarzman, Referee), entered on or about September 13, 2018, which, upon a finding that respondent mother committed the family offenses of harassment in the second degree and disorderly conduct, issued a one-year order of protection in favor of petitioner, and order, same court and Referee, entered on or about September 19, 2018, which, upon a finding that the mother willfully violated a prior temporary order of protection, extended the order of protection for another year until September 2020, unanimously affirmed, without costs.

The court’s finding that the mother committed the family offenses of harassment in the second degree (Penal Law § 240.26[1]) and disorderly conduct (Penal Law § 240.20) was

supported by a fair preponderance of the evidence (*see generally Matter of Everett C. v Oneida P.*, 61 AD3d 489 [1st Dept 2009]). The hearing testimony showed, inter alia, that the mother yelled derogatory words at petitioner father in public, threatened to kill him, and struck him. There exists no basis to disturb the credibility findings of the Referee (*see Matter of Peter G. v Karleen K.*, 51 AD3d 541, 542 [1st Dept 2009]).

The court also properly determined that the mother willfully failed to obey a temporary order of protection issued against her in April 2018 (Family Ct Act § 846-a). The record shows that during an incident in May 2018, the mother followed the father after he picked up their child for visitation, cursed at him in public, engaged in a physical altercation with the father's wife, and yelled at him for trying to walk away from the altercation.

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

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

ENTERED: JUNE 11, 2019

CLERK

Renwick, J.P., Manzanet-Daniels, Gesmer, Kern, Singh, JJ.

9594 The People of the State of New York, Respondent, Ind. 1982/16

-against-

Najaleck Walker, Defendant-Appellant.

Janet E. Sabel, The Legal Aid Society, New York (Harold V. Ferguson, Jr. of counsel), for appellant.

Cyrus R. Vance, Jr., District Attorney, New York (Stephen Kress 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 (Ronald A. Zweibel at plea; Charles Solomon, J., at sentencing; Mark Dwyer, J. at resentencing), rendered October 6, 2016, as amended, February 10, 2017,

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: JUNE 11, 2019

CLERK

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

Renwick, J.P., Manzanet-Daniels, Gesmer, Kern, Singh, JJ.

9595 In re Nicole Phillips, Index 101413/15
Petitioner,

-against-

New York Citywide Administrative
Services, et al.,
Respondents.

____

Hegge & Confusione, LLC, New York (Michael Confusione of counsel), for petitioner.

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

____

Determination of respondent City of New York Financial Information Services Agency (FISA), dated April 1, 2015, upholding FISA's determination, dated September 14, 2013, placing petitioner on involuntary leave of absence pursuant to Civil Service Law § 72(5), and FISA's determination, dated June 17, 2015, terminating petitioner's employment pursuant to Civil Service Law § 73, unanimously confirmed, the petition denied, and the proceeding brought pursuant to CPLR article 78 (transferred to this Court by order of the Supreme Court, New York County [Carmen Victoria St. George, J.], entered May 3, 2018), dismissed, without costs.

The Department of Citywide Administrative Services (DCAS) did not improperly delegate its duty to select a medical officer

pursuant to Civil Service Law § 72(1) to an outside entity (JurisSolutions). Civil Service Law § 72(1) provides, "When in the judgment of an appointing authority an employee is unable to perform the duties of his or her position by reason of a disability . . . the appointing authority may require such employee to undergo a medical examination to be conducted by a medical officer selected by the civil service department or municipal commission having jurisdiction." It does not specify any method that the municipal commission must use to select the medical officer, and nothing in the text prohibits DCAS from employing a procurement process to select the medical officer who will conduct the evaluation (*see e.g. generally Matter of Lazzari v Town of Eastchester*, 20 NY3d 214, 222 [2012]). Although JurisSolutions provides the doctors, DCAS maintains complete control over the selection process.

Petitioner's contention that the doctors that conducted her fit-for-duty evaluation were unqualified is not supported by the record, and the hearing officer's determinations concerning the doctors' credibility should not be disturbed (*see Matter of Ariel Servs., Inc. v New York City Envtl. Control Bd.*, 89 AD3d 415, 415 [1st Dept 2011]).

Substantial evidence supports respondent's determinations. Petitioner's arguments ignore the hearing testimony and fail to

address the detailed accounts of her behavior leading to her being placed on leave.

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: JUNE 11, 2019

CLERK

Renwick, J.P., Manzanet-Daniels, Gesmer, Kern, Singh, JJ.

9596 The People of the State of New York, Ind. 260376/16
Respondent,

-against-

Richard Diaz,
Defendant.
- - - - -
Seneca Insurance Company, Inc., et al.,
Nonparty Appellants.

____

The Heinrich Law Group, PC, Bronx (Jay Heinrich of counsel), for appellants.

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

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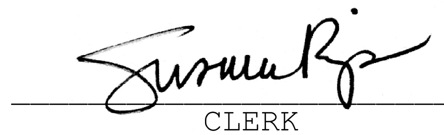
Order, Supreme Court, Bronx County (Robert E. Torres, J.), entered October 31, 2016, which, upon reargument, adhered to its prior decision to deny the surety's motion for remission of a bail forfeiture in the amount of $25,000, unanimously affirmed, without costs.

The court providently exercised its discretion in denying the surety's motion for remission of forfeited bail. The record demonstrates that defendant's absence was willful and there are no exceptional circumstances warranting the relief sought (*see People v Fiannaca*, 306 NY 513, 517 [1954]; *People v Gonzalez*, 280

AD2d 274 [1st Dept 2001]; *People v Peerless Ins. Co.*, 21 AD2d 609, 613-614 [1st Dept 1964]).

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

ENTERED: JUNE 11, 2019



CLERK

Renwick, J.P., Manzanet-Daniels, Gesmer, Kern, Singh, JJ.

9597 Martel Riollano, et al., Index 302312/16
Plaintiffs-Appellants,

-against-

James F. Leavey,
Defendant-Respondent.

____

Krentsel & Guzman, LLP, New York (Steven E. Krentsel of counsel), for appellants.

Law Office of Brian Rayhill, Elmsford (Renaud T. Bleecker of counsel), for respondent.

____

Order, Supreme Court, Bronx County (Alison Y. Tuitt, J.), entered on or about January 24, 2018, which granted defendant's motion for summary judgment dismissing the complaint, and denied as moot plaintiffs' motion for partial summary judgment on the issue of liability, unanimously modified, on the law, defendant's motion denied as to plaintiff Ejamai Ovbude, Ovbude's claims as related to the cervical spine and lumbar spine reinstated, partial summary judgment on the issue of liability granted in his favor, and otherwise affirmed, without costs.

Defendant established prima facie that plaintiff Martel Riollano did not sustain serious injuries to his right shoulder by submitting the affirmed report of his orthopedic surgeon finding only minor limitations in the shoulder (*see Licari v Elliott*, 57 NY2d 230, 238-239 [1982]; *Style v Joseph*, 32 AD3d

212, 214 n* [1st Dept 2006]). In opposition, Riollano failed to raise a triable issue of fact. While his orthopedic surgeon found persisting limitations, the limitations were also minor, and insufficient to raise a triable issue of fact (*see Stevens v Bolton*, 135 AD3d 647, 648 [1st Dept 2016]; *Rickert v Diaz*, 112 AD3d 451, 452 [1st Dept 2013]).

Defendant established prima facie that plaintiff Ejamai Ovbude did not sustain serious injuries to his cervical or lumbar spine by submitting the sworn reports of his acupuncturist and chiropractor, and the affirmed report of his orthopedic surgeon, all finding normal range of motion and negative objective clinical test results, and opining that plaintiff's alleged injuries had resolved (*see Holloman v American United Transp. Inc.*, 162 AD3d 423, 423 [1st Dept 2018]; *Moreira v Mahabir*, 158 AD3d 518, 518 [1st Dept 2018]). Ovbude raised a triable issue of fact by submitting the affirmed report of his orthopedic surgeon who, based on a recent evaluation, found persisting range of motion limitations and positive clinical test results, as well as MRI reports showing disc bulges with a hernation at C5-6, and nerve root impingement at L3 (*see Toure v Avis Rent A Car Sys, Inc.*, 98 NY2d 345, 352-353 [2002]). The MRI reports, although unaffirmed, are admissible because they were not the sole basis for Ovbude's opposition to defendant's motion (*see Clemmer v Drah*

Cab Corp., 74 AD3d 660, 661-662 [1st Dept 2010]). Contrary to defendant's contention, Dr. Hausknecht need not provide a quantified assessment of Ovbude's injuries upon his initial evaluation, and his recording of symptoms is sufficient (*see Perl v Meher*, 18 NY3d 208, 217-218 [2011]). Ovbude's testimony that his insurance stopped covering treatments adequately explained the gap in treatment (*see Ramkumar v Grand Style Transp. Enters. Inc.*, 22 NY3d 905, 906 [2013]).

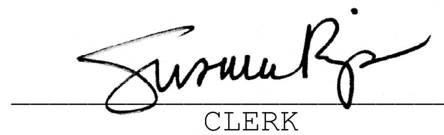
As the record does not reflect a total loss of use any of the above parts of the body, plaintiffs' claims under the permanent loss of use category should be dismissed (*see Oberly v Bangs Ambulance*, 96 NY2d 295, 299 [2001]).

In view of the reinstatement of Ovbude's claims as noted, we grant him summary judgment on the issue of liability. It is undisputed that defendant rear-ended Riollano's car while it was stopped, and defendant has not come forward with an adequate,

nonnegligent explanation for the accident (*see Urena v GVC Ltd.*, 160 AD3d 467 [1st Dept 2018]).

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

ENTERED: JUNE 11, 2019



CLERK

Renwick, J.P., Manzanet-Daniels, Gesmer, Kern, Singh, JJ.

9598 The People of the State of New York, Ind. 704N/16
Respondent,

-against-

Eric Vargas,
Defendant-Appellant.

____

Marianne Karas, Thornwood, for appellant.

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

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Judgment, Supreme Court, New York County (Richard M. Weinberg, J. at plea; Patricia M. Nuñez, J. at sentencing), rendered February 6, 2018, convicting defendant of criminal sale of a controlled substance in the third degree, and sentencing him, as a second felony drug offender, to a term of two years, unanimously affirmed.

Defendant's challenges to the voluntariness of his plea are unpreserved (*see People v Conceicao*, 26 NY3d 375, 382 [2015]), and we decline to review them in the interest of justice. As an alternative holding, we find that the record as a whole establishes that the plea was knowingly, intelligently and voluntarily made (*see generally People v Fiumefreddo*, 82 NY2d 536, 544 [1993]). The plea colloquy, along with the written plea that defendant had discussed with counsel and signed,

sufficiently advised defendant of the potential duration and completion requirements of the drug program that he was entering in order to earn dismissal of the charges.

Defendant also failed to preserve his argument that the court should have held a hearing as to his compliance with the program's requirements, and we likewise decline to review it in the interest of justice. As an alternative holding, we find that defendant was not entitled to a hearing (*see People v Fiammegta*, 14 NY3d 90 [2010]; *People v Stephens*, 108 AD3d 414 [1st Dept 2013], *lv denied* 21 NY3d 1077 [2013]), because the record, including defendant's own admissions, clearly established his violation of his plea agreement and forfeiture of the opportunity for a dismissal.

We have considered and rejected defendant's ineffective assistance of counsel claims relating to the lack of preservation (*see People v Benevento*, 91 NY2d 708, 713-14 [1998]; *see also Strickland v Washington*, 466 US 668 [1984]).

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

ENTERED: JUNE 11, 2019

CLERK

Renwick, J.P., Manzanet-Daniels, Gesmer, Kern, Singh, JJ.

9599 The People of the State of New York, Ind. 849/13
Respondent,

-against-

Ming Guang Huang,
Defendant-Appellant.

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

Cyrus R. Vance, Jr., District Attorney, New York (Ross D. Mazer of counsel), for respondent.

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An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Robert Stolz, J.), rendered January 11, 2017,

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: JUNE 11, 2019

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

Renwick, J.P., Manzanet-Daniels, Gesmer, Kern, Singh, JJ.

9600 Jonny Contreras, Index 310552/11
Plaintiff-Appellant,

-against-

3335 Decatur Avenue Corp.,
Defendant-Respondent.
- - - - -
[And a Third Party Action]

____

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

Dillon Horowitz & Goldstein LLP, New York (Thomas Dillon of counsel), for respondent.

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Order, Supreme Court, Bronx County (Doris M. Gonzalez, J.), entered on or about March 8, 2017, which, inter alia, granted defendant's motion for summary judgment dismissing plaintiff's Labor Law § 241(6) cause of action, unanimously reversed, on the law, without costs, and the motion denied.

Industrial Code (12 NYCRR) § 23-1.5(c)(3), which provides that "[a]ll safety devices, safeguards and equipment in use shall be kept sound and operable, and shall be immediately repaired or restored or immediately removed from the job site if damaged," applies to the instant action and is sufficiently specific to support a section 241(6) claim (*see e.g. Jackson v Hunter Roberts Constr. Group, LLC*, 161 AD3d 666, 667 [1st Dept 2018]). Here, plaintiff testified that he was given a hand-held grinder from

which the safety guard had been removed by his employer to install an over-sized disc blade. Plaintiff was then instructed to use this grinder to cut concrete, over his objections, and was injured when the grinder got stuck, kicked back, knocked him to the ground, and cut into his foot. This testimony raises a triable issue of fact as to whether defendant breached its nondelegable duty "to provide reasonable and adequate protection and safety" to plaintiff (Labor Law § 241[6]; *see Becerra v Promenade Apts. Inc.*, 126 AD3d 557, 558-559 [1st Dept 2015]; *see also Perez v 286 Scholes St. Corp.*, 134 AD3d 1085, 1086 [2d Dept 2015]).

We decline plaintiff's request to search the record and grant him partial summary judgment, since issues of fact exist as to whether the safety guard could have prevented his injuries.

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

ENTERED: JUNE 11, 2019

CLERK

Renwick, J.P., Manzanet-Daniels, Gesmer, Kern, Singh, JJ.

9601 Clarence Williams, Index 25778/14E
Plaintiff-Appellant,

-against-

Laura Livery Corporation, et al.,
Defendants-Respondents.

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Ikhilov & Associates, Brooklyn (Maya Vax of counsel), for appellant.

Marjorie E. Bornes, Brooklyn, for respondents.

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Order, Supreme Court, Bronx County (John R. Higgitt, J.), entered September 26, 2018, which, in this action for personal injuries sustained in a collision between plaintiff bicyclist and defendants' motor vehicle, denied plaintiff's motion for partial summary judgment on the issue of liability, and for an order precluding defendants from submitting an affidavit in opposition to the motion or from offering testimony at trial, unanimously affirmed, without costs.

Plaintiff's unopposed motion for partial summary judgment was properly denied. Plaintiff's affidavit submitted in support is inconsistent with his prior deposition testimony that he did not know where the subject intersection was located without explaining the disparity (*see Telfeyan v City of New York*, 40 AD3d 372, 373 [1st Dept 2007]). In addition, his averment that

he saw defendants' vehicle as the accident was unfolding and that it entered the intersection without fully stopping at the stop sign controlling its direction of travel, conflicts with his prior deposition testimony that he did not see the vehicle that struck him until after he was on the ground. Such conflict as to when he saw defendants' vehicle presents factual issues as to liability, which are best left for a trier of fact (*see Odikpo v American Tr., Inc.*, 72 AD3d 568 [1st Dept 2010]). The court properly declined to take judicial notice of the Google Map images, given plaintiff's deposition testimony that he did not know where the subject intersection was located and his failure to explain how he ascertained that the images fairly and accurately depict the accident location.

Furthermore, the court properly denied plaintiff's motion to preclude defendants from submitting an affidavit in opposition to his motion for partial summary judgment, or from testifying at trial. Once plaintiff filed the notice of issue and certificate of readiness certifying to the court that all discovery was complete without reserving his rights or preserving objections,

he waived his right to seek preclusion (*see Rivera-Irby v City of New York*, 71 AD3d 482 [1st Dept 2010]).

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

ENTERED: JUNE 11, 2019

CLERK

Renwick, J.P., Manzanet-Daniels, Gesmer, Kern, Singh, JJ.

9602N Mildred Pellot, Index 22417/16E
Plaintiff-Respondent,

-against-

Tivat Realty LLC,
Defendant-Appellant.

____

Faust, Goetz, Schenker & Blee LLP, New York (Lisa De Lindsay of counsel), for appellant.

Trolman, Glaser, Corley & Lichtman, P.C., New York (Tina M. Wells of counsel), for respondent.

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Order, Supreme Court, Bronx County (Laura G. Douglas, J.), entered January 16, 2019, which denied defendant’s motion to strike the complaint for plaintiff’s failure to produce her Social Security records, and granted plaintiff’s cross motion for a protective order barring disclosure of those records, unanimously affirmed, without costs.

Plaintiff seeks damages for injuries she sustained to her back in a slip and fall on defendant’s premises. Although she was diagnosed at the age of 29 with early onset arthritis in her hands, for which she has since been receiving Social Security disability benefits, plaintiff does not seek damages for exacerbation of an injury.

The court providently exercised its discretion in denying defendant’s motion to strike the complaint or, alternatively, to

compel production of plaintiff’s Social Security disability records from 30 years ago, and granting plaintiff’s motion for a protective order, on the ground that defendant’s request for the Social Security records was overly broad and unduly burdensome. By suing to recover for injuries to her back, plaintiff “did not place in issue her entire medical condition” (*see Spencer v Willard J. Price Assoc., LLC*, 155 AD3d 592, 592 [1st Dept 2017]).

The records the court ordered plaintiff to produce, related to her treatment for arthritis for the three years preceding the accident, which she timely complied with, are sufficient to defend against her allegations of limitations in activities of daily living and joint pain (*compare Walters v Sallah*, 109 AD3d 401, 402 [1st Dept 2013] [although plaintiff’s records relating to arthritis and Social Security disability benefits were relevant to condition that plaintiff placed in controversy, because of “potentially tangential nature of the discovery involved,” case was remanded to motion court to “limit the discovery to reasonable parameters, including as to time frame and relevant parts of the body”]).

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

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

ENTERED: JUNE 11, 2019

CLERK

Renwick, J.P., Manzanet-Daniels, Gesmer, Kern, Singh, JJ.

9603N In re GEICO General Insurance Company, Index 654090/18
Petitioner-Respondent,

-against-

Benjamin Glazer,
Respondent-Appellant.

Ogen & Sedaghati, P.C., New York (Eitan A. Ogen of counsel), for appellant.

O'Connor, McGuinness, Conte, Doyle, Oleson, Watson & Loftus, LLP, White Plains (Montgomery L. Effinger of counsel), for respondent.

Order, Supreme Court, New York County (Melissa A. Crane, J.), entered on or about February 21, 2019, which granted the petition of GEICO General Insurance Company (GEICO) to temporarily stay the arbitration proceeding until respondent complies with the discovery deemed appropriate by the arbitrator, unanimously reversed, on the law, with costs, and the petition denied.

CPLR 7503(c) provides that "[a]n application to stay arbitration must be made by the party served within twenty days after service upon him of the notice or demand, or he shall be so precluded." "This statutory time period is to be strictly construed" (*Gold Mills v Pleasure Sports*, 85 AD2d 527, 528 [1st Dept 1981]). Here, GEICO received the April 26, 2018 demand on April 30, 2018, and did not move to stay arbitration until more

than three months later. Accordingly, the petition was untimely.

Although there is a limited exception to this rule, namely, that an otherwise untimely petition to stay arbitration may be entertained when "its basis is that the parties never agreed to arbitrate, as distinct from situations in which there is an arbitration agreement which is nevertheless claimed to be invalid or unenforceable because its conditions have not been complied with" (*Matter of Matarasso (Continental Cas. Co.]*, 56 NY2d 264, 266 [1982]), this case does not meet that exception.

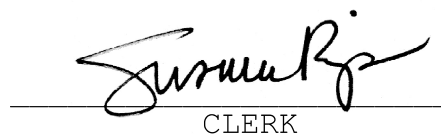
Respondent's refusal to submit to an independent medical examination or examination under oath involves a condition precedent to coverage as opposed to an issue of arbitrability (*see Matter of GEICO Gen. Ins. Co. v Schwartz*, 35 Misc 3d 1221[A], 2012 NY Slip Op 50802[U] [Sup Ct, Kings County 2012]).

GEICO's reliance on CPLR 3102(c), which expressly empowers the court to direct disclosure in aid of arbitration, is misplaced in light of the untimely petition under CPLR 7503(c) (*see Matter of Motor Veh. Acc. Indem. Corp. [McCabe]*, 19 AD2d 349 [1st Dept 1963]; *Matter of GEICO Gen. Ins. Co. v Schwartz*, 35 Misc 3d 1221[A], 2012 NY Slip Op 50802[U] at *5-6). Equally unavailing is GEICO's assertion that the petition should be granted in the interest of justice. The record shows that respondent complied with GEICO's initial demands at the time the

demand for arbitration was forwarded on April 26, 2018. Had GEICO promptly requested the additional discovery, instead of waiting as long as it did, it could have requested the CPLR 7503(c) stay within the requisite time period.

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

ENTERED: JUNE 11, 2019



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