SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

JUNE 27, 2019

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Sweeny, J.P., Renwick, Webber, Oing, JJ.

9738-		Ind. 5579/14
9738A-		985/15
9738B	The People of the State of New York, Respondent,	5082/15

-against-

Stella Mednik,
Defendant-Appellant.

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

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

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Judgments, Supreme Court, New York County (Laura A. Ward, J.), rendered January 22, 2016, convicting defendant, upon her pleas of guilty, of grand larceny in the fourth degree, assault in the second degree, criminal possession of a controlled substance in the seventh degree, aggravated unlicensed operation of a motor vehicle in the first degree (two counts), vehicular assault in the second degree, reckless endangerment in the second degree, reckless driving, driving while intoxicated, driving while ability impaired by the combined influence of drugs or of alcohol and any drugs (two counts), and leaving the scene of an

incident without reporting, and sentencing her to an aggregate term of five years, unanimously affirmed.

Defendant made valid waivers of her right to appeal, which foreclose review of her suppression and excessive sentence claims. The court's oral colloquy sufficiently separated the right to appeal from the trial rights automatically forfeited by a guilty plea. The combination of this colloquy and the written waivers that defendant signed after consulting with her attorney sufficiently demonstrated that defendant, who had been an attorney herself before her disbarment in 2014, knowingly and intelligently waived her right to appeal (*see People v Sanders*, 25 NY3d 337, 341 [2015]). We have considered and rejected defendant's remaining arguments concerning the waivers.

Regardless of whether defendant made valid waivers of her right to appeal, we find that the court properly denied her suppression motions. The record supports the hearing court's findings that the police had probable cause to arrest defendant, and that the blood sample obtained pursuant to search warrant and

the pipes with cocaine residue recovered from her car during an inventory search were admissible. We also perceive no basis for reducing the sentences.

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

ENTERED: JUNE 27, 2019

CLERK

Renwick, J.P., Gische, Kapnick, Singh, JJ.

6881 & [M-1245] The People of The State of New York, Respondent, Ind. 618/17

-against-

Ronald De Los Santos, Defendant-Appellant.

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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 (Laura A. Ward, J.), rendered June 12, 2017,

Said appeal having been argued by counsel for the respective parties, due deliberation having been had thereon, and a decision and order of this Court having been entered on June 14, 2018, holding the appeal in abeyance (162 AD3d 506), and upon the motion of the defendant to withdraw the appeal,

The motion is granted and it is unanimously ordered that the said appeal is deemed withdrawn.

ENTERED: JUNE 27, 2019

CLERK

Sweeny, J.P. Gische, Tom, Mazzarelli, Kern, JJ.

7428- Ind. 1580/03
7429 The People of The State of New York,
Respondent,

-against-

Luis Rodriguez,
Defendant-Appellant.

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Appeals having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Ronald A. Zweibel, J.), rendered February 26, 2009 and order same court and Justice, entered April 29, 2009,

Said appeals having been argued by counsel for the respective parties, due deliberation having been had thereon, and a decision and order of this Court having been entered on October 23, 2018, holding the appeals in abeyance (165 AD3d 546), and upon the stipulation of the parties hereto dated December 18, 2018,

It is unanimously ordered that said appeals be and the same are hereby withdrawn in accordance with the terms of the aforesaid stipulation.

ENTERED: JUNE 27, 2019

CLERK

CORRECTED ORDER - JULY 12, 2019

Sweeny, J.P., Renwick, Webber, Oing, JJ.

9739 In re Golden Horse Realty, Inc., Index 158730/17
Petitioner-Appellant,

-against-

New York State **Division of Housing and Community Renewal**, et. al.,
Respondents-Respondents.

_____

Golino Law Group, PLLC, New York (Santo Golino of counsel), for appellant.

Mark F. Palomino, New York (Martin B. Schneider of counsel), for New York State **Division of Housing and Community Renewal**, respondent.

Himmelstein, McConnell, Gribben, Donoghue & Joseph LLP, New York (Jesse Gribben of counsel), for Keith Lisy, respondent.

Vernon & Ginsberg, LLP, New York (Bari Wolf of counsel), for Shannon Tyree and Jonathan Blitt, respondents.

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Order and judgment (one paper), Supreme Court, New York County (Arlene P. Bluth, J.), entered April 11, 2018, denying the petition to annul a determination of respondent New York State Division of Housing and Community Renewal (DHCR), dated August 3, 2017, which denied the petition for administrative review (PAR) of an order determining that the apartment occupied by respondent Keith Lisy is subject to rent stabilization, and dismissing the proceeding brought pursuant to CPLR article 78, unanimously affirmed, without costs.

DHCR's determination that the subject apartment is rent

stabilized was not arbitrary and capricious (*see Matter of Ansonia Residents Assn. v New York State Div. of Hous. & Community Renewal*, 75 NY2d 206, 213 [1989]). As relevant here, housing accommodations in buildings built before January 1, 1974, with more than six units are subject to rent stabilization (*see Matter of Salvati v Eimicke*, 72 NY2d 784, 791 [1988]). A determination that a building remains "subject to the Rent Stabilization Code notwithstanding its conversion to a building with less than six apartments" is not arbitrary and capricious (*Matter of Ki Wai Leung v Division of Hous. & Community Renewal of State of N.Y.*, 266 AD2d 545, 546 [2d Dept 1999]; *Matter of Shubert v New York State Div. of Hous. & Community Renewal, Off. of Rent Admin.*, 162 AD2d 261 [1st Dept 1990]; 9 NYCRR 2520.11[d]).

Here, there is no dispute that on the applicable base date, the subject building contained more than six housing accommodations. Some time thereafter, petitioner's predecessor-in-interest voluntarily elected to reduce the number of apartments. Accordingly, the determination that the building remained regulated was not arbitrary and capricious (*see Matter of Shubert*, 162 AD2d at 261). Moreover, contrary to petitioner's contention, the record shows that the apartment at issue has been occupied as a residential unit since at least 1999, and it has been registered as rent stabilized by petitioner's predecessor-

in-interest and by petitioner for a number of years. Therefore, the apartment remains subject to the rent stabilization law (*see White Knight Ltd. v Shea*, 10 AD3d 567 [1st Dept 2004]; *Pineda v Irvin*, 40 Misc 3d 5 [App Term, 1st Dept 2013]).

Petitioner failed to preserve its argument that two other apartments were improperly registered as rent stabilized units since those units were specifically omitted from the PAR (*see Matter of Khan v N.Y. State Dept. of Health*, 96 NY2d 879 [2001]; *Matter of Curry v New York City Hous. Auth.*, 161 AD3d 578, 579 [1st Dept 2018]).

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 27, 2019

CLERK

Sweeny, J.P., Renwick, Webber, Oing, JJ.

9740 In re Christina T.,
Petitioner-Appellant,

-against-

Thomas C.T.,
Respondent-Respondent.

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Andrew J. Baer, New York, appellant.

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

Carol L. Kahn, New York, attorney for the child.

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Order, Family Court, Bronx County (Lisa S. Headley, J.), entered on or about August 13, 2018, which, after a hearing, granted respondent father's motion to dismiss the petition to modify a prior custody order for failure to state a cause of action and failure to prove a change in circumstances, unanimously affirmed, without costs.

Viewing the evidence in the light most favorable to petitioner mother, we agree that she failed to make a prima facie showing that modification of the custody order was warranted on any of the grounds alleged in the petition (*see Matter of Samuel A. v Aidarina S.*, 99 AD3d 420, 421 [1st Dept 2012]; *Matter of Juelle G. v William C.*, 96 AD3d 538 [1st Dept 2012]; *Matter of Patricia C. v Bruce L.*, 46 AD3d 399, 399 [1st Dept 2007]). The

record contains no evidence that the father was homeless and the mother herself acknowledged that he had a permanent address. The Family Court properly concluded that relocation by the father to New Jersey was permitted under the parties' 2016 custody and visitation stipulation (*see West v Vanderhorst*, 92 AD3d 615 [1st Dept 2012]; *Matter of Martin R.G. v Ofelia G.O.*, 24 AD3d 305, 306 [1st Dept 2005]). The record is also clear that the mother had not been denied meaningful access to her son after the father's relocation to New Jersey and her parenting access schedule remained the same (*see Matter of Daniel R. v Liza R.*, 309 AD2d 714 [1st Dept 2003]). Lastly, the record established that the child was doing better academically at the new school in New Jersey.

The mother's argument that the deterioration of the parents' relationship constituted a change in circumstances is unpreserved for appellate review (*see Roberta P. v Vanessa J.P.*, 140 AD3d 457, 459 [1st Dept 2016], *lv denied* 28 NY3d 904 [2016]), and we decline to review it in the interest of justice.

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

ENTERED: JUNE 27, 2019

CLERK

Sweeny, J.P., Renwick, Webber, Oing, JJ.

9741 Bijan Karimian, Index 100914/17
Plaintiff-Appellant,

-against-

Stewart L. Karlin, et al.,
Defendants-Respondents.

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Bijan Karimian, appellant pro se.

Furman Kornfeld & Brennan LLP, New York (Aaron M. Barham of counsel), for respondents.

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Order, Supreme Court, New York County (W. Franc Perry, J.), entered May 4, 2018, which denied plaintiff's motions to vacate a prior order, same court (Richard F. Braun, J.), entered on or about October 30, 2017, granting defendants' motion to dismiss the complaint, and to seal the court file, unanimously affirmed, without costs.

Plaintiff failed to demonstrate a reasonable excuse for his default in responding to defendants' motion to dismiss the complaint (CPLR 5015[a][1]; *see Eugene Di Lorenzo, Inc. v A.C. Dutton Lbr. Co.*, 67 NY2d 138, 141 [1986]). His proffered excuse, namely, that he thought his deadline for opposing the motion had been postponed indefinitely pending the court's decision on his motion to seal the court file, is belied by the record. Plaintiff's opposition papers were due October 13, 2017, and

plaintiff concedes that defendants had refused to consent to a further extension of that deadline. Nevertheless, plaintiff waited until October 13 to request an extension of time, in his order to show cause to seal the court file. The motion court struck that relief when it signed the order to show cause. The other events that plaintiff claims sowed confusion in his mind occurred after the deadline for filing opposition papers had passed. Plaintiff's status as a self-represented litigant does not alter this analysis (*see Matter of Kent v Kent*, 29 AD3d 123, 130-31 [1st Dept 2006]). Plaintiff recognized that his opposition papers would not be completed by the deadline, but, instead of submitting incomplete papers, he chose to rely on his optimistic belief that the court would grant his eleventh hour request for an extension of time.

We note that plaintiff also failed to demonstrate a meritorious defense to the motion to dismiss. He failed to show that his legal malpractice claims premised on defendants' representation of him in the United States District Court for the Southern District of New York were not time-barred (*see McCoy v Feinman*, 99 NY2d 295, 300, 306 [2002]). He failed to show that his breach of fiduciary duty claims were not time-barred (*see Block 2829 Realty Corp. v Community Preserv. Corp.*, 148 AD3d 567 [1st Dept 2017]; *Access Point Med., LLC v Mandell*, 106 AD3d 40,

45 [1st Dept 2013]). Although his legal malpractice claims premised on defendants' representation of him in the United States Court of Appeals for the Second Circuit arguably were timely and not barred by collateral estoppel, plaintiff failed to show that defendants' alleged failures caused him to lose on that appeal (*see Brooks v Lewin*, 21 AD3d 731, 734 [1st Dept 2005], *lv denied* 6 NY3d 713 [2006]). Plaintiff's cause of action for "Concealment and Failure to Self Report" is not viable because "there is no private right of action against an attorney or law firm for violations of the Code of Professional Responsibility or disciplinary rules" (*Weinberg v Sultan*, 142 AD3d 767, 769 [1st Dept 2016]).

As plaintiff does not argue that his motion to seal should have been granted regardless of whether the court vacated the order that granted defendants' motion to dismiss, we do not disturb the court's denial of that motion.

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

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

ENTERED: JUNE 27, 2019

CLERK

Sweeny, J.P., Renwick, Webber, Oing, JJ.

9743 The People of the State of New York, Respondent,

Ind. 4140N/11

-against-

Edward Luna,
Defendant-Appellant.

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Justine M. Luongo, The Legal Aid Society, New York (Andrew C. Fine of counsel), for appellant.

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

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Judgment, Supreme Court, New York County (Ruth Pickholz, J.), rendered April 11, 2013, convicting defendant, after a jury trial, of criminal sale of a controlled substance in the first and third degrees and two counts of criminal possession of a controlled substance in the third degree, and sentencing him, as a second felony drug offender, to an aggregate term of 12 years, unanimously affirmed.

The verdict was supported by legally sufficient evidence, and was not against the weight of the evidence (*People v Danielson*, 9 NY3d 342, 349 [2007]). There is no basis for disturbing the jury's credibility determinations. Defendant's knowing and intentional participation in the drug transaction could be reasonably inferred from his conduct during the transaction, including his mention of "92" to the codefendant,

corresponding to the 92 grams of heroin being offered for sale.

Defendant did not preserve any of his arguments regarding the court's intentional inclusion of stricken testimony in a jury readback, including his argument that defense counsel's summation was made in reliance on the original ruling that struck the testimony, and we decline to review them in the interest of justice. As an alternative holding, we adhere to our determination on the codefendant's appeal (*People v Cuenea*, 130 AD3d 412 [1st Dept 2015], *lv denied* 27 NY3d 995 [2016]) that the court providently exercised its discretion in revisiting its prior ruling and permitting the jury to hear the stricken testimony. While counsel did rely on the original ruling in formulating his summation (*see e.g. People v Crumpler*, 242 AD2d 956, 958 [4th Dept 1997], *lv denied* 91 NY2d 871 [1997]), we find that any error in this regard was harmless. There is no reasonable possibility that a different summation would have resulted in a more favorable verdict.

The court providently exercised its discretion in admitting an audio recording of the transaction. The court listened to the tape and made, at least, an implied finding that the recording was sufficiently audible to be played for the jury. Furthermore, the fact that a translator was able to prepare a transcript of the recording indicates that it was sufficiently audible and

distinct. Moreover, the fact that the transcript was not prepared by the testifying officer, but an independent translator, eliminated the danger "that the participant's memory of the events, rather than the actual sounds on the tape, becomes the source of the words on the transcript" (*People v Mincey*, 64 AD2d 615, 615 [2d Dept 1978]). In light of the audibility of the tape and the presence of an independent transcript, there was no danger that the jury was speculating or was relying solely on the officer's interpretation of the recording in returning its verdict. In any event, any error in admitting the recording was harmless.

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

ENTERED: JUNE 27, 2019

CLERK

Sweeny, J.P., Renwick, Webber, Oing, JJ.

9744 Brothers Pac Four, LLC, etc., Index 152864/17
Plaintiff-Respondent,

-against-

War Entertainment, LLC, etc., et al.,
Defendants-Appellants.

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Gleason & Koatz, LLP, New York (John P. Gleason of counsel), for appellants.

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Judgment, Supreme Court, New York County (Melissa A. Crane, J.), entered July 24, 2018, upon a California judgment against defendants and in favor of plaintiff in the amount of $275,586, unanimously affirmed, without costs.

The court correctly concluded that California had long-arm jurisdiction over the non-resident defendants, based upon their soliciting plaintiff in California by phone, exchanging drafts of the investor agreement by email, emailing status reports of the proposed venture, and flying to California to meet with plaintiff, conduct which cumulatively evinced that they purposefully availed themselves of the benefits and protection of California law, from which this dispute arose (*see Burger King Corp. v Rudzewicz*, 471 US 462, 475 [1985]). In the circumstances, it is fair to require that defendants account in California for the consequences that arose from their activity

(*id.* at 473-74). The burden therefore shifted to defendants to "present a compelling case that the presence of some other considerations would render jurisdiction unreasonable" (*id.* at 477).

Defendants failed to meet that burden.

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

ENTERED: JUNE 27, 2019

CLERK

Sweeny, J.P., Renwick, Webber, Oing, JJ.

9745 Suttongate Holdings Limited, Index 652393/15
Plaintiff-Appellant,

-against-

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

- - - - -

Laconm Management N.V. et al.,
Third-Party Plaintiffs-Respondents,

Barbery Group, Ltd., et al.,
Nominal Third-Party Plaintiffs-Respondents,

-against-

Waverly Investments, Ltd., et al.,
Third-Party Defendants-Appellants.

_____

Olshan Frome & Wolosky, LLP, New York (Renee M. Zaytsev of counsel), for Suttongate Holdings Limited, appellant.

Hasapidis Law Offices, Scarsdale (Annette G. Hasapidis of counsel), for Waverly Investments, Ltd. and Arie David, appellants.

Tannenbaum Helpern Syracuse & Hirschtritt LLP, New York (Vincent J. Syracuse, Ralph A. Siciliano and David Holahan of counsel), for respondents.

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Order and judgment (one paper), Supreme Court, New York County (Charles E. Ramos, J.), entered December 21, 2018, which, to the extent appealed from as limited by the briefs, dismissed the complaint and third-party defendant/counterclaim plaintiff Waverly Investments, Ltd.'s counterclaims, held that third-party defendant Arie David had breached his fiduciary duties and

committed fraud, granted defendants' counterclaim and third-party corporate plaintiffs' (Laconm Management N.V., Kashmire Investments, Ltd., Immo Kashmire Development Inc., Sedna Group Ltd., Kuiper Group Ltd., Ourista N.V., Barbery Group, Ltd., and Pledge Group Holdings, Ltd.'s) claim for rescission of a loan agreement and guarantees given to plaintiff, stated that plaintiff's claims against individual defendants Samir Andrawos and Virginia Iglesias on their guarantees to nonparty RBC Royal Bank N.V. were dismissed and that the dismissal would have res judicata effect, and rescinded a purchase agreement and ordered third-party corporate plaintiffs to pay Waverly $307,462, unanimously reversed, on the law and the facts and in the exercise of discretion, without costs, plaintiff's first, second, third and fourth causes of action reinstated to the extent indicated herein, the holding that David breached his fiduciary duties and committed fraud deleted, judgment granted to plaintiff on Andrawos's, Kashmire's, Sedna's, Kuiper's, and Ourista's guarantees to it, judgment granted to plaintiff on the loan agreement dated as of July 15, 2014, as against Laconm, Andrawos, Kashmire, Immo, Sedna, and Kuiper, the matter remanded for a new trial of plaintiff's claim that Iglesias breached the above loan agreement, and the clause about the RBC guarantees and res judicata deleted.

Although the trial court failed to comply with CPLR 4213, in light of the court's retirement, we will resolve this case ourselves to the extent possible instead of remanding for a new trial (*see e.g. Matter of Jose L. I.*, 46 NY2d 1024, 1026 [1979]).

Except for plaintiff's claim on the guarantee that Iglesias was supposed to give it, the court erred in granting the individual defendants' CPLR 4401 motion for a directed verdict at the close of plaintiff's case. Iglesias did not sign a personal guarantee in plaintiff's favor (*see Littleton Constr. Ltd. v Huber Constr., Inc.*, 27 NY3d 1081, 1083 [2016]).

The guarantees given by Andrawos, Kashmire, Sedna, Kuiper, and Ourista (the guarantor defendants) are governed by New York law. They state that they are absolute and unconditional, and also that they "shall be unconditional and irrevocable, irrespective of . . . (a) the genuineness, validity or enforceability of any of the Loan Documents . . . or (g) any other circumstance, occurrence or condition . . . which might otherwise constitute a legal or equitable defense." Hence, the guarantor defendants' claims of fraud in the inducement are barred (*see e.g. Cooperatieve Centrale Raiffeisen-Boerenleenbank, B.A., "Rabobank Intl.," N.Y. Branch v Navarro*, 25 NY3d 485, 493-495 [2015]; *Citibank v Plapinger*, 66 NY2d 90, 92 [1985]).

The guarantor defendants' argument that their guarantees do

not apply to the July 15, 2014 loan agreement is unavailing. The guarantees say they apply to all of Laconm's indebtedness to plaintiff, including, *but not limited to,* the March 7, 2014 loan agreement.

The guarantor defendants failed to prove the defense that they may challenge the guaranty on the ground of David's misconduct (*see Cooperatieve*, 25 NY3d at 496). The trial court found that David's misconduct was not in furtherance of a grand scheme of fraud.

The claims for fraud and breach of fiduciary duty asserted against David by defendants and third-party plaintiffs should be dismissed for lack of damages (*see e.g. Connaughton v Chipotle Mexican Grill, Inc.*, 29 NY3d 137, 142-143 [2017]; *One Times Sq. Assoc. v Calmenson*, 292 AD2d 174 [1st Dept 2002]). The trial court itself commented that the transaction was not a bad idea and that the deal "went bad for reasons other than Mr. David." Even if, arguendo, David violated one or more ethical rules, "an ethical violation will not, in and of itself, create a duty that gives rise to a cause of action that would otherwise not exist" (*Shapiro v McNeill*, 92 NY2d 91, 97 [1998]; *see also Cohen v Kachroo*, 115 AD3d 512, 513 [1st Dept 2014]).

The July 15, 2014 loan agreement should be enforced against Laconm, Andrawos, Kashmire, Immo, Sedna, and Kuiper. However,

because the trial court had already dismissed all claims against Iglesias, plaintiff was unable to introduce evidence (e.g., a handwriting expert) to rebut her claim that the signatures on the loan agreement were not hers. Therefore, a new trial is required on this point (*see Weckstein v Breitbart*, 111 AD2d 6, 8 [1st Dept 1985]).

The loan agreement, which is governed by New York law, appears to be signed in two places by all of the above-named defendants (as indicated, Iglesias disputes her signature), who are "presumed to know the contents of the instrument [they] signed and to have assented to such terms" (*British W. Indies Guar. Trust Co. v Banque Internationale à Luxembourg*, 172 AD2d 234, 234 [1st Dept 1991]).

Even if, as he testified, Andrawos failed to read the agreement before signing it, that does not excuse him from performing (*see Amend v Hurley*, 293 NY 587, 595 [1944]; *U.S. Legal Support, Inc. v Eldad Prime, LLC*, 125 AD3d 486, 487 [1st Dept 2015]; *Vulcan Power Co. v Munson*, 89 AD3d 494, 495 [1st Dept 2011], *lv denied* 19 NY3d 807 [2012]; *British W. Indies*, 172 AD2d at 234).

In any event, Andrawos did not sign on behalf of Laconm, Kashmire, Immo, Sedna, or Kuiper. Rather, two nonparties signed on behalf of these defendants. There was no testimony that David

made misrepresentations to these nonparties to induce them to sign. Even if David had committed misconduct, there is no reason that *plaintiff* should suffer consequences due to *David's* misconduct. David is neither a shareholder nor an officer, director, or employee of plaintiff.

In its second amended complaint, plaintiff sought to recover under the guarantees given to it, not the guarantees given to RBC. Although its prayer for relief includes a reference to the RBC guarantees, plaintiff repeatedly said during trial that it was not seeking to enforce the RBC guarantees in this action. A "court may permit pleadings to be amended before or after judgment to conform them to the evidence" (CPLR 3025[c]).

During the trial, Waverly's then lawyer said, "the parties are in agreement that the [Waverly] transaction should be rescinded." Waverly – currently represented by different counsel – may not now seek judgment for breach of contract, as opposed to rescission. Similarly, when appellants submitted their proposed order and judgment, they requested only $307,462 for Waverly, not $422,079.

As we are upholding rather than rescinding the loan agreement and guarantees given to plaintiff, we need not reach the parties' rescission-related arguments.

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

ENTERED: JUNE 27, 2019

CLERK

Sweeny, J.P., Renwick, Webber, Oing, JJ.

9747 Primiano Electric Co., Index 651724/11
Plaintiff-Appellant,

-against-

HTS-NY, LLC, et al.,
Defendants-Respondents,

SI Wood Furniture Corp., et al.,
Defendants.

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Keane & Beane P.C., White Plains (Andrew P. Tureaud of counsel), for appellant.

Schiff Hardin LLP, New York (Gary L. Rubin of counsel), for respondents.

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Order, Supreme Court, New York County (Marcy S. Friedman, J.), entered August 1, 2018, which, to the extent appealed from, granted defendants HTS-NY, LLC, HE Newport, LLC, RC Dolner, LLC and Hyatt Hotels Corporation's motion for summary judgment dismissing the first, second, third, fourth, sixth and seventh causes of action as against them and dismissing the complaint in its entirety as against Hyatt Hotels Corporation, and denied plaintiff's motion for partial summary judgment, unanimously modified, on the law, to deny defendants' motion as to the first, second, and third causes of action to the extent indicated herein and to grant plaintiff's motion as to the fifth cause of action, and otherwise affirmed, without costs.

The record demonstrates that the construction delays for which plaintiff seeks damages were not the result of actions by defendants that render unenforceable the no-damages-for-delay provision in the operative contract (*see Corinno Civetta Constr. Corp. v City of New York*, 67 NY2d 297, 309 [1986]; *Advanced Automatic Sprinkler Co., Inc. v Seaboard Sur. Co.*, 139 AD3d 424 [1st Dept 2016]). Accordingly, the fourth cause of action, which seeks delay damages, and the first, second and third causes of action to the extent they seek delay damages were correctly dismissed.

However, the record does not demonstrate as a matter of law that all the change orders that plaintiff claims are outstanding stated costs caused by delay. The March 2010 change order, which permitted defendants to release certain retainage monies to pay plaintiff's certified payroll prospectively, did not change the original contract's provisions concerning change orders or otherwise limit plaintiff's compensation for any future changes to the scope of work to payroll costs only. Accordingly, the claims for money owed on post-March 2010 change orders should not be dismissed.

The March 2010 change order allowed plaintiff to engage nonparty ATech Electric Enterprises, Inc. for additional labor at a rate of 110% of ATech's payroll. Contrary to its contentions

on appeal, plaintiff would bear that cost, and, per the change order, defendants could pay ATech out of plaintiff's retainage. However, the change order permitted defendants to pay down the retainage to ATech only in an amount equal to 110% of ATech's certified payroll. To the extent defendants paid ATech 110% of a labor rate subsequently negotiated between them but not agreed to by plaintiff, the claims for breach of contract should not be dismissed.

Defendants failed to raise an issue of fact in opposition to plaintiff's prima facie showing of entitlement to summary judgment on its claim for change order work performed in connection with accidental water damage to finished work (*see Delgado v New York City Hous. Auth.*, 51 AD3d 570 [1st Dept 2008], *lv denied* 11 NY3d 706 [2008]). The only evidence defendants submitted to controvert the value of that claim was an expert report that relied solely on the contents of an unsubmitted report by defendant Dolner's insurance carrier, which was in turn based solely upon a third-party consultant's opinion. Moreover, the basis of the insurance carrier's reductions are irrelevant to the contract between defendants and plaintiff, and defendants' unsubstantiated claims that plaintiff was not cooperative with the insurance investigation are contradicted by the record.

There is no evidence in the record that plaintiff willfully

exaggerated its mechanic's lien. Thus, to that extent the first cause of action should not be dismissed. The extent to which the lien is incorrect should be resolved at trial (*see e.g. NDL Assoc., Inc. v Villanova Hgts., Inc.*, 99 AD3d 450, 450 [1st Dept 2012]).

The complaint was correctly dismissed as against Hyatt Hotels Corporation (*see Horsehead Indus. v Metallgesellschaft AG.*, 239 AD2d 171 [1st Dept 1997]).

We do not address plaintiff's assertion that the sixth and seventh causes of action were incorrectly dismissed, because plaintiff makes no argument concerning those causes of action.

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

ENTERED: JUNE 27, 2019

CLERK

Sweeny, J.P., Renwick, Webber, Oing, JJ.

9748 Samuel Gblah, et al., Index 22931/14
Plaintiffs-Appellants,

-against-

New York City Transit Authority, et al.,
Defendants-Respondents.

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Hach & Rose, LLP, New York (John Blyth of counsel), for appellants.

Lawrence Heisler, Brooklyn (Alison Estess of counsel), for respondents.

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Order, Supreme Court, Bronx County (Donald J. Miles, J.), entered on or about April 16, 2018, which, to the extent appealed from as limited by the briefs, granted defendants' motion for summary judgment dismissing plaintiff Janet Cole's claims based on her inability to satisfy the serious injury threshold of Insurance Law § 5102(d), unanimously affirmed, without costs.

Defendants satisfied their prima facie burden of showing that Cole did not sustain a serious injury to her lumbar spine by submitting the report of their neurologist who found that she had normal range of motion and opined that any alleged injuries had resolved with no neurological disabilities (*see Holloman v American United Transp. Inc.*, 162 AD3d 423, 423 [1st Dept 2018]; *Frias v Gonzalez-Vargas*, 147 AD3d 500, 500 [1st Dept 2017]).

They also relied on her testimony that she had a previous work-related lumbar spine injury for which she had surgery and received Social Security disability (*see Pommells v Perez*, 4 NY3d 566, 576 [2005]).

In opposition, plaintiff failed to raise an issue of fact. She offered no admissible medical evidence concerning any of her alleged serious injuries, but only unaffirmed medical records. In any event, if those unaffirmed medical records were considered, they would defeat her serious injury claim because they demonstrate that her lumbar spine injury, and subsequent surgeries, were causally related to the prior work-related injury, not the subject motor vehicle accident (*see Bogle v Paredes*, 170 AD3d 455, 455 [1st Dept 2019]; *Ogando v National Frgt., Inc.*, 166 AD3d 569, 570 [1st Dept 2018]). Moreover, the medical records contain no evidence of contemporaneous treatment of her lumbar spine in the period following the subject accident, which also indicates a lack of any causal connection (*see Rosa v Mejia*, 95 AD3d 402, 403 [1st Dept 2012]).

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

ENTERED: JUNE 27, 2019

CLERK

Sweeny, J.P., Renwick, Webber, Oing, JJ.

9749 The People of the State of New York, Ind. 3480/17
Respondent,

-against-

Terrell Sutherland,
Defendant-Appellant.

_____

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

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

_____

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Abraham Clott, J.), rendered January 25, 2018,

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 27, 2019

CLERK

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

Sweeny, J.P., Renwick, Webber, Oing, JJ.

9750- Ind. 4540/09
9750A The People of the State of New York, SCI 1867/10
Respondent,

-against-

Barbara Kogan,
Defendant-Appellant.

_____

Michael E. Lipson, Jericho, for appellant.

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

_____

An appeal having been taken to this Court by the above-named appellant from judgments of the Supreme Court, New York County (Roger Hayes, J.), rendered June 4, 2010,

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 judgments so appealed from be and the same are hereby affirmed.

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

ENTERED: JUNE 27, 2019

CLERK

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

Sweeny, J.P., Renwick, Webber, Oing, JJ.

9751 Hollister C. Moore, Index 156813/14
Plaintiff-Respondent,

-against-

Elite Plus Security,
Defendant-Appellant,

Nancy Anahi Angelone, et al.,
Defendants-Respondents.

- - - - -

Nancy Anahi Angelone, et al.,
Third-Party Plaintiffs-Respondents,

-against-

Dereck Ethredge,
Third-Party Defendant.

_____

Perry, Van Etten, Rozanski & Primavera, LLP, New York (Jeffrey Van Etten of counsel), for appellant.

Hasapidis Law Offices, South Salem (Annette G. Hasapidis of counsel), for Hollister C. Moore, respondent.

Garbarini & Scher, P.C., New York (William D. Buckley of counsel), for Nancy Anahi Angelone, Sun of May, LLC and Christopher Huisinga, respondents.

_____

Order, Supreme Court, New York County (W. Franc Perry, III, J.), entered May 22, 2018, which, to the extent appealed from as limited by the briefs, denied defendant Elite Plus Security LLC's cross motion for summary judgment dismissing the complaint and any cross claims as against it, unanimously affirmed, without costs.

The motion court properly denied summary judgment, as triable issues of fact exist as to how the accident occurred (*see Rawls v Simon*, 157 AD3d 418 [1st Dept 2018]; *see also Sutherland v Comprehensive Care Mgt. Corp.*, 155 AD3d 414 [1st Dept 2017]). Plaintiff testified that defendant's security guard closed the restroom door on her hand, while the guard testified that it was plaintiff's friend who closed the door. Because defendant's submissions contain competing versions as to the proximate cause of plaintiff's accident, it failed to meet its initial burden to demonstrate the absence of all triable issues (*see Friends of Thayer Lake LLC v Brown*, 27 NY3d 1039, 1043 [2016]).

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

ENTERED: JUNE 27, 2019

CLERK

Sweeny, J.P., Renwick, Webber, Oing, JJ.

9752 In re Natalie Schleifer, etc., et al., File 3599/10A
Petitioners-Respondents,

-against-

Richard L. Yellen, et al.,
Respondents,

338-342 East 110 LLC, et al.,
Respondents-Appellants.

_____

Morrison Cohen LLP, New York (Mary E. Flynn of counsel), for appellants.

Loeb & Loeb LLP, New York (Wook Hwang of counsel), for respondents.

_____

Order, Surrogate's Court, New York County (Rita Mella, S.), entered on or about November 7, 2018, which, upon petitioners' motion, dismissed respondents 338-342 East 110 LLC, 333-339 East 109 LLC, Douglaston Realty Associates, and David Marx's (the Marx Group) counterclaim, unanimously affirmed, without costs.

The Surrogate correctly concluded that, under the terms of the settlement agreement, the Marx Group's obligation to make the Fourth Payment by March 28, 2015, preceded petitioners' obligation to deliver a quitclaim deed (*see Oppenheimer & Co. v Oppenheim, Appel, Dixon & Co.*, 86 NY2d 685, 690-691 [1995]). Although it is undisputed that the Marx Group required the deed in order to make the payment, petitioners did not breach the

settlement agreement by failing to attend a closing and provide the deed before the Fourth Payment was timely made (*see id.* at 691).

The Marx Group contends that the court improperly made factual findings on this motion for summary judgment, rather than draw all reasonable inferences in its favor. However, the settlement agreement conclusively establishes a defense to the counterclaim as a matter of law (*see MCAP Robeson Apts. L.P. v MuniMae TE Bond Subsidiary, LLC*, 136 AD3d 602 [1st Dept 2016]).

The Marx Group asserts that, if petitioners had complied with the settlement agreement and placed the executed deed into escrow, the closing would not been aborted, because the escrow agent would have delivered the deed simultaneously with receipt of the Fourth Payment. However, the escrow agent was bound by the terms of the settlement agreement and therefore could not deliver the deed until the Fourth Payment was made.

The Marx Group contends that petitioners violated section 8(A) of the settlement agreement, which required them to act cooperatively to effectuate the transfer of title of the Douglaston property, including providing a seller's affidavit and completed "ACRIS" form, which was required by New York State. However, section 8(A) provides that the parties will use their "best efforts"; this clause is unenforceable, because no

objective criteria are stated by which to measure a party's performance (*see Digital Broadcast Corp. v Ladenburg, Thalmann & Co., Inc.*, 63 AD3d 647 [1st Dept 2009], *lv dismissed* 14 NY3d 737 [2010]). Moreover, the requirement that petitioners provide the documents necessary to effectuate the purposes of the agreement did not require petitioners to provide the deed in advance of payment, because doing so would violate section 1(D)(2)(B), an express term of the agreement.

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

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

ENTERED: JUNE 27, 2019

CLERK

Sweeny, J.P., Renwick, Webber, Oing, JJ.

9753 The People of the State of New York, Index 260045/18
Plaintiff-Respondent, Ind. 352/17

-against-

Robert Paulino,
Defendant.
- - - - -
Franklyn Paulino Castillo, et al.,
Nonparty Appellants.

_____

Kasowitz Benson Torres LLP, New York (Sabrina Baig of counsel), for appellants.

Darcel D. Clark, District Attorney, Bronx (Felicia Yancey of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (Robert E. Torres, J.), entered April 16, 2018, which denied appellants' application for remission of a bail forfeiture in the amount of $ 25,000, unanimously affirmed, without costs.

Appellants lacked standing to seek remission (*see Matter of Van Deusen v People*, 97 AD2d 924 [3d Dept 1983], *appeal dismissed*

62 NY2d 605 [1984]), and, in any event, they did not show exceptional circumstances warranting the relief sought (*see People v Cotto*, 262 AD2d 138 [1st Dept 1999]).

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

ENTERED: JUNE 27, 2019

CLERK

Sweeny, J.P., Renwick, Webber, Oing, JJ.

9754 Kenton Rojas, Index 150691/13
Plaintiff-Appellant,

-against-

Empire City Subway Company Ltd.,
Defendant-Respondent,

City of New York, et al.,
Defendants.

_____

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

Obermayer Rebmann Maxwell & Hippel, New York (Jesse Levitsky of counsel), for respondent.

_____

Order, Supreme Court, New York County (Alexander M. Tisch, J.), entered on or about April 5, 2018, which, to the extent appealed from as limited by the briefs, granted defendant Empire City Subway Company Ltd.'s (Empire) motion for summary judgment dismissing the complaint as against it, unanimously reversed, on the law, without costs, and the motion denied.

Empire owns certain manholes in Manhattan, including one located immediately adjacent to where plaintiff allegedly tripped and fell on a hole in a curb. While the Highway Rules require owners of manholes to monitor and repair defective street conditions within an area extending twelve inches outward from the perimeter of the manhole (34 RCNY 2-07[b][2]), curbs are not

included in the area that a manhole owner is required to repair (*see* 34 RCNY 2-01). Accordingly, 34 RCNY 2–07(b) does not apply to curbs (*see Vucetovic v Epsom Downs, Inc.*, 10 NY3d 517, 521-522 [2008]; *Rakowski v St. Aiden's R.C. Church*, 135 AD3d 730, 731 [2d Dept 2016]; *Ascencio v New York City Hous. Auth.*, 77 AD3d 592, 593 [1st Dept 2010]; *Garris v City of New York*, 65 AD3d 953 [1st Dept 2009]).

Nevertheless, Empire City Subway Company Ltd.'s motion for summary judgment should have been denied, as it failed to establish that the hole which caused plaintiff's fall was entirely on the curb (*see Metzker v City of New York*, 139 AD3d 828, 830 [2d Dept 2016]; *Buonviaggio v Parkside Assoc., L.P.*, 120 AD3d 460, 461-462 [2d Dept 2014]; *cf. Ascencio* at 593), or outside of the manhole's 12 inch perimeter (34 RCNY 2-07 [b][2]). Although plaintiff described the hole as located at the curb, another witness testified that the hole was partially on the curb

and partially on the sidewalk. Plaintiff also identified a photo of the hole which indicated that the area where the hole was located did not have a clearly defined curb.

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

ENTERED: JUNE 27, 2019

CLERK

Sweeny, J.P., Renwick, Webber, Oing, JJ.

9755- Index 657387/17
9756-
9757N In re Wells Fargo Bank, et al.,
Petitioners,

-against-

Nover Ventures, LLC,
Respondent-Appellant,

D.E. Shaw Refraction Portfolios,
L.L.C., et al.
Respondents-Respondents,

DW Partners LP,
Respondent.

_____

McKool Smith, P.C., New York (Gayle R. Klein of counsel), for appellant.

Quinn Emanuel Urquhart & Sullivan LLP, New York (Kevin S. Reed of counsel), for respondents.

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Order, Supreme Court, New York County (Marcy S. Friedman, J.), entered August 8, 2018, which, inter alia, granted respondents-respondents' motion to dismiss Nover Ventures, LLC (Nover) as a respondent with respect to any Settlement Trust in which Nover does not hold a certificate, unanimously affirmed, without costs. Order, same court and Justice, entered May 22, 2018, which, inter alia, denied Nover's application for additional disclosure, unanimously affirmed, without costs. Order, same court and Justice, entered on or about August 8,

2018, which granted reargument, and upon reargument, adhered to its May 22, 2018 determination to deny Nover additional discovery, unanimously affirmed, without costs.

Even upon the broad construction required of article 77 of the CPLR, "cover[ing] any matter of interest to trustees, beneficiaries or adverse claimants concerning the trust" (*Matter of Greene v Finley, Kumble, Wagner, Heine & Underberg*, 88 AD2d 547, 548 [1st Dept 1982]), the court correctly limited Nover's interest as a respondent to the trusts in which Nover was the named certificateholder. To the extent Nover was an investor in collateralized debt obligation (CDO), it had no standing to participate in the proceeding. Moreover, there was no other basis for concluding that Nover was an "interested person" which should be permitted to make a claim with regard to those Settlement Trusts in which it was not a certificateholder (CPLR 7701, 7703; *see* SCPA 103[8], 103[39], 315).

The CDOs transfer all "right, title, and interest" in the assets held by the CDO to the trustee, not to CDO investors like Nover. Accordingly, the court correctly concluded that the trustees of those CDOs, which held certificates in the Settlement Trusts, could participate in the article 77 proceeding, but not individual CDO investors.

It was a provident exercise of the court's discretion to

deny Nover leave to intervene (CPLR 401) on the basis that its interest in CDOs that held an interest in some of the residential mortgage-backed securities governed by the Settlement Trusts was too attenuated, particularly where it gave Nover an opportunity to substitute the trustees of the CDOs at issue.

We perceive no abuse of discretion in denying Nover's untimely application seeking additional disclosures (*see 148 Magnolia, LLC v Merrimack Mut. Fire Ins. Co.*, 62 AD3d 486, 487 [1st Dept 2009]).

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

ENTERED: JUNE 27, 2019

CLERK

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

9758 The People of the State of New York, Respondent, Ind. 5363/09

-against-

James Montgomery, Defendant-Appellant.

_____

Christina A. Swarns, Office of the Appellate Defender, New York (Margaret E. Knight of counsel), for appellant.

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

_____

Judgment, Supreme Court, New York County (Bruce Allen, J.), rendered September 23, 2010, as amended October 27, 2010, convicting defendant, after a jury trial, of two counts of assault in the second degree, and sentencing him, as a second violent felony offender, to concurrent terms of five years, unanimously affirmed.

The verdict was supported by legally sufficient evidence and was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). The evidence here amply supports the conclusion that defendant caused physical injury within the meaning of Penal Law § 10.00(9) to both a police officer and a bus driver. Initially, we find no basis for disturbing any of the jury's credibility determinations.

Concerning the police officer, physical injury was

established by proof showing that defendant bit the officer's finger, broke the skin and caused a significant amount of bleeding. The officer also sought medical treatment for the bite, experienced pain, and took medication. The jury could have reasonably concluded that the bite and resulting cut went beyond mere "petty slaps, shoves, kicks and the like" (*Matter of Philip A.*, 49 NY2d 198, 200 [1980]), and caused "more than slight or trivial pain" (*People v Chiddick*, 8 NY3d 445, 447 [2007]). We find it unnecessary to address the other forms of injury that the officer may have sustained.

Concerning the bus driver, the evidence supports the conclusion that defendant attacked him and continued to punch him after one of the officers identified himself, and that as a result of the officers' attempts to separate defendant and the bus driver, the driver injured his knee, causing injuries that undisputedly reached the level of physical injury. Defendant's actions forged a link in the chain of causes that brought about the driver's knee injury, and the result was reasonably foreseeable (*see People v Davis*, 28 NY3d 294, 300 [2016]; *People v DaCosta*, 6 NY3d 181, 184-186 [2006]; *People v Douglas*, 143 AD2d 452 [3d Dept 1988]).

In any event, injuries that defendant directly inflicted upon the driver also satisfied the physical injury element. The

driver testified that as a result of defendant punching him, he had swelling to the head, face and back, pain throughout his body, sought medical treatment, and likened the initial pain and swelling to his face to the throbbing pain that he suffered from his knee injury (*see People v Guidice*, 83 NY2d 630, 636 [1994]; *People v Stapleton*, 33 AD3d 464, 465 [1st Dept 2006] *lv denied* 7 NY3d 904 [2006]; *People v James*, 2 AD3d 291, 291 [1st Dept 2003], *lv denied* 2 NY3d 741 [2004]).

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

ENTERED: JUNE 27, 2019

CLERK

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

9759 In re Mehki L.W.,

Catholic Guardian Services,
Petitioner-Respondent,

Keyara J.,
Respondent-Appellant.

_____

Andrew J. Baer, New York, for appellant.

Magovern & Sclafani, Mineola (Joanna M. Roberson of counsel), for respondent.

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

_____

Appeal from order, Family Court, New York County (Patria Frias-Colon, J.), entered on or about March 16, 2018, which denied respondent mother's motion to vacate a conditional surrender of the child, unanimously dismissed, without costs, as moot.

Prior to the finalization of an adoption, where there is a substantial failure of a material condition of a surrender executed pursuant to Social Services Law (SSL) § 383-c, Family Court may rehear the matter sua sponte, or upon petition by the agency, parent or attorney for the child (*see* Family Court Act § 1055-a [a]). Here, however, it appears that the adoption of the child was finalized during the pendency of this appeal. Thus, the parties' rights will not be directly affected by our

determination on this issue, and it is therefore moot (*see generally Matter of Hearst Corp. v Clyne*, 50 NY2d 707, 714 [1980]). Accordingly, we dismiss the appeal.

In any event, we find that the Family Court properly denied the mother's motion to vacate the conditional surrender. Although petitioner complied with the statutory notice requirements, the mother waited over a year in moving to vacate the surrender after she knew or should have known of the substantial failure of a material condition, namely that the foster father would no longer be an adoptive resource for the child (*see* SSL § 383-c[6][c]; *cf. Matter of Christopher F.*, 260 AD2d 97, 99-101 [3d Dept 1999]). Moreover, it is undisputed that the mother failed to provide petitioner with her updated contact information, as required under the express terms of the judicial surrender (*see* SSL § 383-c[5][c][iii]).

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

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

ENTERED: JUNE 27, 2019

CLERK

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

9760 Meer Enterprises, LLC, Index 160990/17
Plaintiff-Respondent,

-against-

Durson Kocak, et al.,
Defendants-Appellants.

_____

The Roth Law Firm, PLLC, New York (Richard Roth of counsel), for appellants.

Sadis & Goldberg LLP, New York (Ben Hutman of counsel), for respondent.

_____

Order, Supreme Court, New York County (Gerald Lebovits, J.), entered November 20, 2018, which denied defendants' motion to dismiss the complaint pursuant to CPLR 3211(a)(7), unanimously modified, on the law, to dismiss the first cause of action as against defendant Durmesh Kocak, the second cause of action for misappropriation of confidential information and trade secrets as against defendant D.C. Group, Inc., the third cause of action for tortious interference with contract, and the fifth cause of action for unjust enrichment as against defendant Durson Kocak, D.C. Group Inc., Nuri Kocak and Nurco Technologies Inc., and otherwise affirmed, without costs.

Plaintiff Meer Enterprises, LLC purchased from defendant D.C. Group, Inc. an interest in a jewelry company doing business under the registered trade name Unique Settings of New York.

Thereafter, defendants allegedly began operating a competing business under the name Unique Casting House and, later, Empire Casting House.

Plaintiff has pled a claim for breach of the noncompete, nonsolicitation and confidentiality provisions of the asset purchase agreement against Durson Kocak and D.C. Group (*Second Source Funding, LLC v Yellowstone Capital, LLC*, 144 AD3d 445, 445-446 [1st Dept 2016]; *Harris v Seward Park Hous. Corp.*, 79 AD3d 425, 426 [1st Dept 2010]). Durmesh Kocak is not a "covered person" bound by those provisions.

A claim for misappropriation of trade secrets against defendants Durson, Durmesh, Selina Kocak, Nuri Kocak, Gonco LLC and Nurco is sufficiently alleged (*Schroeder v Pinterest*, 133 AD3d 12, 27 [1st Dept 2015]). Plaintiff claims that it provided its sales reports, customer lists, customer account information, and pricing data to Durson and Durmesh pursuant to the confidentiality provision of the asset purchase agreement, as well as an oral confidentiality agreement, with the understanding that they would use it solely to assess Unique Settings' showroom business. Notwithstanding, Durson and Durmesh allegedly used plaintiff's information in breach of those agreements, and shared it with Selina, Nuri, Gonco and Nurco, who knew they were not entitled to use it, but did so anyway in competition with

plaintiff. However, the complaint does not plead a legally sufficient misappropriation claim against DC Group because it does not include allegations that DC Group, in particular, committed any acts of misappropriation.

The cause of action for tortious interference with contract is dismissed. Plaintiff has not sufficiently alleged that Durmesh, Nuri, Selina, Gonco or Nurco procured a breach of the asset purchase agreement by Durson (*White Plains Coat & Apron Co., Inc. v Cintas Corp.*, 8 NY3d 422, 426 [2007]; *Lama Holding Co. v Smith Barney*, 88 NY2d 413, 424 [1996]), or that their activities were the "but for" cause of any such breach (*Cantor Fitzgerald Assoc. v Tradition N. Am.*, 299 AD2d 204 [1st Dept 2002], *lv denied* 99 NY2d 508 [2003]; *see Twin City Fire Ins. Co. v Arch Ins. Group, Inc.*, 143 AD3d 533, 534 [1st Dept 2016], *lv dismissed* 29 NY3d 995 [2017]).

Plaintiff sufficiently alleges a claim for unfair competition against Durson, Durmesh, Selina, Nuri, Gonco and Nurco (*see Brook v Peconic Bay Med. Ctr.*, 152 AD3d 436, 439 [1st Dept 2017]; *Apogee Handcraft, Inc. v Verragio, Ltd.*, 155 AD3d 494, 496 [1st Dept 2017], *lv denied* 31 NY3d 903 [2018]; *Ahead Realty LLC v India House, Inc.*, 92 AD3d 424, 425 [1st Dept 2012]), including based on allegations of likely, if not actual, consumer confusion between plaintiff's trade name and defendants'

competing business (*Allied Maintenance Corp. v Allied Mech. Trades*, 42 NY2d 538, 543 [1977]).

Plaintiff has also stated a claim against D.C. Group and its shareholder, Durson, based on Durson's efforts to solicit Unique Settings' customers subsequent to the sale of its goodwill to plaintiff (*Bessemer Trust Co., N.A. v Branin*, 16 NY3d 549, 556-557 [2011]).

The unjust enrichment claim is duplicative of the breach of contract claim asserted against Durson and D.C. Group (*Clark-Fitzpatrick, Inc. v Long Is. R.R. Co.*, 70 NY2d 382, 388 [1987]), and is also dismissed against Nurco and Nuri, since they are not alleged to have operated Unique Casting House. The claim is properly pled against Durmesh and Selina, who allegedly operated the Unique Casting House business with Durson (*Georgia Malone & Co., Inc. v Reider*, 19 NY3d 511, 516 [2012]).

Plaintiff has pled defamation per se against Durmesh - who allegedly made a statement that may arguably impugn plaintiff's reputation in its trade, business or profession - and need not allege special damages (*Liberman v Gelstein*, 80 NY2d 429, 435 [1992]; *Glazier v Harris*, 99 AD3d 403, 404 [1st Dept 2012]).

Moreover, plaintiff pled the claim with the requisite particularity (CPLR 3016[a]; *Amaranth LLC v JP Morgan Chase & Co.*, 71 AD3d 40, 48 [1st Dept 2009], *lv dismissed in part, denied in part* 14 NY3d 736 [2010]).

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

ENTERED: JUNE 27, 2019

CLERK

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

9761 Elizabeth S. Straus, Index 304189/13
Plaintiff-Appellant,

-against-

Daniel A. Strauss,
Defendant-Respondent.

_____

Pillsbury Winthorp Shaw Pittman LLP, New York (Edward Flanders of counsel), for appellant.

Stutman Stutman & Lichtenstein, New York (William S. Beslow of counsel), for respondent.

_____

Order, Supreme Court, New York County (Deborah A. Kaplan, J.), entered July 24, 2018, which, to the extent appealed from, upon reargument and renewal, granted plaintiff's application for an award of attorneys' fees and costs to Pillsbury Winthrop Shaw Pittman LLP (Pillsbury) to the extent of awarding $440,000 in counsel fees, unanimously modified, on the law, to remand for a determination as to whether reasonable out of pocket costs and expenses paid for outside vendors should be awarded, and otherwise affirmed, without costs.

This claim for attorneys fees and out of pocket expenses arises as a collateral dispute in the context of an underlying matrimonial action. In a prior decision the court found that defendant and his attorney engaged in frivolous conduct by improperly retaining an iPad containing privileged communications

between plaintiff and her attorney, Mr Lugo, about the underlying case as well as communications concerning plaintiff's personal relationships. As part of the iPad dispute, the Pillsbury firm was retained to represent Mr. Lugo. Plaintiff obligated herself to pay Mr. Lugo's fees.

The underlying frivolous conduct, detailed in the court's prior order, provided a sufficient basis for an award of reasonable counsel fees and costs to Pillsbury, whose retention was limited to the iPad dispute (*see* 22 NYCRR 130-1.2). In determining that Pillsbury was entitled to counsel fees in the amount of $440,000 of the more than $1.3 million billed, the court set forth the factors it considered, which included a review of the invoices and attorney affirmations, that fees were also due to plaintiff's own counsel, the experience, ability and reputation of the attorneys working on the dispute, the complexity of the issues and the results obtained. The court also found that the firm's combined hourly billing rate was excessive. We believe that the court's decision was sufficiently detailed in providing "the reasons why the court found the amount awarded ... to be appropriate" (22 NYCRR 130-1.2; *Spinnell v Toshiba Am. Consumer Prods.*, 239 AD2d 175 [1st Dept 1997]).

To the extent the court considered Pillsbury's non-compliance with 22 NYCRR 1400, the court recognized that Part

1400 is meant to address abuses in the practice of matrimonial law and to protect the public (*Gross v Gross*, 36 AD3d 318, 322 [2d Dept 2006] [internal quotation marks omitted]) and that compliance with Part 1400 may be waived by the client (*see Rivacoba v Aceves*, 110 AD3d 495 [1st Dept 2013]). The court expressly held that non-compliance with Part 1400 did not prevent an award of fees in this case. While the court noted that Pillsbury was still required to, but did not, comply with Part 1400, we find no abuse of discretion in the overall reduced amount awarded, especially where, as here, the court was fully familiar with the case, and considered the relevant factors.

The court, however, should have separately considered an award on Pillsbury's request for out of pocket costs and disbursements paid to the outside vendors. We, therefore, remand this matter for a determination solely on this issue.

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

ENTERED: JUNE 27, 2019

CLERK

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

9762 The People of the State of New York, Respondent, Ind. 4230/13

-against-

Justin Cook,
Defendant-Appellant.

_____

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

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

_____

Judgment, Supreme Court, New York County (Richard D. Carruthers, J. at hearings; Robert M. Stolz, J. at jury trial and sentencing), rendered March 25, 2015, convicting defendant of robbery in the first and second degrees and burglary in the first degree, and sentencing him, as a second felony offender, to concurrent prison terms of 12 years, unanimously reversed, on the law, and the matter remanded for a new trial.

The court erred in denying defendant's application, expressly made under *Chambers v Mississippi* (410 US 284 [1973]), to receive testimony that one of the robbery victims, who was unavailable to testify at trial, failed to identify defendant at a lineup. Of the requirements for admission of exculpatory hearsay evidence, the only one in dispute is the reliability of the nonidentification. Although there were reasons to suspect

that this victim may have falsely claimed to be unable to identify anyone in the lineup, the nonidentification plainly bore sufficient "indicia of reliability" under the applicable standard, which "hinges upon reliability rather than credibility" (*People v Robinson*, 89 NY2d 648, 657 [1997]). Where the proponent of the statement "'is able to establish this possibility of trustworthiness, it is the function of the jury alone to determine whether the declaration is sufficient to create reasonable doubt of guilt'" (*id.* [quoting *People v Settles*, 46 NY2d 154, 170 [1978]).

We have considered and rejected defendant's arguments for dismissal. Because we are ordering a new trial, we find it unnecessary to reach any other issues, except that we find that the verdict was based on legally sufficient evidence and was not against the weight of the evidence.

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

ENTERED: JUNE 27, 2019

CLERK

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

9763 Jermaine Thomas, Index 304542/14
Plaintiff-Appellant,

-against-

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

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Sim & Record, LLP, Bayside (Sang J. Sim of counsel), for appellant.

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

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Order, Supreme Court, Bronx County (Alison Y. Tuitt, J.), entered on or about April 4, 2018, which granted defendants' motion for summary judgment dismissing plaintiff's remaining claims of state and federal malicious prosecution, unanimously modified, on the law, to reinstate the state and federal malicious prosecution claims as against defendant Detective James Fleming, and otherwise affirmed, without costs.

Plaintiff alleges that in the early morning of December 7, 2009, he was walking his dog, a pit bull, and going to get baby food for his young child. He contends that, initially, he had his dog off leash, which caused Detective Fleming to stop him. Detective Fleming subsequently arrested him and sprayed mace in his face.

Detective Fleming contends that, on the morning of December

7, 2009, he witnessed plaintiff sell what he believed to be drugs to another individual, smoke a marijuana cigarette, and threaten the officers that his dog would attack them. He also contends plaintiff resisted arrest, and that after plaintiff was arrested, Detective Fleming discovered a ziplock bag of marijuana on plaintiff's path to the police car which had not been there before plaintiff passed by. The alleged buyer was never apprehended, and the marijuana cigarette never recovered. Detective Fleming also could only describe the buyer as male and taller than plaintiff, and could not describe his ethnicity, height, weight or clothing. Plaintiff denied that he smoked or was carrying any marijuana that day.

The arrest report indicates that plaintiff was arrested for criminal sale of marijuana and resisting arrest. The next day, the People filed a criminal information accusing him solely of criminal possession of marijuana, unlawful possession of marijuana, resisting arrest, and harassment. During the criminal proceedings, plaintiff sought to suppress the ziplock bag of marijuana and the Criminal Court conducted a *Mapp* hearing. The Criminal Court found that there was probable cause for the arrest based upon Detective Fleming's testimony. Following a bench trial, plaintiff was acquitted of all charges.

Where "there is a dispute about either the true state of

facts, or the inferences to be drawn by a reasonable person from the facts which led to the prosecution, the uniform rule has been to require there be a factual resolution at a trial" (*Munoz v City of New York*, 18 NY2d 6, 11 [1966]; *see also Murray v City of New York*, 154 AD3d 591, 591 [1st Dept 2017]; *Rivera v City of New York*, 148 AD3d 462, 463 [1st Dept 2017]; *Mendez v City of New York*, 137 AD3d 468, 471 [1st Dept 2016]). "[T]he court on a summary judgment motion must indulge all available inferences of the absence of probable cause and the existence of malice" in the plaintiff's favor (*De Lourdes Torres v Jones*, 26 NY3d 742, 763 [2016]). In light of plaintiff's and Detective Fleming's sharply different versions of the events leading up to plaintiff's arrest, including whether or not plaintiff engaged in a drug transaction and/or smoked a marijuana cigarette, there is a triable issue of fact as to probable cause for the initial arrest (*see Murray*, 154 AD3d at 491). In addition, based upon the surrounding circumstances, actual malice may be inferred from the lack of probable cause and plaintiff's testimony that Detective Fleming intentionally provided false information to law enforcement authorities (*Cardoza v City of New York*, 139 AD3d 151, 164 [1st Dept 2016]).

The prior *Mapp* determination by the Criminal Court does not collaterally estop this Court from finding a triable issue of

fact regarding the lack of probable cause. Because plaintiff was acquitted of all charges in the underlying criminal case, he could not appeal the *Mapp* hearing decision and therefore, it was not sufficiently final to be accorded collateral estoppel effect (*see Davidson v City of New York*, 155 AD3d 544, 544 [1st Dept 2017]; *Williams v Moore*, 197 AD2d 511, 513 [2d Dept 1993]).

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

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

ENTERED: JUNE 27, 2019

CLERK

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

9764 Ness Technologies S.A.R.L., et al., Plaintiffs-Respondents, Index 657241/17

-against-

Pactera Technology International Limited, Defendant-Appellant,

HNA Group (International) Company Limited, et al., Defendants.

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O'Melveny & Myers LLP, Los Angeles, CA (William K. Pao of the bar of the State of California, admitted pro hac vice, of counsel), for appellant.

Sheppard, Mullin, Richter & Hampton LLP, New York (Paul A. Werner of the bar of the State of Virginia and the District of Columbia, admitted pro hac vice, and Imad S. Martini of counsel), for respondents.

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Order, Supreme Court, New York County (Barry R. Ostrager, J.), entered May 22, 2018, which, to the extent appealed from, denied defendant Pactera Technology International Limited's (PACL) motion to dismiss plaintiffs' breach of contract and declaratory judgment causes of action, unanimously modified, on the law, to dismiss the declaratory judgment cause of action, and otherwise affirmed, without costs.

Assuming arguendo that section 10.02(b)(ii) of the Stock Purchase Agreement creates a condition precedent, once the Outside Date of October 27, 2017 had passed, plaintiff had

terminated the agreement and defendant had not obtained approval from the Committee on Foreign Investment in the United States (CFIUS) for the purchase, neither specific performance nor an injunction would have remedied defendant's breach.

The complaint sufficiently articulated specific breaches of defendant's obligation to use its "reasonable best efforts," including delaying submission of its information to CFIUS so that its affiliate HNA Group could complete an unrelated transaction, and "knowingly providing false information inconsistent with publically-available filings and reports" (*Van Valkenburgh, Nooger & Neville, Inc. v Hayden Publishing Company, Inc*, 30 NY2d 34, 45-47 [1972] *lv denied* 409 US 875 [1972]); *Morris v 702 E. Fifth St. HDFC*, 46 AD3d 478, 479 [1st Dept 2007]).

However, since plaintiff has a legal remedy for breach of contract, its cause of action for declaratory judgment should have been dismissed (*Cronos Group Ltd. v XComIP, LLC,* 156 AD3d 54 [1st Dept 2017]; *Singer Asset Fin. Co., LLC v Melvin*, 33 AD3d 355, 358 [1st Dept 2006]).

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

ENTERED: JUNE 27, 2019

CLERK

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

9766 Allan Landis, Index 653847/15
Plaintiff-Appellant, File 1388/17B

-against-

383 Realty Corp., et al.,
Defendants-Respondents,

Sally Carrubba,
Defendant.

_____

Knox Law Group, P.C., New York (Daniel Knox of counsel), for appellant.

Ganfer Shore Leeds & Zauderer LLP, New York (Mark A. Berman of counsel), for respondents.

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Order, Surrogate's Court, New York County (Nora Anderson, S.), entered on or about December 6, 2018, which denied plaintiff's motion for summary judgment, unanimously affirmed, without costs.

This action was commenced in Supreme Court and transferred to Surrogate's Court upon the death of defendant Bunita L. Weiner. Before the transfer, plaintiff had moved for summary judgment, and Supreme Court (Barry Ostrager, J.) had denied the motion in an order entered July 31, 2017. That ruling, which plaintiff did not appeal, remained law of the case and could not be contravened by a court of coordinate jurisdiction (*Grossman v Meller*, 213 AD2d 221, 224 [1st Dept 1995]). Thus, the Surrogate

correctly denied the instant motion for summary judgment on the ground that, as she said, "the substance of [plaintiff's] motion was already squarely decided against him" by Supreme Court.

The Surrogate also properly denied plaintiff's alternative request for leave to replead the fraudulent conveyance cause of action (*see Pasalic v O'Sullivan*, 294 AD2d 103, 104 [1st Dept 2002]). Plaintiff was granted leave to replead in an order of Supreme Court (Barry Ostrager, J.) entered May 10, 2017, and the repleaded cause of action was subsequently dismissed by the court in the same order that denied plaintiff's motion for summary judgment.

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

ENTERED: JUNE 27, 2019

CLERK

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

9767 In re Princetta S.S.,
Petitioner-Appellant,

-against-

Felix Z.J.,
Respondent-Respondent.

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Tennille M. Tatum-Evans, New York, for appellant.

Karen Freedman, Lawyers for Children, Inc., New York (Shirim Nothenberg of counsel), for respondent.

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Order, Supreme Court, New York County (Tandra L. Dawson, J.), entered on or about October 26, 2015, which dismissed the mother's petition for modification of visitation, unanimously reversed, on the law, without costs, and the matter remanded for a hearing to determine if a change in the current visitation schedule would be in the child's best interests.

The mother's allegations that the father had been making baseless accusations that she was subjecting the child to sexual abuse constituted a change in circumstances sufficient to warrant a hearing to determine if modification of the parties' visitation schedule would be in the child's best interest (*see Fargasch v Alves*, 116 AD3d 774, 775-776 [2d Dept 2014]; *see also Mildred S.G. v Mark G.*, 62 AD3d 460, 461 [1st Dept 2009]). Moreover, the mother's assertion that the now almost nine-year-old child's

position on visitation had changed, that she presently wanted to be able to spend one weekend per month with the mother, if true, would also constitute a change in circumstances *(see Matter of Athena H.M v Samuel M.*, 143 AD3d 561, 561-562 [1st Dept 2016]). Indeed, the current order does not allow the child to have any parenting time with the mother on the weekends. The mother also alleges that the father was not taking the child to her extracurricular activities as required.

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

ENTERED: JUNE 27, 2019

CLERK

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

9768 Temple Beth Sholom, Inc., et al., Index 652187/16
Plaintiffs-Respondents,

-against-

Commerce & Industry Insurance Company,
Defendant-Appellant.

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Law Office of Jeffrey Mathews, New York (Jeffrey A. Mathews of counsel), for appellant.

Marshall, Conway & Bradley P.C., New York (Christopher T. Bradley of counsel), for respondents.

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Order, Supreme Court, New York County (Debra A. James, J.), entered September 5, 2018, which, inter alia, granted plaintiffs' motion for summary judgment to declare that defendant is obligated to defend and indemnify plaintiffs in the underlying action, and reimburse them for all attorneys' fees, costs, and expenses, and denied defendant's cross motion for summary judgment to dismiss the first through fifth causes of action of the complaint, unanimously affirmed, with costs.

Plaintiff Temple relied to its detriment on the defense provided by defendant Commerce, which was in conflict with the defense Commerce provided to the general contractor, and as a result, Temple lost control of its defense. Commerce was properly estopped from denying coverage by virtue of its conduct in handling the underlying claim (*see Albert J. Schiff Assoc. v*

Flack, 51 NY2d 692, 699 [1980]).

Moreover, since Commerce accepted coverage, without reservation, and without having investigated the tender or having failed to uncover facts that were readily available through a review of the contracts and an interview of its insured, through no fault of Temple, Commerce is estopped from denying or disclaiming coverage (*see Draper v Oswego County Fire Relief Assn.*, 190 NY 12, 16 [1907]; *see also Yoda, LLC v National Union Fire Ins. Co. of Pittsburgh, Pa.*, 88 AD3d 506 [1st Dept 2011]).

Finally, it is undisputed that Temple, pursuant to the subcontract, was required to be added as an additional insured to the policy; that the subcontract contemplated that Boyle would perform all of the asbestos removal for Temple's project, including any possible additional work that might become necessary during the construction phase; and that the work performed by Duran, a Boyle employee, constituted both "ongoing operations" and "your work" as defined under the policy.

Accordingly, the work performed by Duran at the time of his accident falls within the scope of both additional insured endorsements in the policy (*see Consolidated Edison Co. of N.Y. v Hartford Ins. Co.*, 203 AD2d 83 [1st Dept 1994].

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

ENTERED: JUNE 27, 2019

CLERK

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

9769 The People of the State of New York, Respondent, Ind. 653/16

-against-

Pedro Echevarria, Defendant-Appellant.

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Janet E. Sabel, The Legal Aid Society, New York (Allen Fallek of counsel), for appellant.

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

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Judgment, Supreme Court, New York County (Ronald A. Zweibel, J.), rendered June 16, 2016, convicting defendant, upon his plea of guilty, of criminal possession of stolen property in the fourth degree, and sentencing him, as a second felony offender, to a term of 1½ to 3 years, unanimously affirmed.

After suppressing a metal rod recovered from defendant's backpack in an initial search near the crime scene, the hearing court properly declined to suppress the remaining evidence removed from the backpack after an inventory search at the police precinct. The evidence established that the initial illegality did not taint the inventory. The observations of the main police witness were sufficient to satisfy the People's burden at the hearing, and the circumstances did not require them to call the officer who conducted the initial search (*see People v Norman*,

304 AD2d 405, 405 [1st Dept 2003], *lv denied* 100 NY2d 623 [2003]).

The court also correctly found that the inventory search, in which all the items found in defendant's backpack and the backpack itself were vouchered, was proper (*see e.g. People v Lee*, 143 AD3d 626 [1st Dept 2016], *affd* 29 NY3d 1119 [2017]; *People v Pompey*, 63 AD3d 612 [1st Dept 2009], *lv denied* 13 NY3d 861 [2009], *cert denied* 559 US 1051 [2010]). Unlike the situation in *People v Galak* (80 NY2d 715, 720-721 [1993]), a delay in completing the inventory procedure was satisfactorily explained. We have considered and rejected defendant's remaining arguments on this subject.

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

ENTERED: JUNE 27, 2019

CLERK

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

9770 Rockwell Capital Partners, Inc., et al., Plaintiffs-Appellants, Index 160529/17

-against-

HempAmericana, Inc., Defendant-Respondent,

Derwin A. Wallace, et al., Defendants.

White and Williams LLP, New York (Nicole A. Sullivan of counsel), for appellants.

Suares Law, Brooklyn (Donnell Suares of counsel), for respondent.

Order, Supreme Court, New York County (Robert David Kalish, J.), entered January 9, 2019, which, insofar as appealed from as limited by the briefs, granted defendant HempAmericana, Inc.'s CPLR 3211(a)(7) motion to dismiss plaintiffs' defamation claims, unanimously affirmed, without costs.

This defamation action arises out of statements made about plaintiffs Rockwell Capital Partners, Inc. and Northbridge Financial, Inc. (Northbridge) by the Chief Executive Officer of defendant HempAmericana, Inc. (HempAmericana), nonparty Salvador Rosillo, in an interview published in CannaInvestor Magazine (the Magazine). Plaintiffs specifically object to Rosillo's characterization of the subject deal as "toxic"; implication that

plaintiffs were the only reason for HempAmericana's financial troubles and low stock prices; and allegedly inaccurate reference to Northbridge as being included in the deal.

The court properly granted the motion to dismiss the defamation claims. Rosillo's characterization of the deal as "toxic" constitutes a non-actionable statement of opinion. This language is "[l]oose, figurative or hyperbolic" and lacks a precise meaning (*Dillon v City of New York*, 261 AD2d 34, 38 [1st Dept 1999]; *see generally Brian v Richardson*, 87 NY2d 46, 51 [1995]; *Pontos Renovation v Kitano Arms Corp.*, 226 AD2d 191, 191-192 [1st Dept 1996]; *Intellect Art Multimedia, Inc. v Milewski*, 24 Misc 3d 1248(A), *4-5 [Sup Ct, NY County 2009]). Moreover, given its publication in an industry investor magazine, it is best interpreted as an attempt by HempAmericana's CEO to explain his company's past poor performance and encourage future investment (*see Brian*, 87 NY2d at 51-54; *Steinhilber v Alphonse*, 68 NY2d 283, 294-295 [1986]; *Sandals Resorts Intl. Ltd. v Google, Inc.*, 86 AD3d 32, 41-45 [1st Dept 2011]).

Contrary to plaintiffs' claim, there is no implication that the "toxic deal" statement was based on undisclosed facts, so as to bring it within the realm of mixed opinion (*see generally Steinhilber*, 68 NY2d at 289-290). Rather, Rosillo made clear that this characterization was based on the drop in share prices

resulting from the deal - a fact plaintiffs do not dispute.

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

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

ENTERED: JUNE 27, 2019

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

9771 Theresa Sapienza, etc., Index 153922/17
Plaintiff-Appellant,

-against-

Becker & Poliakoff, also known as
Becker & Poliakoff, LLP, et al.,
Defendants-Respondents.

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Law Offices of Mario Biaggi, Jr., New York (Mario Biaggi, Jr. of counsel), for appellant.

Furman Kornfeld & Brennan LLP, New York (Andrew Jones of counsel), for respondents.

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Order, Supreme Court, New York County (Shirley Werner Kornreich, J.), entered on or about April 5, 2018, which granted defendants' motion to dismiss the amended complaint, and denied plaintiff's cross motion for leave to file a second amended complaint, unanimously affirmed, without costs.

Plaintiff's fraud claim was properly dismissed, as plaintiff did not allege "actual pecuniary loss sustained" by plaintiff's decedent individually "as the direct result of" defendants' alleged fraud (*Lama Holding Co. v Smith Barney*, 88 NY2d 413, 421 [1996] [internal quotation marks omitted]), with "the requisite particularity under CPLR 3016(b)" (*Eurycleia Partners, LP v Seward & Kissel, LLP*, 12 NY3d 553, 559 [2009]). The alleged "lost opportunity" damages are too speculative to support a

recovery, since a plaintiff cannot be compensated under a fraud cause of action "for what [he] might have gained" (*Connaughton v Chipotle Mexican Grill, Inc.*, 29 NY3d 137, 142 [2017] [internal quotation marks omitted]).

The legal malpractice claim was also properly dismissed. Plaintiff did not allege "actual, ascertainable damages" incurred by plaintiff's decedent "as a result of an attorney's negligence" (*Dempster v Liotti*, 86 AD3d 169, 177 [1st Dept 2011]; *see Humbert v Allen*, 89 AD3d 804, 806 [2d Dept 2011]).

Plaintiff's cross motion for leave to amend the complaint was properly denied since the proposed amended complaint added only conclusory allegations that did not cure the failure to adequately plead damages sustained by plaintiff's decedent in his individual capacity that were proximately caused by defendants (*see Heller v Louis Provenzano, Inc.*, 303 AD2d 20, 25 [1st Dept 2003]).

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

ENTERED: JUNE 27, 2019

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

9772 The People of the State of New York, Ind. 791N/16
Respondent,

-against-

Rasheen Lurch,
Defendant-Appellant.

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Justine M. Luongo, The Legal Aid Society, New York (Harold V. Ferguson, Jr. of counsel), for appellant.

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

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An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Abraham Clott, J.), rendered August 3, 2016,

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

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

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

ENTERED: JUNE 27, 2019

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

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

9773 Vladislav Gershkovich, Index 655982/17
Plaintiff-Respondent,

-against-

Shchukin Gallery Inc., et al.,
Defendants-Appellants.

Weingrad & Weingrad PC, New York (Anna Jinjolava of counsel), for appellants.

Law Office of Irina Frolova, New York (Irina Frolova of counsel), for respondent.

Order, Supreme Court, New York County (Paul A. Goetz, J.), entered September 10, 2018, which granted plaintiff's motion for summary judgment on plaintiff's claims and for dismissal of defendants' counterclaims, unanimously affirmed, without costs.

The motion court correctly granted plaintiff summary judgment. Plaintiff met his initial burden on summary judgment by submitting a signed copy of the parties' debt restructuring agreement (DRA), defendants' guarantees of repayment, record evidence of the months of negotiations leading to the agreement, as well as proof of wire transfers of funds loaned to defendants and of their default on repayment.

In opposition, defendants failed to raise a triable issue of fact on the basis of their argument that they signed the DRA and guarantees under duress (*Sosnoff v Carter*, 165 AD2d 486, 491 [1st

Dept 1991]). They are unable to show that they entered into the DRA unwillingly on account of an alleged theft of art by a nonparty to this action allegedly in conspiracy with plaintiff. Not only is there an absence of proof of the alleged theft and conspiracy, but no allegation refers to Gershkovich himself stealing the art, being in possession of the art or threatening defendants in any untoward way. To the extent that the alleged duress was based on Gershkovich's threatened demand for repayment and potential legal action, this theory also fails. It is well-settled that "[the] threatened exercise of a legal right cannot constitute duress" (*Nuntnarumit v Lyceum Partners LLC*, 165 AD3d 532, 532-533 [1st Dept 2018][citation and internal quotation marks omitted]). Moreover, defendants waived any claim of duress when, after months of participating in negotiations and the drafting of the loan agreement, they entered the agreement, accepted the benefits of the loan, and did not repudiate the agreement.

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

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

ENTERED: JUNE 27, 2019

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

9774 In re Bronwyn Ryan, Index 159677/16
Petitioner,

-against-

New York City Department of
Housing Preservation and Development,
et al.,
Respondents.

_____

Green and Cohen, P.C., New York (Adam M Bernstein of counsel), for petitioner.

Zachary W. Carter, Corporation Counsel, New York (Eva L. Jerome of counsel), for New York City Department of Housing Preservation and Development, respondent.

Gallet Dreyer & Berkey LLP, New York (Michelle P. Quinn of counsel), for East Midtown Plaza Housing Company, Inc., respondent.

_____

Determination of respondent New York City Department of Housing Preservation and Development, dated October 18, 2016, which, after a hearing, denied the petition for succession rights to the subject apartment and issued a certificate of eviction, unanimously confirmed, the petition denied, and the proceeding brought pursuant to CPLR article 78 (transferred to this Court by order of Supreme Court, New York County [Erika M. Edwards, J.], entered June 12, 2017), dismissed, without costs.

The determination that petitioner failed to establish succession rights to the subject apartment is supported by

substantial evidence, as was the issuance of the certificate of eviction (*see 300 Gramatan Ave. Assoc. v State Div. of Human Rights*, 45 NY2d 176, 180 [1978]). Petitioner admitted that her mother, a cooperator of record, always resided in a different apartment, and that her father lived with her at the subject apartment "on and off" and "a lot of times in the summer." By such testimony, petitioner failed to establish that her father, the other cooperator of record, used the subject apartment as his primary residence, let alone that he and petitioner resided there during the two years before he vacated the apartment (*see Matter of Pietropolo v New York City Dept. of Hous. Preserv. & Dev.*, 39 AD3d 406, 407 [1st Dept 2007]).

The only documentation petitioner offered to establish that her father's primary residence was the subject apartment was the income affidavits from 2001 through 2008. Income affidavits alone, however, are insufficient to establish primary residency (*see Matter of Broussard v New York City Dept. of Hous. Preserv. & Dev.*, 170 AD3d 563 [1st Dept 2019]; *Matter of Hochhauser v City of N.Y. Dept. of Hous. Preserv. & Dev.*, 48 AD3d 288, 289 [1st Dept 2008]). Petitioner provided no objective documentation, such as her father's tax returns, driver's license, voter registration card, or utility bills in his name to establish his primary residency in the apartment (*see Matter of Horne v Wambua*,

143 AD3d 605 [1st Dept 2016]). The Hearing Officer's conclusion that petitioner's father may have spent some time at the apartment, but that no documentation reflected it as his address, was entitled to deference (*see Matter of Ayvazayan v City of N.Y. Dept. of Hous. Preserv. & Dev.*, 129 AD3d 494 [1st Dept 2015]).

The testimony of petitioner's witnesses, who admitted they had never been in the apartment or met petitioner's father, was not specific and detailed, and was insufficient to help petitioner establish her father's primary residency and her succession rights (*see Matter of Renda v New York State Div. of Hous. & Community Renewal*, 22 AD3d 382, 383 [1st Dept 2005]).

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 27, 2019

CLERK

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

9775 Naomi Pouchie, Index 308501/12
Plaintiff-Appellant,

-against-

Sandra Pichardo, et al.,
Defendants-Respondents.

_____

Spiegel & Barbato, LLP, Bronx (Stephen A. Iannacone of counsel), for appellant.

Sweetbaum & Sweetbaum, Lake Success (Joel A. Sweetbaum of counsel), for Sandra Pichardo, respondent.

Russo & Tambasco, Melville (Susan J. Mitola of counsel), for Ronald Harrison, respondent.

Robert D. Grace, Brooklyn, for Edgar Feijoo, respondent.

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Order, Supreme Court, Bronx County (Alison Y. Tuitt, J.), entered on or about April 20, 2018, which granted defendants' motions and cross motion for summary judgment dismissing the complaint based on plaintiff's inability to establish a serious injury within the meaning of Insurance Law § 5102(d), unanimously modified, on the law, the motions and cross motion denied as to plaintiff's claims of serious injury to the right shoulder, cervical spine, and psychological injuries, and otherwise affirmed, without costs.

Defendants failed to meet their prima facie burden as to plaintiff's claim that she sustained post-traumatic stress

disorder and panic attacks as a result of the accident, since they submitted no evidence in connection with those claims nor otherwise challenged them (*see Singer v Gae Limo Corp.*, 91 AD3d 526, 527 [1st Dept 2012]). Accordingly, the burden did not shift to plaintiff on that issue.

However, defendants established prima facie that plaintiff did not sustain permanent or significant injuries to her cervical spine, lumbar spine, or right shoulder through the reports of their expert orthopedist and neurologist, who found negative clinical test results and normal range of motion in both sections of the spine, and in the right shoulder (*see e.g. Castro v DADS Natl. Enters., Inc.*, 165 AD3d 601, 601 [1st Dept 2018]; *Alverio v Martinez*, 160 AD3d 454, 454 [1st Dept 2018]). As to the claimed cervical spine and right shoulder injuries, defendants also established prima facie that the injuries were not causally related to the accident through the report of their radiologist, who opined that plaintiff's MRIs showed conditions that were longstanding, chronic and degenerative in nature (*see e.g. Auquilla v Singh*, 162 AD3d 463, 463 [1st Dept 2018]).

In opposition, plaintiff raised an issue of fact as to causation of her cervical spine and right shoulder injuries by submitting an earlier report prepared by defendant's expert orthopedist, in which she concluded, based on her review of

plaintiff's medical records and examination of plaintiff, that these injuries were causally related to the accident. This opinion, which contradicts both her later conclusion and the opinion of defendant's radiologist, raises an issue of fact as to causation (*see Johnson v Salaj*, 130 AD3d 502, 502-503 [1st Dept 2015]). Concerning her right shoulder claim, plaintiff raised an issue of fact through the report of her treating orthopedic surgeon who documented limitations in range of motion, recounted his direct observations of plaintiff's injuries during surgery, and causally related them to the accident, disagreeing with defendant's radiologist (*see Liz v Munoz*, 149 AD3d 646 [1st Dept 2017]; *Bux v Pervez*, 156 AD3d 550, 551 [1st Dept 2017]; *Hazel v Colon*, 136 AD3d 483 [1st Dept 2016]). Concerning her cervical spine claim, plaintiff submitted the report of her treating physiatrist, who also documented limitations in range of motion and, while acknowledging the existence of arthritis and degeneration, opined that the accident exacerbated and aggravated the condition (*see Ortiz v Boamah*, 169 AD3d 486, 488 [1st Dept 2019]). Plaintiff's medical records, including MRI reports prepared about three months after the accident, provide evidence of contemporaneous treatment, supporting plaintiff's claim of serious injury within the meaning of the statute (*see Vishevnik v Bouna*, 147 AD3d 657, 659 [1st Dept 2017]; *Salman v Rosario*, 87

AD3d 482, 484 [1st Dept 2011]).

Plaintiff submitted no admissible medical evidence concerning her lumbar spine injury, and therefore failed to raise an issue of fact as to whether that constituted a serious injury (*see Santana v Centeno*, 140 AD3d 437, 438 [1st Dept 2016]; *Singer*, 91 AD3d at 526). Should a jury determine that plaintiff has met the threshold for serious injury, it may award damages for all of her injuries causally related to the accident, even those not meeting the serious injury threshold (*Santana*, 140 AD3d at 438; *Rubin v SMS Taxi Corp.*, 71 AD3d 548, 549 [1st Dept 2010]).

Finally, defendants established their entitlement to dismissal of plaintiff's 90/180-day claim by relying on her deposition testimony, in which she admitted that she was not confined to home immediately following the accident (*see e.g. Echevarria v Ocasio*, 135 AD3d 661, 662 [1st Dept 2016]; *Dennis v New York City Tr. Auth.*, 84 AD3d 579, 579 [1st Dept 2011]). In opposition, plaintiff did not submit any medical or other

documentary proof in support of her claim that she could not return to work and was confined to home following the accident (*see Martin v Portexit Corp.*, 98 AD3d 63, 68 [1st Dept 2012]; *Rosa-Diaz v Maria Auto Corp.*, 79 AD3d 463, 464 [1st Dept 2010]).

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

ENTERED: JUNE 27, 2019

CLERK

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

9776 Sally Keech, Index 155081/13
Plaintiff-Respondent,

-against-

30 East 85th Street Company, et al.,
Defendants,

30 East 85th Street Condominium Associates, et al.,
Defendants-Appellants.

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Wilson Elser Moskowitz Edelman & Dicker LLP, White Plains (John B. Martin of counsel), for appellants.

Appell & Parrinelli, New York (John J. Appell of counsel), for respondent.

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Order, Supreme Court, New York County (James E. d'Auguste, J.), entered October 4, 2018, which denied the motion of defendants 30 East 85th Street Condominium Associates and Wallack Management for summary judgment dismissing the complaint and all cross claims as against them, unanimously affirmed, without costs.

Defendants failed to establish prima facie entitlement to judgment as a matter of law in this action where plaintiff alleges that she was injured when she tripped and fell over a hole or indentation in the sidewalk abutting defendants' building. Defendants failed to show that the defect, which was about three inches wide and one-foot long, was open, obvious, and

not inherently dangerous (*see Westbrook v WR Activities-Cabrera Mkts.*, 5 AD3d 69, 72 [1st Dept 2004]), particularly since the accident occurred at night, when it was dark outside (*see Soto v 2780 Realty Co., LLC*, 114 AD3d 503 [1st Dept 2014]; *see also Mauriello v Port Auth. of N.Y. & N.J.*, 8 AD3d 200 [1st Dept 2004]).

Defendants also failed to show that the defect, as described by plaintiff and shown in the photographs, was trivial as a matter of law (*see Trincere v County of Suffolk*, 90 NY2d 976 [1997]; *Tese-Milner v 30 E. 85th St. Co.*, 60 AD3d 458 [1st Dept 2009]). Furthermore, the defect was obscured from plaintiff's view due to the poor lighting conditions along the sidewalk at the time of her accident (*see Hutchinson v Sheridan Hill House Corp.*, 26 NY3d 66, 78 [2015]).

We note that the *Tese-Milner* decision involved a pedestrian fall at the same location approximately ten years earlier. The evidence plaintiff submitted from that case in opposition to defendants' motion is probative on the issue of whether the defect was dangerous, given that plaintiff averred that the defect depicted in the photographs from that case appeared to be the same as the defect that caused her accident (*see e.g. Daniels v City of New York*, 291 AD2d 269 [1st Dept 2002]; *Martin v Our Lady of Wisdom Regional Sch.*, 151 AD3d 838 [2d Dept 2017]).

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

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

ENTERED: JUNE 27, 2019

CLERK

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

9777 The People of the State of New York, Respondent, Ind. 2601/15

-against-

Brandon Simmons, Defendant-Appellant.

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

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

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Judgment, Supreme Court, New York County (Robert M. Stolz, J.), rendered September 20, 2016, convicting defendant, upon his plea of guilty, of assault in the first degree, and sentencing him, as a second felony offender, to a term of 12 years, unanimously modified to the extent of vacating the sentence and remanding for resentencing, including a predicate felony adjudication, and otherwise affirmed.

We note at the outset that defendant was adequately represented by counsel and was given an opportunity by the court to speak. The court also correctly determined that defendant was a second felony offender based on his Pennsylvania conviction. We adhere to our previous determination (expressed, not as "dicta" but as what was intended to be an alternative holding), that the Pennsylvania statute at issue (35 Pa Cons Stat § 780-

113[a][30]) is the equivalent of a New York felony (*People v Mulero*, 251 AD2d 252 [1st Dept 1998], *lv denied* 92 NY2d 928 [1998]).

However, as the People concede, defendant is entitled to resentencing because he was not actually arraigned as a second felony offender and provided with an opportunity to controvert the allegations in the predicate felony statement. Because we are vacating the sentence, we find it unnecessary to address any other issues.

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

ENTERED: JUNE 27, 2019

CLERK

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

9778N Reversible Destiny Foundation, Inc., Index 657477/17
Plaintiff-Respondent,

-against-

Johanna Post, et al.,
Defendants-Appellants.

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Baum, LLC, New York (David R. Baum of counsel), for appellants.

Carter Ledyard & Milburn LLP, New York (Judith M. Wallace of counsel), for respondent.

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Order, Supreme Court, New York County (Tanya R. Kennedy, J.), entered January 4, 2019, which granted plaintiff's motion to dismiss defendants' fifth and sixth affirmative defenses, unanimously affirmed, without costs.

Defendant Post, a director of nonparty Architectural Body Research Foundation (ABRF), is a former employee and director of plaintiff. After she was terminated from plaintiff's employ, Post and defendant MacNair, her husband and another director of ABRF, and plaintiff executed a "Severance and Release Agreement" (the agreement), pursuant to which Post received severance and medical insurance premiums for 12 months in exchange for releasing plaintiff from, among other things, all claims relating to her employment relationship and her termination. Plaintiff later sought by letter the return of $109,600 that it had paid

Post under the agreement, on the ground of breaches of the agreement, and thereafter commenced this action asserting claims of breach of contract against both defendants and breach of fiduciary duty against Post.

Defendants asserted an affirmative defense alleging that the restrictive covenants in the agreement are an unlawful retaliation against Post for blowing the whistle on plaintiff's misappropriation of property belonging to ABRF (the fifth) and an affirmative defense alleging that the restrictive covenants are unenforceable, lack consideration, are inconsistent with New York law, and contravene public policy (the sixth). These defenses are without merit as a matter of law (*see* CPLR 3211[b]; *see 534 E. 11th St. Hous. Dev. Fund Corp. v Hendrick*, 90 AD3d 541 [1st Dept 2011]).

The motion court correctly found that defendants ratified the agreement by retaining the $109,600 paid under it (*see Allen v Riese Org., Inc.*, 106 AD3d 514, 517 [1st Dept 2013]; *see also Sheindlin v Sheindlin*, 88 AD2d 930, 931 [2d Dept 1982], *appeal dismissed* 57 NY2d 775 [1982]). Defendants argue that their retention of these funds does not signify ratification of the restrictive covenants, because the $109,600 was paid for defendant Post's release of her claims only, per section 3(a) of the agreement. However, read as a whole (*see W.W.W. Assoc. v*

Giancontieri, 77 NY2d 157, 162-163 [1990]), the agreement plainly shows that the parties intended the payments to be made in exchange for all of defendants' agreements, not the release only. Section 6(b) further shows that the parties intended the payments as consideration for the restrictive covenants as well as for the release. In that section, defendants acknowledged that any breaches of sections 2 through 5 of the agreement (the restrictive covenants are in sections 3 and 4) constituted a material breach, the remedies for which included the return to plaintiff of any portion of the severance payment received by Post and the forfeiture of any right to receive additional portions of the severance payment.

Defendants argue that the agreement lacked consideration as to defendant MacNair. However, "a benefit flowing to a third person ... constitutes a sufficient consideration for the promise of another" (*Mencher v Weiss*, 306 NY 1, 8 [1953]; Restatement [Second] of Contracts § 71, Comment *e* and Illustrations 14-18). Moreover, consideration for an agreement consists of *either* a benefit to the promisor *or* a detriment to the promisee; plaintiff forwent $109,600 as consideration for the promises of non-disclosure and non-disparagement made to it by MacNair (*see Weiner v McGraw-Hill, Inc.*, 57 NY2d 458, 464 [1982]).

Defendants argue that it was premature to dismiss their

affirmative defenses. However, the discovery that defendants claim to need concerns the circumstances of Post's termination, and Post released all claims pertaining to that issue in section 3(a) of the agreement. Moreover, that discovery would not be probative of the core issue here, i.e., whether defendants' retention of the severance payments bars them from challenging the agreement on any theory.

Defendants contend that they were deprived of independent counsel. However, the reasonable reading of section 4(a) of the agreement, "Confidentiality and Non-Disclosure," is that defendants may not disclose proprietary or confidential information owned by *plaintiff*, including plaintiff's "communications with any person, including but not limited to counsel, with respect to any claim of any kind against Madeline Gins, Shusaku Arakawa, or the Estate." Thus, defendants would not divulge plaintiff's litigation strategy as to these third parties; their right to consult with their own counsel was not infringed. Indeed, to the contrary, section 4(b) states that defendants may disclose the existence and terms of the agreement to Post's legal counsel.

Defendants' argument that the covenants are unenforceable because they are overbroad is unpreserved and in any event unavailing. The covenants are narrow in scope, do not evince

anti-competitive intent, and do not even bear on defendants' ability to earn a livelihood (*see e.g. BDO Seidman v Hirshberg*, 93 NY2d 382, 388-389 [1999]).

We reject defendants' argument that the covenants do a disservice to the public interest because they deprive defendants and ABRF from taking important steps to recover misappropriated artwork.

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

ENTERED: JUNE 27, 2019

CLERK

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

9779 In re Jose Joaquin Ramirez, Ind. 1812/17
[M-1979] Petitioner, OP 179/19

-against-

Hon. April A. Newbauer, etc., et al.,
Respondents.

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Jose Joaquin Ramirez, petitioner pro se.

Letitia James, Attorney General, New York (Charles F. Sanders of counsel), for New York State respondents.

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

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

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

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

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

ENTERED: JUNE 27, 2019

CLERK