SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

APRIL 18, 2019

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Richter, J.P., Manzanet-Daniels, Kapnick, Gesmer, Oing, JJ.

8424-
8425 &
M-6152 The People of the State of New York,
Appellant,

-against-

Jayvon McKinney,
Defendant-Respondent.

Ind. 3829/16

_____

Darcel D. Clark, District Attorney, Bronx (Joshua P. Weiss of counsel), for appellant.

The Bronx Defenders, Bronx, (Joshua Occhiogrosso-Schwartz of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (Alvin Yearwood, J.), entered on or about July 7, 2017, which granted defendant's motion to inspect grand jury minutes and upon inspection, dismissed the indictment, unanimously reversed, on the law, the motion denied and the indictment reinstated. Appeal from order, same court and Justice, entered on or about November 21, 2017, which effectively granted reargument and adhered to the original decision, unanimously dismissed as academic.

The court erroneously dismissed an indictment charging defendant with crimes committed in two incidents, both recorded

in videotapes presented to the grand jury, on the ground that a police officer who witnessed neither incident, but knew defendant from the area, identified him in each videotape. This testimony was not impermissible and it did not render the grand jury proceedings defective. The detective testified from his personal knowledge. Moreover, unlike trial jurors who can normally observe a defendant in court, grand jurors do not have that means of making a comparison between a videotape and a defendant's appearance. In so holding, we express no opinion on the admissibility of a similar identification at trial. The "exceptional remedy of dismissal" (*People v Huston*, 88 NY2d 400, 409 [1996]) was not warranted.

Finally, we note that, there was no basis for dismissing those counts of the indictment relating to a November 7, 2016 crime, because the grand jury presentation included defendant's confession to that crime.

We have considered and rejected defendant's remaining arguments for affirmance.

M-6152 - ***People of the State of New York v Jayvon McKinney***

Motion to dismiss appeal denied.

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

ENTERED: APRIL 18, 2019

CLERK

Friedman, J.P., Sweeny, Webber, Gesmer, Singh, JJ.

8951 Nakia Lewis, Index 155630/14
Plaintiff-Respondent,

-against-

New York City Housing Authority,
Defendant-Appellant.

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

Alexander J. Wulwick, New York, for respondent.

_____

Order, Supreme Court, New York County (Nancy M. Bannon, J.), entered March 29, 2018, which denied defendant's motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

Supreme Court properly denied defendant's motion for summary judgment dismissing the complaint. Plaintiff testified at her deposition and General Municipal Law § 50-h hearing that at around noon on the alleged date of the accident, she went to visit a friend, who lived in the same building, one floor up on the fifth floor. When plaintiff entered the fourth floor stairwell, she saw a NYCHA maintenance employee sweeping the stairs. She observed a bucket and mop on the fifth floor landing. The employee told her not to go up the stairs and to use a second staircase. They exchanged words before plaintiff

ascended the stairs to the fifth floor.

Plaintiff's friend did not answer the door. Plaintiff returned to her apartment using the same staircase. The NYCHA maintenance employee was now sweeping the stairwell on the fifth floor. Plaintiff did not see any water on the stairs before she started walking down to the fourth floor. As plaintiff proceeded, she first heard water and then saw waterrunning down the stairs between her legs. She turned around and saw the NYCHA maintenance employee holding a dripping mop over the landing. Plaintiff continued to walk down. She suddenly felt herself slip and allegedly fell down the rest of the staircase (*cf. Brown v New York Marriot Marquis Hotel*, 95 AD3d 585 [1st Dept 2012] [where plaintiff acknowledged that before she fell, she observed the open door, yellow cone, and liquid, which led her to suspect that the steps were wet, but she proceeded to descend them in any event]). On this record, there are triable issues of fact as to whether the employee's actions were a proximate cause of plaintiff's accident.

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

ENTERED: APRIL 18, 2019

CLERK

Richter, J.P., Manzanet-Daniels, Kahn, Gesmer, Oing, JJ.

9013 The People of the State of New York, Respondent, Ind. 1289/14

-against-

Servicio Simmon, Defendant-Appellant.

_____

Christina A. Swarns, Office of the Appellate Defender, New York (Rosemary Herbert of counsel), and Jones Day, New York (Nassim Ameli of counsel), for appellant.

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

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Judgment, Supreme Court, New York County (Laura A. Ward, J. at suppression hearing; Juan M. Merchan, J. at jury trial and sentencing), rendered May 10, 2016, convicting defendant of attempted assault in the first degree and criminal possession of a weapon in the second degree (two counts), and sentencing him, as a second violent felony offender, to an aggregate term of 15 years, unanimously affirmed.

The court properly denied defendant's suppression motion. There is no basis for disturbing the court's credibility determinations (*see People v Prochilo*, 41 NY2d 759, 761 [1977]), including its finding, after reviewing conflicting testimony, that the police entered defendant's apartment only after obtaining the voluntary consent of another occupant, who answered

the door. Furthermore, it was permissible for the officers to proceed by seeking consent to enter, regardless of whether they had probable cause and the opportunity to obtain a warrant (*Kentucky v King*, 563 US 452, 466-467 [2011]; *People v Garvin*, 30 NY3d 174, 187-188, 188 n 9 [2017]).

A detective told defendant that he would "probably be coming back" from the precinct and that he could bring his cell phone with him if he wished to do so. This was deceptive, because the detective actually intended to arrest defendant and hoped defendant would have the phone on his person so it could be seized. However, the deception was not "so fundamentally unfair as to deny due process" (*People v Tarsia*, 50 NY2d 1, 11 [1980]), because it did not undermine the voluntariness of defendant's actions. The detective only suggested that defendant might want to bring his phone, and the deception was not of a type that would compel him to do so (*see People v Abrams*, 95 AD2d 155 [2d

Dept 1983]). Thus, we find no basis to suppress the contents of the phone, which was seized incident to a lawful arrest, and searched after the police obtained an undisputedly valid search warrant.

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

ENTERED: APRIL 18, 2019

CLERK

Richter, J.P., Manzanet-Daniels, Kahn, Gesmer, Oing, JJ.

9014 William S. Monaghan as Trustee of the Monaghan Qualified Personal Residence Trust,
Plaintiff-Respondent,

-against-

Eric Cole,
Defendant-Appellant.

Index 650099/18

Schwartz Sladkus Reich Greenberg Atlas LLP, New York (Ethan A. Kobre of counsel), for appellant.

Profeta & Eisenstein, New York (Jethro M. Eisenstein of counsel), for respondent.

Order, Supreme Court, New York County (Doris Ling-Cohan, J.), entered August 20, 2018, which granted plaintiff's motion for summary judgment declaring defendant in default under the parties' contract of sale of real property and that plaintiff is entitled to the contract deposit as damages, and so declared, and denied defendant's motion for summary judgment, unanimously affirmed, without costs.

During the parties' negotiations over the transfer of a cooperative apartment owned by the Monaghan Qualified Personal Residence Trust to defendant, plaintiff trustee was in litigation against the cooperative corporation, alleging that the board wrongfully conditioned its consent to his transfer of the unit upon his purchase of additional shares. The contract of sale

executed by the parties provided that plaintiff had "not entered into, shall not enter into, and has no actual knowledge of any agreement (other than the Lease) affecting title to the Unit or its use and/or occupancy after Closing, or which would be binding on or adversely affect Purchaser after Closing (e.g., a sublease or alteration agreement)" (paragraph 4.1.7), and that plaintiff had advised defendant, and defendant acknowledged, that plaintiff was in a dispute with the cooperative about the number of shares allocable to his unit, that defendant acknowledged that plaintiff had no obligation to resolve the dispute, and that plaintiff "may, in [his] sole and absolute discretion, settle the dispute on any terms [plaintiff] finds acceptable, and [defendant's] consent is not required in connection with any such settlement" (paragraph 34 of the contract rider).

Defendant's argument that, in view of the above-quoted provisions, plaintiff's absolute discretion to resolve his dispute with the cooperative may not be construed to permit a settlement imposing terms that would bind or adversely affect defendant after closing is unsustainable in the face of paragraph 31 of the contract rider. Paragraph 31 provides, in pertinent part, "To the extent that there may be any conflict or inconsistency between provisions of this Rider [and] any provisions of the main body of this Contract of Sale . . ., the

provisions of this Rider shall govern." The parties expressly agreed that the rider would override any inconsistent provisions in the contract (*see Pandey v Pierce*, 158 AD3d 460 [1st Dept 2018]).

Defendant's argument that plaintiff abused his discretion, which could not be exercised to "frustrate the purpose of the agreement," is also unavailing. The settlement did not frustrate the purpose of the contract, which was the sale of the apartment to defendant. Moreover, the discretion afforded plaintiff under the rider was bounded only by the Side Letter, which defendant does not contend was breached by plaintiff (*cf. C & E 608 Fifth Ave. Holding, Inc. v Swiss Ctr., Inc.*, 54 AD3d 587, 587 [1st Dept 2008] [defendant did not have "unfettered" discretion]), and plaintiff's dispute and pending settlement with the cooperative was out in the open at all relevant times (*cf. Richbell Info. Servs. v Jupiter Partners*, 309 AD2d 288, 294 [1st Dept 2003] [defendants entered into "secret" agreement designed to insure plaintiffs' default and allow defendants to purchase plaintiffs' interest in joint venture at "collusive foreclosure" prices]).

On plaintiff's motion, the attorney affirmation properly served as the vehicle for the submission of admissible evidence on which the court relied (*see Zuckerman v City of New York*, 49 NY2d 557, 563 [1980]; *Melniker v Melniker*, ___ AD3d ___, 2019 NY

Slip Op 01650, *1 [1st Dept, Mar. 7, 2019]). Defendant does not challenge the admissibility of that evidence.

Defendant argues that the court erred in considering plaintiff's reply affidavit because it contained new material. However, the representations in the affidavit were contained in earlier submissions. In particular, the contract (at paragraph 4.1.6) and the Purchaser's Rider (at paragraph 58), both annexed to plaintiff's initial motion papers, state that, to plaintiff's knowledge, all alterations were in compliance with applicable law and no Building Department violations had been issued. In opposition, defendant submitted no evidence to raise an issue of fact as to the validity of these contractual representations.

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

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

ENTERED: APRIL 18, 2019

CLERK

Richter, J.P., Manzanet-Daniels, Kahn, Gesmer, Oing, JJ.

9016 Jasmina Husovic, Index 157134/16
Plaintiff-Respondent,

-against-

Structure Tone, Inc.,
Defendant-Appellant.

_____

Barry McTiernan & Moore LLC, New York (Laurel A. Wedinger of counsel), for appellant.

Law Office of Craig Rosuck, PC, New York (Elliot Budashewitz of counsel), for respondent.

_____

Order, Supreme Court, New York County (Arlene P. Bluth, J.), entered April 30, 2018, which denied defendant's motion to vacate an order, entered on or about December 13, 2017, imposing discovery sanctions, unanimously affirmed, without costs.

"If any party . . . refuses to obey an order for disclosure or wilfully fails to disclose information which the court finds ought to have been disclosed" the court may, inter alia, make an order "that the issues to which the information is relevant shall be deemed resolved for purposes of the action in accordance with the claims of the party obtaining the order" (CPLR 3126[1]; *Longo v Armor El. Co.*, 307 AD2d 848, 849 [1st Dept 2003]). A determination of sanctions pursuant to CPLR 3216 lies in the trial court's discretion and should not be set aside absent a clear abuse of discretion (*see Kihl v Pfeffer*, 94 NY2d 118, 122

[1999]; *De Socio v 136 E. 56th St. Owners, Inc.*, 74 AD3d 606, 607 [1st Dept 2010][citing *Arts4All, Ltd. v Hancock*, 54 AD3d 286, 286 [1st Dept 2008], *affd* 12 NY3d 846 [2009], *cert denied* 559 US 905 [2010]).

Here, Supreme Court issued three separate discovery orders directing defendant to produce documents, including one order that expressly laid out what documents needed to be provided and warned that failure to comply may result in sanctions. Defendant failed to demonstrate a reasonable excuse for its failure to comply (*see Fish & Richardson, P.C. v Schindler*, 75 AD3d 219, 221-222 [1st Dept 2010]). Accordingly, Supreme Court providently exercised its discretion in resolving limited factual issues in favor of plaintiff (CPLR 3126[1]; Rogers v Howard Realty Estates, Inc., 145 AD3d 1051, 1052 [2d Dept 2016]).

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

ENTERED: APRIL 18, 2019

CLERK

Richter, J.P., Manzanet-Daniels, Kahn, Gesmer, Oing, JJ.

9017 U.S. Bank N.A. as Legal Title Trustee for Truman 2013 SC4 Legal Title Trust,
Plaintiff-Appellant,

-against-

The Nassau County Public Administrator, as Administrator of the Estate of Kathleen Bestany, Deceased,
Defendant,

532 West 187 Realty, LLC,
Defendant-Respondent.

Index 850323/13

_____

Friedman Vartolo LLP, New York (Chad Harlan of counsel), for appellant.

The Law Office of Jeremy Rosenberg, Chestnut Ridge (Jeremy Rosenberg of counsel), for respondent.

_____

Order, Supreme Court, New York County (Shlomo Hagler, J.), entered June 30, 2017, which granted defendant 532 West 187 Realty LLC's (532 West) motion to vacate the default judgment entered against it, unanimously affirmed, with costs.

We find that the motion court properly exercised its discretion pursuant to CPLR 317. Taken together, the affidavits submitted by 532 West established that it never received notice of the summons because its agent for service never forwarded the same to it (*cf. John v Arin Bainbridge Realty Corp.*, 147 AD3d 454, 455-456 [1st Dept 2017]). Plaintiff does not dispute that

the affidavits also established that 532 West did not otherwise have notice of the action. Further, there was no indication in the record that 532 West deliberately evaded service (*cf. Eugene Di Lorenzo, Inc. v A.C. Dutton Lumber Co.*, 67 NY2d 138, 141-143 [1986]). 532 West showed that it had a potentially meritorious defense to the foreclosure action by submitting a discharge of mortgage that stated that the subject mortgage had been satisfied (*Reale v Tsoukas*, 146 AD3d 833, 835 [2d Dept 2017]).

We decline to hear plaintiff's arguments, made for the first time on appeal, that the motion to vacate was untimely and that 532 West failed to establish its meritorious defense through an affidavit from an individual with knowledge of the facts.

We have considered the remaining arguments and find them unavailing.

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

ENTERED: APRIL 18, 2019

CLERK

Richter, J.P., Manzanet-Daniels, Kahn, Gesmer, Oing, JJ.

9019- Ind. 3571/12
9020- 3299/15
9021 The People of the State of New York,
Respondent,

-against-

Tyrone Adams,
Defendant-Appellant.

_____

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

Darcel D. Clark, District Attorney, Bronx (Ryan J. Foley of counsel), for respondent.

_____

Judgments, Supreme Court, Bronx County (April A. Newbauer, J. at plea; Ralph Fabrizio, J. at sentencing [indictment 3571/12]), rendered December 3, 2015, and same court (Albert Lorenzo, J. [indictment 3299/15]), rendered January 11, 2017, unanimously affirmed.

Although we find that defendant did not make a valid waiver of the right to appeal, we perceive no basis for reducing the sentence.

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

ENTERED: APRIL 18, 2019

CLERK

Richter, J.P., Manzanet-Daniels, Kahn, Gesmer, Oing, JJ.

9022 Debra Cascardo, Index 101055/17
Plaintiff-Respondent,

-against-

Joshua Dratel, Esq., etc., al.,
Defendants-Appellants.

_____

Vigorito, Barker, Patterson, Nichols & Porter, LLP, Garden City (Megan A. Lawless of counsel), for appellants.

Hagan, Coury & Associates, Brooklyn (Paul Golden of counsel), for respondent.

_____

Order, Supreme Court, New York County (Eileen A. Rakower, J.), entered on or about April 17, 2018, which, inter alia, denied defendants' motion to dismiss plaintiff's claims for fraud, excessive legal fees, and breach of fiduciary duty, unanimously modified, on the law, to dismiss the fraud claim, and to dismiss the breach of fiduciary duty claim as subsumed in the excessive attorney fees claim, and otherwise affirmed, without costs.

Plaintiff's fraud claim should have been dismissed because the complaint did not sufficiently plead justifiable reliance upon defendant's claim that it needed an additional $10,000 to continue its work on her lawsuit. In fact, the complaint specifically asserts that plaintiff knew the additional $10,000 legal fee demanded by defendant would not be used for her

benefit, but he required it because other clients had not paid him. This admission negates an element of the fraud claim, that plaintiff justifiably relied on the defendant's alleged misrepresentation that "[defendants] needed $10,000 to continue their work [on her case]" (*see Shalam v KPMG LLP*, 89 AD3d 155, 157-158 [1st Dept 2011]; *Havell Capital Enhanced Mun. Income Fund, L.P. v Citibank, N.A.*, 84 AD3d 588, 589 [1st Dept 2011]).

The claim for excessive legal fees (and the related discussion in the complaint of defendants' alleged breach of fiduciary duty based on the alleged overcharges) was correctly sustained. Plaintiff alleged that "[her] fee bore no rational relationship to the product delivered," and detailed that, in exchange for the $25,000 fee, defendants produced only a draft complaint that was essentially identical to the one that she had presented to them (*see Johnson v Proskauer Rose LLP*, 129 AD3d 59, 70 [1st Dept 2015]). This claim is not duplicative of the legal malpractice claim, as plaintiff's complaints regarding the over billing were not a direct challenge to the quality of the work but instead a claim that the fee paid bore no rational relationship to the work performed (*see Ullmann-Schneider v Lacher & Lovell-Taylor, P.C.*, 121 AD3d 415, 416 [1st Dept 2014]; *Johnson*, 129 AD3d at 70). To the extent that the motion court

read the pro se complaint as alleging a separate cause of action for breach of fiduciary duty, these allegations are subsumed in the cause of action for excessive attorney fees.

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: APRIL 18, 2019

CLERK

Richter, J.P., Manzanet-Daniels, Kahn, Gesmer, Oing, JJ.

9024 The People of the State of New York, Respondent, Index 570051/15

-against-

Michael McNeil, Defendant-Appellant.

_____

Justine M. Luongo, The Legal Aid Society, New York (Paul Wiener of counsel), for appellant.

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

_____

Order, Appellate Term, First Department, entered March 26, 2018, which affirmed an order of the Criminal Court of the City of New York, Bronx County (Raymond L. Bruce, J.), entered on or about November 17, 2014, adjudicating defendant a level three sex offender pursuant to the Sex Offender Registration Act (Correction Law art 6-C), unanimously affirmed, without costs.

As the Appellate Term concluded, the hearing court properly assessed 15 points under the risk factor for lack of supervised release. Although defendant was placed on postrelease supervision immediately upon his release from incarceration, that

supervision was only based on a prior burglary conviction, which was not a qualifying offense for this purpose (*see People v Reid*, 141 AD3d 156, 157 [1st Dept 2016], *lv denied* 28 NY3d 901 [2016]).

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

ENTERED: APRIL 18, 2019

CLERK

Richter, J.P., Manzanet-Daniels, Kahn, Gesmer, Oing, JJ.

9025 In re Aliyah N.,

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

Alvin N.,
Respondent-Appellant,

Administration for Children's Services,
Petitioner,

Leila S.,
Respondent-Respondent.

_____

The Bronx Defenders, Bronx (Miriam Schachter of counsel), for appellant.

Larry S. Bachner, New York, for respondent.

Law Offices of Randall S. Carmel, Jericho (Randall S. Carmel of counsel), attorney for the child.

_____

Order, Family Court, Bronx County (Michael R. Milsap, J.), entered on or about April 24, 2018, which denied respondent father's motion to compel petitioner Administration for Children's Services' (ACS) medical expert witness to appear for a deposition, unanimously reversed, on the law, the facts and in the exercise of discretion, without costs, and the motion granted.

The father met his burden of demonstrating special circumstances warranting the grant of his motion to subpoena and depose ACS's expert medical witness, given ACS's failure to

oppose the application and its concession that it does not know whether the doctor's testimony at the fact finding hearing will support its allegations of child abuse (*see* CPLR 3101[d][1][iii]; *Falcone v Karagiannis*, 93 AD3d 632, 634 [2d Dept 2012]).

The excerpts of the child's medical records provided to the father did not indicate the substance of the expert's expected fact finding testimony, including her expert opinion as to the extent of the child's injuries, her future prognosis, or the facts supporting her conclusion that the child's injuries were non-accidental (*see Melendez v Roman Catholic Archdiocese of N.Y.*, 277 AD2d 64 [1st Dept 2000]; *Weinberger v Lensclean Inc.*, 198 AD2d 58, 59 [1st Dept 1993]).

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

ENTERED: APRIL 18, 2019

CLERK

Richter, J.P., Manzanet-Daniels, Kahn, Gesmer, Oing, JJ.

9026 The People of the State of New York, Respondent, Ind. 792/13

-against-

Roland Lijin, Defendant-Appellant.

_____

Marianne Karas, Thornwood, for appellant.

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

_____

Judgment, Supreme Court, New York County (Laura A. Ward, J.), rendered December 21, 2015, convicting defendant, upon his guilty plea, of grand larceny in the third degree and unlawful possession of personal identification information in the third degree, and sentencing him to an aggregate term of five years' probation, unanimously affirmed.

Defendant's challenges to his plea allocution are unpreserved, and they do not come within the narrow exception to the preservation requirement (*see People v Conceicao*, 26 NY3d 375, 382 [2015]). We decline to review these claims in the interest of justice. As an alternative holding, we find that the plea was entered into knowingly, intelligently and voluntarily (*see Boykin v Alabama*, 395 US 238 [1969]; *People v Tyrell*, 22 NY3d 359, 365 [2013]). The court had no duty to warn defendant

of the potential future collateral consequences of his plea. "[T]his Court has repeatedly rejected the argument that a defendant who pleads guilty is entitled to be advised of the effect of the plea on sentences he or she might receive for future crimes" (*People v Parker*, 309 AD2d 508, 508 [1st Dept 2003], *lv denied* 1 NY3d 577 [2003]).

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

ENTERED: APRIL 18, 2019

CLERK

Richter, J.P., Manzanet-Daniels, Kahn, Gesmer, Oing, JJ.

9027 In re Liquidation of Midland Insurance Company — Index 41294/86

- - - - -

The ASARCO Asbestos Personal Injury Settlement Trust,
Claimant-Respondent,

-against-

Superintendent of Financial Services of the State of New York in Her Capacity as Liquidator of Midland Insurance Company,
Respondent-Appellant.

_____

DLA Piper LLP (US), New York (Aidan M. McCormack of counsel), for appellant.

Anderson Kill L.L.P., New York (Rhonda D. Orin of counsel), for respondent.

_____

Order, Supreme Court, New York County (Barbara Jaffe, J.), entered August 28, 2018, which denied appellant's motion to reject the referee's report dated November 28, 2016, unanimously affirmed, without costs.

The motion court correctly concluded that losses covered under the insurance policies at issue as a result of asbestos exposure that occurred over the course of multiple successive policy periods must be allocated pursuant to the "all sums" method, as generally required, rather than pro rata across the successive policies (*see Matter of Viking Pump, Inc.*, 27 NY3d

244, 260-261 [2016]). This Court has determined that the language of the excess insurance policies issued by Midland Insurance Company provides that the policies follow form to, i.e., incorporate (*see id.* at 252), the language of the non-cumulation clauses of the underlying policies issued by American Home Assurance Company (*see Matter of Midland Ins. Co.*, 269 AD2d 50, 64 [1st Dept 2000], *abrogated in part on other grounds* 16 NY3d 536 [2011]). The non-cumulation clauses "plainly contemplate that multiple successive insurance policies can indemnify the insured for the same loss or occurrence by acknowledging that a covered loss or occurrence may 'also [be] covered in whole or in part under any other excess [p]olicy issued to the [insured] prior to the inception date' of the instant policy," thereby rendering all sums the appropriate allocation method (*Viking Pump*, 27 NY3d at 261). Moreover, vertical exhaustion, which is consistent with an all sums allocation, is required here (*id.* at 264-265).

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

ENTERED: APRIL 18, 2019

CLERK

Richter, J.P., Manzanet-Daniels, Kahn, Gesmer, Oing, JJ.

9028 In re Anna Denicolo, Index 654505/16
Petitioner-Appellant,

-against-

Board of Education of the City
of New York and/or The New York City
Department of Education,
Respondent-Respondent.

_____

The Jacob D. Fuchsberg Law Firm, New York (Alan L. Fuchsberg and Edward Hynes of counsel), for appellant.

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

_____

Order, Supreme Court, New York County (Shlomo S. Hagler, J.), entered December 26, 2017, which, after a hearing, denied the petition to vacate the determination of respondent New York City Board of Education, dated August 15, 2016, which terminated petitioner's employment, and dismissed the proceeding, unanimously affirmed, without costs.

The hearing officer's findings had a rational basis and were supported by adequate evidence *(Matter of Broad v New York City Bd./Dept. Of Educ.*, 150 AD3d 438 [1st Dept 2017]). The record supports a reasonable determination that petitioner abdicated her responsibilities as a teacher by leaving a student in crisis with a school aide, in violation of school protocol, and then confronting the student's mother to inform her about discipline

she had received as a result of the incident. After the child was removed from the school, the teacher repeatedly telephoned the same student's home, despite being asked to stop, and violated the student's privacy by sending a package of get well cards and a home-school application to the student's home, causing unwelcome confusion for the student and her family (*see Broad*, 150 AD3d 438).

Under constraint of controlling precedent, our sense of fairness is not shocked by the penalty of termination (*see Matter of Bolt v New York City Department of Education*, 30 NY3d 1065, 1071-72 [2018] ["the mere fact that a penalty is harsh, and imposes severe consequences on an individual, does not so affront our sense of fairness that it shocks the conscience, unless it is obviously disproportionate to the misconduct and in contravention of the public interest and policy reflected by the agency's mission. . . . '(T)he Court has been reticent to opine on the precise sanction appropriate for misconduct' in matter(s) involving both internal discipline and an understandable concern for the reactions of parents in the school district, areas in which the board (of education) possesses special sensitivity" (citation omitted)]). Petitioner's poor judgment, and her failure to take responsibility for her actions or demonstrate any remorse gave no indication that her inappropriate behavior was

likely to change (*Matter of Vagianos v City of New York*, 151 AD3d 518, 519 [1st Dept 2017]).

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: APRIL 18, 2019

CLERK

Richter, J.P., Manzanet-Daniels, Kahn, Gesmer, Oing, JJ.

9029 The People of the State of New York, Respondent, Ind. 5219/15

-against-

Burnnett James, Defendant-Appellant.

_____

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

_____

Judgment, Supreme Court, New York County (Richard M. Weinberg, J. at plea; Kevin McGrath, J. at sentencing), rendered April 14, 2016, unanimously affirmed.

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

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

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

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

ENTERED: APRIL 18, 2019

CLERK

Richter, J.P., Manzanet-Daniels, Kahn, Gesmer, Oing, JJ

9030 Esther Melendez, et al., Index 307653/11
Plaintiffs-Appellants,

-against-

City of New York,
Defendant-Respondent.

_____

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

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

_____

Order, Supreme Court, Bronx County (Mitchell J. Danziger, J.), entered on or about March 27, 2018, which granted defendant's motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

While plaintiffs' vehicle was stuck in traffic on the Major Deegan Expressway, it was rammed multiple times by a SUV that had been pursued by New York City police officers. The SUV eventually pushed plaintiffs' vehicle onto the concrete barrier in the middle of the expressway. The driver of the SUV, going both forward and in reverse, also struck several other cars, while ignoring directions from officers to stop the car. Officers subsequently shot and killed the driver of the SUV, who was purportedly attempting to run them over.

Plaintiffs' negligence claims against the City based on the

officers' vehicular pursuit of the SUV fails, as that pursuit had terminated by the time the SUV reached the expressway where plaintiffs' car was stopped in traffic. The actions of the driver of the SUV were the sole proximate cause of plaintiffs' injuries (*see Greenawalt v Village of Cambridge*, 67 AD3d 1158, 1160 [3d Dept 2009]; *Fappiano v City of New York*, 292 AD2d 566, 567 [2d Dept 2002]). Similarly, the record demonstrates that the officers' conduct was not reckless, as would be required to give rise to liability (*see* Vehicle and Traffic Law § 1104[e]; *Saarinen v Kerr*, 84 NY2d 494, 501-502 [1994]). We need not determine whether the City is entitled to governmental function immunity under these circumstances (*compare Dorsey v City of Poughkeepsie*, 275 AD2d 386, 387 [2d Dept 2000], *lv dismissed in part denied in part* 96 NY2d 789 [2001], *with Foster v Suffolk County Police Dept.*, 137 AD3d 855, 857 [2d Dept 2016]).

Plaintiffs' claims for intentional infliction of emotional distress against the City is "barred as a matter of public policy" (*Dillon v City of New York*, 261 AD2d 34, 41 [1st Dept 1999). Furthermore, the evidence fails to raise a triable issue of fact as to whether the discharge of police weapons to prevent the SUV from harming officers on foot or members of the public

who were stuck in traffic was "extreme and outrageous conduct" sufficient to support the claim for negligent infliction of emotional distress (*Lau v S&M Enters.*, 72 AD3d 497, 498 [1st Dept 2010]; *Sheila C. v Povich*, 11 AD3d 120, 130-131 [1st Dept 2004]).

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

ENTERED: APRIL 18, 2019

CLERK

Richter, J.P., Manzanet-Daniels, Kahn, Gesmer, Oing, JJ.

9031 In re Community United to Protect Theodore Roosevelt Park, et al., Petitioners-Appellants, Index 152354/18

-against-

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

_____

Hiller, PC, New York (Michael S. Hiller of counsel), for appellants.

Zachary W. Carter, Corporation Counsel, New York (Janet L. Zaleon of counsel), for City of New York, The New York City Department of Parks and Recreation and Mitchell J. Silver, respondents.

Sive, Paget & Riesel P.C., New York (David Paget of counsel), for The American Museum of Natural History, respondent.

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Judgment (denominated an order), Supreme Court, New York County (Lynn R. Kotler, J.), entered December 10, 2018, which denied the petition and dismissed the proceeding brought pursuant to CPLR article 78 seeking to vacate the New York City Department of Parks and Recreation's (Parks Department) determinations, dated December 4, 2017 (Letter and Statement of Findings approving the construction of an addition to the Museum of Natural History - the Gilder Center) and April 25, 2018 (letter approving modifications to the Gilder Center project), unanimously affirmed, without costs.

Petitioners challenge the Parks Department's (the lead

agency) determination on the ground that no Uniform Land-Use Review Procedure (ULURP) was conducted, and that Parks Department allegedly failed to take a "hard look" at the hazardous materials involved in the project, and the construction noise, in violation of the State Environmental Quality Review Act (SEQRA) and the City Environmental Quality Review (CEQR).

The court properly found that no ULURP was required, either under NY City Charter § 197-C(a)(5) or (10), as there was no "site selection for capital projects" or a disposition of city property involved in this case. The disposition of the city property to the Museum of Natural History for the original building and future buildings to be erected in the area now known as Theodore Roosevelt Park, and the selection of the site for the Museum's expansions occurred more than 100 years ago, pursuant to statute (L 1876, ch 139, § 2) and the subsequent lease entered into between the City and the Museum in 1877 (*see Matter of Tuck v Heckscher*, 29 NY2d 288 [1971] [discussing identical circumstances relating to the Metropolitan Museum of Art]; *Matter of Metropolitan Museum Historic Dist. Coalition v De Montebello*, 20 AD3d 28, 30-31 [1st Dept 2005]; *Community Alliance For Responsible Dev., Inc. v American Museum of Natural History Planetarium Auth.*, 1997 WL 34848975 [Sup Ct, NY County 1997]).

The court also properly found that petitioners have failed

to demonstrate that the Parks Department's SEQRA/CEQR determination was not made in accordance with lawful procedure, was affected by an error of law, or was arbitrary and capricious or an abuse of discretion (*see Matter of Chinese Staff & Workers' Assn. v Burden*, 19 NY3d 922, 924 [2012]). "[I]t is not the role of the court to weigh the desirability of the proposed action, choose among alternatives, resolve disagreements among experts, or substitute its judgment for that of the agency" (*Matter of Fisher v Giuliani*, 280 AD2d 13, 19-20 [1st Dept 2001]). Here, the hazardous vapors cited by petitioners did not violate any code or standard, and the Final Environmental Impact Statement (FEIS) articulated reasonable mitigation plans for toxins located at the project site. Similarly, the record demonstrates that the Parks Department took a "hard look" at the noise which would ensue during construction, and despite finding no significant adverse impact, reasonably proposed actions to mitigate that noise.

We have examined petitioners' remaining arguments and find them unavailing.

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

ENTERED: APRIL 18, 2019

CLERK

Richter, J.P., Manzanet-Daniels, Kahn, Gesmer, Oing, JJ.

9032 The People of the State of New York, Ind. 3672/14
Respondent,

-against-

Nelson Judkins,
Defendant-Appellant.

_____

Justine M. Luongo, The Legal Aid Society, New York (Katheryne M. Martone of counsel), for appellant.

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

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Judgment, Supreme Court, New York County (Michael J. Obus, J.), rendered November 5, 2015, unanimously affirmed.

Although we find that defendant did not make a valid waiver of the right to appeal, we perceive no basis for reducing the sentence.

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

ENTERED: APRIL 18, 2019

CLERK

Richter, J.P., Manzanet-Daniels, Kahn, Gesmer, Oing, JJ.

9033 Marjorie Givens, etc., Index 25103/15E
Plaintiff-Appellant,

-against-

Kingsbridge Heights Care Center, Inc., et al.,
Defendants-Respondents.

_____

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

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

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Order, Supreme Court, New York County (Mary Ann Brigantti, J.), entered February 9, 2017, which granted defendants' motion to stay plaintiff's negligence action against defendants for as long as an order of a Montana court enjoining all litigation against defendants' insolvent risk retention group, CareConcepts Insurance, Inc., remains in effect, unanimously reversed, on the law, without costs, and the motion denied.

In this action seeking to recover for injuries sustained by plaintiff while she was a resident at defendants' nursing home, defendants ask the Court to afford full faith and credit to an order of the Montana First Judicial Court of Lewis and Clark County granting an automatic stay of all pending legal proceedings and actions against CareConcepts Insurance, Inc.

(CareConcepts), defendants' risk retention group. However, the Montana order, by its express terms, enjoins and prohibits only actions against CareConcepts, without mentioning its insureds.

Even assuming that the Montana order's reference to actions to obtain "possession and control of the property or assets of [CareConcepts]" indicates an intention to enjoin actions against its insureds, we conclude that a stay is not warranted as a matter of full faith and credit or comity.

Generally, a stay issued by a foreign court "enjoining claims against insureds of an insolvent liability insurer is entitled to full faith and credit, and has the effect of suspending all proceedings against the insured as of its effective date" (*Dambrot v REJ Long Beach, LLC*, 39 AD3d 797, 799 [2d Dept 2007]; *Beecher v Lewis Press Co.*, 238 AD2d 927, 927-928 [4th Dept 1997]). However, the Full Faith and Credit clause does not require a state to apply another state's laws in violation of its own legitimate public policy (*Crair v Brookdale Hosp. Med. Ctr., Cornell Univ.*, 94 NY2d 524, 528 [2000]).

Risk retention groups, unlike traditional insurance companies, are not required to contribute to a guaranty fund which would be available in the event of their insolvency (*see* 15 USC §§ 3901-3906; Insurance Law § 5906 [exempts risk management companies from the requirement of contributing to an insurance

insolvency fund]). Thus, injured plaintiffs suing defendants insured by a risk retention agency are particularly prejudiced by the enforcement of such stays. Imposing a stay, of potentially indefinite duration, in this case would undermine the State's important public policy of protecting victims of negligence in nursing homes and allowing them economic redress (*see Matter of Kent Nursing Home v Office of Special State Prosecutor for Health & Social Servs.*, 49 AD2d 616 [1975], *affd sub nom. Matter of Sigety v Hynes*, 38 NY2d 260 [1975], *cert denied* 425 US 974 [1976]).

For these reasons, the doctrine of comity also does not require enforcement of the Montana order (*J. Zeevi & Sons v Grindlays Bank [Uganda]*, 37 NY2d 220, 228 [1975], *cert denied* 423 US 866 [1975] ["where there is a conflict between our public policy and application of comity, our own sense of justice and equity as embodied in our public policy must prevail"]).

Denying a stay of plaintiff's negligence action would not violate the Liability Risk Retention Act (LRRA) (15 USC 3901-3906) because the LRRA does not necessitate compliance with out-of-state court orders regarding a stay of legal proceedings against a risk retention group's insured. In addition, denying a

stay in this case would not violate the Uniform Insurers Liquidation Act (UILA) (Insurance Law §§ 7408-7415), as CareConcepts is a risk retention group and exempt from state laws such as the UILA.

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

ENTERED: APRIL 18, 2019

CLERK

Richter, J.P., Manzanet-Daniels, Kahn, Gesmer, Oing, JJ.

9034 Janina Wilk, etc., et al.,
Plaintiffs,

-against-

Columbia University, et al.,
Defendants.

- - - - -

[And Third-Party Actions]

- - - - -

A.C.T. Abatement Corporation,
Fourth Third-Party Plaintiff-Appellant,

-against-

Breeze National, Inc.,
Fourth Third-Party Defendant-Respondent.

Index 105784/10
590780/10
590410/11
590789/11
311057/16

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Mauro Lilling Naparty LLP, Woodbury (Anthony F. DeStefano of counsel), for appellant.

Shaub, Ahmuty, Citrin & Spratt, LLP, Lake Success (John F. Watkins of counsel), for respondent.

_____

Order, Supreme Court, New York County (George J. Silver, J.), entered July 18, 2018, which granted fourth third-party defendant's (Breeze) motion to amend its answer to assert, inter alia, the affirmative defenses of waiver of subrogation and antisubrogation and, upon amendment, to dismiss the fourth third-party complaint, unanimously affirmed, with costs.

The main action was commenced after the decedent, while employed by Breeze at a construction site, sustained fatal injuries falling through an elevator shaft window that fourth

third-party plaintiff (ACT) had removed and covered with a plastic sheet. The subcontract between Breeze and ACT required ACT to obtain insurance naming, inter alia, Breeze as an additional insured and containing a waiver of subrogation clause in favor of Breeze. ACT obtained such a policy from Century Surety Company.

Summary judgment ultimately was granted to plaintiff, the administrator of the decedent's estate, on the Labor Law claims. In addition, it was determined that ACT was required to indemnify the building owner and construction manager of the project where the accident occurred because the accident arose out of ACT's work and thus fell within the broad language of the contractual indemnification agreement between ACT and Breeze (*see Wilk v Columbia Univ.*, 150 AD3d 502, 503 [1st Dept 2017]). ACT then commenced the fourth third-party action asserting claims against Breeze for contribution and common-law and contractual indemnification.

Breeze's motion to amend its answer to include, inter alia, the affirmative defenses of waiver of subrogation and the antisubrogation rule was correctly granted. ACT failed to show that Breeze's reliance on the same subcontract that ACT relies on has "hindered [ACT] in the preparation of [its] case" or "prevented [it] from taking some measure in support of [its]

position" (*see Jacobson v McNeil Consumer & Specialty Pharms.*, 68 AD3d 652, 655 [1st Dept 2009] [internal quotation marks omitted]). Moreover, as a party to its subcontract with Breeze, ACT cannot claim surprise or prejudice (*see e.g. American Scientific Light. Corp. v Hamilton Plaza Assoc.*, 144 AD3d 614, 615 [2d Dept 2016]).

The fourth third-party action was correctly dismissed on the ground of waiver of subrogation (*see generally Pennsylvania Gen. Ins. Co. v Austin Powder Co.*, 68 NY2d 465, 471 [1986]). Although ACT is the named fourth third-party plaintiff, Century, as its insurer, is the real party in interest, because it is covering ACT's defense and liability. Thus, the waiver of subrogation must apply to ACT's claims (*see Lim v Atlas-Gem Erectors Co.*, 225 AD2d 304, 306 [1st Dept 1996]; *see also Loctite VSI v Chemfab N.Y.*, 268 AD2d 869, 871 [3rd Dept 2000]).

The complaint was correctly dismissed for the additional reason that permitting ACT to maintain a claim against Breeze, when both are insured by Century, would violate the

antisubrogation rule (*see North Star Reins. Corp. v Continental Ins. Co.*, 82 NY2d 281, 294-295 [1993]).

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

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

ENTERED: APRIL 18, 2019

CLERK

Richter, J.P., Manzanet-Daniels, Kahn, Gesmer, Oing, JJ.

9035N- Index 158570/17
9035NA Zayre Preston,
Plaintiff-Appellant,

-against-

Janssen Pharmaceuticals, Inc., et al.,
Defendants,

Dr. Raihana Khorasanee, M.D.,
Defendant-Respondent.

_____

Monaco & Monaco, LLP, Brooklyn (Frank A. Delle Donne of counsel), for appellant.

Zachary W. Carter, Corporation Counsel, New York (Lorenzo Di Silvio of counsel), for respondent.

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Order, Supreme Court, New York County (Joan A. Madden, J.), entered June 7, 2018, which denied plaintiff's motion for leave to file and serve a late notice of claim on the City of New York and New York City Health and Hospitals Corporation (HHS) and for leave to file and serve a supplemental summons and amended complaint naming those entities as party defendants, unanimously affirmed, without costs. Order, same court and Justice, entered October 16, 2018, which granted defendant Dr. Raihana Khorasanee, M.D.'s motion to dismiss the complaint as against her for failure to file and serve a notice of claim prior to commencing the action and to commence the action within the applicable statute of limitations, unanimously affirmed, without costs.

Plaintiff failed to establish that the statute of limitations on her medical malpractice cause of action against defendant Dr. Khorasanee arising from alleged ocular injuries should be tolled by application of the continuous treatment doctrine (*see Plummer v New York City Health & Hosps. Corp.*, 98 NY2d 263, 267-268 [2002]; *Boyle v Fox*, 51 AD3d 1243 [3d Dept 2008], *lv denied* 11 NY3d 701 [2008]). The medical records do not establish the plaintiff informed Dr, Khorasanne of her ocular problems.

Plaintiff's motion for leave to serve a late notice of claim on the City and HHS was correctly denied as untimely, since it was not made within the limitations period for tort claims against these entities, i.e., one year and 90 days after the accrual of her cause of action (*see* General Municipal Law §§ 50-e[5]; 50-i[1]; McKinney's Unconsolidated Laws of NY § 7401[2]; *see also Young v New York City Health & Hosps. Corp.*, 147 AD3d 509, 509 [1st Dept 2017]). Since Dr. Khorasanee established that she was HHS's employee at all relevant times, the complaint was

correctly dismissed as against her (*see* Uncons Laws § 7401[6]; *see also Young*, 147 AD3d at 509-510).

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

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

ENTERED: APRIL 18, 2019

CLERK

Richter, J.P., Manzanet-Daniels, Kahn, Gesmer, Oing, JJ.

9036-
9037N Index 100425/18

Anna Betts,
Plaintiff-Appellant,

-against-

Savas Tsitiridis, et al.,
Defendants-Respondents,

1617A, LLC,
Defendant.

_____

Finkelstein Law Group, PLLC, Syosset (Stuart Finkelstein of counsel), for appellant.

Abrams, Fensterman, Fensterman, Eisman, Formato, Ferrara & Wolf LLP, Brooklyn (Thomas Torto of counsel), for respondents.

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Order, Supreme Court, New York County (Adam Silvera, J.), entered August 20, 2018, which sua sponte vacated an order, same court and Justice, entered July 11, 2018, granting plaintiff's motion for a default judgment as against defendants Savas Tsitiridis, Central Hacking Corp., Ionut Patroi, and United Taxi Management Group, Inc., unanimously reversed, on the law, without costs, and the order entered July 11, 2018 reinstated.

While an order entered sua sponte is not appealable as of right (*Sholes v Meagher*, 100 NY2d 333, 335 [2003]), given the lack of evidence of the timeliness of the service of the answer and given the motion court's failure to identify a legal basis for vacating the prior order, we deem the notice of appeal a

motion for leave to appeal, and grant leave (*see e.g. Ray v Chen*, 148 AD3d 568 [1st Dept 2017]).

The court exceeded its authority in sua sponte vacating the prior order granting plaintiff's motion for a default judgment (*see Kiker v Nassau County*, 85 NY2d 879, 881 [1995]; *Howell v City of New York*, 165 AD3d 567 [1st Dept 2018]). In the absence of a motion or other request for relief from the order, the court's discretion to correct the order was limited to curing any mistake, defect or irregularity "not affecting a substantial right of a party" (CPLR 5019[a]).

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

ENTERED: APRIL 18, 2019

CLERK

Friedman, J.P., Sweeny, Tom, Moulton, JJ.

9057 Eileana Valentin, Index 24072/13
Plaintiff-Appellant,

-against-

The City of New York,
Defendant,

New York City Housing Authority,
Defendant-Respondent.

_____

Gjoni Law, P.C., New York (Gencian Gjoni of counsel), for appellant.

Herzfeld & Rubin, PC, New York (Linda M. Brown of counsel), for respondent.

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Order, Supreme Court, Bronx County (Llinèt M. Rosado, J.), entered on or about January 9, 2018, which granted defendant New York City Housing Authority's (defendant), motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

Dismissal of the complaint was warranted in this action where plaintiff was beaten up in the elevator of defendant's building. There is a lack of evidence from which it could reasonably be inferred that a proximate cause of plaintiff's assault was a negligently maintained entrance. Defendant offered proof that the entrance had been checked and found without defect

on th day of the assault (*see Burgos v Aqueduct Realty Corp.*, 92 NY2d 544 [1998]; *Schuster v Five G. Assoc., LLC*, 56 AD3d 260 [1st Dept 2008]).

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

ENTERED: APRIL 18, 2019

CLERK