SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

DECEMBER 26, 2019

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Sweeny, J.P., Richter, Kapnick, Kern, Singh, JJ.

9886-
9886A Jennifer Chaitman, et al., Index 653037/12
Plaintiffs-Appellants,

-against-

Francis Moezinia, et al.,
Defendants,

FSM Holdings II, LLC, et al.,
Defendants-Respondents.

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[And Third-Party Actions]

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Chaitman LLP, New York (Helen Davis Chaitman of counsel), for appellants.

Bonner Kiernan Trebach & Crociata LLP, New York (Alan R. Levy of counsel), for respondents.

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Orders, Supreme Court, New York County (Melissa Crane, J.), entered on or about August 7, 2018, which, to the extent appealed from as limited by the briefs, denied plaintiffs' motion for partial summary judgment on the claim for a full rent abatement, and granted defendants FSM Holding II, LLC, DMZ III, LCC and SM 84th TIC, LLC's motion for summary judgment dismissing the claims for a full rent abatement and lost profits as against them, unanimously modified, on the law, to deny defendants' motion as

to the claim for a full rent abatement to the extent predicated upon paragraph 26 of the lease, and otherwise affirmed, without costs.

While the motion court correctly denied plaintiffs' motion for partial summary judgment on the claim for a full rent abatement, it should not have dismissed the claim to the extent it was based on paragraph 26 of the lease, which provides that "if more than thirty percent (30%) of the demised premises is damaged or affected thereby and the demised premises cannot be open for business to the general public, then all rent and additional rent shall be fully abated until it can be opened for business." Issues of fact exist as to the percentage of the premises that was affected by defendants' negligent renovations. Plaintiffs were not precluded from asserting this claim on the ground that the plain meaning of "open for business to the general public" included the situation in which, due to the renovations, the business remained open to existing clients but could not accept new clients.

The claim for lost profits, however, was properly dismissed. General Obligations Law § 5-321 provides:

> "Every covenant, agreement or understanding in or in connection with or collateral to any lease of real property exempting the lessor from liability for damages for injuries to person or property caused by or resulting from the negligence of the lessor, his

> agents, servants or employees, in the operation or maintenance of the demised premises or the real property containing the demised premises shall be deemed to be void as against public policy and wholly unenforceable."

The exculpatory clauses in the lease relieving defendants of liability for lost profits resulting from their own negligence are not void under General Obligations Law § 5-321 because lost profits are distinct from property damage (*see e.g. Duane Reade v 405 Lexington, L.L.C.*, 22 AD3d 108, 112 [1st Dept 2005] [General Obligations Law § 5-321 does not void the waiver of business loss liability because claims for business losses are "wholly distinct and separate from property damage" claims]; *Periphery Loungewear v Kantron Roofing Corp.*, 190 AD2d 457, 461 [1st Dept 1993] ["If we accept plaintiff's argument that 'injuries to . . . property' include loss due to business interruption, then General Obligations Law § 5-321 might very well invalidate [the exculpatory clause] of the lease. But . . . from the perspective of insurance coverage, the concept of business interruption loss is one wholly distinct and separate from property damage."]. This Court has repeatedly enforced exculpatory clauses related to business interruption losses (*see After Midnight Co. LLC v MIP 145 E. 57th St., LLC*, 146 AD3d 446, 447 [1st Dept 2017], and cases cited therein).

Moreover, paragraph 23 of the lease amendment specifically

provides that "[*n*]*otwithstanding anything to the contrary* . . . Tenant waives, to the full extent permitted by law, any claim for consequential or punitive damages in connection [with damage to Tenant's property]" (emphasis added).[1] In view of this unequivocal exculpatory clause stating that no other provision in the lease shall entitle the tenant to consequential damages, the claim for lost profits is barred (*see generally Board of Mgrs. of the Saratoga Condominium v Shuminer*, 148 AD3d 609, 610 [1st Dept 2017]; *Periphery Loungewear*, 190 AD2d at 461).

Contrary to plaintiff's argument, the separate provision in the lease amendment that requires the landlord to "use its reasonable efforts to minimize the inconvenience to, annoyance and injury to Tenant's business and its use and enjoyment of the demised premises" does not override the exculpatory clause in this lease amendment (*cf*. *Duane Reade v Reva Holding Corp*., 30 AD3d 229, 235 [1st Dept 2006] [plaintiff's claim for business interruption losses permitted where lease clause that provided that owner shall not unreasonably interfere with tenant's

[1]Although the parties do not address whether the damages for lost profits in this case would be general or consequential damages, we conclude that the damages are consequential because plaintiffs are seeking lost profits arising from "collateral business arrangements" as opposed to general damages directly flowing from a breach of the lease (*see generally Biotronik A.G. v Conor Medsystems Ireland, Ltd.*, 22 NY3d 799, 807-808 [2014]).

business took precedence over exculpatory clause that provided that "[e]xcept as specifically provided in Article 9 or elsewhere in the lease" there shall be no liability to tenant for injury to business, and there was a provision elsewhere in the lease]; *Union City Union Suit Co. v Miller*, 162 AD2d 101, 102, 104 [1st Dept 1990] [plaintiff's claim for damages arising out of failure of landlord to provide heat and freight elevator service permitted because the exculpatory clause stating that "[e]xcept as specifically provided in Article 9 or elsewhere in this lease" there shall be no liability to the tenant for injury to business was significantly narrowed by another clause providing that alterations to premises shall be made at such time so as not to unreasonably interfere with tenant's use of the premises], *lv denied* 77 NY2d 804 [1991]).

Since the exculpatory clause in this lease amendment, unlike the clauses in *Duane Reade* and *Union City*, overrides any other

clause in the lease amendment that could be interpreted as imposing liability on the landlord for lost profits, that claim was correctly dismissed.

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

ENTERED: DECEMBER 26, 2019

CLERK

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

10080 Amanda Schmitt, Index 159496/17
Plaintiff-Appellant,

-against-

Artforum International Magazine, Inc., et al.,
Defendants-Respondents.

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Clarick Gueron Reisbaum, New York (Emily Reisbaum of counsel), for appellant.

Proskauer Rose LLP, New York (Bettina B. Plevan of counsel), for Artforum International Magazine, Inc., respondent.

Littler Mendelson P.C., New York (Margaret L. Watson of counsel), for Knight Landesman, respondent.

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Judgment, Supreme Court, New York County (Frank P. Nervo, J.), entered January 2, 2019, dismissing the complaint, pursuant to an order same court and Justice, entered December 24, 2018, which granted defendants' motions to dismiss the complaint pursuant to CPLR 3211(a)(7), modified, on the law, the judgment against defendant Artforum International Magazine, Inc. vacated, Artforum's motion to dismiss the claims alleging retaliation by Artforum against plaintiff in violation of the New York City Human Rights Law (Administrative Code of the City of NY §8-107[7]) and promissory estoppel denied, and the judgment is otherwise affirmed, without costs.

Plaintiff is a New York City curator and art fair director who began her career in 2009 at the age of 21 years, as a recent arrival from Wisconsin, with her employment at defendant Artforum. Artforum publishes a periodical that has significant influence in the art world arising in part from its role as a major advertising vehicle for participants in the art trade but also because of the various events that it sponsors, which serve as a forum for the leading participants in the art trade. The complaint as well as record materials indicate that defendant Knight Landesman is very influential and highly connected in the industry, and was one of Artforum's four co-publishers. In this capacity at Artforum, he exercised supervisory authority over plaintiff and others.

Plaintiff's complaint alleges an extended period of sexual harassment of plaintiff by defendant Landesman about which defendant Artforum became informed and allegedly acted adversely to her in the closely-knit commercial art world with consequences including reputational harm. Shortly after plaintiff's employment with Artforum commenced, Landesman, who was then in his late 50s, subjected her to uncomfortable sexual advances. This continued while she was employed by Artforum and, despite her pleas that Landesman end that conduct, continued for several years after she left Artforum until she filed this action.

Plaintiff explained that this was her first office job, and that she did not know how to respond to Landesman's sexual advances or how to fight back. Since Landesman was her supervisor and she was aware of his power in the art world, she was afraid to confront him or to risk her position at Artforum. Hence, she concluded that she was forced to put up with the harassment. Plaintiff claims that it became apparent to her that Landesman's proclivities were known at Artforum since, when the subject arose, people often rolled their eyes and said, "[W]ell, that's just how Knight is."

Plaintiff left Artforum in August 2012 but, she alleges, Landesman's unwanted attentions and communications to her did not end. Rather, they expanded in person and by emails that are included in the record. The nature of the harassment and Landesman's ongoing sexual overtures are amply supported by the record for purposes of CPLR 3211. Plaintiff alleged that given her youth and lack of work experience, although she was disgusted, ashamed and confused, Landesman's goodwill was still critical to her professional advancement, which required her to endure his harassment. Landesman's connection with defendant Artforum was also an important factor in plaintiff's reticence in seeking legal relief. The complaint and supporting materials in the record establish, again for purposes of a CPLR 3211(a)(7)

dismissal motion, the need for plaintiff to maintain good relations with Artforum, both as Landesman's publishing vehicle and because of its own seminal importance with respect to advancing or ruining careers such as plaintiff's.

Artforum's influence was underscored for plaintiff when in December 2012 she was invited by Artforum to what the complaint characterizes as a prestigious dinner of insiders at an event in Miami where she participated as an exhibitor. At the time plaintiff no longer worked for Artforum. Landesman took the opportunity to email plaintiff again from an Artforum account with the subject line "Teacher*Student," where he gushed, "Good to have you at *our* dinner in the Miami moonlight," fantasized about a kiss, and urged her to "[g]ive yourself to me! ALL of you=to all of me, Our own deeply secret, deeply special, no boundaries, in friendship." This email was of a kind with a history of prior emails, the explicit details of which are not necessary to reiterate in this decision.

Plaintiff alleges that she thereafter tried to keep her distance from Landesman. Nevertheless, she felt that it was professionally necessary to attend an Artforum dinner, which was attended by artists, dealers and curators, at its, and Landesman's, invitation in March 2013. He perpetuated his sexual harassment, now in front of clients and potential employers, and

afterward emailed her again from an Artforum account where he professed his enjoyment at being her "teacher," but chided her with a "B- on your delivery to me." Plaintiff alleges that while she was seeking new employment during 2013, Landesman, knowing that his goodwill and status at Artforum were critical, took advantage of the opportunity by sending numerous increasingly sexually explicit harassing emails and texts included in the record, which she tried to ignore.

As a consequence of the emotional distress this was causing her, plaintiff claims she had to start seeing a therapist in October 2014. Nevertheless, because of the nature of the industry, she could not avoid running into Landesman at events over the next two years. On those occasions he took advantage of the opportunity to whisper suggestions about masturbation and spanking while publicly touching her hands, waist, buttocks and hips without her consent.

In April 2016 and thereafter, he texted her more explicit materials linked to explicit videos and web articles, and chided her when she failed to respond. When plaintiff saw Landesman in Artforum's premises in May 2016, she implored him to stop the harassment, which was harming her emotionally and professionally. In response he rubbed her calf with his shoeless foot and suggested that she request permission from her partner for

Landesman to continue his conduct towards her. After she left, Landesman emailed her a similar request, eliciting her response that he had to stop the harassment that he had been perpetrating since 2012. In an ambiguous response, Landesman emailed back that they should meet so that they could "get on the same page" and resume their prior "friendliness."

Instead, plaintiff met with Charles Guarino and Danielle McConnell, who published Artforum Magazine along with Landesman, to communicate the harassment and show them some of Landesman's emails. The publishers subsequently advised plaintiff by email that she could contact a lawyer and seek out other targets of Landesman's harassment. Plaintiff responded that she was not seeking monetary relief but only wanted to end the harassment without damage to her career. In response, Guarino promised in writing that Artforum was "taking action to insure that whatever may have transpired never happens again."

Plaintiff alleges that any action taken was minimal and ineffective insofar as Landesman's harassment continued. However, she alleges, it became clear to her that Artforum did take action - but against her, by excluding her from the influential dinners and events which were professionally important in the New York art world to which she had regularly been invited in the past. In the meantime, plaintiff alleges, in

reliance on Guarino's and McConnell's promise that Artforum would take steps to ensure that Landesman's sexual harassment would never happen again, she did not file legal claims for Landesman's conduct, and the limitations periods passed, precluding adequate relief.

Apparently, Artforum's efforts in furtherance of its promise, limited to directing Landesman to engage in therapy and not to contact plaintiff, were unsuccessful and in effect were superficial window dressing. Plaintiff alleges that on May 7, 2017, plaintiff was dining in a Manhattan restaurant with her partner, an academic and professional artist, and Alex Kitnick, an art professor and critic, both of whom appeared regularly in Artforum Magazine, when Landesman, uninvited, appeared, sat down, and harangued her about accusing him unfairly of sexual harassment. The attempted departure of Kitnick, whom Landesman professed was a "dear friend," was physically blocked by Landesman, after which Landesman threatened to reveal "details" to him so that he could "judge" for himself. As described in the complaint, plaintiff was emotionally distraught and fearful of the professional consequences.

In June of 2017, plaintiff finally undertook preliminary legal steps by having an attorney write to Landesman and Artforum, identifying other victims of his sexual harassment, and

demanding that the harassment stop but also that what she construed to be retaliation also end. Among other remedies, she demanded reimbursement for her therapy costs, corrective policies including training to address sexual harassment and effective harassment reporting at Artforum but, otherwise, not monetary damages. An attempt at settlement was unsuccessful, plaintiff alleges, when she would not submit to a nondisclosure agreement.

However, as negotiations were ongoing, plaintiff alleges, Artforum conducted an employee meeting at which employees were told that plaintiff's claims involving Landesman were unjust, that she had maintained a consensual and non physical relationship with him, that plaintiff was exaggerating, and that her goal was actually to "try to take down Artforum." During a subsequent statement to an Artnet reporter, Artforum characterized plaintiff's relationship with Landesman as only a close friendship which started after she had left Artforum and stated that her claims were unfounded and were only "an attempt to exploit a relationship that she herself worked hard to create and maintain." Moreover, Artforum stated, in stark contradiction to the nondisclosure agreement on which Artforum had insisted as a condition of settlement, that "we have no wish to silence anyone, nor will we engage in any attempt to do so."

Concurrently, plaintiff alleges, Artforum had been excluding

her from its sponsored events that were essential for business development, meeting artists, other curators and other participants in the New York art world and thereby, in effect, freezing her out from the trade. In the present action, plaintiff connects Artforum's exclusionary conduct and its disparaging comments about her experiences and motivation to portray a pattern of its own harassment directed at her in retaliation for having brought these matters to light.

By complaint dated October 25, 2017, plaintiff sued both Artforum and Landesman for retaliation in violation of New York City's Human Rights Law set forth in Administrative Code § 8-107 in a first cause of action. The second cause of action alleged slander and slander per se against both defendants. The third cause of action sounded in gross negligence against only Artforum. The fourth cause of action, again against only Artforum, was for promissory estoppel. Plaintiff claimed defamation and defamation per se against Artforum in the fifth and sixth causes of action. The complaint alleges that Guarino conceded that it was known to them that Landesman had behaved in a similar fashion on prior occasions. The complaint also sets forth information about at least eight other victims of Landesman's sexual harassment who described a similar pattern of suggestive and even explicit conversational overtures by him,

explicit emails, groping and inappropriate touching and public humiliation when they declined to respond to him physically. Defendants moved to dismiss under CPLR 3211(a)(7) on the basis that the complaint fails to set forth a cause of action.

Supreme Court granted defendant's CPLR 3211 motions and dismissed the complaint. We reinstate the claims of retaliation against Artforum (but not against Landesman) and promissory estoppel, but affirm the dismissal of the remaining claims.

It is well established that on a motion to dismiss pursuant to CPLR 3211(a)(7), the court must accept as true the plaintiff's factual allegations and afford the plaintiff all favorable inferences in ascertaining whether the pleadings support relief on the basis of any reasonable view of the facts pled (*Aristy-Farer v State of New York*, 29 NY3d 501, 509 [2017]). Although the complaint does not set forth adequate grounds for a theory of defamation or slander, Artforum's verbal and written disparagement of plaintiff, especially after she explained her plight and displayed Landesman's emails, combined with allegations that Artforum sought to effectively freeze her out of the close-knit business and professional trade in which she was engaged, adequately set forth retaliation claims under the New York City Human Rights Law (Administrative Code § 8-107[7]) for purposes of CPLR 3211(a)(7).

Administrative Code § 8-107(7) defines as an unlawful discriminatory practice conduct by "any person engaged in any activity to which *this chapter* applies to retaliate or discriminate in any manner against any person because such person has," inter alia, "opposed any practice forbidden *under this chapter* . . . filed a complaint . . . in any proceeding *under this chapter* . . . commenced a civil action alleging the commission of an act which would be an unlawful discriminatory practice *under this chapter* . . . " (emphasis added). Section 8-107 includes 31 subsections which set forth a range of contexts in which the discrimination or retaliation would be prohibited. These generally reference employment, housing, places of public accommodation and other discrete activities. As is evident in Supreme Court's findings, the present claim against Artforum does not fit neatly into the categories of this chapter. Nevertheless, that should not require dismissal of the claim against Artforum as a former employer or, alternatively, as the participant in an ongoing economic relationship in the close-knit art industry where plaintiff's prospective business/employment is allegedly being intentionally compromised.

The United States Supreme Court, interpreting the "employment" relationship with reference to § 704(a) of Title VII of the Civil Rights Act of 1964 (42 USC § 2000e-3[a]), found

"employment" to be sufficiently ambiguous in that statute that it could also be applied to a former employer-employee relationship so as to bring the retaliation or discrimination within the statutory reach (*Robinson v Shell Oil Co.*, 519 US 337, 339, 346 [1997]). In an earlier ruling, the Second Circuit had found the term "employment" to be sufficiently elastic that the alleged harm need not occur precisely during the current employment relationship (*Pantchenko v C.B. Dolge Co., Inc.*, 581 F2d 1052 [2d Cir 1978]). To respect the legislative goal of shielding "employees" from retaliatory or discriminatory harm and affording them a legal remedy in the event of "employer" transgressions, the Second Circuit applied the terminology liberally to past, present or prospective employers rather than requiring a parsimonious literalness (*id.* at 1055).

Hence, there is jurisprudential grounding for expanding the boundaries of the employment context that is central to discrimination and retaliation claims in section 8-107(7) to the extent necessary to provide redress when there exists some nexus between the retaliatory harm alleged and a relationship characterized in some manner as one of employment, past or present. This Court acknowledged as much in a decision where dismissal nevertheless was required because the plaintiff was a partner rather than an employer, which we construed to be a

fundamentally different relationship (*cf. Ballen-Stier v Hahn & Hessen*, 284 AD2d 263 [1st Dept 2001], *lv dismissed* 97 NY2d 699 [2002]).

Similar reasoning can be justified in reading some expansiveness into the undefined and similarly ambiguous term "employment" for remedying retaliation under Administrative Code section 8-107(7). However, some safeguards are necessary to avoid the unintended consequence of allowing a lawsuit against a party who happens to be a plaintiff's former employer on a retaliation theory when there is no reasonable connection between the harm alleged and that economic relationship. The plaintiff, if not a current employee, should be shown to occupy a subordinate position in an ongoing economic relationship that is threatened by the "employer's" retaliation, and the nature of the retaliation itself should have a demonstrable nexus to the harm being alleged. These are factual issues which can be explored outside of the context of the present challenge to the pleadings.

Such an approach comports with the directive in *Albunio v City of New York* (16 NY3d 472 [2011]) that the New York City Human Rights Law should be construed by its terms as broadly as is reasonable, with some license given for how its terms are to be construed in accordance with that principle. In *Albunio*, the plaintiffs claimed that their careers were adversely impacted for

having opposed a superior officer's discrimination against another officer whom the supervising officer believed to be gay. Although one of the plaintiffs had not formally filed a complaint claiming retaliation, the evidence indicated that her career, in fact, had been adversely impacted and, interpreting the City Human Rights Law broadly, the Court of Appeals found that the jury could draw an inference of retaliation against her on the basis of the proof submitted. The *Albunio* principle, however, requires that even a broad construction demands that for a retaliation claim, the facts must demonstrate that the defendant's actions and the position in which the plaintiff is consequentially placed exceed what would reasonably be expected. This must be a "difference in treatment [that is] attributable to retaliation," as we recognized in affirming dismissal in *Willams v New York City Hous. Auth.* (61 AD3d 62, 72 [1st Dept 2009], *lv denied* 13 NY3d 702 [2009]).

These facts, as pleaded and supplemented by materials in the record, satisfy that requirement for purposes of stating a cause of action for retaliation against Artforum. Plaintiff's employment in her career started with Artforum, where Landesman, allegedly known to engage in sexual harassment at that time, was her supervisor. Landesman, a publisher, supervisory employee and part owner of Artforum, allegedly engaged in extensive sexual

harassment during those early years, which continued for several years thereafter, during which he even portrayed himself as her "teacher." Even if his meaning was libidinous rather than supervisory as time went on, he nevertheless underscored the extent to which plaintiff remained professionally and economically tethered to him, and hence to Artforum, due to their influence in the art world, at least for purposes of CPLR 3211(a)(7). During that latter time period, even after plaintiff started to develop her own business as a curator and art dealer, Landesman, whose influence in the New York art world provided significant economic and reputational benefits to Artforum, still maintained continuing and regular contact with plaintiff, albeit holding himself out as a career advisor who could influence her career. This is amply documented in the record.

During those same years, Artforum also maintained a business and professional relationship with plaintiff by regularly inviting her to the events that it sponsored. The complaint sets forth how necessary this kind of relationship was for her business success. It was at such events, plaintiff claims, that she met artists, curators, and other professionals in the field, networking that was essential to her own professional and business success. Although the facts as pleaded do not allow for Artforum's vicarious liability for its employee's misconduct,

they do provide a plausible context for explaining why and how it reacted as it did, for purposes of this CPLR 3211(a)(7) motion, when plaintiff more formally advanced her complaint of Landesman's sexual harassment following his ambiguously threatening confrontation of plaintiff in the restaurant.

As pleaded, then, this was an ongoing seamless affiliation in which plaintiff, by virtue of the extent and nature of Artforum's influence, necessarily remained in a subordinate economic position to it in its role as a publisher and as a professional lodestar. The break came, as alleged in the complaint, when, having relied on her established relationship with Artforum, plaintiff first professionally requested the publishers' assistance in ending Landesman's emotionally and professionally damaging behavior, then, when that allegedly failed, she took the additional step of seeking legal assistance. Whether we deem the former employment to extend to these circumstances for purposes of pleading retaliation, or we construe the ongoing quasi-employment economic relationship that bound plaintiff to Artforum to be an adequate criterion, these facts as pleaded sufficiently make out a claim of retaliation against Artforum within the reach of § 8-107(7) for purposes of CPLR 3211.

The complaint sets forth two categories of retaliatory

responses by Artforum, which, plaintiff alleges, harmed her professionally and, relatedly, from a business perspective. As already noted, she alleges that Artforum essentially froze her out of the gatherings sponsored by it where the New York art world congregated, thereby diminishing her ability to sustain success in that field. In effect, she argues in sum and substance, Artforum, influential in the art world, could help make or break her career.

Magnifying this alleged harm, she further claims, Artforum's characterizations of her conduct, motivations and goals presented an attack on her professional and personal integrity, which, while technically not defamatory, nevertheless besmirched her in a manner that could harm her professionally. As alleged, Artforum's accusations form a pattern: to its employees, it characterized her claims as "unjust"; it trivialized her interactions with Landesman as "consensual and nonphysical"; argued that she was "try[ing] to take down Artforum"; conducted private meetings with its employees who had shared an Instagram post equating Landesman with Harvey Weinstein, itself ostensibly coercive, during which plaintiff's claims were described as disproportionate to Landesman's actual conduct; threatened other employees who claimed to have been subjected to Landesman's sexual harassment with reputational harm and even firing; and

described plaintiff's claims to an Artnet reporter as unfounded and "an attempt to exploit a relationship that she herself worked hard to create and maintain." For purposes of CPLR 3211(a)(7), plaintiff has adequately pleaded that these actions and statements were in retaliation for pursuing her right to stop the sexual harassment by a person economically and professionally important to Artforum and influential in the industry in which Artforum was a major player.

The retaliation claim against Landesman, however, fails on the absence of an allegation of actual retaliation. Plaintiff therein relies on the mere allegation that when Landesman confronted plaintiff in the restaurant he "threaten[ed] to discuss the 'details'" with Kitnick and her partner, which she construes as a threat to slander her. The complaint alleges no further conduct on Landesman's part, nor is there any reliable means to know what "details" were in issue. Notwithstanding the characterization in the complaint, these were not threats in any explicit sense notwithstanding possible, albeit unstated and vague, implications of his reaction to her accusation. Although plaintiff argues that Landesman in doing so was acting within the scope of his employment with Artforum, the facts as alleged show no more than Landesman's personal defensive hostility.

We reinstate the claim for promissory estoppel. The facts

as pleaded show that plaintiff, relying on her ongoing professional and business relationship with Artforum, sought the personal help of two of its co-publishers in restraining the sexual harassment of its third co-publisher so as to avoid further emotional and professional harm to her; conceding their awareness of Landsman's proclivities, they professed to be concerned for her emotionally and professionally and promised that she would never be subjected to the damaging behavior again without harm to her professionally; it was reasonable that plaintiff relied on their assurances and their ostensible good faith; they addressed the problem at best superficially and ultimately unsuccessfully; when she finally retained legal counsel, she still sought only to end the behavior rather than monetary remedies; and, as a consequence of this reliance, potential legal remedies became time-barred. These allegations, supported by record documentation, sufficiently set forth a cause of action for promissory estoppel so as to survive dismissal under CPLR 3211(a)(7) (*Braddock v Braddock*, 60 AD3d 84, 95 [1st Dept 2009], *appeal withdrawn* 12 NY3d 780 [2009]).

Although evolving caselaw indicates that a defendant's public accusation of a plaintiff of fabricating claims of sexual harassment may support a theory of defamation, importance must still be placed on the allegedly slanderous words and whether

they are provably false factual statements, in order to be actionable. Subjective statements of opinion, in contrast to objectively understandable statements of fact, are not actionable as such (*Mann v Abel*, 10 NY3d 271 [2008], *cert denied* 555 US 1170 [2009]). The verbal and written texts on which plaintiff relies in the complaint fall short of defamation, even if they ultimately may be supportive of the retaliation claim against Artforum. Plaintiff claims that at the employee meeting, Artforum described her claims as "unjust." This is subjective opinion. Accepting the allegation as true, Artforum also described plaintiff's relationship with Landesman as "consensual and non physical." This would seem to be accurate in a technical sense. Plaintiff contends that Guarino told the employees that plaintiff was campaigning to "take down Artforum." The phrase "take down" is a figure of speech, perhaps even hyperbolic, amenable to several possible meanings, making it innately not falsifiable. Moreover, in context it seems to be intended as a statement of opinion (*Mann*, 10 NY2d at 276-277). The complaint alleges that Artforum wrote on its own website and communicated to Artnet for publication in that medium that plaintiff's sexual harassment claim "appears to be unfounded, and seems to be an attempt to exploit a relationship that she herself worked hard to create and maintain." While possibly disingenuous, this

carefully hedged phrasing also does not present falsifiable statements of fact; how something "appears" and what it "seems" to be are innately subjective. Even if the qualifying verb forms had been omitted, the statements are more in the nature of defensive statements of conjecture that would be classifiable as opinion rather than provably false facts (*El-Amine v Avon Prods.*, 293 AD2d 283 [1st Dept 2002]).

Similarly, Landesman's statements that plaintiff has "unfairly accused him" and that they needed to "help her understand the reality" do not suffice since they do not convey falsifiable facts. Fairness is innately subjective, and an expression of Landesman's opinion, whether realistic or not and whether disingenuous or not, and importuning their help in clarifying "reality" for plaintiff cannot be reasonably interpreted as conveying false factual content.

Since the statements on which plaintiff relies are neither slander nor defamation, we need not reach the per se claims. Even if we did, however, the complaint does not set forth the requisite damages arising from these statements.

Even if Artforum might be construed to have assumed a moral obligation to plaintiff to intercede with Landesman to end his offensive conduct, the complaint fails to set forth a legal duty of care owed by Artforum to plaintiff, a breach of that duty,

foreseeability and Artforum's proximate causation in relation to the confrontation by Landesman, such as would sustain a negligence theory of harm *(Hunt v Scotia-Glenville Cent. School Dist.,* 92 AD2d 680 [3d Dept 1983]). Nor do these facts establish a basis to imply a duty of care by Artforum owed to plaintiff as urged by the dissent. The promissory estoppel claim rests on a reliance theory - plaintiff allegedly forebore time-limited legal rights on the basis of an assurance that Artforum's management would induce Landesman to change his conduct towards plaintiff, in which they did not succeed - which differs from Artforum's assumption of a duty of care towards plaintiff. As Supreme Court found, the pleadings show, at most, that Landesman's statements during the restaurant confrontation were his own, for his own purposes while he was not under Artforum's control, that they were not made to advance Artforum's interests, and that he was the sole proximate cause of any alleged harm resulting therefrom. Nor do the facts as pleaded establish a basis to impute to Artforum Landesman's misconduct after plaintiff left its

employment, and the limitations period had long lapsed since she left its employment.

All concur except Mazzarelli, J. who dissents in part in a memorandum as follows:

MAZZARELLI, J. (dissenting in part)

I dissent from that part of the majority's decision that affirms the dismissal of plaintiff's claim for gross negligence. The majority acknowledges that plaintiff reasonably relied to her detriment on representations made by Artforum that it would take action to protect her from defendant Landesman's harassment. However, the promise implied from those representations, that the majority holds Artforum is estopped from disavowing, is also the precise nucleus of the duty of care that plaintiff alleges Artforum created, and then willfully breached, when it failed to act. Accordingly, it is inconsistent to dismiss the gross negligence claim.

The basis for both causes of action is a meeting plaintiff had in June 2016 with two of Artforum's co-publishers at Artforum's office. Although the meeting took place four years after plaintiff left Artforum's employ, it followed a persistent campaign of sexual harassment against plaintiff pursued by Landesman after she left the company. According to the complaint, plaintiff told the publishers about Landesman's long history of sexually harassing her, showed them some of the recent text messages he had sent her, and asked them to prevail upon Landesman to stop. Plaintiff explained that her goal was not monetary, but solely to have Landesman stop without seeking

retribution against her. The publishers expressed horror at Landesman's conduct, and one of them confirmed that other young women had previously complained to him about Landesman's sexual harassment. Plaintiff followed up with an email summarizing the meeting, and received an emailed response assuring her that the publishers would be "taking action to insure that whatever may have transpired never happens again." Artforum told Landesman to see a therapist, not to approach plaintiff, and not to meet female employees alone or bring them to industry events. However, it took no steps to enforce these instructions. Instead, Artforum continued to employ Landesman and provide him with a private office. Moreover, plaintiff alleges that, contrary to these assurances to her, Artforum directly retaliated against her by excluding her from its events and dinners, including functions to which she had already been invited.

Much like a promise can be implied when the promisee relies on the words or acts of a promisor, a duty of care can be implied when a person relies on another person's commitment to assume the duty (see *Heard v City of New York*, 82 NY2d 66, 72 [1993]). The majority's attempt to differentiate between the reliance element of the promissory estoppel cause of action and that of the gross negligence claim, by emphasizing plaintiff's forbearance from asserting certain legal rights in alleging the former, ignores

that a negligence claim can, as here, be grounded on a plaintiff's reliance on another party's actions such that she is lulled into a false sense of security (*id.* at 72-73, citing *Nallan v Helmsley-Spear, Inc.*, 50 NY2d 507, 522 [1980]). Here, a promise was implied, and a willingness to undertake a duty conveyed, when Artforum told plaintiff in the June 2016 meeting that it would be "taking action." If, as the majority concedes, it was reasonable for plaintiff to rely on that statement for purposes of creating an implied promise by Artforum, then that same reliance could have created a duty by Artforum to act with due care by reassuring plaintiff that she no longer needed to fear being harassed by Landesman. Further, Artforum's statement implied that it had the ability and means to control Landesman. Thus, plaintiff adequately alleged that Artforum had a duty to prevent Landesman from harassing her, including confronting her in social settings such as the restaurant meeting where he publicly accused her of "unfairly accus[ing]" him. Further, given Artforum's stated ability to control Landesman, the majority's conclusion that the complaint establishes that Landesman was the sole proximate cause of plaintiff's harm is unfounded.

For the foregoing reasons, I would reinstate plaintiff's gross negligence claim.

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

ENTERED: DECEMBER 26, 2019

CLERK

Renwick, J.P., Gische, Tom, Gesmer, Moulton, JJ.

10167 The People of the State of New York, Ind. 1932/15
Respondent,

-against-

John Kojo Zi,
Defendant-Appellant.

_____

Robert S. Dean, Center for Appellate Litigation, New York (Scott H. Henney 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 (Laura A. Ward, J.), rendered September 6, 2017, convicting defendant, after a jury trial, of offering a false instrument for filing in the first degree (six counts), grand larceny in the first degree (four counts), scheme to defraud in the first degree, forgery in the second degree, making an apparently sworn false statement in the first degree and grand larceny in the second degree, and sentencing him to an aggregate term of 4 to 12 years, reversed, on the law, and the matter remanded for a new trial.

Under the facts of this case, the trial court improperly granted defendant's request to proceed pro se without first conducting a searching inquiry regarding defendant's mental capacity to waive counsel (*see People v Stone*, 22 NY3d 520 [2014]). A defendant's request to proceed pro se must be denied

unless the defendant effectuates a knowing, voluntary and intelligent waiver of the right to counsel (*People v Crampe*, 17 NY3d 469, 481 [2011], *cert denied sub nom. New York v Wingate*, 565 US 1261 [2012]). In assessing the efficacy of the defendant's waiver, a trial court must undertake a "searching inquiry" to determine whether the defendant understands the dangers and disadvantages of proceeding without counsel (*id.*). It is within the trial court's discretion to determine whether its searching inquiry should include questioning about a defendant's mental capacity to waive counsel (*Stone*, 22 NY3d at 529; *People v Hilser*, 158 AD3d 819, 820 [2d Dept 2018] *lv denied* 31 NY3d 1083 [2018]). Where there are "red flags" that a defendant may be suffering from a serious mental illness affecting his or her competency to waive counsel, the searching inquiry should include a particularized assessment of defendant's mental capacity (*Stone*, 22 NY3d at 528). A court reviewing the trial court's determination looks at the entire record developed by the time the inquiry is made (*People v Providence*, 2 NY3d 579, 583 [2004]; *People v Hisler*, 158 AD3d at 820; *see People v Cruz*, 131 AD3d 724, 726-727 [2d Dept 2015], *lv denied* 26 NY3d 1087 [2015]).

We recognize that any determination regarding whether "red flags" exist is necessarily fact driven. Nonetheless, case law

provides guidance for making that determination. As the Court of Appeals stated in *Stone*, "[W]e have long recognized that a mentally-ill defendant, though competent to stand trial, may not have the capacity to appreciate the demands attendant to self-representation, resulting in an inability to knowingly, voluntarily and intelligently waive the right to counsel and proceed pro se" (22 NY3d at 526-27). The Court of Appeals has also made it clear that a trial court need not order a CPL Article 730 exam to determine that a defendant has mental capacity to waive counsel (*id.* at 527). Even so, information obtained from CPL Article 730 exams that have otherwise been previously ordered by the court may bear upon the issue of waiver capacity (*People v Fleming*, 141 AD3d 408, 409 [1st Dept 2016] [given defendant's history of mental illness, court providently exercised its discretion in ordering a new CPL Article 730 proceeding to ensure that any waiver of the right to counsel would be knowing] *lv denied* 28 NY3d 1027 [2016]; *People v Malone*, 119 AD3d 1352, 1354 [4th Dept 2014] [CPL Article 730 exam finding defendant mentally competent "weighs in favor of our conclusion that defendant knowingly, voluntarily and intelligently waived his right to counsel"] *lv denied* 24 NY3d 1003 [2014]). A CPL Article 730 exam finding a defendant fit to proceed, however, is not determinative on the issue of waiver of counsel and does not,

in itself, foreclose an enhanced searching inquiry (*Stone*, 22 NY3d at 527; *People v Brodeur*, 55 Misc 3d 37, 40 [App Term, 2d Dept, 2d, 11th, & 13th Jud Dists 2017]). Thus, in determining whether a basis for inquiry exists, a trial court should consider the information in the record from any prior CPL Article 730 exam, even if a defendant is fit to stand trial.

It also stands to reason that the threshold for determining that a basis exists for inquiry about a defendant's mental capacity to waive counsel is broader than the standard applied to the ultimate determination about whether a defendant actually has capacity to do so (*See People v Johnson*, 128 AD3d 412, 413 [1st Dept 2015] [following a determination that the defendant was fit to stand trial, the court still inquired into whether defendant's mental condition would affect his right to waive counsel based upon his history of violent behavior, but then permitted him to represent himself] *lv denied* 27 NY3d 999 [2016]). This is because the particularized inquiry is only a tool to assist the court in obtaining information to determine that a defendant seeking to exercise a constitutional right to self-representation actually has the capacity to waive counsel (*Stone*, 22 NY3d at 525). Red flags only serve to trigger an inquiry; the information elicited aids the court in reaching its ultimate conclusion on defendant's ability to waive counsel. Red flags by

themselves do not foreclose a determination that defendant has that ability.

Not every indication of a defendant's mental infirmity mandates inquiry. Expressions of paranoia or distrust of an attorney, common for many defendants, are not red flags (*Stone*, 22 NY3d at 528). Nor is a defendant's belief that he or she was framed by police (*Cruz*, 131 AD3d at 727). A psychiatric history in itself may not be enough (*People v Moore*, 126 AD3d 561 [1st Dept 2015] *lv denied* 26 NY3d 1090 [2015]). On the other hand, notwithstanding a CPL Article 730 exam finding defendant fit, court observations that a defendant was irrational and had a tendency to "fly off the handle" warranted a searching inquiry into defendant's mental capacity (*Boudeur*, 55 Misc 3d at 40). So too, inquiry was warranted where defendant was observed by the court to be unruly, volatile and physically menacing (*Johnson*, 128 AD3d at 413). In many cases, whether or not the behavior would trigger an inquiry may be a question of degree.

Here, the record establishes that before defendant's application to proceed pro se was considered by the court, his third court-appointed attorney requested, of a prior judge, an order for a CPL Article 730 examination. The attorney reported to the examining psychiatrists that defendant believed he committed no crime, and that he faced prosecution as the result

of "a Jewish conspiracy led by the Court and ISIS." Although defendant was found by both psychiatrists to be fit for trial, there were red flags in both reports suggesting the need for further inquiry. Both psychiatrists reported that defendant spoke about warrants being forged. One psychiatrist observed that some of defendant's assertions "impressed as potentially delusional," but that they were not a result of "psychotic delusions." The examiner expressly questioned whether defendant's beliefs about forged warrants and also the resignation of the arresting officer were delusional in nature. The examiner explained, however, that he could not conclude whether defendant's beliefs were delusional because he had no evidence to challenge the beliefs. Notwithstanding his conclusions, the examiner stated that "should further information become available . . . which suggests that some of [defendant's] beliefs are false and unyielding," his competency should be reassessed. The second psychiatrist described defendant's speech in part as "tangential and verbose." He also described defendant's assessment of the merits of winning his own case as "unrealistic but irrational."

Defendant appeared for trial before a justice who was presiding over the case for the first time. Defense counsel informed the court that defendant wished to proceed pro se.

Neither defense counsel nor the prosecution made the court aware of defendant's CPL Article 730 exams or the potential for him to be experiencing delusional thoughts. Although the trial court conducted an extensive colloquy with defendant regarding the waiver of the right to counsel, at no point did the court inquire into defendant's mental health. We find that, notwithstanding other aspects of the record supporting defendant's capacity, the information in the CPL Article 730 reports indicating a potential for delusional thought was a red flag that required a particularized assessment of defendant's mental capacity before resolving his request to proceed pro se (*see generally People v Stone, supra*). Consequently, defendant's waiver of the right to counsel, made without such inquiry, cannot be deemed to have been knowing, voluntary, and intelligent.

Because we grant a new trial, we find no need to address defendant's remaining arguments.

All concur except Tom, J.
who dissents in a
memorandum as follows:

TOM, J. (dissenting)

Because I conclude on the basis of the record that defendant has failed to establish that he lacked the mental competency to waive his right to representation by counsel at trial, and because the judgment otherwise was sound and should be affirmed, I respectfully dissent.

The right to self-representation should not be lightly disregarded by a court (*Indiana v Edwards*, 554 US 164 [2008]; *Faretta v California*, 422 US 806 [1975]), and a defendant is presumed to be competent to proceed absent a basis to question his or her competence (*People v Gelikkaya*, 84 NY2d 456 [1994]), although a defendant's decision to forego representation by counsel will depend on the defendant's waiver of such right to be knowing, voluntary and intelligent (*People v Stone*, 22 NY3d 520 [2014]; *cf., People v Arroyo*, 98 NY2d 101 [2002]).

"Intelligent" as used in this context refers to cognitive capacity and should not be construed to require that the waiver decision must be a wise one. A defendant's choice may be rash but a "criminal defendant is entitled to be master of his own fate" (*People v Vivenzio*, 62 NY2d 775, 776 [1984]), and even "where the accused is harming himself by insisting on conducting his own defense[,] . . . he [should] be allowed to go to jail under his own banner if he so desires and makes the choice 'with

eyes open'" (*United States ex rel. Maldonado v Denno*, 348 F2d 12, 15 [2d Cir 1965]).

The Court of Appeals in *Stone* discusses a defective waiver in terms of the defendant suffering from a *severe* mental illness. The purportedly paranoid comments in that case by the defendant were not red flags that should have put the court on notice that the defendant might be suffering from a severe mental illness. Our own review of the record in *Stone* (98 AD3d 910 [1st Dept 2012]), affirmed by the Court of Appeals, found no manifest signs of mental illness at the time of trial warranting a further inquiry by the trial court, and we even characterized the defendant's opening statement as cogent and appropriate. There is no discernable difference between the setting in *Stone* and that which we are now reviewing. The present defendant engaged in an extensive colloquy with the court addressing the wisdom of his decision to proceed pro se. Defendant concluded that as a real estate practitioner he was better positioned to defend against these charges than a lawyer not experienced in real estate. While unwise, defendant's reasoning, as manifested in the colloquy, was not irrational. In fact, no aspect of that proceeding can reasonably be characterized as a red flag signaling any severe mental illness by defendant.

This particular defendant, in any event, seems to have been

reasonably intelligent as is evidenced by the colloquy conducted by the court, a factor upon which the *Stone* decision also relied. Moreover, the logical character of his mind seems apparent in the intricate nature of the real estate frauds that he was accused of perpetrating. The fact that defendant engaged in a complex scheme to steal five residential properties located on the Upper West Side and in Harlem by filing forged deeds with the New York City Department of Finance's Automatic City Register Information System, and illegally transferring the properties from their owner to defendant's corporate entities, certainly is relevant to our review. This is not a person lacking in cognitive sophistication. He had some peculiar beliefs about how he was ensnared in the prosecution. While one might reasonably reject the soundness of some of those beliefs out of hand, that does not compel a conclusion that the defendant had an unsound mental acuity such that he was cognitively incapable of understanding the right he was waiving or the possible consequences of the waiver. This setting and my conclusion also comport with the analytical approach prescribed by the Court of Appeals in *Stone*. Defendant acknowledged repeatedly under questioning by the court that he understood the pitfalls of self-representation, as they were adequately described to him. Nor, for these reasons, can the volitional character of the waiver be gainsaid on the basis

of this record.

Since the majority does not identify any actual red flags arising out of the actual waiver proceeding, it falls back on the existence of an earlier CPL 730 report. However, the mere existence of a prior 730 report should not itself be deemed to signal the requisite severe mental illness, nor do I agree with the majority's conclusion that, seemingly as a matter of law, it would nevertheless warrant an additional inquiry into the speculative possibility that there might - or even might not - exist the degree of mental instability necessary to vitiate a waiver of representation by counsel. Tangential comments by the prior examining psychiatrists as to what might someday occur, or that future delusional thinking by defendant might warrant a re-examination, should have no bearing on how defendant presented himself to the court at the time of the waiver and on how the court perceived defendant.

Moreover, since the court allowed defense counsel to assist defendant during trial as a legal advisor, concerns over the consequences of his waiver are even further reduced (*People v Collins*, 77 AD3d 404 [1st Dept 2010], *lv denied* 16 NY3d 797 [2011]).

The majority draws a distinction between a defendant's capacity to waive his right to counsel in opting to proceed pro

se and his fitness to stand trial. The majority then proposes that the former evaluation is subject to a heightened standard - that the threshold for requiring an inquiry into his mental capacity to waive representation by counsel is broader, warranting a particularized assessment at the time of the waiver, than that necessary for evaluating whether he can stand trial. In fact, the Court of Appeals in *Stone* actually rejected such a categorical approach and declined to define separate and distinct levels of mental capacity. This Court, in *People v Schoolfield* (196 AD2d 111 [1st Dept 1994] *lv dismissed* 83 NY2d 858 [1994]), in emphasizing the constitutional primacy of a defendant's right to self-representation, has also rejected this as a false equivalence. The *Schoolfield* trial judge had concluded that "the standard of competency for waiving counsel and appearing pro se is a much higher standard than competence to stand trial," (*id.* at 114) then found the defendant competent to stand trial but not competent to proceed pro se. In reversing, we found no distinction in the mental capacity tests to be applied to a defendant's waiver, and to his capacity to stand trial.

In *Stone,* our decision characterized as "exceptional" (98 AD3d at 911) an occasion where a defendant might be competent to stand trial but not competent to waive the right to representation by counsel. The Court of Appeals acknowledged

that a mentally ill defendant might be able to stand trial but might not be competent to understand the waiver but, agreeing with our analysis, found no basis to reject the manner in which the trial judge proceeded. Nor, the court held, is it necessary for a trial judge to undertake a particularized assessment of a defendant's mental capacity regarding the defendant's self-representation or to sua sponte order a CPL 730 hearing when, at the time of the waiver, the defendant does not exhibit mental illness.

The issue in the consolidated appeal in *People v Crampe* (17 NY3d 469 [2011], *cert denied sub nom. New York v Wingate*, 565 US 1261 [2012]), cited by the majority, arose from the adequacy of the respective courts' advisements at different stages of those proceedings regarding the perils of self-representation rather than from a concern about those defendants' mental states. The Court of Appeals noted the absence of "any rigid formula[,] and [it] endorsed the use of a non-formalistic, flexible inquiry" (*id.* at 482). The majority herein raises no such concerns. The majority notes that expressions of paranoia, or that police or other outside forces framed the defendant, are not red flags, a conclusion which I join. Rather, the majority faults the trial court for not pursuing some contingent and, at that time, speculative comments in the CPL 730 examination report regarding

some of the defendant's beliefs.

As I read the record, including the extensive observations of the examining psychiatrists, I find the absence of red flags telling. Defendant might have manifested odd conclusions about how he ended up in the court system and about his case, but the examining psychiatrists noted his education level, business background and proficiency in English, and that the general tenor of his staments and responses was not irrational and that he was adequately cognizant about the court proceedings even if he lacked sufficient knowledge to understand the timing of discovery and the like. The fact that the court did not delve deeper into references contained in the CPL 730 examination report that defendant had strange and *potentially* delusional beliefs about some things did not compromise either the court's inquiry or its conclusions.

As the test is articulated by *Stone*, there was no present manifestation of a severe mental illness operating on the defendant's cognitive capacities such as would override the validity of his waiver at the time that the waiver was executed. Moreover, here there is not even the later manifestation of mental illness that arose in *Stone*, which still did not render defective the manner in which that trial court had proceeded. Nor, if the majority's perspective is followed to its logical

conclusion, would the spare and unelaborated references by the examining psychiatrists, who actually found no present mental illness, have been a constitutionally defensible basis to deny defendant the right of self-representation upon which he insisted.

It also is telling that defendant, who seems to have been well educated in his native Ghana, experienced in business, and proficient in the English language, has not challenged the findings of competency by the examining psychiatrists. Nor did the examining psychiatrists find that he was delusional in a manner bearing on his ability to competently waive his right to representation by counsel.

In conclusion, contrary to the characterization by the majority, the 730 examination report did not establish that the defendant was mentally ill; it simply noted the peculiarity of some of his beliefs that in the future or under different circumstances might possibly cross the threshold of delusional thinking in those regards. This record does not support a conclusion that the court failed to ascertain whether the defendant "suffered from an illness severe enough to impact his

ability to waive counsel and proceed pro se" (*People v Stone*, supra, at 528). Hence, I conclude that there is no sound basis to reverse this judgment and to order a new trial.

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

ENTERED: DECEMBER 26, 2019

CLERK

Richter, J.P., Gische, Tom, Gesmer, Moulton, JJ.

10212 Collateral Loanbrokers Association of New York, Inc., et al., Plaintiffs-Respondents, Index 303901/14

-against-

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

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Zachary W. Carter, Corporation Counsel, New York (Kathy C. Park of counsel), for appellants.

Kriss, Kriss & Brignola, LLP, Albany (Mark C. Kriss and Paul Solda of counsel), for respondents.

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Order, Supreme Court, Bronx County (Mitchell J. Danziger, J.,), entered on or about April 5, 2019, which granted plaintiffs' motion for summary judgment, inter alia, enjoining defendants from enforcing General Business Law § 45, New York City Charter §§ 435 and 436, Local Law No. 149 of 2013 and the resulting amendments to Administrative Code of City of NY §§ 20-267, 20-273, and 20-277, Rules of City of New York Department of Consumer Affairs (6 RCNY) § 1-16 and Police Department (38 RCNY) §§ 21-03(a) and (b), 21-04(a) and (c), 21-07(a)-(f), and 21-08, and the procedures outlined in a 1998 memorandum by then NYPD Deputy Commissioner of Legal Matters George A. Grasso, and in NYPD Patrol Guide Procedure No. 214-38, and denied defendants' motion for summary judgment dismissing the action in its

entirety, unanimously modified, on the law, to deny plaintiffs' motion and to grant defendants' motion as to all of the aforementioned statutes, regulations, and procedures, except New York City Charter § 436, and otherwise affirmed, without costs. The Clerk is directed to enter judgment accordingly.

In the underlying action, plaintiffs challenged the aforementioned statutes, regulations and procedures that monitored the business activities of pawnbrokers and second-hand dealers. Plaintiffs asserted that the regulatory scheme violated New York State's Constitutional prohibition against unreasonable searches and seizures by establishing electronic reporting requirements and authorizing on-premises administrative searches by the NYPD and the New York City Department of Consumer Affairs.

In a prior appeal in this action, this Court reversed an order that granted plaintiffs' motion for a preliminary injunction prohibiting enforcement of the statutes, regulations, and procedures at issue here, concluding plaintiffs had not shown a likelihood of success on the merits (*see Collateral Loanbrokers Assn. of N.Y., Inc. v City of New York*, 148 AD3d 133, 135 [1st Dept 2017], *appeal dismissed* 29 NY3d 974 [2017]).[1] Considering

[1]Even if there is wording in our prior decision that could be read as deciding the constitutional issue on the merits, we believe that a different result is warranted here (*see Gem Fin. Serv., Inc. v City of New York, infra*).

the question now on the merits we hold that all of plaintiffs' claims fail and must be dismissed, except with respect to NY City Charter § 436. Plaintiffs' non-constitutional claims also fail as a matter of law.

NY City Charter § 436 provides, in relevant part:

> "The [police] commissioner shall possess powers of inspection over all licensed or unlicensed pawnbrokers . . . [and] dealers in second-hand merchandise . . . within the city; and in connection with the performance of any police duties he shall have power to examine such persons, their clerks and employees and their books, business premises, and any articles of merchandise in their possession. A refusal or neglect to comply in any respect with the provisions of this section . . . shall be triable by a judge of the criminal court and punishable by not more than thirty days' imprisonment, or by a fine of not more than fifty dollars, or both"

(New York City Charter § 436).

It is important "not to nullify more of a legislature's work than is necessary" (*Ayotte v Planned Parenthood of N. New England*, 546 US 320, 329 [2006]). Accordingly, we hold that NY City Charter § 436 is facially unconstitutional to the extent that it provides that the commissioner "shall have power to examine such persons, their clerks and employees and their books, business premises, and any articles of merchandise in their possession" (*see e.g. Gem Fin. Serv., Inc. v City of New York*, (298 F Supp 3d 464, 499 [ED NY 2018]). That portion of NY City Charter § 436 is facially unconstitutional because it is

unlimited in scope, and provides "no meaningful limitation on the discretion of the inspecting officers" (*id.* at 497). NY City Charter § 436 contains no limits on the time, place, and scope of searches of persons or property. It contains no record keeping requirements and it authorizes an immediate arrest for a failure to comply.

Contrary to defendants' argument, NY City Charter § 436 is not merely a general authorizing statute that looks to other sources to articulate and refine specific legal standards for searches. NY City Charter § 436 incorporates no other statute, regulation, or procedure that could cabin the unfettered discretion that NY City Charter § 436 gives to the NYPD. While the City's adherence to its limiting rules and procedures, such as the Grasso memorandum and the Patrol Guide, might render an as-applied challenge unlikely, these rules do not, by themselves correct the facial overbreadth of NY City Charter § 436 (see *Gem Fin. Serv. Inc.*, 298 F Supp 3d at 499).

However, with respect to the reporting requirements contained in the statutory and regulatory scheme, we again conclude that there is little or no expectation of privacy in the reported information, whether in traditional paper or electronic form, and that the requirements at issue, which are imposed on a closely regulated industry, sufficiently describe and limit the

information to be provided, and are reasonably related to the regulatory authority of the agency to which the information is provided (*see California Bankers Assn. v Shultz*, 416 US 21, 67 [1974]).

With respect to the inspection programs, we reiterate that, except for NY City Charter § 436, the statutory and regulatory scheme is unlike the unconstitutional scheme in *People v Scott* (*Keta*), 79 NY2d 474 [1992]). The regulatory scheme here was not created solely to uncover evidence of criminality. Rather it serves to enforce the reporting requirements that provide consumer protection. The scheme qualifies as "pervasive," because this industry has been subject to a long tradition of regulation requiring that it create, maintain, and make transactional records available for inspection (*see People v Quackenbush*, 88 NY2d 534, 541-542 [1996]). The scheme also is properly "designed to guarantee the certainty and regularity of . . . application" so as "to provide either a meaningful limitation on the otherwise unlimited discretion the statute affords or a satisfactory means to minimize the risk of arbitrary and/or abusive enforcement" (*id.* at 542 [internal quotation marks and citation omitted]).

City of Los Angeles, Calif. v Patel (_ US _, 135 S Ct 2443 [2015]) does not compel a different result. The challenged

municipal ordinance stated, in relevant part, that hotel guest records "shall be made available to any officer of the Los Angeles Police Department for inspection," and provided that "[w]henever possible, the inspection shall be conducted at a time and in a manner that minimizes any interference with the operation of the business" (*id.* at 2448). Thus, the ordinance failed to provide either a minimum number of inspections or inspections on a "regular basis" (*id.* at 2456). The ordinance further authorized the immediate arrest of a hotel owner if the owner failed to make guest records available for police inspection (*id.* at 2452). The United States Supreme Court held that the ordinance was facially unconstitutional under the Fourth Amendment because it "fail[ed] to provide hotel operators with an opportunity for precompliance review" (*id.* at 2451-2452).

As plaintiffs concede, *City of Los Angeles, Calif. v Patel* involved the hotel industry, which unlike the industry here, is not closely regulated. To be sure, the United States Supreme Court reasoned that even if the hotels were pervasively regulated, the ordinance failed the second and third prong of the test articulated by the United States Supreme Court in *New York v Burger* (*id.* at 2456). However, apart from NY City Charter § 436,

the robust statutory and regulatory scheme here that governs, among other things, on-premises administrative inspections, would satisfy the *Burger* standards (*see New York v Burger*, 482 US 691 [1987]).

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

ENTERED: DECEMBER 26, 2019

CLERK

Gische, J.P., Mazzarelli, Singh, Moulton, JJ.

10582 Misleidy Cuenca, Index 23153/14
Plaintiff-Appellant,

-against-

City of New York, et al.,
Defendants,

Dominican Sisters of Hope,
Inc., et al.,
Defendants-Respondents.

_____

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

Schwab & Gasparini, PLLC, White Plains (Louis U. Gasparini of counsel), for Dominican Sisters of Hope, Inc. and Dominican Sisters Family Health Services, Inc., respondents.

Burke, Conway & Stiefeld, White Plains (Chikodi E. Emerenini of counsel), for Capri Landscaping, Inc., respondent.

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Order, Supreme Court, Bronx County (Julia I. Rodriguez, J.), entered on or about September 27, 2017, which granted the motion of defendants Dominican Sisters of Hope, Inc. and Dominican Sisters Family Health Services, Inc. (collectively Dominican) and the cross motion of defendant Capri Landscaping, Inc. (Capri) for summary judgment dismissing the complaint and all cross claims as against them, unanimously modified, on the law, Capri's motion to dismiss the complaint denied, and otherwise affirmed, without costs.

Defendants each established their prima facie entitlement to

judgment as a matter of law in this action where plaintiff was injured when she tripped and fell on the sidewalk. Dominican showed that they had no liability for plaintiff's trip and fall since plaintiff fell in front of 278 Alexander Avenue while Dominican's premises was located at 280 Alexander Avenue. Dominican relied, in part, on the expert testimony of a surveyor that shows that the location of the accident was within the property lines of 278 Alexander Avenue. Capri provided a sworn statement that it did not perform any work on the sidewalk where plaintiff fell (*see Flores v City of New York*, 29 AD3d 356, 358-359 [1st Dept 2006]).

In opposition, plaintiff failed to raise a triable issue of fact with respect to Dominican. The affidavit of defendant Lopez, the owner of 278 Alexander Avenue, lacked a statement indicating either the cause of plaintiff's fall, or any basis to factually dispute the exact location of the sidewalk boundaries in relation to the location of the fall (*see Grullon v City of New York*, 297 AD2d 261, 262-263 [1st Dept 2002]). Plaintiff has, however, raised an issue of fact regarding Capri, relying on a

work permit for sidewalk repair, issued approximately five days before the accident and covering an area that included the location of the accident.

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

ENTERED: DECEMBER 26, 2019

CLERK

Renwick, J.P., Manzanet-Daniels, Oing, Singh, González, JJ.

10633-
10633A The People of the State of New York, Ind. 8131/97
Respondent,

-against-

Danny Green,
Defendant-Appellant.

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

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

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Order, Supreme Court, New York County (Ruth Pickholz, J.), entered on or about January 9, 2018, which, to the extent appealed from, vacated defendant's conviction of murder in the second degree rendered February 2, 1999 and denied any other relief, and judgment of resentence, same court and Justice, rendered January 8, 2018, resentencing defendant on the remaining convictions rendered February 2, 1999 to an aggregate term of 56⅔ years to life, unanimously affirmed.

The court, which granted defendant's CPL 440.10 motion to the extent of ordering a new trial as to defendant's murder conviction, correctly declined to grant any other relief. The facts relating to both the underlying trial conviction and the motion are set forth in the motion court's opinion (54 Misc 3d

1208[A], 2016 NY Slip Op 51853[U][Sup Ct NY County 2016]).

The court vacated the murder conviction on the grounds that the People failed to disclose exculpatory or impeaching evidence, and that defense counsel rendered ineffective assistance with regard to matters of forensic evidence. These defects were specific to the murder charge, and we reject defendant's argument that they affected defendant's kidnapping and conspiracy convictions, which involved acts that were separate and distinct from the murder. To the extent the defects that led the court to vacate the murder conviction cast any doubt on the credibility of the murder witness who was also the victim of the kidnapping, or of any other witness, these defects cast no doubt on their credibility regarding the other crimes at issue. As to the kidnapping, the victim gave credible and extensively corroborated testimony about her own victimization. As to the conspiracy, there was overwhelming independent evidence about defendant's major role in an extensive drug operation. Accordingly, we find no reasonable possibility that the nondisclosure and ineffectiveness defects affected any convictions other than murder (*see People v Doshi*, 93 NY2d 499, 505 [1999]; *People v Baghai-Kermani*, 84 NY2d 525, 532 [1984]).

Defendant is not entitled to dismissal of the murder count (upon which the People do not intend to try him in any event), or

any other count of the indictment. The indictment was not based entirely on false testimony (*compare People v Pelchat*, 62 NY2d 97 [1984]), and there was no impairment of the integrity of the grand jury proceeding warranting dismissal (*see* CPL 210.35[5]; *People v Darby*, 75 NY2d 449, 455 [1990]; *People v Crowder*, 44 AD3d 330 [1st Dept 2007], *lv denied* 9 NY3d 1005 [2007]). The kidnapping victim testified in the grand jury about defendant's role in the murder. Another witness (who did not testify at trial) gave testimony about witnessing the murder that was later determined to be false, because the witness had actually been incarcerated at the time. The kidnapping victim also testified that this other witness was present at the time, and this was plainly incorrect, but it is not clear whether this was intentionally false or honestly mistaken. Unlike the situation in *Pelchat*, it cannot be said that the only grand jury evidence connecting defendant with the murder was testimony later proven to be false or incorrect (*see* 62 NY2d at 99). There is also no basis for any corrective action regarding any other counts.

The court lawfully imposed consecutive sentences for conspiracy, kidnapping, and first and third degree sale of a controlled substance because defendant committed these crimes through separate and distinct acts (*see People v McKnight*, 16 NY3d 43, 48-49 [2010]; *People v Arroyo*, 93 NY2d 990 [1999]).

We perceive no basis for reducing the sentence.

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

ENTERED: DECEMBER 26, 2019

CLERK

Renwick, J.P., Manzanet-Daniels, Oing, Singh, González, JJ.

10634 Jeffrey W. Jones, Sr., Index 156753/16
Plaintiff-Appellant,

-against-

30 Park Place Hotel LLC, et al.,
Defendants-Respondents.

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Pollack, Pollack, Isaac & DeCicco, LLP, New York (Jillian Rosen of counsel), for appellant.

Harrington, Ocko & Monk, LLP, White Plains (Adam G. Greenberg of counsel), for respondents.

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Order, Supreme Court, New York County (Lynn R. Kotler, J.), entered March 25, 2019, which, to the extent appealed from as limited by the briefs, granted defendants' motion for summary judgment dismissing the Labor Law § 200 and common-law negligence claims and the Labor Law § 241(6) claim predicated on Industrial Code § 23-1.7(e)(1), unanimously affirmed, without costs.

Plaintiff testified that while stepping backward with a wheelbarrow, he tripped over a piece of plywood nailed to the floor of the construction site, apparently to cover a hole. Plaintiff's Labor Law § 241(6) claim was correctly dismissed, because the area where plaintiff tripped and fell was an open area and not a "passageway" within the meaning of Industrial Code (12 NYCRR) § 23-1.7(e)(1) (*see Purcell v Metlife Inc.*, 108 AD3d 431, 432 [1st Dept 2013]; *see also Canning v Barneys N.Y.*, 289

AD2d 32, 34 [1st Dept 2001]).

The Labor Law § 200 and common-law negligence claims were correctly dismissed because defendants neither controlled or directed plaintiff's work nor had notice of the allegedly defective condition of the work site (*see Cappabianca v Skanska USA Bldg. Inc.*, 99 AD3d 139, 143-144 [1st Dept 2012]).

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

ENTERED: DECEMBER 26, 2019

CLERK

Renwick, J.P., Manzanet-Daniels, Oing, Singh, González, JJ.

10635 In re Jamiyla S. J.,
Petitioner-Appellant,

-against-

Kenneth D.,
Respondent-Respondent.

George E. Reed, Jr., White Plains, for appellant.

Kenneth M. Tuccillo, Hastings on Hudson, for respondent.

Elisa Barnes, New York, attorney for the child.

Order, Family Court, New York County (Stephanie Schwartz, Referee), entered on or about January 26, 2018, which, after a hearing, dismissed the petition for custody modification, unanimously reversed, on the law, without costs, the petition reinstated, and the matter remanded for a hearing to determine whether the proposed modification is in the best interests of the child.

Petitioner demonstrated a change in circumstances warranting modification of the parties' stipulation of shared custody (*see Matter of Sergei P. v Sofia M.*, 44 AD3d 490 [1st Dept 2007]; *Matter of Michael G. v Katherine C.*, 167 AD3d 494 [1st Dept 2018]). Respondent's post-stipulation failure to disclose to petitioner his conviction on drug charges and his court-mandated admission to a drug treatment facility was a breach of the trust

required in a shared custody arrangement; it effected a significant change in circumstances, and was not merely, as Family Court found, an imprudent lapse in judgment.

The threshold issue of changed circumstances being thus disposed of, the matter is remanded for a determination of whether petitioner's proposed modification of custody is in the best interests of the child (*Sergei P.*, 44 AD3d at 490; *Michael C.*, 167 AD3d at 495).

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

ENTERED: DECEMBER 26, 2019

CLERK

Renwick, J.P., Manzanet-Daniels, Oing, Singh, González, JJ.

10636 Belle Lighting LLC, Index 655050/16
Plaintiff-Respondent,

-against-

Artisan Construction Partners LLC, et al.,
Defendants-Appellants.

_____

Platzer, Swergold, Levine, Goldberg, Katz & Jaslow, LLP, New York (Robert Mastrogiacomo of counsel), for appellants.

Law Offices of Edward Weissman, New York (Edward Weissman of counsel), for respondent.

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Judgment, Supreme Court, New York County (David A. Cohen, J.), entered October 26, 2018, in plaintiff's favor and against defendants, jointly and severally, in the amount of $471,771.37 with interest, unanimously affirmed, against defendants Artisan Construction Partners LLC and James Galvin, with costs.

To make a prima facie case on its breach of contract claim, plaintiff had to demonstrate "the existence of a contract, the plaintiff's performance thereunder, the defendant's breach thereof, and resulting damages" (*Harris v Seward Park Hous. Corp.*, 79 AD3d 425, 426 [1st Dept 2010]; *see also Nevco Contr. Inc. v R.P. Brennan Gen. Contrs. & Bldrs., Inc.*, 139 AD3d 515 [1st Dept 2016]). It is undisputed that there were contracts between plaintiff and Artisan. Plaintiff made a prima facie case

on all of its contracts. Galvin's conclusory assertion that plaintiff breached the contracts is insufficient to defeat summary judgment as he does not specify how plaintiff failed to perform (*see Stonehill Capital Mgmt., LLC v Bank of the W.*, 28 NY3d 439, 448 [2016]["bald, conclusory assertions or speculation and '(a) shadowy semblance of an issue' are insufficient to defeat summary judgment"] [citations omitted]).

Although plaintiff failed to satisfy the requirements for piercing Artisan's corporate veil (*see e.g. Retropolis, Inc. v 14th St. Dev. LLC,* 17 AD3d 209, 211 [1st Dept 2005]), liability may be imposed on Galvin (Artisan's president and sole member) as to the 1411 Broadway project on the theory that "a corporate officer who participates in the commission of a tort can be held personally liable even if the participation is for the corporation's benefit" (*id.* at 211; *see also Sergeants Benevolent Assn. Annuity Fund v Renck,* 19 AD3d 107, 110 [1st Dept 2005]). Galvin pleaded guilty to forging lien waivers. Plaintiff submitted waivers, containing forgeries of its principal's signature, as to the 1411 Broadway project but not the other projects. The amount attributable to the 1411 Broadway project is $414,278.94.

Due to the existence of contracts between plaintiff and Artisan, which defendants admitted, the court should have denied

plaintiff's motion for summary judgment on its second cause of action, which was for unjust enrichment (*see e.g. Citibank, N.A. v Soccer for a Cause, LLC,* 169 AD3d 401, 403 [1st Dept 2019], *lv denied* __ NY3d __, 2019 NY Slip Op 83020 [Oct. 29, 2019]). In addition, "unjust enrichment is not a catchall cause of action to be used when others fail. It is available only in unusual situations" (*Corsello v Verizon N.Y., Inc.,* 18 NY3d 777, 790 [2012]).

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

ENTERED: DECEMBER 26, 2019

CLERK

Renwick, J.P., Manzanet-Daniels, Oing, Singh, González, JJ.

10637 Knickerbocker Village, Inc., Index 653665/15
Plaintiff-Appellant,

-against-

Lexington Insurance Company,
et al.,
Defendants-Respondents.

_____

Weg & Myers, P.C., New York (Joshua L. Mallin of counsel), for appellant.

Fleischner Potash LLP, New York (Gil M. Coogler of counsel), for respondents.

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Order, Supreme Court, New York County (Tanya R. Kennedy, J.), entered on March 28, 2019, which denied plaintiff's request for information about defendant's handling of its other insureds' losses resulting from Superstorm Sandy, unanimously affirmed, without costs.

The court properly denied plaintiff's request to compel disclosure of information about defendants' handling of its other insureds' losses resulting from Superstorm Sandy. The requested discovery is not material and necessary to the prosecution of the claims in this action (*see* CPLR 3101[a]; *Gray v Tri-State Consumer Ins. Company*, 157 AD3d 938, 940-941 [2d Dept 2018]; *Diaz v City of New York*, 140 AD3d 826 [2d Dept 2016]).

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: DECEMBER 26, 2019

CLERK

Renwick, J.P., Manzanet-Daniels, Oing, Singh, González, JJ.

10638 The People of the State of New York, Respondent, Ind. 1263/15

-against-

Edward Major,
Defendant-Appellant.

_____

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

Cyrus R. Vance, Jr., District Attorney, New York (Samuel Z. Goldfine of counsel), for respondent.

_____

Judgment, Supreme Court, New York County (Gregory Carro, J.), rendered January 5, 2017, convicting defendant, after a jury trial, of robbery in the first and second degrees, burglary in the first degree (two counts), attempted assault in the first degree (two counts), assault in the second degree (two counts), attempted assault in the second degree and assault in the third degree, and sentencing him, as a persistent violent felony offender, to an aggregate term of 52 years to life, unanimously modified, as a matter of discretion in the interest of justice, to the extent of reducing all life sentences to 20 years to life and directing that all sentences be served concurrently, resulting in a new aggregate term of 20 years to life, and otherwise affirmed.

The verdict was not against the weight of the evidence (*see*

People v Danielson, 9 NY3d 342, 348-349 [2007]). The jury was justified in concluding that defendant was not so intoxicated as to be unable to form the requisite intent for the crimes of which he was convicted (*see* Penal Law § 15.25; *People v McCray*, 56 AD3d 359 [1st Dept 2008], *lv denied* 12 NY3d 760 [2009]). There is no basis for disturbing the jury's credibility determinations. The objective evidence bearing on the degree of defendant's intoxication only demonstrated that defendant smelled of alcohol and had bloodshot eyes, but did not stumble, slur his words, or have trouble understanding or responding to questions. In addition, defendant's testimony about the huge amount of alcohol he purportedly drank was incompatible with the medical evidence in the record.

The court providently exercised its discretion in precluding evidence that, on the night of his arrest for the crimes at issue, defendant identified himself on a surveillance videotape depicting another robbery. This evidence was offered under the theory that defendant is not the person in the video, and that his alleged misidentification of himself was relevant to the level of his intoxication at the time. However, the video, and the surrounding circumstances, were inconclusive as to whether defendant was, in fact the person depicted. Accordingly, the proffered evidence was only marginally relevant and raised

collateral issues (*see People v Smith*, 303 AD2d 206 [1st Dept 2003], *lv denied* 100 NY2d 543 [2003]). Defendant failed to preserve his constitutional argument for introducing this evidence, and only raised a question of state evidentiary law (*see People v Lane*, 7 NY3d 888, 889 [2006]; *see also Smith v Duncan*, 411 F3d 340, 348-349 [2d Cir 2005]). We decline to review his unpreserved constitutional claim in the interest of justice. As an alternative holding, we reject it on the merits (*see Crane v Kentucky*, 476 US 683, 689-690 [1986]).

Defendant's argument that the trial court should have granted his challenge for cause to a prospective juror is foreclosed because defendant failed to exhaust all the peremptory challenges available to him (*see* CPL 270.20[2]), notwithstanding that he was mistakenly afforded additional challenges (*see People v Lynch*, 95 NY2d 243, 249 [2000]; *People v Ramos*, 13 AD3d 321, 321 [1st Dept 2004], *lv denied* 4 NY3d 890 [2005]).

We find the sentence excessive to the extent indicated.

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

ENTERED: DECEMBER 26, 2019

CLERK

Renwick, J.P., Manzanet-Daniels, Oing, Singh, González, JJ.

10639 The People of the State of New York, Ind. 3116/16
Respondent,

-against-

Conrad Hunter,
Defendant-Appellant.

_____

Marianne Karas, Thornwood, 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 (Ellen N. Biben, J.), rendered June 15, 2017, convicting defendant, upon his plea of guilty, of assault in the second degree, and sentencing him to a term of one year, unanimously affirmed.

The record establishes that defendant's plea was knowing, intelligent, and voluntary and fails to support his claim that the plea was taken under coercive circumstances (*see People v Fiumefreddo*, 82 NY2d 536, 544 [1993]; *People v Luckey*, 149 AD3d

414 [1st Dept 2017], *lv denied* 29 NY3d 1082 [2017]; *People v Pagan*, 297 AD2d 582 [1st Dept 2002], *lv denied* 99 NY2d 562 [2002]).

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

ENTERED: DECEMBER 26, 2019

CLERK

Renwick, J.P., Manzanet-Daniels, Oing, Singh, González, JJ.

10640 Lazaro Sanchez, Index 24105/13E
Plaintiff-Respondent,

-against-

Extra Space Storage Inc.,
Defendant-Appellant,

Gabriel Castano, et al.,
Defendants.
- - - - -
Extra Space Management, Inc.,
Third-Party Plaintiff,

-against-

JR Building Service, Inc.,
Third-Party Defendant.
- - - - -
Extra Space Management, Inc.,
Second Third-Party Plaintiff,

-against-

Long Island Landscapes, Ltd.,
Second Third-Party Defendant.

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An appeal having been taken to this Court by the above-named appellant from an order of the Supreme Court, Bronx County (Fernando Tapia, J.), entered on or about August 9, 2018,

And said appeal having been withdrawn before argument by counsel for the respective parties; and upon the stipulation of the parties hereto dated November 25, 2019,

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

ENTERED: DECEMBER 26, 2019

CLERK

Renwick, J.P., Manzanet-Daniels, Oing, Singh, González, JJ.

10642 The People of the State of New York, Ind. 2024/16
Respondent,

-against-

Jason Burgess,
Defendant-Appellant.

_____

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

Cyrus R. Vance, Jr., District Attorney, New York (Michael J. Yetter of counsel), for respondent.

_____

Judgment, Supreme Court, New York County (Charles H. Solomon, J. at hearing; Ruth Pickholz, J. at nonjury trial and sentencing), rendered May 1, 2017, convicting defendant of 12 counts of criminal possession of a forged instrument in the first degree, and sentencing him, as a second felony offender, to an aggregate term of three to six years, unanimously reversed, on the law, and the matter remanded for a new suppression hearing and trial.

Both the hearing and trial courts erred in denying defendant's request to cross-examine a police officer regarding allegations of misconduct in a civil lawsuit in which it was claimed, among other things, that this particular officer arrested the plaintiff without suspicion of criminality and

lodged false charges against him (*see People v Smith*, 27 NY3d 652 [2016]). The civil complaint contained specific allegations of falsification by this officer that bore on his credibility at both the hearing and trial. At each proceeding, this officer was the only witness for the People. We find that the error was not harmless (*see People v Robinson*, 154 AD3d 490 [1st Dept 2017], *lv denied* 30 NY3d 1108 [2018]), and the People's arguments to the contrary are unavailing.

The verdict was based on legally sufficient evidence and was not against the weight of the evidence. We find it unnecessary to reach any other issues.

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

ENTERED: DECEMBER 26, 2019

CLERK

Renwick, J.P., Manzanet-Daniels, Oing, Singh, González, JJ.

10643 In re Yamailiz G.,

A Child Under Eighteen Years
of Age, etc.,

Yamara R.,
Respondent-Appellant,

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

_____

Steven N. Feinman, White Plains, for appellant.

Georgia M. Pestana, Acting Corporation Counsel, New York (Antonella Karlin of counsel), for respondents.

Dawne A. Mitchell, The Legal Aid Society, New York (Riti P. Singh of counsel), attorney for the child.

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Order of fact-finding and disposition, Family Court, Bronx County (David J. Kaplan, J.), entered on or about September 24, 2018, which found that respondent mother neglected the subject child due to her mental illness, unanimously affirmed, without costs.

Petitioner agency demonstrated by a preponderance of the evidence that the mother suffers from a mental illness, that she often lacks insight into her illness and need for treatment, that her mental condition interferes with her judgment and parenting abilities, and that the child was aware of the mother's impaired mental condition, thereby placing the child at imminent risk of

physical, mental or emotional impairment (see *Matter of Jacob L. [Chastity P.]*, 121 AD3d 502 [1st Dept 2014]; *Matter of Immanuel C.-S [Debra C.]*, 104 AD3d 615 [1st Dept 2013]; Family Ct Act § 1012[f][i]). The record shows that the mother exhibited delusional behavior, underwent multiple hospitalizations for mental illness and was noncompliant with prescribed medication and therapy (*see Matter of Ruth Joanna O.O. [Melissa O.]*, 149 AD3d 32, 41 [1st Dept 2017], *affd* 30 NY3d 985 [2017]*; Matter of Naomi S. [Hadar S.]*, 87 AD3d 936, 937 [1st Dept 2011], *lv denied* 18 NY3d 804 [2012]).

Evidence of actual injury to the child was not required to enter a finding of neglect, since there is sufficient evidence that the child was at imminent risk of harm due to the mother's untreated mental illness (*see Ruth Joanna O.O.* at 41; *Immanuel C.-S.*, 104 AD3d at 615). In any event, there is evidence that the mother's illness interferes with her ability to care for the child, who was aware of the mother's unfounded fears that people were out to harm her and the child.

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

ENTERED: DECEMBER 26, 2019

CLERK

Renwick, J.P., Manzanet-Daniels, Oing, Singh, González, JJ.

10644 In re New York State Land Title Association, Inc., et al., Petitioners-Respondents, Index 151562/18

-against-

New York State Department of Financial Services, et al., Respondents-Appellants.

_____

Letitia James, Attorney General, New York (Steven C. Wu of counsel), for appellants.

Gibson Dunn & Crutcher LLP, New York (Mylan Denerstein of counsel), for respondents.

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Order, Supreme Court, New York County (Eileen A. Rakower, J.), entered on or about August 5, 2019, which granted the petition to annul Insurance Regulation 208, codified at 11 NYCRR part 228 on October 18, 2017, effective December 18, 2017, unanimously reversed, on the law, the petition denied, and the proceeding brought pursuant to CPLR article 78 dismissed, without costs.

This appeal reprises our review of the State's safe harbor regulations implementing its prohibition of the use of valuable inducements by title insurers to garner additional title insurance business. On appeal from a prior order which also granted the petition and annulled Insurance Regulation 208 in its entirety, this Court found that only two provisions were properly

annulled, and "remand[ed] to Supreme Court for review of any arguments for affirmative relief raised in the petition that the court declined to reach because its grant of the petition rendered them academic" (*Matter of New York State Land Tit. Assn., Inc. v New York State Dept. of Fin. Servs.*, 169 AD3d 18, 34 [1st Dept 2019]). This Court found 'that Insurance Law § 6409(d) is unambiguous," and that except for provisions not at issue here, "Insurance Regulation 208 has a rational basis as it echoes and further defines the legislative intent behind Insurance Law § 6409(d)" (*id.* at 22). On remand, Supreme Court agreed with petitioners' due process and free speech challenges to 11 NYCRR § 228.2(c), which sets forth a non-exhaustive list of examples of activities by title insurers that are permitted under certain conditions, in contrast with 11 NYCRR § 228.2(b), which sets forth prohibited activities.

Petitioners contend that section 228.2(c) is unconstitutionally vague in setting forth a non-exhaustive list of activities that are "permissible, provided[,]" among other things, that they are "reasonable and customary, and not lavish or excessive" (11 NYCRR § 228.2[c]). The court should have rejected this vagueness challenge, since section 228.2(c) "is sufficiently definite to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden," and "the

enactment provides officials with clear standards for enforcement so as to avoid resolution on an ad hoc and subjective basis" (*People v Stephens*, 28 NY3d 307, 312 [2016]). A law that "employs terms having an accepted meaning long recognized in law and life cannot be said to be so vague and indefinite as to afford . . . insufficient notice of what is prohibited or inadequate guidelines for adjudication" (*id.*). Of course, reasonableness is one of the most commonly applied legal standards (*see United States v Johnson*, 911 F3d 849, 854 [7th Cir 2018] ["'(r)easonable' is one of those protean words that resists specification" and "is ubiquitous in statutes and regulations"), and indicates an objective test which does not give license to enforce the provision in an arbitrary or subjective manner (*see Stephens*, 28 NY3d at 312; *but see Giaccio v Pennsylvania*, 382 US 399 [1966]). Similarly, the words "lavish" and "excessive," standing in clear contrast with the word "reasonable," provide adequate notice of the type of behavior that is proscribed. The word "customary" also sets forth a standard that can be understood by an ordinary person (*see People v Byron*, 17 NY2d 64, 66 [1966] [rejecting vagueness challenge to ordinance proscribing "excessive or unusual noise"]).

The provisions of section 228.2(c) generally permitting advertising, charitable contributions, and political

contributions are consistent with the right to free speech under the First Amendment to the United States Constitution and article I, § 8 of the New York Constitution. "[W]hen 'speech' and 'nonspeech' elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms . . . if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest" (*United States v O'Brien*, 391 US 367, 376 [1968]). Moreover, the First Amendment "accords a lesser protection to commercial speech than to other constitutionally guaranteed expression"; as long as commercial speech is not misleading or related to unlawful activity, the government "must assert a substantial interest to be achieved by restrictions on commercial speech," and any "limitation on expression must be designed carefully to achieve the State's goal" (*Central Hudson Gas & Elec. Corp. v Public Serv. Comm'n of N.Y.*, 447 US 557, 563-564 [1980]). The content-neutral provisions at issue in this case are narrowly tailored to the substantial government interest of clarifying a statute intended to "prevent consumers from being required to subsidize

unscrupulous exchanges of valuable things for real estate professionals" (*Matter of New York State Land Tit. Assn., Inc.*, 169 AD3d at 31; *cf. Central Hudson Gas*, *supra*), and that interest is "unrelated to the suppression of free expression" (*O'Brien*, 391 US at 376).

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

ENTERED: DECEMBER 26, 2019

CLERK

Renwick, J.P., Manzanet-Daniels, Oing, Singh, González, JJ.

10645 The People of the State of New York, Respondent, Ind. 4528/01

-against-

Lamont Jones,
Defendant-Appellant.

_____

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

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

_____

Order, Supreme Court, New York County (Erika M. Edwards, J.), entered on or about September 5, 2018, which denied defendant's CPL 440.46 motion for resentencing, unanimously affirmed.

After considering the relevant factors, the court properly exercised its discretion (*see People v Sosa*, 18 NY3d 436, 442-443 [2012]) in determining that substantial justice dictated the denial of resentencing. Courts may deny the applications of persons who "have shown by their conduct that they do not deserve relief from their sentences" (*People v Paulin*, 17 NY3d 238, 244 [2011]). Defendant's criminal history includes a serious crime of violence committed while he was on bail in connection with the drug sale upon which he seeks resentencing, and his institutional

record, which he describes as "exemplary," actually includes numerous disciplinary infractions (*see e.g. People v Arroyo*, 99 AD3d 515 [1st Dept 2012], *lv denied* 20 NY3d 1059 [2013]).

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

ENTERED: DECEMBER 26, 2019

CLERK

Renwick, J.P., Oing, Singh, González, JJ.

10646 Scott Emery, Index 110133/11
Plaintiff-Appellant, 590344/13
590291/14

-against-

Steinway, Inc., et al.,
Defendants-Respondents.
- - - - -
[And Third-Party Actions]

_____

Sacks and Sacks, L.L.P., New York (Scott N. Singer of counsel), for appellant.

Law Office of James J. Toomey, New York (Evy Kazansky of counsel), for Steinway, Inc. and 111 West 57th Street Associates L.P., respondents.

Shaub, Ahmuty, Citrin & Spratt LLP, Lake Success (Jonathan P. Shaub of counsel), for Cheung Kong Graduate School of Business School and Rockefeller Technology Solutions, respondents.

_____

Order, Supreme Court, New York County (Carmen Victoria St. George, J.), entered November 29, 2018, which, to the extent appealed from as limited by the briefs, granted defendants' motions for summary judgment dismissing plaintiff's Labor Law § 241(6) claim, unanimously reversed, on the law, without costs, and the motions denied.

Plaintiff brought this Labor Law § 241(6) action against defendants for injuries he allegedly sustained while installing cabling above a drop ceiling. Plaintiff contends he hit his head on a steel beam due to defendants' failure to provide him with a

hard hat, in violation of Labor Law § 241(6) and Industrial Code § 23-1.8, and the inadequate lighting of the premises, in violation of Industrial Code § 23-1.30.

Defendants moved for summary judgment supported by various affidavits, claiming, among other things, that Industrial Code § 23-1.8 was inapplicable since plaintiff was not engaged in activity that constituted "construction, excavation, or demolition" within the meaning of Labor Law § 241(6), and that, in any event, the Industrial Code sections cited were either too general or insufficiently relevant to form a basis for section 241(6) liability.

Supreme Court granted defendants' motion, finding that section 241(6) "only applies to accidents caused during demolition, construction and/or excavation, none of which was underway at the time of the accident." Additionally, the court found that plaintiff was only required to "move a single tile out of the way and then snake a cable through a drop ceiling that had already been fully installed. As such, without more, plaintiff's work '[did] not constitute 'construction, excavation or demolition' within the meaning of the statute.'" Supreme Court reasoned that because the structure was not physically altered in some way, plaintiff's work also could not constitute construction.

Plaintiff appealed. We now reverse.

Labor Law § 241(6) requires owners, contractors and their agents to provide a safe workplace for workers performing "construction, excavation or demolition work." "In determining what constitutes 'construction' for purposes of the statute we look to the Industrial Code which, as relevant here, defines construction to include alteration of a structure" (*Saint v Syracuse Supply Co.*, 25 NY3d 117, 129 [2015], citing 12 NYCRR 23-1.4[b][13]; *see also Jablon v Solow*, 91 NY2d 457 [1998]).

We find that an issue of fact is raised as to whether plaintiff was altering the structure when he was pulling cable above the drop ceiling (*see Weininger v Hagedorn & Co.*, 91 NY2d 958 [1998]). In his deposition plaintiff stated that, in order to access the cable, plaintiff pushed a ceiling tile "over to the next tile." He described his work at the time of the accident as "going up into the ceiling . . . to figure out where we were going with the cable." Plaintiff had been provided with a saw to cut holes in the wall and ceiling when necessary.

The work plaintiff performed is similar to the alteration described in *Weininger*. There, "at the time of his accident, the plaintiff was running computer and telephone cable through the ceiling . . . . This involved . . . access[ing] a series of holes punched in the ceiling and pulling the wiring through" (*id.*

at 959). The Court of Appeals found that this work "involved making a *significant* physical change to the configuration or composition of the building or structure, not a simple, routine activity," and thus held it to be an alteration within the purview of section 240(1) (*id.* at 960 [internal quotation marks omitted]). Although *Weininger* did not involved a section 241(6) claim, its explanation of what work constitutes an "alteration" is relevant to the case at bar (*see Saint*, 25 NY3d at 129; *see also Sarigual v New York Tel. Co.*, 4 AD3d 168 [1st Dept 2004], *lv denied* 3 NY3d 606 [2004] ["Stripping the insulation from the subject cable wire is an alteration under [240(1)]"]). Thus, as "running cables" is considered to be a "significant physical change" to fall within the purview of alteration and not "routine" maintenance, there remains a question of fact as to whether plaintiff's work constituted an alteration within the meaning of Labor Law § 241(6).

Further, it is simply irrelevant that plaintiff could not remember if he had made any holes while performing the installation work or if they were preexisting. At issue is whether the operative work plaintiff was engaged to perform was a building alteration (*Saint*, 25 NY3d at 124 ["'it is neither pragmatic nor consistent with the spirit of the statute to isolate the moment of injury and ignore the general context of

the work'"], quoting *Prats v Port Auth. Of N.Y. & N.J.*, 100 NY2d 878, 882 [2003]).

Concerning defendants' remaining argument, that the Industrial Code sections cited were either too general or insufficiently relevant to form a basis for section 241(6) liability, we have held otherwise (*see Rutkowski v New York Convention Ctr. Dev. Corp.*, 146 AD3d 686, 687 [1st Dept 2017] [holding that 12 NYCRR 23-1.8(c)(1) is sufficiently specific with regard to the requirement of providing protective apparel]; *Murphy v Columbia Univ.*, 4 AD3d 200, 202 [1st Dept 2004] [holding that 12 NYCRR 23-1.30 is sufficiently specific with regard to the obligation to keep work areas illuminated, and expert testimony regarding the level of illumination was unnecessary to demonstrate its inadequacy]). These code sections are applicable to the facts of this case. Accordingly, defendants' arguments are unavailing.

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

ENTERED: DECEMBER 26, 2019

CLERK

Renwick, J.P., Manzanet-Daniels, Oing, Singh, González, JJ.

10647- Index 160660/16
10647A-
10647B-
10647C-
10647D-
10647E Good Gateway, LLC, et al.,
Plaintiffs-Respondents,

-against-

Rohan Thakkar,
Defendant-Appellant.

_____

Mayer Brown, LLP, New York (Henninger Bullock of counsel), for appellant.

Strassberg & Strassberg, P.C., New York (Todd Strassberg of counsel), for respondents.

_____

Judgment, Supreme Court, New York County (Paul A. Goetz, J.), entered April 17, 2019, awarding plaintiffs a sum of money against defendant, unanimously affirmed, with costs. Appeals from orders, Supreme Court, New York County (Paul A. Goetz, J.; Philip S. Straniere, J.H.O.), entered February 7, 2019, on or about March 26, 2019, on or about April 8, 2019, on or about April 16, 2019, and April 30, 2019, unanimously dismissed, without costs, as subsumed in the appeal from the judgment.

Defendant waived his defense of lack of personal jurisdiction by failing to raise it until after he had filed a notice of appearance, attended numerous court conferences,

consented to a "hear and determine" damages inquest, and cross-examined a witness at the inquest, following the grant of plaintiffs' motion for a default judgment against him (*see CIBC Mellon Trust Co. v Mora Hotel Corp.*, 100 NY2d 215, 225-226 [2003], *cert denied* 540 US 948 [2003]; *Urena v NYNEX, Inc.*, 223 AD2d 442, 443 [1st Dept 1996]; *see also Matter of Fry v Village of Tarrytown*, 89 NY2d 714, 720 n 2 [1997] ["service of process can be waived by respondent simply by appearing in the proceeding and submitting to the court's jurisdiction"]).

In moving to vacate his default, defendant failed to demonstrate a meritorious defense. As this Court determined on an appeal from the order that decided plaintiffs' motion for a default judgment, under the circumstances in which defendant's father executed a document forgiving a debt of $2,720,849.63 owed him by defendant, the debt forgiveness was a conveyance made with actual intent to hinder or delay creditors, including plaintiffs, who obtained final judgments in the amount of $14.5 million against him in a Florida lawsuit (*Good Gateway, LLC v Thakkar*, 163 AD3d 449 [1st Dept 2018]). We set aside the loan forgiveness document and remanded for a hearing on the appropriate remedy.

Defendant's assertion that his father was solvent at the time of the transfer fails to establish a meritorious defense. As a preliminary matter, solvency is merely one badge of fraud to

be considered; on the prior appeal, this Court found numerous badges of fraud in the documentary evidence (*Thakkar*, 163 AD3d at 449, citing *General Elec. Co. v Chuly Intl., LLC*, 118 So 3d 325, 328 [Fla Dist Ct App 2013]; Fla Stat § 726.105).

Moreover, in support, defendant offered only a conclusory affidavit by his father asserting that he was worth $142 million as of December 2012, the time of the debt forgiveness, and attaching personal financial statements. This evidence is questionable on its face. It does not show who prepared the personal financial statements. However, even assuming their accuracy, the statements show that the majority of the $142 million consisted of real estate assets owned by corporations in which there is no evidence that defendant's father had any ownership interest. The statements also show that $24 million in liabilities disappeared from March 2012 to December 2012 and that defendant's father holds securities valued at more than $30 million. However, no explanation is provided for the

disappearance of the liabilities, and no list of the securities defendant's father purports to hold is attached.

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

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

ENTERED: DECEMBER 26, 2019

CLERK

Renwick, J.P., Manzanet-Daniels, Oing, Singh, González, JJ.

10648 The People of the State of New York, Ind. 5170/13
Respondent,

-against-

Maxsimino Lucero,
Defendant-Appellant.

_____

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

Cyrus R. Vance, Jr., District Attorney, New York (Alexander Michaels 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 (Michael J. Obus, J.), rendered June 9, 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: DECEMBER 26, 2019

CLERK

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

Renwick, J.P., Manzanet-Daniels, Oing, Singh, González, JJ.

10650 The People of the State of New York, Ind. 4667/16
Respondent,

-against-

Maria Nieves,
Defendant-Appellant.

_____

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

Cyrus R. Vance, Jr., District Attorney, New York (Valerie Figueredo 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 (Edwina G. Mendelson, J.), rendered April 19, 2017,

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

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

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

ENTERED: DECEMBER 26, 2019

CLERK

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

Renwick, J.P., Manzanet-Daniels, Oing, Singh, González, JJ.

10651 In re Georgia Malone, Index 150814/18
Petitioner-Appellant,

-against-

New York State Division of Housing
and Community Renewal,
Respondent-Respondent,

- - - - -

Trafalgar Company,
Intervenor Respondent-Respondent.

_____

Fischman & Fischman, New York (Doreen J. Fischman of counsel), for appellant.

Mark F. Palomino, New York (Sandra A. Joseph of counsel), for New York State Division of Housing and Community Renewal, respondent.

Kucker & Bruh, LLP, New York (Daniel Gewirtz of counsel), for Trafalgar Company, respondent.

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Judgment, Supreme Court, New York County (John J. Kelley, J.), entered May 20, 2019, denying the petition to vacate a determination of respondent New York State Division of Housing and Community Renewal (DHCR), dated January 5, 2018, which found that petitioner's apartments are not subject to rent stabilization, and dismissing the proceeding brought pursuant to CPLR article 78, unanimously affirmed, without costs.

DHCR's determination that petitioner's apartments are not subject to rent stabilization has a rational basis in the record (*see Matter of Peckham v Calogero*, 12 NY3d 424, 431 [2009]), from

which DHCR concluded that the apartments were deregulated in 1995 due to high-rent vacancy, pursuant to former Administrative Code of City of NY § 26-504.2, and that the base date rents were not unreliable (*see* Administrative Code § 26-516[h][i]; *see also Matter of Grimm v State of N.Y. Div. of Hous. & Community Renewal Off. of Rent Admin.*, 15 NY3d 358, 366-367 [2010]). DHCR considered all the available evidence of the units' history back to the early 1990s, including an asserted unexplained rent increase for one apartment that the landlord claimed to have substantially changed, and an alleged fraudulent scheme to deregulate both units that purportedly began years before high-vacancy rent deregulation was authorized by law, and its interpretation of the data and the inferences to be drawn therefrom is not irrational or unreasonable (*see Matter of Wembly Mgt. Co. v New York State Div. of Hous. & Community Renewal, Off. of Rent Admin.*, 205 AD2d 319 [1st Dept 1994], *lv denied* 85 NY2d 88 [1995]).

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: DECEMBER 26, 2019

CLERK

Renwick, J.P., Manzanet-Daniels, Oing, Singh, González, JJ.

10652 Stewart Title Insurance Company, Index 651794/16
Plaintiff, 595338/16

-against-

New York Title Research Corporation,
Defendant.

- - - - -

New York Title Research Corporation,
Third-Party Plaintiff-Appellant,

Newburgh Commons, LLC, et al.,
Third-Party Defendants-Respondents,

Robert W. Fink, Esq.,
Third-Party Defendant.

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Traub Lieberman Straus & Shrewsberry LLP, Hawthorne (Jonathan R. Harwood of counsel), for appellant.

Joseph J. Haspel, Goshen, for respondents.

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Order, Supreme Court, New York County (Nancy M. Bannon, J.), entered August 31, 2018, which granted third-party defendants Newburgh Commons LLC and Abe Goldberger's motion to dismiss New York Title Research Corporation's (NY Title) third-party claims for contractual and common law indemnification, unanimously modified, on the law, to deny defendants' motion as to the claim for contractual indemnification against Newburgh, and otherwise affirmed, without costs.

The doctrine of judicial estoppel is inapplicable because NY Title has not obtained any relief based on any of its allegedly

competing positions (*see D&L Holdings, LLC v Goldman Co.*, 287 AD2d 65, 71-72 [1st Dept 2001], *lv denied* 97 NY2d 611 [2002]; *see also Angel v Bank of Tokyo-Mitsubishi, Ltd.*, 39 AD3d 368, 371 [1st Dept 2007]).

The common law indemnification claim was nonetheless properly dismissed. A "party cannot obtain common-law indemnification unless it has been held to be vicariously liable without proof of any negligence or actual supervision on its own part" (*McCarthy v Turner Constr., Inc.*, 17 NY3d 369, 378 [2011]). Here, the first-party complaint did not propound any theory that NY Title was vicariously liable to Stewart for third-party defendants' actions. As a result, NY Title is not entitled to the common law indemnification it seeks in the third-party action (*see Esteva v Nash*, 55 AD3d 474, 475 [1st Dept 2008]).

The contractual indemnification claim against Newburgh should not have been dismissed. The escrow agreement at issue, on its face, does not contain any language imposing the requirement to obtain the payoff letter on either party and is ambiguous in this respect (*LDIR, LLC v DB Structured Prods., Inc.*, 172 AD3d 1, 5-6 [1st Dept 2019]). In light of such an ambiguity and assuming the truth of allegations that third-party defendants promised to obtain the payoff letter and satisfy the tax lien, as is required at this stage, the contractual

indemnification claim should proceed to discovery on parol evidence (*id.* at 5-6). Moreover, it is irrelevant whether NY Title was negligent in fulfilling its obligations under the escrow agreement since Newburgh agreed to indemnify against "all loss" (*see Levine v Shell Oil Co.*, 28 NY2d 205, 211 [1971]; *Gortych v Brenner*, 83 AD3d 497, 498 [1st Dept 2011]; *Cortes v Town of Brookhaven*, 78 AD3d 642, 644-645 [2d Dept 2010]).

Nor should the claim have been dismissed because NY Title entered into the escrow agreement as agent of the first-party plaintiff. Although the parties understood that NY Title was the agent of the first-party plaintiff, a disclosed principal, it is alleged that the escrow agreement was executed for the benefit of NY Title, as escrow agent, and all dealings of the third-party defendants were solely with NY Title. Under these circumstances, and based on the allegation of the third-party complaint, NY Title is able to commence this action seeking to enforce the indemnification provision against Newburgh (*see Shirai v Blum*, 239 NY 172, 182 [1924]; *see also* Restatement, Agency 2d, § 372).

The claims against Goldberger, were, however, properly dismissed because the allegations that he exercised dominion and control over Newburgh, that he abused the privilege of doing business in the corporate form and failed to adhere to LLC formalities, are alone insufficient to state a claim for piercing

the corporate veil *(see American Media. Inc. v Bainbridge & Knight. Labs., LLC*, 135 AD3d 477, 477 [1st Dept 2016]; *see also Metropolitan Transp. Auth. v Triumph Adv. Prods.*, 116 AD2d 526, 528 [1st Dept 1986]).

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

ENTERED: DECEMBER 26, 2019

CLERK

Renwick, J.P., Manzanet-Daniels, Oing, Singh, González, JJ.

10653N Julio J. Lopez, Index 309896/12
Plaintiff-Appellant,

-against-

Gregory M. Hicks, et al.,
Defendants-Respondents,

City of New York, et al.,
Defendants.

_____

Law Offices of Alexander Bespechny, Bronx (Alexander Bespechny and Yelena Gordiyenko of counsel), for appellant.

Lawrence Heisler, Brooklyn (Timothy O'Shaughnessy of counsel), for respondents.

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Order, Supreme Court, Bronx County (Mitchell J. Danziger, J.), entered on or about April 20, 2018, which to the extent appealed from, resolved defendants Gregory M. Hicks, New York City Transit Authority, MTA Bus Company, the Metropolitan Transportation Authority, MTA New York City Bus, and Manhattan and Bronx Surface Transit Operating Authority's motion to vacate the note of issue by directing plaintiff to provide certain discovery, unanimously affirmed, without costs.

Plaintiff has not shown that the post-note of issue discovery directed by the Supreme Court caused him prejudice or was otherwise an improvident exercise of that court's broad

discretion in supervising disclosure (*see* 22 NYCRR 202.21[d]; *Cuprill v Citywide Towing & Auto Repair Servs.*, 149 AD3d 442, 443 [1st Dept 2017]; *Those Certain Underwriters at Lloyds, London v Occidental Gems, Inc.*, 11 NY3d 843, 845 [2008]).

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

ENTERED: DECEMBER 26, 2019

CLERK

Renwick, J.P., Manzanet-Daniels, Oing, Singh, González, JJ.

10654N Hulya Temiz, Index 158865/16
Plaintiff-Respondent,

-against-

The TJX Companies, Inc., et al.,
Defendants-Appellants.

_____

McAndrew, Conboy & Prisco, LLP, Melville (Mary C. Azzaretto of counsel), for appellants.

Steven C. Rauchberg, P.C., New York (Steven C. Rauchberg of counsel), for respondent.

_____

Order, Supreme Court, New York County (Arlene P. Bluth, J.), entered May 13, 2019, which granted plaintiff's motion for an order to strike defendants' answer for spoliation of evidence to the extent of directing an adverse inference charge at trial, unanimously modified, on the law and the facts, to delete the adverse inference charge as specified, and remand the matter for a new adverse inference charge in accordance herewith, and otherwise affirmed, without costs.

In ordering a lesser sanction than the striking of the answer that plaintiff requested in response to defendant's spoliation of evidence (*see* CPLR 3126), the motion court directed that the jury be instructed that "if the footage was preserved and produced, it would have shown that a slippery substance was on the floor long enough for the defendant to be aware of the

condition and therefore the defendant had constructive notice of the slippery condition at the time plaintiff fell." This charge is not appropriate, because it requires, rather than permits, the jury to draw an adverse inference, and is tantamount to a grant to plaintiff of summary judgment as to liability (*see Pegasus Aviation I, Inc. v Varig Logistica S.A.*, 26 NY3d 543, 554 [2015]). Accordingly, a new, permissive adverse inference charge is required (*see* PJI 1:77.1).

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

ENTERED: DECEMBER 26, 2019

CLERK

Friedman, J.P., Webber, Kern, Moulton, JJ.

10655 The People of the State of New York, Respondent, Ind. 2699/14

-against-

Lorenzo Shoy,
Defendant-Appellant.

_____

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

Darcel D. Clark, District Attorney, Bronx (Kristian D. Amundsen of counsel), for respondent.

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Judgment, Supreme Court, Bronx County (Robert A. Neary, J.), rendered August 2, 2017, convicting defendant, after a jury trial, of attempted gang assault in the first degree (two counts) and assault in the third degree, and sentencing him to an aggregate term of 11 years, unanimously affirmed.

The verdict was based on legally sufficient evidence and was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). There is no basis for disturbing the jury's credibility determinations. As to both victims, the evidence, including a surveillance videotape, established the element of intent to cause serious physical injury, as required for attempted first-degree gang assault. The evidence supporting the inference of defendant's intent was not limited to his own violent acts, but also included his acts of assisting others in

committing more serious violence against the victims (*see Matter of Juan J.*, 81 NY2d 739 [1992]). The evidence permitted the jury to reasonably infer that defendant was part of a group that surrounded the first victim, and that while some members of the group assaulted the victim, defendant and others prevented him from leaving (*see People v Edmonds*, 267 AD2d 19, 19 [1st Dept 1999], *lv denied* 94 NY2d 862 [1999]). The jury was also justified in finding that defendant kicked the second victim, and that this intentionally aided another participant in simultaneously inflicting more serious blows (*see People v Bishop*, 117 AD3d 430 [1st Dept 2014], *lv denied* 23 NY3d 1034 [2014]). We do not find that the jury's mixed verdict warrants a different result (*see People v Rayam*, 94 NY2d 557 [2000]).

The court's charge, viewed as a whole (*see generally People v Umali*, 10 NY3d 417, 426-427 [2008], *cert denied* 556 US 1110 [2009]; *People v Drake*, 7 NY3d 28, 33 [2006]), properly explained that in order to find defendant criminally liable for the conduct of others, the jury had to find that he acted with the requisite intent to commit the offense, and that he intentionally aided the others in such conduct. The court gave the jury a thorough and accurate explanation of the concept of acting in concert, in which it repeatedly emphasized that defendant's personal state of mind was controlling. At the point when the court used the term

acting in concert while stating the elements of attempted gang assault, the jury had just been told exactly what acting in concert requires. As such, the jury could not have been misled to believe that the intent of another participant in the crime could satisfy the intent element. Finally, the court provided meaningful responses to notes from the deliberating jury.

We perceive no basis for reducing the sentence.

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

ENTERED: DECEMBER 26, 2019

CLERK

Friedman, J.P., Webber, Kern, Moulton, JJ.

10656 In re Mariah B., and Another,

Children under Eighteen Years
of Age, etc.,

Nigel M.,
Respondent-Appellant,

Commissioner of Social Services of the
City of New York,
Petitioner-Respondent.

_____

Steven N. Feinman, White Plains, for appellant.

Georgia M. Pestana, Acting Corporation Counsel, New York (Susan Paulson of counsel), for respondent.

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

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Order of fact-finding, Family Court, New York County (Ta-Tanisha D. James, J.), entered on or about June 21, 2018, which found that respondent neglected and abused the subject children, unanimously affirmed, without costs.

The record supports Family Court's determination that, at the relevant times, respondent was a person legally responsible for the children, because he had resided in the home with them for two years, cared for them and assumed other household and parental duties (*see Matter of Yolanda D.*, 88 NY2d 790 [1996]; *Matter of Christopher W.*, 299 AD2d 268 [1st Dept 2002]). His contention that he had no relationship with the children was

rebutted not only by the mother's testimony, which the court found credible, but by respondent's testimony that he was the children's guardian and godfather.

The determination that respondent abused and neglected the children is supported by a preponderance of the evidence (*see* Family Ct Act §§ 1046[b][i]; 1012[e][iii][A]; *Matter of Jayden C. (Luisanny A.)*, 126 AD3d 433 [1st Dept 2015]). Family Court was in the best position to observe the witnesses and assess their demeanor, and there is no basis to disturb its credibility determinations (*see Matter of Ricardo M.J. [Kiomara A.]*, 143 AD3d 503 [1st Dept 2016]). The evidence supports the finding that respondent neglected the children by committing acts of domestic violence against the mother in their presence, including choking her and threatening to kill her and the children, thereby placing the children's emotional well-being at imminent risk of harm (*see Matter of Cristalyn G. [Elvis S.]*, 158 AD3d 563 [1st Dept 2018]; *Matter of Nia J. [Janet Jordan P.]*, 107 AD3d 566, 567 [1st Dept 2013]). The finding of abuse is supported by evidence that respondent committed acts constituting forcible touching in order to abuse and degrade the children (*see* Family Ct Act § 1012 [e][iii]; Penal Law § 130.52[1]). Contrary to respondent's argument, the court properly found that the child Mariah's out-of-court statements were sufficiently corroborated by testimony

of a caseworker and her mother showing that she consistently reported the abuse (*see Matter of Nicole V.*, 71 NY2d 112, 118-119 [1987]).

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

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

ENTERED: DECEMBER 26, 2019

CLERK

Friedman, J.P., Webber, Kern, Moulton, JJ.

10657 Lorraine Letitio Lorenc, Index 302628/18
Plaintiff-Appellant,

-against-

Zbigniew Paul Lorenc,
Defendant-Respondent.

_____

Law Office of Deana Balahtsis, New York (Deana Balahtsis and Merilda Petri Nina of counsel), for appellant.

Timothy J. Horgan, New York, for respondent.

_____

Order, Supreme Court, New York County (Laura E. Drager, J.), entered February 13, 2019, which denied plaintiff's motion to set aside the parties' prenuptial agreement, unanimously affirmed, without costs.

Plaintiff failed to establish that the parties' prenuptial agreement was the product of fraud, duress, or other inequitable conduct and should therefore be set aside (*see Anonymous v Anonymous*, 123 AD3d 581, 582 [1st Dept 2014]). In arguing that the agreement was unconscionable, plaintiff asserted that it was thrust upon her at the last minute and that she was deprived of any opportunity to review and consider its terms with the advice of independent counsel. However, there is no support for these assertions in the record.

There is also no support for a conclusion that plaintiff did not understand the agreement's terms. By her own account, she is an able negotiator and possesses impressive business acumen and sophistication, and she takes credit for having transformed her husband's medical practice into a thriving success.

Plaintiff failed to establish that the agreement was the product of overreaching on defendant's part (*see Gottlieb v Gottlieb*, 138 AD3d 30, 37 [1st Dept 2016], *lv dismissed* 27 NY3d 1125 [2016]. She did not claim that defendant failed to disclose assets in connection with the agreement. The significant financial disparity between the parties that presumably will result does not, without more, justify vitiating the parties' freely negotiated agreement (*see id.* at 41-42).

Plaintiff failed to establish that the agreement was the result of fraud. Her claims that defendant fraudulently promised her that he would tear up the agreement and that defendant fraudulently promised to put her name on the title to the townhouse are not supported by the record. Further, the agreement expressly disclaims reliance on representations other than those set forth in the agreement. Plaintiff's claim that defendant fraudulently promised to raise her salary every year is in essence a breach of contract claim, which presumes the validity of the agreement.

Plaintiff's public policy argument is without merit. New York has a "strong public policy favoring individuals ordering and deciding their own interests through contractual arrangements" (*Matter of Greiff*, 92 NY2d 341, 344 [1998]). The right to enter into a contractual arrangement as to matrimonial matters is expressly authorized by Domestic Relations Law § 236 (B)(3) (*see Kessler v Kessler*, 33 AD3d 42, 46 [2d Dept 2006], *lv dismissed* 8 NY3d 968 [2007]). This right is not unfettered and the agreement must be arrived at fairly and equitably and free from the taint of fraud and duress. As stated above, plaintiff failed to establish that the agreement was the product of fraud, duress, or other inequitable conduct and would therefore be against public policy.

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: DECEMBER 26, 2019

CLERK

Friedman, J.P., Webber, Kern, Moulton, JJ.

10658 Sheena Burton, Index 156604/15
Plaintiff-Appellant,

-against-

Khedouri Ezair Corp., et al.,
Defendants-Respondents,

Antonio Pecora, etc.,
Defendant.

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

Ahmuty, Demers & McManus, Albertson (Glenn A. Kaminska of counsel), for Khedouri Ezair Corp. and 7 Just One Corp., respondents.

McManus Atheshoglou Aiello & Apostolakos, PLLC, New York (Peter Naber of counsel), for H.K. Paris Inc., respondent.

_____

Order, Supreme Court, New York County (Lynn R. Kotler, J.), entered September 7, 2017, which, to the extent appealed from as limited by the briefs, granted defendants' motions for summary judgment dismissing the complaint against them, and denied plaintiff's cross motions to strike their answers or, in the alternative, to compel them to provide discovery, unanimously modified, on the law, to deny Khedouri Ezair Corp.'s (Khedouri) and Iggy's motions for summary judgment, and otherwise affirmed, without costs.

The court properly granted summary judgment in favor of Voila, in that plaintiff's testimony, affidavit, and supplemental bill of particulars indicated that she fell in front of Iggy's, or where the door to the residences met the front of Iggy's. It was undisputed that Voila's premises was a distance away from that area; plaintiff testified that it had nothing to do with her fall; and she presented no evidence that the black ice on which she allegedly fell was created by Voila's failure to properly clear the area in front of its store or the entrance to the residences.

However, Khedouri and Iggy's failed to sustain their initial burden of demonstrating that they neither created nor had actual or constructive knowledge of the icy condition of the sidewalk in front of Iggy's and the entrance to the residences. Neither presented evidence concerning snow removal immediately prior to plaintiff's accident and/or their lack of notice of the condition (*see Adario-Caine v 69th Tenants Corp*, 164 AD3d 1143, 1144 [1st Dept 2018]; *Ceron v Yeshiva Univ.*, 126 AD3d 630, 631-632 [1st Dept 2015]).

The court providently exercised its discretion in declining to strike Khedouri and Iggy's answers for failure to provide discovery because plaintiff did not demonstrate willful or contumacious conduct by either of them.

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: DECEMBER 26, 2019

CLERK

Friedman, J.P., Webber, Kern, Moulton, JJ.

10659 The People of the State of New York, Ind. 2576/15
Respondent,

-against-

Shenay Taylor,
Defendant-Appellant.

_____

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

Darcel D. Clark, District Attorney, Bronx (John George Edward Marck of counsel), for respondent.

_____

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, Bronx County (Miriam R. Best, J.), rendered February 4, 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: DECEMBER 26, 2019

CLERK

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

Friedman, J.P., Webber, Kern, Moulton, JJ.

10660 Unique Goals International, Ltd., et al.,
Plaintiffs-Appellants,

-against-

Maxim Finskiy, et al.,
Defendants-Respondents.

Index 655692/17

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Rosenfeld & Kaplan, LLP, New York (Tab K. Rosenfeld of counsel), for appellants.

Shutts & Bowen LLP, Tallahassee, FL (Daniel E. Nordby of the bar of the State of Florida, admitted pro hac vice, of counsel), for respondents.

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Order, Supreme Court, New York County (O. Peter Sherwood, J.), entered on or about November 2, 2018, which, to the extent appealed from as limited by the briefs, granted defendants' motion to dismiss the claims for fraud and conspiracy to commit fraud, unanimously affirmed, with costs.

The complaint alleges that plaintiffs — three entities controlled by nonparty Sergey Yanchukov, a wealthy Russian businessman — were fraudulently induced by defendants — Maxim Finskiy, also a wealthy Russian businessman, and several entities under his control or otherwise affiliated with him — to purchase defendants' controlling interest in White Tiger Gold, Ltd. (White Tiger), a gold-mining company. In summary, plaintiffs allege that defendants misled them about White Tiger's financial

condition and the gold reserves of its mines, principally by means of (1) Finskiy's oral statements to his personal friend Yanchukov, (2) a false report publicly filed pursuant to the securities laws of Canada (where White Tiger was listed on the Toronto Stock Exchange), and (3) false information provided to a consulting firm engaged by plaintiffs to prepare a report for them on White Tiger. The complaint does not allege, however, that plaintiffs undertook an independent due diligence inquiry to verify defendants' claims about White Tiger. Specifically, before closing the transaction, plaintiffs conducted neither their own review of White Tiger's books and records nor their own geological survey of White Tiger's mining properties. On the contrary, the complaint alleges that "plaintiffs were deceived into taking immediate action [in March and April of 2013] . . . to buy defendants out of White Tiger" by Finskiy's representation that there existed an imminent prospect of the seizure of White Tiger's assets by a major creditor, which creditor, Finskiy claimed, "had withheld funding to create an exigency."

After the deal closed, an audit commissioned by plaintiffs revealed that $30 million of White Tiger's cash, which had been reported as having been used to pay for drilling, had been misappropriated. The audit further revealed that White Tiger's management had paid itself excessive bonuses. In addition, a

post-closing geological survey of White Tiger's only operating gold mine commissioned by plaintiffs revealed that the previous management had substantially overstated both the amount of ore stored at the mine and the mine's provable gold reserves. Plaintiffs learned that the mine's remaining "life" was only four years, which was insufficient to generate enough ore to pay off White Tiger's major creditor.

We affirm the dismissal of the fraud cause of action on the ground that the complaint fails to plead the element of justifiable reliance (*see ACA Fin. Guar. Corp. v Goldman, Sachs & Co.*, 25 NY3d 1043, 1044 [2015] [if a plaintiff has failed to make use of "the means available to it of knowing, by the exercise of ordinary intelligence, the truth or real quality of the subject of the representation," that plaintiff "will not be heard to complain that it was induced to enter into the transaction by misrepresentations"] [internal quotation marks and brackets omitted]; *DDJ Mgt., LLC v Rhone Group L.L.C.*, 15 NY3d 147, 154-155 [2010] [a sophisticated investor claiming to have been defrauded must allege that it took reasonable steps to protect itself against deception]; *VisionChina Media Inc. v Shareholder Representative Servs., LLC*, 109 AD3d 49, 57 [1st Dept 2013] ["(s)ophisticated investors must show they used due diligence and took affirmative steps to protect themselves from

misrepresentations by employing what means of verification were available at the time"]). Here, the financially sophisticated investors do not allege that they conducted due diligence to verify defendants' representations about White Tiger's financial condition and gold reserves, or even sought to do so, even though they were aware that White Tiger was experiencing financial difficulties. Accordingly, the complaint fails to state a legally sufficient cause of action for fraud (*see RKA Film Fin., LLC v Kavanaugh*, 171 AD3d 678 [1st Dept 2019]; *MP Cool Invs. Ltd. v Forkosh*, 142 AD3d 286, 291-292 [1st Dept 2016], *lv denied* 28 NY3d 911 [2016]; *MAFG Art Fund, LLC v Gagosian*, 123 AD3d 458, 459 [1st Dept 2014], *lv denied* 25 NY3d 901 [2015]).

In view of the foregoing, the court also properly dismissed plaintiffs' cause of action for conspiracy to commit fraud (*see Alexander & Alexander of N.Y. v Fritzen*, 68 NY2d 968, 969 [1986]).

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

ENTERED: DECEMBER 26, 2019

CLERK

Friedman, J.P., Webber, Kern, Moulton, JJ.

10661 In re Stone Column Trading House Limited,
Claimant-Respondent,

-against-

Beogradska Banka A.D., etc.,
Claimant-Appellant.

Index 650228/13

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Marion & Allen, P.C., New York (Roger K. Marion of counsel), for appellant.

Dunnington Bartholow & Miller LLP, New York (Olivera Medenica of counsel), for respondent.

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Judgment, Supreme Court, New York County (Charles E. Ramos, J.), entered on October 1, 2018, awarding claimant Stone Column Trading House Limited $8,937,120.23 plus interest, costs and disbursements, unanimously modified, on the law, to delete the award of statutory interest ($5,410,018.40), and to vacate the judgment entered in favor of Stone Column and against Beogradska in the amount of $14,347,973.63, and otherwise affirmed, without costs.

In 1992, $20 million was deposited into an account in the name of Stone Column at Beogradska's New York agency (Beogradska NY). After bankruptcy proceedings were initiated against Beogradska in Belgrade, the Superintendent of Financial Services of the State of New York took possession of Beogradska NY's

business and property pursuant to Banking Law § 606(4)(a). Stone Column and Beogradska filed competing proofs of claim to the $20 million; after the Superintendent rejected both claims, Stone Column and Beogradska commenced separate actions against the Superintendent pursuant to Banking Law § 625(3).

In 2014, the Superintendent, Beogradska, and Stone Column entered into a Stipulation of Consolidation and Discharge which, inter alia, acknowledges that Stone Column submitted timely proofs of claim and says that "the sole legal issue to be adjudicated . . . is whether Beogradska . . . or Stone Column has the superior right to receive all or a portion of the Claim Amount," i.e., the $20 million. The stipulation continues, "Except for the claims of Beogradska . . . and Stone Column to the Claim Amount, Beogradska . . . and Stone Column . . . agree not to assert or otherwise pursue any other direct or indirect claims against one another arising out of the subject matter of the Consolidated Action." By entering into this stipulation, Beogradska waived the issue of Stone Column's standing (*see Access 4 All, Inc. v Grandview Hotel Ltd. Partnership*, 2006 WL 566101, *2-3, 2006 US Dist LEXIS 15603, *5-8 [ED NY, March 2006, CV04-4368(TCP)(MLO)]).

Stone Column made a prima facie showing that the money in its account is its money (*see Karaha Bodas Co., L.L.C. v*

Perusahaan Pertambangan Minyak Dan Gas Bumi Negara, 313 F3d 70, 86 [2d Cir 2002], *cert denied* 539 US 904 [2003]). The record includes a Beogradska NY statement showing $20 million in Stone Column's account as of April 30, 1992. In addition, Beogradska stipulated that Stone Column maintained an account at Beogradska NY. Thus, the burden shifted to Beogradska to establish that the money in the Stone Column account was not Stone Column's money.

In its verified amended complaint, Beogradska alleged that Stone Column relinquished its ownership rights to a total of $19,480,187.33 by sending orders of transfer signed by Branislav Jerotić – the General Director of a company called Limes d.o.o. that was not related to Stone Column – and Željko Popović – the Executive Director of Foreign Exchange Affairs at Beobanka. Beogradska further alleged that Jerotić and Popović could act on Stone Column's behalf due to powers of attorney executed on or about March 31, 1992. However, Stone Column demonstrated that these powers of attorney were invalid. Hence, it did not relinquish its rights. Furthermore, Beogradska's claim is based on transactions that violate U.S. law (*see Bank of N.Y. v Norilsk Nickel*, 14 AD3d 140, 141-142, 147 [1st Dept 2004], *lv dismissed* 4 NY3d 846 [2005], *appeal dismissed* 4 NY3d 843 [2005]).

Due to the parties' stipulation (quoted above), Stone Column

is not entitled to 9% statutory interest (*see J. D'Addario & Co., Inc. v Embassy Indus., Inc.*, 20 NY3d 113, 117-118 [2012]). Stone Column is also not entitled to a judgment against Beogradska in this interpleader action as the parties stipulated that they agreed not to pursue any claims against one another arising out of this action except for the claims of the parties to the Claim Amount held by the escrow agent.

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

ENTERED: DECEMBER 26, 2019

CLERK

Friedman, J.P., Webber, Kern, Moulton, JJ.

10662 The People of the State of New York, Ind. 207/16
Respondent,

-against-

Quandele T.,
Defendant-Appellant.

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

Darcel D. Clark, District Attorney, Bronx (Robert Myers 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, Bronx County (Ralph Fabrizio, J.), rendered August 3, 2017,

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

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

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

ENTERED: DECEMBER 26, 2019

CLERK

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

Friedman, J.P., Webber, Kern, Moulton, JJ.

10663 In re Youssouf D.,

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

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

Georgia M. Pestana, Acting Corporation Counsel, New York (Julia Bedell of counsel), for presentment agency.

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Order of disposition, Family Court, Bronx County (Sidney Gribetz, J.) entered on or about February 19, 2019, which adjudicated appellant a juvenile delinquent upon a fact-finding determination that he committed acts that, if committed by an adult, would constitute the crimes of burglary in the third degree, two counts of petit larceny, and two counts of criminal possession of stolen property in the fifth degree, and placed him on probation for a period of 18 months, unanimously affirmed, without costs.

The court's fact-finding determination was based on legally sufficient evidence and was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). The evidence, including a videotape depicting appellant's furtive behavior behind a counter where the store's cash register was

located, supports the conclusions that he entered a portion of the store that was not open to customers except under limited circumstances, and that he was aware that he had no license or privilege to enter. According to the court, appellant's face was "clearly recognizable" on the videotape, thereby establishing appellant's identity, notwithstanding the absence of an in-court identification by a witness.

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

ENTERED: DECEMBER 26, 2019

CLERK

Friedman, J.P., Webber, Kern, Moulton, JJ.

10664 The People of the State of New York, Ind. 5508/12
Respondent,

-against-

Joseph Taylor,
Defendant-Appellant.

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Janet E. Sabel, The Legal Aid Society, New York (William B. Carney of counsel), for appellant.

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

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Judgment, Supreme Court, New York County (Juan M. Merchan, J.), rendered March 2, 2015, convicting defendant, after a jury trial, of attempted murder in the second degree and assault in the first degree, and sentencing him, as a second felony offender, to an aggregate term of 20 years, unanimously affirmed.

The court properly denied defendant's suppression motion. The record supports the hearing court's finding that a statement made by defendant was spontaneous and not the product of interrogation requiring *Miranda* warnings. The officer's sudden exclamation upon discovering that he had gotten blood on his hands after touching defendant's clothing was not the functional equivalent of interrogation (*see Rhode Island v Innis*, 446 US 291, 300-301 [1980]).

Defendant failed to preserve, or expressly waived, his present claim that he was stopped without reasonable suspicion, and the court "did not expressly decide, in response to protest, the issue[] now raised on appeal" (*People v Miranda*, 27 NY3d 931, 932 [2016]). Furthermore, the People were not placed on notice of the need to develop the hearing record as to the particular point raised on appeal (*see People v Martin*, 50 NY2d 1029 [1980]; *People v Tutt*, 38 NY2d 1011 [1976]). We decline to review this unpreserved issue in the interest of justice. As an alternative holding, we find that to the extent it permits review, the record supports a finding of reasonable suspicion.

The verdict was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). There is no basis for disturbing the jury's determinations concerning credibility and identification.

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

ENTERED: DECEMBER 26, 2019

CLERK

Friedman, J.P., Webber, Kern, Moulton, JJ.

10665 Tyrek Heights Erectors, Inc., Index 650690/12
Plaintiff-Appellant,

-against-

WDF, Inc., et al.,
Defendants-Respondents,

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

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The Law Office of Joshua D. Spitalnik, P.C., Roslyn (Joshua D. Spitalnik of counsel), for appellant.

Kaufman, Dolowich & Voluck, LLP, Woodbury (Andrew L. Richards of counsel), for respondents.

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Order, Supreme Court, New York County (Charles E. Ramos, J.), entered on or about February 5, 2018, which, insofar as appealed from as limited by the briefs, granted defendants' motion for partial summary judgment dismissing the amended complaint's nineteenth cause of action for bad-faith interference with plaintiff's performance of certain subcontracts and twentieth cause of action for prime contractor defendant WDF's contractual failure to present plaintiff's claim for additional compensation to defendant New York City Transit Authority (NYCTA), unanimously modified, on the law, to deny so much of defendants' summary judgment motion as sought dismissal of

plaintiff's 19th cause of action for damages relating to the "Five Stations Project," and otherwise affirmed, without costs.

Plaintiff has met its burden of pointing to evidence raising triable issues of fact as to whether WDF engaged in intentional misconduct by willfully interfering with plaintiff's timely performance of its subcontracts. It is undisputed that the subject projects suffered extensive delays when a high-voltage cable owned by the Long Island Power Authority (the LIPA cable) was discovered running alongside the subway line on which the work was being performed. Subsequent to this development, an internal WDF claim position document authored by its then-COO states that it had been "the logic of the team to delay doing work and try to blame it on the LIPA issue." Other documentary evidence indicates that WDF "deliberate[ly] delayed" work by not provid[ing] enough manpower to perform work when power [on the LIPA cable] is off." Another of WDF's COOs likewise confirmed in deposition testimony that WDF would sometimes "minimize the workforce," reducing the amount of work being done when the LIPA cable was de-energized. Record evidence indicates that WDF took advantage of the LIPA cable issues and other delays "to make up for WDF's underbid of the Projects."

Against this evidence of willful delay by WDF, the evidence of delays to plaintiff's performance of its subcontract work, at

least viewed in the light most favorable to plaintiff, takes on a hue of being willfully inflicted. Thus, WDF's Five Stations Project Superintendent confirms that, contrary to industry custom, WDF refused to hire a surveyor to chart out areas where concrete needed to be "chopped" preliminary to structural work by plaintiff. Instead, WDF insisted on doing the surveying work itself, leading to "many errors in the chopping" and consequent delays for plaintiff. WDF also breached a contractual requirement to provide plaintiff with fixed "platform shields" for performance of elevated work, instead supplying it with less efficient "man-lifts," and, even then, at times removing the man-lifts without explanation. WDF also, without explanation, and, according to the Three Stations Project Manager, "arbitrar[il]y," excluded plaintiff from the work staging area, hindering its ability to store equipment and materials. Finally, the Three Stations Project Manager testified that he objected to WDF's

issuance to plaintiff of notices of default, calling them "not warranted," and was subsequently punished by WDF by being "put in the cafeteria for a month."

Hence, we find that there is a triable issue of fact as to whether WDF "acted in bad faith and with deliberate intent delayed the plaintiff in the performance of its obligation," which, if demonstrated at trial, would remove plaintiff's claims under the 19th cause of action from the ambit of the contractual no-delay damages clause (*Kalisch-Jarcho, Inc. v City of New York*, 58 NY2d 377, 386 [1983]). We accordingly modify to deny so much of defendants' summary judgment motion as sought dismissal of plaintiff's 19th cause of action relating to the Five Stations Project. We note that, at this juncture, we leave undisturbed that portion of the motion court's decision to hold in abeyance the portion of defendants' motion seeking dismissal of plaintiff's claims relating to the "Three Stations Project," pending resolution of WDF's claims against NYCTA, since it is still possible that the claim may be impacted or superseded by the outcome of the WDF-NYCTA dispute.

There is no evidence that plaintiff ever submitted any delay damages claim relating to its work on the Five Stations Project. As such, plaintiff has failed to satisfy a condition precedent for recovery under its 20th cause of action for WDF's alleged

breach of its contractual duty to submit plaintiff's delay claims to NYCTA (*see A.H.A. Gen. Constr. v New York City Hous. Auth.*, 92 NY2d 20, 30-31 [1998]).

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

ENTERED: DECEMBER 26, 2019

CLERK

Friedman, J.P., Webber, Kern, Moulton, JJ.

10666 Doris Dees, as Administrator of the Estate of William Tate-Mitros (deceased), Plaintiff-Respondent, Index 112752/08

-against-

MTA New York City Transit, also known as New York City Transit Authority, et al., Defendants-Appellants.

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Lawrence Heisler, Brooklyn (Timothy J. O'Shaughnessy of counsel), for appellants.

Alexander J. Wulwick, New York, and Theodore Friedman, P.C., New York (Theodore Friedman of counsel), for respondent.

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Judgment, Supreme Court, New York County (Shlomo S. Hagler, J.), entered August 28, 2018, which, upon a jury verdict, awarded plaintiff's decedent $2.5 million for past pain and suffering and $2 million for future pain and suffering over 10 years, unanimously modified, on the facts, to vacate the award for future pain and suffering, and to direct a new trial of those damages, unless, within 30 days after service of a copy of this order with notice of entry, plaintiff stipulates to a reduction of the award for future pain and suffering to $1,000,000, and to entry of judgment in accordance therewith, and otherwise affirmed, without costs.

Based on the evidence presented at trial, the jury's finding that, due to negligence, a rear tire of an articulated bus ran over decedent's right foot when the bus mounted the sidewalk as it was pulling into a bus stop was rational (*see Cohen v Hallmark Cards*, 45 NY2d 493, 498-499 [1978]). The jury could reasonably have credited the expert testimony of Nicholas Bellizzi, a forensic engineer who opined, based on a review of the pleadings and General Municipal Law § 50-h and deposition testimony and an examination and measurements of the accident location, that it was physically feasible for the right side of the bus to mount the sidewalk and run over decedent's foot with its rear wheel.

To the extent Bellizzi's opinion is inconsistent with decedent's claim that only the rear tire mounted the sidewalk, the jury was entitled to credit Bellizzi's expert opinion concerning the mechanics of the incident rather than decedent's observations. Decedent admitted that everything happened very quickly and he was just making assumptions as to what occurred based on what he recalled seeing. As to other discrepancies between decedent's trial testimony and earlier testimony, including those related to his distance from the curb and whether he actually saw the tire run over his foot, decedent testified similarly that he was merely making "guesses" or assumptions

based on his recollection of the fast-paced sequence of events, and the jury was entitled to credit that testimony.

The jury was also entitled to credit decedent's explanation for the discrepancy between his initial notice of claim, which said that he was standing at a corner when the accident occurred, and his amended notice of claim and subsequent statements, in which he said that he was in the middle of the block. We note that, regardless of the lack of clarity as to how the accident occurred, the evidence demonstrates that decedent consistently told his doctor, emergency medical personnel, police officers, and treating physicians that a bus ran over his foot. Moreover, decedent's biomechanical engineering expert, Dr. Calum McRae, testified that the injuries were consistent with a tire rolling over the foot.

Defendants' challenges to the trial court's evidentiary rulings are unavailing. Any error in allowing decedent to answer a leading question as to whether he told his treating physicians that he had been run over by a "double bus" was harmless, in light of the wealth of other evidence showing that he was hit by such a bus. Decedent's statement to his attorney, in correcting an inaccuracy in the notice of claim, that he was in the middle of the block and the subsequent amended notice of claim filed by

his attorney were admissible as prior consistent statements (*see Abrams v Gerold*, 37 AD2d 391, 393-394 [1st Dept 1971]).

While we affirm the jury award for past pain and suffering, we find that under the circumstances, the jury award for future pain and suffering deviates materially from what would be reasonable compensation to the extent indicated herein (CPLR 5501[c]).

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

ENTERED: DECEMBER 26, 2019

CLERK

Friedman, J.P., Webber, Kern, Moulton, JJ.

10667 Shondel Ferguson, et al., Index 161274/14
Plaintiffs-Appellants,

-against-

Durst Pyramid, LLC, et al.,
Defendants-Respondents,

The Durst Organization, Inc.,
Defendant.

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Sacks and Sacks, L.L.P., New York (Scott N. Singer of counsel), for appellants.

Cullen and Dykman LLP, New York (Kristy R. Eagan of counsel), for respondents.

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Order, Supreme Court, New York County (Margaret A. Chan, J.), entered September 28, 2018, which denied plaintiffs' motion for partial summary judgment on the Labor Law § 240(1) claim and the Labor Law § 241(6) claim predicated on Industrial Code § 23-1.7(f), and granted defendants Durst Pyramid, LLC and Hunter Roberts Construction Group, LLC's motion for summary judgment dismissing the complaint, unanimously modified, on the law, to deny defendants' motion as to the Labor Law §§ 240(1) and 241(6) claims, and grant plaintiff's motion, and otherwise affirmed, without costs.

The protection of Labor Law § 240(1) encompasses plaintiff Shondel Ferguson's fall while trying to access an elevated work

platform by stepping up onto an inverted bucket, an inadequate safety device that failed to provide proper protection (*see McKeighan v Vassar Coll.*, 53 AD3d 831, 831-833 [3d Dept 2008]; *Wilson v Niagara Univ.*, 43 AD3d 1292, 1292-1293 [4th Dept 2007]).

Moreover, defendants failed to cite any evidence rebutting the affidavit by plaintiff's foreman stating that stairs or other access points to the work platform were either restricted or blocked by materials. Because no safety devices were available to plaintiff to access the platform, as a matter of fact and law, plaintiff's attempt to use the inverted bucket cannot be the sole proximate cause of his accident (*see Cuentas v Sephora USA, Inc.*, 102 AD3d 504 [1st Dept 2013]).

Because no stairways, ramps, or runaways were available to plaintiff to access the platform, he was entitled to summary judgment on his Labor Law § 241(6) claim predicated upon Industrial Code (12 NYCRR) § 23-1.7(f) (*see Conklin v Triborough Bridge & Tunnel Auth.*, 49 AD3d 320, 321 [1st Dept 2008]). However, because plaintiff's accident occurred due to the means and methods of accessing his work, which defendants did not direct and control, the common-law negligence and Labor Law § 200

claims were correctly dismissed (*see Cappabianca v Skanska USA Bldg. Inc.*, 99 AD3d 139, 143-144 [1st Dept 2012, Catterson, J., dissenting]).

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: DECEMBER 26, 2019

CLERK

Friedman, J.P., Webber, Kern, Moulton, JJ.

10668-
10668A The People of the State of New York,
Respondent,

-against-

Joseph Davis,
Defendant-Appellant.

Ind. 3201/11

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

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

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Order, Supreme Court, Bronx County (Margaret L. Clancy, J.), entered on or about June 18, 2014, which granted defendant's motion to reargue, and upon reargument, adhered to a prior order, (same court, Seth L. Marvin, J.), entered on or about March 5, 2014, which adjudicated defendant a level three sexually violent offender pursuant to the Sex Offender Registration Act (Correction Law art 6-C), unanimously affirmed, without costs. Appeal from the March 5, 2014 order, unanimously dismissed, without costs, as academic.

Grand jury minutes and a victim impact statement provided reliable evidence that supported the court's determination in all respects (*see People v Sincerbeaux*, 27 NY3d 683, 687-688 [2016]; *People v Mingo*, 12 NY3d 563, 572-574 [2009]). Nothing in the

record casts doubt on the veracity of the victim's account of defendant's extensive misconduct, and the disposition of defendant's underlying case does not warrant a different conclusion (*see People v Epstein*, 89 AD3d 570, 571 [1st Dept 2011]). The record also establishes that defendant received sufficient access to the relevant minutes.

Although defendant's correct point score is 95, rather than 105 as found by the court, defendant's presumptive risk level remains at level two, and even with that reduction, the record supports the court's discretionary upward departure to level three. The upward departure was based on clear and convincing evidence that there were aggravating factors not sufficiently taken into account by the risk assessment instrument (*see People v Gillotti*, 23 NY3d 841, 861 [2014]). Contrary to defendant's assertion, the court did not consider the egregiousness of defendant's conduct as a matter of "moral outrage," but for its bearing on defendant's likelihood of reoffense and the potential harm in the event of his reoffense. The mitigating factors

defendant relies on were outweighed by the aggravating factors noted by the court.

We have considered and rejected defendant's remaining arguments.

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

ENTERED: DECEMBER 26, 2019

CLERK

Friedman, J.P., Webber, Kern, Moulton, JJ.

10669 In re JNPJ Tenth Ave., LLC, Index 100268/18
Petitioner-Appellant,

-against-

The Department of Buildings of the
City of New York, et al.
Respondents-Respondents.

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Nicholas E. Brusco, New York, for appellant.

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

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Judgment, Supreme Court, New York County (Carmen Victoria St. George, J.), entered January 22, 2019, dismissing the petition brought pursuant to CPLR article 78 to vacate the determination of respondent Office of Administrative Trials & Hearings, dated January 4, 2018, that petitioner violated Administrative Code of the City of New York §§ 28-210.3 and 28-301.1 and New York City Building Code (Administrative Code, tit 28, ch 7) § BC 907.2.8, unanimously reversed, on the law, without costs, the petition granted and the violations vacated, and it is directed that all penalties paid by petitioner be refunded.

Administrative Code § 28-210.3 ("Illegal conversions of dwelling units from permanent residences") provides, in pertinent part, "It shall be unlawful for any . . . entity [which] owns . . . a . . . dwelling unit classified for permanent residence

purposes to . . . permit the use or occupancy [of] . . . such . . . dwelling unit for other than permanent residence purposes." The article 78 court correctly determined that, pursuant to this provision, penalties may be imposed on building owners for their tenants' use of their apartments for transient occupancy (*see generally Matter of Pamela Equities Corp. v Environmental Control Bd. of the City of N.Y.*, 171 AD3d 623, 623-24 [1st Dept 2019]). The court also correctly determined that an owner may be found to have permitted tenants to use their apartments for transient occupancy upon evidence that it either had knowledge of such transient occupancy or had the opportunity to acquire knowledge of the transient occupancy through the exercise of reasonable diligence (*see Matter of Martin v State Liq. Auth.*, 41 NY2d 78, 79 [1976]; *People ex rel. Price v Sheffield Farms-Slawson-Decker Co.*, 225 NY 25, 30 [1918]; *Matter of Albany Manor Inc. v New York State Liq. Auth.*, 57 AD3d 142, 145 [1st Dept 2008]; *Matter of Northland Transp. v Jackson*, 271 AD2d 846, 848-849 [3d Dept 2000]).

The court's determination that petitioner permitted an apartment in its building to be used for transient occupancy is not supported by the record (*see Matter of Santiago v New York City Hous. Auth.*, 122 AD3d 433 [1st Dept 2014]). While respondents presented substantial evidence before the hearing

officer that an apartment in petitioner's building was used for transient occupancy, they failed to show petitioner had either actual knowledge or the opportunity through reasonable diligence to acquire such knowledge (*see Matter of Albany Manor Inc.*, 57 AD3d at 145). Evidence of the tenant's history of involvement in housing court cases involving numerous other buildings, the tenant's advertising with short-term rental businesses, and the availability of services that monitor tenants' use of apartments for short-term rentals was not part of the administrative record, and it therefore should not have been considered by the court (*see Santiago*, 122 AD3d at 433).

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

ENTERED: DECEMBER 26, 2019

CLERK

Friedman, J.P., Webber, Kern, Moulton, JJ.

10671 Artemus USA LLC, Index 156295/18
Plaintiff-Respondent,

-against-

Paul Kasmin Gallery, Inc.,
Defendant-Appellant.

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Frankfurt Kurnit Klein & Selz, P.C., New York (Amelia K. Brankov of counsel), for appellant.

Walden Macht & Haran LLP, New York (Jim Walden of counsel), for respondent.

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Order, Supreme Court, New York County (Eileen Bransten, J.), entered November 14, 2018, which denied defendant's motion to dismiss the complaint, unanimously affirmed, with costs.

The complaint asserts a claim for fraud based on defendant's alleged materially false representations in certain invoices. It alleges that defendant sold a 60% interest in an artwork by Frank Stella entitled La Scienza della Fiacca to nonparty Antole Shagalov for $430,000, and that, two years later, when plaintiff was conducting due diligence in connection with purchasing La Scienza and three other artworks from Shagalov, defendant provided Shagalov with a backdated invoice that indicated that Shagalov would acquire full title to La Scienza upon payment of the $430,000. The complaint alleges that Shagalov made defendant aware that the invoice was either for itself or for a potential

purchaser. Thereafter, at Shagalov's request, defendant provided a second backdated invoice, which included a previously omitted resale certificate number and showed the purchaser as Shagalov's company, rather than Shagalov personally. After completing due diligence, plaintiff and Shagalov entered into a transaction that plaintiff characterized as a "sale-leaseback," wherein plaintiff purchased four artworks, including La Scienza, for $3.4 million, and leased those artworks back to Shagalov, with a repurchase option for Shagalov. Subsequently, defendant filed a UCC-1 financing statement on La Scienza, and Shagalov commenced an action alleging, inter alia, that plaintiff violated his rights under article 9 of the UCC by trying to dispose of the artwork. In an appeal in the *Shagalov* action, this Court affirmed the grant of a preliminary injunction enjoining plaintiff from selling, transferring or disposing of, inter alia, La Scienza (*see Shagalov v Edelman*, 161 AD3d 455, 456 [1st Dept 2018]).

Plaintiff's allegations are sufficient to permit the inference that defendant intended that the fraudulent invoices would be provided to potential purchasers or lessors (*see Ultramares Corp. v Touche*, 255 NY 170, 187 [1931]; *see also Credit Alliance Corp. v Arthur Andersen & Co.*, 65 NY2d 536, 547 [1985]). While the allegations concerning Shagalov's direct statements to defendant about the necessity of the invoices were

made "upon information and belief," additional alleged facts, such as the timing of defendant's furnishing of the invoice and its accommodation to Shagalov's requests for revisions, support the inference that defendant knew the purpose and the recipient of the invoices (*see Aozora Bank, Ltd. v J.P. Morgan Sec. LLC*, 144 AD3d 440, 441 [1st Dept 2016]).

The complaint also adequately alleges that defendant's misrepresentations induced plaintiff to enter into the "sale-leaseback" transaction with Shagalov and that they directly caused plaintiff's loss (*see Basis PAC-Rim Opportunity Fund [Master] v TCW Asset Mgt. Co.*, 149 AD3d 146, 149 [1st Dept 2017], *lv denied* 30 NY3d 903 [2017]). Plaintiff alleges that it would not have entered into the transaction had it known that defendant's invoices falsely represented Shagalov's ownership of La Scienza. It further alleges that the misrepresentation of Shagalov's 100% ownership interest directly caused it to pay more than it would have paid for a 60% interest, and that it incurred costs in uncovering the truth after defendant filed its UCC-1. Accepted as true on this motion to dismiss, these allegations are sufficient to sustain plaintiff's claim that it may be entitled to recover some of its litigation costs in the Shagalov action as damages because it would not have incurred those costs had it not been for defendant's alleged fraud.

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

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

ENTERED: DECEMBER 26, 2019

CLERK

Friedman, J.P., Webber, Kern, Moulton, JJ.

10672-
10672A The People of the State of New York, Ind. 1817/16
Respondent, SCI 3682/16

-against-

John Landi,
Defendant-Appellant.

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

Darcel D. Clark, District Attorney, Bronx (Yuri Chornobil of counsel), for respondent.

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An appeal having been taken to this Court by the above-named appellant from judgments of the Supreme Court, Bronx County (Miriam R. Best, J.), rendered December 22, 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 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: DECEMBER 26, 2019

CLERK

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

Friedman, J.P., Webber, Kern, Moulton, JJ.

10673 The People of the State of New York, Respondent, Ind. 548/17

-against-

Christopher Chandler, Defendant-Appellant.

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

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

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Judgment, Supreme Court, New York County (Ellen N. Biben, J. at request for new counsel; Robert M. Mandelbaum, J. at jury trial and sentencing), rendered September 18, 2017, convicting defendant of attempted assault in the first degree and two counts of assault in the second degree, and sentencing him, as a second violent felony offender, to an aggregate term of 15 years, unanimously affirmed.

The verdict was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). There is no basis for disturbing the jury's credibility determinations. The evidence disproved defendant's justification defense beyond a reasonable doubt.

The court properly denied defendant's eve-of-trial request for new counsel, in support of which defendant's only specific

allegation was that counsel had not obtained a prison surveillance videotape of an alleged prior attack on defendant by the victim. The court made appropriate inquiry, which revealed that the Department of Correction had destroyed the video (ultimately resulting in a adverse inference charge at trial), and there was nothing to suggest any deficiency in defense counsel's performance (*see People v Porto*, 16 NY3d 93, 99-100 [2010]). Defendant's suggestion that his application raised other specific concerns warranting further inquiry finds no support in the record of the colloquy on substitution of counsel.

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

ENTERED: DECEMBER 26, 2019

CLERK

Friedman, J.P., Webber, Kern, Moulton, JJ.

10674N Starr Donovan, Index 27098/16E
Plaintiff-Respondent,

-against-

New York City Housing Authority,
Defendant-Appellant.

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Kelly D. MacNeal, New York (Nabiha Rahman and Byron S. Menegakis of counsel), for appellant.

Schwartz Perry & Heller, LLP, New York (Daniel H. Kovel of counsel), for respondent.

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Order, Supreme Court, Bronx County (Llinet M. Rosado, J.), entered January 8, 2019, which, in this action alleging discrimination and retaliation in employment, denied the motion of defendant New York City Housing Authority (NYCHA) pursuant to CPLR 3124 to compel disclosure of plaintiff's medical records from March 2015 to the present, unanimously modified, on the law, to grant the motion to the extent of requiring plaintiff to provide an authorization for disclosure of Dr. John Poff's records from September 2015 onward, and otherwise affirmed, without costs.

Plaintiff provided NYCHA with an authorization for medical records from her primary care provider from June 2016 to the present. Although plaintiff only seeks damages for emotional distress, she affirmatively put her physical condition at issue

by alleging that, starting with an incident in September 2015 in which her supervisor allegedly groped her, NYCHA created a hostile work environment that caused her physical distress, and ultimately resulted in a miscarriage (*see Rega v Avon Prods., Inc.*, 49 AD3d 329 [1st Dept 2008]; *see also Cynthia B. v New Rochelle Hosp. Med. Ctr.*, 60 NY2d 452, 456-457 [1983]). As such, plaintiff's medical records for that period forward are material and necessary to NYCHA's defense (*see Colwin v Katz*, 102 AD3d 449 [1st Dept 2013]).

However, NYCHA has not demonstrated entitlement to wholesale disclosure of all of plaintiff's hospital and physician records starting six months before the conduct complained of commenced. NYCHA failed to establish that these records would be pertinent (*see Kenneh v Jey Livery Serv.*, 131 AD3d 902 [1st Dept 2015]; *Felix v Lawrence Hosp. Ctr.*, 100 AD3d 470 [1st Dept 2012]).

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

ENTERED: DECEMBER 26, 2019

CLERK

Friedman, J.P., Webber, Kern, Moulton, JJ.

10675N Ira Daniel Tokayer, Esq., Index 157471/16
Plaintiff-Respondent,

-against-

Kosher Sports Inc., et al.,
Defendants-Appellants.

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The Law Office of Jason J. Rebhun, P.C., New York (Jason J. Rebhun of counsel), for appellants.

Stropheus Law LLC, New York (Daniel M. Hartman of counsel), for respondent.

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Order, Supreme Court, New York County (Lynn R. Kotler, J.), entered February 11, 2019, which, insofar as appealed from, in this action seeking to recover legal fees, granted plaintiff's motion for sanctions against defendants to the extent of awarding plaintiff the costs incurred in making the motion upon settling an order with notice supported by an affirmation attesting to costs and attorneys' fees incurred, unanimously affirmed, without costs.

The court providently exercised its discretion in imposing the monetary sanction on defendants pursuant to 22 NYCRR 130-1.1 for failing to comply with the so-ordered stipulation requiring them to produce an affidavit of diligent search by March 30, 2018 (*see Vandashield Ltd v Isaacson*, 146 AD3d 552, 555-556 [1st Dept 2017]). The court had a reasonable basis to conclude that,

regardless of the surrounding circumstances, defendants' unexcused seven-month delay in producing the affidavit was frivolous, dilatory conduct sufficient to warrant the imposition of the limited sanction.

Contrary to defendants' contention, counsel's affirmation submitted with the motion for sanctions provided sufficient detail to comply with 22 NYCRR 202.7(c) (*see Cuprill v Citywide Towing & Auto Repair Servs.*, 149 AD3d 442 [1st 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: DECEMBER 26, 2019

CLERK

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

Peter Tom, J.P.
Ellen Gesmer
Cynthia S. Kern
Peter H. Moulton, JJ.

9783
Index 161137/17

_____x

Haleigh Breest,
Plaintiff-Respondent,

-against-

Paul Haggis,
Defendant-Appellant.

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Eleven Civil Rights Organizations, C.A. Goldberg PLLC, Professor Sally F. Goldfarb, Professor Julie Goldscheid, Professor Victoria Nourse and Legal Momentum,
Amici Curiae.

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Defendant appeals from an order of the Supreme Court, New York County (Robert R. Reed, J.), entered August 15, 2018, which denied his motion to dismiss the complaint and to strike the Jane Doe allegations.

Harris, St. Laurent & Chaudhry LLP, New York (Priya Chaudhry and Joseph Gallagher of counsel), and Mitchell Silberberg & Knupp LLP, New York (Jeffrey Movit and Christine Lepera of counsel), for appellant.

Emery Celli Brinckerhoff & Abady LLP, New York (Zoe Salzman, Jonathan S. Abady and Ilann M. Maazel of counsel), for respondent.

Kirkland & Ellis LLP, New York (Yosef J. Riemer, Ashley S. Gregory and Joseph M. Sanderson of counsel), for Her Justice, American Civil Liberties Union, Sanctuary for

Families, New York City Alliance Against Sexual Assault, National Organization for Women-New York City, Women's Justice NOW, FreeFrom, National Women's Law Center, Transgender Legal Defense & Education Fund, Anti Violence Project, Black Women's Blueprint and C.A. Goldberg PLLC, amici curiae.

Stroock & Stroock & Lavan LLP, New York (Jennifer S. Recine, Daniel H. Lewkowicz and Natalie R. Birnbaum of counsel), for Professor Sally F. Goldfarb, Professor Julie Goldscheid, Professor Victoria Nourse and Legal Momentum, amici curiae.

MOULTON, J.

The central question in this appeal is: what must a plaintiff allege in order to state a cause of action under New York City's Victims of Gender-Motivated Violence Protection Law (Administrative Code of City of NY § 10-1101 *et seq.*)?

The New York City Council passed the Victims of Gender-Motivated Violence Protection Law (VGM) in 2000 in response to the United States Supreme Court's decision in *United States v Morrison* (529 US 598 [2000]). The *Morrison* Court struck down the federal civil rights remedy for gender-motivated crimes contained in the Violence Against Women Act (42 USC § 13981) (VAWA), finding the remedy an unconstitutional exercise of Congressional power. VGM, as did its federal predecessor, provides a civil cause of action for victims of crimes of violence "committed because of gender or on the basis of gender, and due, at least in part, to an animus based on the victim's gender" (Administrative Code § 10-1103) and allows a victim of such a gender-based violent crime to collect money damages from the perpetrator.

In the decision on appeal, Supreme Court denied defendant's motion to dismiss plaintiff's amended complaint. The court also denied defendant's alternative request to strike allegations concerning other alleged sexual assaults from the amended complaint pursuant to CPLR 3013 and 3024(b). Supreme Court held, inter alia, that plaintiff's amended complaint adequately stated

a cause of action under VGM by alleging that defendant had raped and sexually assaulted her, and spoke to her during the course of the alleged rape in ways that displayed gender-based animus. Supreme Court also found that allegations that defendant had sexually assaulted other women were relevant, at the pleading stage, to establish the requisite gender-based animus. Supreme Court's decision was consistent with state and federal trial court precedents that require such allegations of additional facts tending to show gender-based animus even where the alleged offense is rape or sexual assault. We write to clarify that these additional allegations are not necessary to prove animus in alleged rape and sexual assault cases such as the one at bar.

Plaintiff's Amended Complaint

Under CPLR 3211(a)(7), we evaluate the sufficiency of the amended complaint by assuming that the facts alleged therein are true and according plaintiff the benefit of every possible favorable inference (*Wilson v Dantas*, 29 NY3d 1051, 1056-1057 [2017]).

In January 2013, plaintiff was a 26-year-old publicist for a company that hosted film premieres in New York City. Defendant was, and remains, a prominent film and television producer, director and screenwriter. He was 59 at the time of the events alleged in the amended complaint. The two had a passing acquaintance from encountering each other at entertainment

industry events.

On January 31, 2013, the parties both attended a premiere party in New York City. At the end of the party defendant offered to give plaintiff a ride home. She accepted. Once they were in the car, defendant invited plaintiff to come to his apartment for a drink. Plaintiff suggested that they go to a public bar instead. When defendant insisted, plaintiff agreed to go to his apartment.

The amended complaint alleges that once they were in defendant's apartment he immediately began to make unwanted sexual advances. Plaintiff told defendant to stop. Defendant said, "You're scared of me, aren't you?" and continued. As she resisted, defendant asked plaintiff her age. Plaintiff told him she was 26 and defendant replied, "Don't fucking act like an 18 year old." Plaintiff asked defendant, "Why are you doing this?" He replied, "What do you mean? You've been flirting with me for months." The amended complaint alleges that plaintiff's continued resistance, including telling defendant, "No," repeatedly, seemed to excite him. According to the amended complaint defendant eventually forced plaintiff to give him oral sex; then he digitally penetrated her and commented that she was "nice and tight"; then he raped her.

In his answer and his motion to dismiss defendant vigorously contests plaintiff's version of their interactions and asserts

that the parties' sexual relations were consensual.

In late 2017 plaintiff's counsel contacted defendant and described plaintiff's allegations. The parties differ in their descriptions of what happened next. Plaintiff alleges that defendant's counsel subsequently asked plaintiff to come up with a settlement figure. Defendant contends that plaintiff's counsel wrote him directly, enclosing a draft complaint. He avers that he and his counsel vigorously denied the allegations in the draft complaint. According to defendant, plaintiff's counsel demanded $9 million to settle out of court.

Defendant brought an action in New York County in December 2017 for intentional infliction of emotional distress arising from plaintiff's settlement demand and threat to sue.

Plaintiff then filed her complaint, asserting a cause of action under VGM based on the January 31, 2013 incident. The two cases were assigned to a single justice. In January 2018, plaintiff filed an amended complaint with a slightly expanded account of the January 31 incident and allegations of three other sexual assaults allegedly perpetrated by defendant against other women in 1996, 2008 and 2015 (the Jane Doe allegations).

The parties cross-moved to dismiss the respective complaints. Defendant also moved in the alternative to strike the Jane Doe allegations in plaintiff's amended complaint. Supreme Court dismissed defendant's intentional infliction of

emotional distress claim, and allowed plaintiff's claim under VGM to go forward. The court declined to strike the amended complaint's description of the Jane Doe allegations. In so holding, the court found that the amended complaint must allege facts that demonstrate some gender-based animus against women as a group, and not just against plaintiff. The court found indications of such animus in the allegations of statements made by defendant during the course of the incident, and in the fact that he allegedly committed sexual assaults on other women. The court also allowed plaintiff to further amend her complaint to add a claim under CPLR 213-c. Defendant does not appeal from that ruling, nor does he appeal the court's dismissal of his intentional infliction of emotional distress claim.

Discussion

VGM provides a civil cause of action for "injur[y] by an individual who commit[ted] a crime of violence motivated by gender" (Administrative Code § 10-1104). The term "crime of violence" is defined as "an act or series of acts that would constitute a misdemeanor or felony against the person as defined in state or federal law . . . if the conduct presents a serious risk of physical injury to another, whether or not those acts actually resulted in criminal charges, prosecution or conviction" (Administrative Code § 10-1103). The term "crime of violence motivated by gender" is defined as a "crime of violence committed

because of gender or on the basis of gender, and due, at least in part, to an animus based on the victim's gender" (*id.*). This section was adopted verbatim from VAWA.

The parties do not dispute that the allegations in plaintiff's amended complaint set forth "crime[s] of violence." Additionally, defendant concedes that the alleged rape and sexual assault are sufficient to allege crimes of violence committed "because of gender or on the basis of gender." Where the parties differ concerns whether plaintiff has alleged facts that the alleged crime of violence was "due, at least in part, to an animus based on the victim's gender" (*id.*).

This appeal thus turns on the meaning of "an animus based on the victim's gender" in VGM. "Animus" is not a defined term in the statute, just as it was not defined in VAWA.

> "When presented with a question of statutory interpretation, our primary consideration is to ascertain and give effect to the intention of the legislature. Inasmuch as the clearest indicator of legislative intent is the statutory text, the starting point in any case of interpretation must always be the language itself, giving effect to the plain meaning thereof"

(*Kuzmich v 50 Murray St. Acquisition LLC*, 34 NY3d 84, 91 [2019] [internal quotations and citations omitted]). Generally, undefined terms in a statute "are to be interpreted in accordance with their ordinary and accepted meaning" (*People v Hall*, 158 AD2d 69, 80 [1st Dept 1990] [*lv denied* 76 NY2d 940 [1990]).

The problem here is that "animus" has two distinct meanings. As defendant argues, it can mean "prejudiced and often spiteful or malevolent ill will" (Merriam-Webster's Collegiate Dictionary [11th ed]). It can also mean, as plaintiff urges, "basic attitude or governing spirit" (*id.; see also* J. Rebekka S. Bonner *Reconceptualizing VAWA's "Animus" for Rape in States' Emerging Post-VAWA Civil Rights Legislation*, 111 Yale L J 1417, 1422 [2002] [urging that animus in this context means "(a)n attitude that informs one's actions" or one's "disposition"] [internal quotation marks omitted]).

Given this ambiguity we look to VGM's legislative history. Unfortunately, it provides no interpretative aid. The parties have not cited, and we could not find, any legislative history from the City Council that discusses the meaning of "an animus based on the victim's gender."[1]

Instead, both parties look to VAWA's legislative history, and case law interpreting VAWA,[2] to breathe meaning into the phrase "an animus based on the victim's gender." They also cite

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[1]The Report of the City Council's Committees of General Welfare and Women's Issues, the Mayor's Memorandum in Support, and the testimony before the Council focused on how victims of domestic violence would be able to use VGM to sue their abusers. The City Council's hearing minutes also reflect the Council's intent that transgender, gay and lesbian victims of gender-based violence were covered by VGM.

[2]Of course, the case law ended in the year 2000 with the Supreme Court's decision in *Morrison*.

the few cases that have interpreted VGM, which themselves look to VAWA and the body of case law interpreting it.

VAWA's legislative history makes clear that Congress wanted to ensure that VAWA's civil rights cause of action would not federalize criminal and domestic relations law and flood federal courts with claims traditionally heard in state fora. Chief Justice Rehnquist took the unusual step of speaking publicly against the proposed legislation, asserting that VAWA's civil rights cause of action would place an unnecessary burden on the federal judiciary (William H. Rehnquist, *Chief Justice's 1991 Year-End Report on the Federal Judiciary, The Third Branch,* Jan. 1992, at 3*; see* Victoria F. Nourse, 11 Wisconsin Women's L J 1, 16 [1996]). Concomitantly, some state officials expressed concerns that the VAWA civil rights remedy would adversely affect state court litigation. As VAWA was being drafted, the Conference of Chief Justices of State Supreme Courts voted to oppose the civil rights remedy, on the ground that it would cause major dislocations in domestic relations cases because litigants would use it as a bargaining tool in divorce negotiations.[3] The legislative history addresses this concern and makes clear that not all rapes or sexual assaults fell within the ambit of the

[3]The official position of the Conference of Chief Justices is reprinted in 1991 S Hearing 369 at 314-317.

Act.[4]

Congress's concern that VAWA would federalize criminal and domestic relations law is demonstrated by changes it made to the civil rights remedy in the proposed bill. While initial drafts of VAWA created a statutory presumption that every rape was a violent crime committed on the basis of gender,[5] this presumption was not included in VAWA as enacted. Defendant seizes on this fact. He also cites to portions of VAWA's legislative history that indicate that hate crime statutes would be a model for interpreting VAWA.[6] From these two strands of legislative history, defendant argues that the animus requirement was placed in VAWA to make it clear that a plaintiff must plead facts tending to show that a defendant committed a crime of violence

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[4]Senate Report No. 103-138 at 51.

[5]The first version of VAWA considered in the Senate in 1990 provided explicitly that a "crime of violence motivated by the victim's gender was defined as "any rape, sexual assault, or abusive sexual contact motivated by gender-based animus" (*see* Victoria F. Nourse, *Where Violence, Relationship and Equality Meet: The Violence Against Women Act's Civil Rights Remedy*, 11 Wisconsin Women's L J 1, 7 [1996], *supra*). Additionally, the House of Representatives in 1993 considered a draft bill stating that a "crime of violence motivated by the victim's gender" meant, inter alia, "a crime of violence that is rape (excluding conduct that is characterized as rape solely by virtue of the ages of the participants), sexual assault, sexual abuse, or abusive sexual contact" (H.R. 1133.IH, 103rd Cong § 301[e][1] [1993]; *see* Jill Elaine Hasday, *Federalism and the Family Reconstructed*, 45 UCLA L Rev 1297, 1315 n 78 [1998]).

[6]S Rep No. 103-138 at 52 n 61.

because of hatred against women as a group. Accordingly, defendant asserts that a litigant must plead something more than a rape or sexual assault to show the required level of animus toward women.[7]

For her part plaintiff argues that the gender motivation and animus elements in VAWA (and VGM) comprise a single inquiry, and that the animus provision was included to "clarify" that a violent crime must be motivated by gender. Plaintiff acknowledges that Congress was concerned that VAWA's civil rights cause of action should not federalize criminal and family law. She argues that the animus requirement was an attempt to limit the number of cases that could be brought under VAWA by making it clear that disparate impact claims would not fall within VAWA's purview and that there would have to be some showing of gender-based intent to state a cause of action.[8] Plaintiff asserts, correctly, that Congress invoked Title VII as a model for VAWA's civil rights cause of action, but did not want to import Title

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[7]Defendant is incorrect that hate crimes statutes require that a perpetrator affirmatively declare animus against a protected class at large (*see e.g.* New York Penal Law § 485.05[1][a]). Rather, such animus may be inferred by the nature of the attack on an individual class member (*see People v Fox*, 17 Misc 3d 281, 286 [Sup Ct Kings County 2007]).

[8]S Rep 103-138 at 64 ("[t]he defendant must have had a specific intent or purpose, based on the victim's gender, to injure the victim"); *see also* Sally F. Goldfarb, *The Supreme Court, the Violence Against Women Act and the Use and Abuse of Federalism*, 71 Fordham L Rev 57, 68 [2002].

VII's disparate impact theory of liability as well.

This legislative history reflects Congress's goal of limiting the number of cases presented to federal courts. It might also have reflected some legislators' concern that VAWA's civil rights cause of action exceeded the limits of Congressional power under the Commerce Clause and section 5 of the Fourteenth Amendment - limits which turned out, in *Morrison*, to be VAWA's Achilles heel. In contrast neither of these concerns were of any relevance to the New York City Council when it passed VGM.

The federal courts that considered VAWA's civil rights remedy varied in their analyses of what a plaintiff must plead and prove to prevail under the act. Plaintiff and amici curiae herein cite *Schwenk v Hartford* (204 F3d 1187 [9th Cir 2000]) for its finding that an alleged rape or attempted rape was per se within the statute. In *Schwenk*, the court held:

> "The fact that in this case the alleged crime was a sexual assault is sufficient in and of itself to support the existence of gender-based animus for purposes of [VAWA]. Rape (or attempted rape) is sui generis. As several courts have noted, rape *by definition* occurs at least in part because of gender-based animus. The psychological factors that underlie a particular rape or the conduct of a particular rapist are often complex as well as extremely difficult to determine. It would be both an impossible and an unnecessary task to fashion a judicial test to determine whether particular rapes are due in part to gender-based animus. With respect to rape and attempted rape, at least, the nature of the crime dictates a uniform, affirmative answer to the inquiry"

(*id.* at 1203).

While the Ninth Circuit's reasoning in *Schwenk* is persuasive, it was not the dominant interpretation of animus in the reported decisions interpreting VAWA's civil rights cause of action. Most federal courts required the plaintiffs to make some additional allegation of facts tending to show animus in order to state a claim under VAWA (*see Reconceptualizing VAWA's "Animus" for Rape,* 111 Yale L J at 1439-1448 [summarizing cases]).[9]

VAWA's legislative history, and its varied case law, have exerted a gravitational pull on the few decisions, all from trial courts, that have interpreted VGM thus far. In some of these decisions, courts have interpreted the animus requirement in a way that veers from the statute's remedial purpose. These decisions, often invoking the "not all rapes" language from VAWA's legislative history, have interpreted animus in VGM to require the plaintiffs to show extrinsic evidence of the defendant's expressed hatred toward women as a group (*see Hughes v Twenty First Century Fox, Inc.,* 304 F Supp 3d 429, 455 [SD NY 2018] [the defendant's verbal abuse, violent behavior, and workplace discrimination, in addition to his alleged rape of the plaintiff, insufficient to demonstrate animosity towards women as

[9]A number of federal courts, presaging *Morrison*, found that VAWA's civil rights remedy was unconstitutional (*see* Caroline S. Schmidt, *What Killed the Violence Against Women Act's Civil Rights Remedy before the Supreme Court Did?* 101 Va L Rev 501, 541-542 [2015]).

required by VGM]; *Gottwald v Sebert,* 2016 NY Slip Op 32815[U], *21 [Sup Ct, NY County 2016] [complaint did not allege that the defendant harbored animus toward women as a group when he raped and behaved violently toward the plaintiff because not every rape is "a gender-motivated hate crime" under VGM]; *Garcia v Comprehensive Ctr., LLC,* 2018 WL 3918180, *5, 2018 US Dist LEXIS 138983, *11 [SD NY, Aug. 16, 2018, No. 17-CV-8970 (JPO)] [supervisor's assault, misogynistic insults, and intimations that the plaintiff would be treated better if she provided sexual services, insufficient under VGM because these allegations do not allege "feelings of animosity and malevolent ill will" against women] [internal quotation marks omitted]).

Other trial courts interpreting VGM, including Supreme Court in this case, have applied the "totality of the circumstances" analysis borrowed from Title VII to find that plaintiffs sufficiently showed gender-based animus by alleging actions and statements by the perpetrator during the commission of the alleged crime of violence (*see e.g. Roelcke v Zip Aviation, LLC*, 2018 WL 1792374, *13, 2018 US Dist LEXIS 51452, *36 [SD NY, Mar. 26, 2018, No. 15 Civ. 6284 (DAB)] [the defendant's use of "gendered terms" while assaulting the plaintiff sufficient to state a cause of action]; *see also Mosley v Brittain*, 2017 NY Slip Op 32447[U] [Sup Ct, NY County 2018] [cause of action stated where the defendant repeatedly called plaintiff a "bitch" and

contemporaneously kneed her in the crotch]).

What the few cases that have grappled with VGM's pleading requirements have in common is the premise that some allegation of other acts or statements tending to show gender animus are necessary to supplement allegations of rape or sexual assault. Some courts, such as the Supreme Court below, have found that a plaintiff states a cause of action with very limited additional allegations; others have erected insuperable barriers to stating a claim.

We find that cases interpreting VGM have been distorted by the vestigial legislative history and case law of VAWA. While the City Council was clearly filling a gap left by VAWA's demise, it does not follow that it incorporated all of VAWA's legislative compromises into VGM. There is no stated concern in VGM's legislative history that the number of cases brought under VGM must somehow be limited. The legislative history of VGM does not invoke the "not all rapes" language from VAWA's legislative history. Accordingly, courts seeking to interpret VGM's pleading requirements are not required to follow the pre-*Morrison* federal case law that often struggled to determine the meaning of the animus provision in VAWA's civil rights cause of action.

However, the animus provision remains in VGM, and a statute "is to be interpreted so as to give effect to every provision. A construction that would render a provision superfluous is to be

avoided" (*Majewski v Broadalbin-Perth Cent. School Dist.*, 91 NY2d 577, 587 [1998]).[10] As we find that VGM's legislative history provides no insight on this point, and that VAWA's legislative history and case law are inapposite, we return to the two possible definitions of animus.

Plaintiff's interpretation of the animus requirement, that it signifies "attitude or governing spirit," would render superfluous the language that comes immediately before it in the statute. As noted above, VGM defines a "crime of violence motivated by gender" as a crime "committed because of gender or on the basis of gender, and due, at least in part, to an animus based on the victim's gender" (Administrative Code § 10-1103). It is redundant to say that a crime is committed "because of gender or on the basis of gender" and that the crime is due in part because of animus based on gender, where animus is defined as an "attitude or governing spirit" based on the victim's gender. In order for animus to add meaning to the statute, and avoid redundancy, it must mean what defendant urges: malice or ill will.

However, even under this definition plaintiff's claims in

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[10]It is worth noting that in enacting VGM the City Council made certain changes to the VAWA civil rights cause of action, for example, by extending the applicable statute of limitations and including misdemeanors in the definition of "crime of violence" that could give rise to a claim. By contrast, as discussed above, it incorporated the animus provision verbatim from VAWA. We are not free to ignore it.

the amended complaint that she was raped and sexually assaulted are sufficient to allege animus on the basis of gender. She need not allege any further evidence of gender-based animus. Defendant has conceded that the allegations herein are sufficient to show that the acts alleged were "committed because of gender or on the basis of gender." That the alleged rape and sexual assault was "due, at least in part, to an animus based on the victim's gender" is sufficiently pleaded by the nature of the crimes alleged.

Rape and sexual assault are, by definition, actions taken against the victim without the victim's consent.[11] Without consent, sexual acts such as those alleged in the complaint are a violation of the victim's bodily autonomy and an expression of the perpetrator's contempt for that autonomy. Coerced sexual activity is dehumanizing and fear-inducing. Malice or ill will based on gender is apparent from the alleged commission of the act itself. Animus inheres where consent is absent.

Accordingly, plaintiff has stated a claim under VGM.[12]

Defendant also argues that the Jane Doe allegations in the

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[11]*See e.g.* Penal Law §§ 130.20, 130.25(1), 130.30(2), 130.35(1) and (2), 130.40(1), 130.55, 130.60(1). All of these offenses have as an element that the victim did not consent to the sexual activity in question.

[12]Other crimes of violence, such as assault, do not inherently involve gender animus and may require additional allegations to fall within VGM.

complaint, which allege, on information and belief, that three other women have accused defendant of rape or attempted rape, should be stricken as scandalous and prejudicial (*see* CPLR 3024[b]). CPLR 3024(b) allows for the striking of such matter that has been "unnecessarily inserted in a pleading." Relevancy is the "measuring rod" (Siegel, NY Prac § 230 [5th ed 2011]). For the reasons stated above, the Jane Doe allegations herein are not necessary to satisfy the animus requirement of VGM. Accordingly, they should be stricken from the complaint as they serve no purpose at this juncture and tend to prejudice defendant.[13]

Accordingly, the order of the Supreme Court, New York County (Robert R. Reed, J.), entered August 15, 2018, which denied defendant's motion to dismiss the complaint and to strike the Jane Doe allegations, should be modified, on the law, to grant defendant's motion to strike the Jane Doe allegations, and otherwise affirmed, without costs.

All concur except Tom, J.P.
who concurs in a separate
Opinion.

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[13]Of course, this holding arises from the facts alleged in the instant complaint; such Jane Doe allegations might be appropriate in another VGM complaint arising under divergent facts. Additionally, whether evidence of such prior alleged sexual misconduct would be admissible at trial in this case to demonstrate absence of consent, or for some other evidentiary purpose, is not before us.

TOM, J.P. (concurring)

I agree with my colleagues that the order of Supreme Court denying the motion to dismiss the complaint pursuant to CPLR 3211(a)(7) should be affirmed. Hence, I join the bench in the result. However, I respectfully disagree with some of the reasoning employed which, I believe, reaches beyond what is necessary, and in doing so seems to craft a new rule of law defining the applicable standard for a claim under New York City's Victims of Gender-Motivated Violence Protection Law (VGM, Administrative Code of City of NY §§10-1101 *et.seq*). Rather, I conclude that defendant's conduct and statements, as they are alleged, present a prima facie showing for CPLR 3211 purposes without the need to deem the nature of the alleged rape - coerced sex - to itself satisfy the requisite gender-based animus.

As Justice Moulton observes, we are reviewing this case against what appears to be a blank slate. City Council did not articulate how it intended the requisite gender-based animus to be construed. The relevant terminology lacks clarity as to whether a defendant, in perpetrating a crime of violence against a victim, must be motivated by animosity against the particular victim because of her gender, or that as a consequence of animosity against a gender, generally, the defendant is acting out against the victim. The distinction may seem subtle, but it may be important, and greater clarity as to the legislative

intent would have been helpful.

The federal jurisprudence addressing the Violence Against Women Act (42 USC §13981) which employed terminology similar to that in the VGM, provides uncertain guidance following the ruling in *United States v Morrison* (529 US 598 [2000]) striking it down on the basis that its constitutional predicate, premised on Congress's powers under the Commerce Clause, was defective. *Schwenk v Hartford* (204 F3d 1187, 1202 [9th Cir 2000]), decided just before *Morrison* was issued, provides one interpretive lens through which the terms codified both in the federal statute and VGM can be considered. The Ninth Circuit characterized defining "animus based on the victim's gender" as "the most troublesome part of the statute because animus is generally thought of as reflecting 'hostility.' Such is not always the case, however." The court concluded that while the coerced sexual act may manifest hostility to some degree, a "reasonable and logical approach" could combine "animus and gender motivation into a single inquiry" to reach an "emotionally motivated - as are all rapes and sexual assaults -" attack. (*id.*). The Ninth Circuit even posited that the defendant might be motivated by misplaced affection, an emotion which conceivably could bring a sexual attack within the reach of the federal statute. I don't see how such a semantic elasticity for the term animus makes sense. Animus equates with animosity; this strikes me as plain English.

Even if "animated," the "governing spirit" alluded to in *Schwenk*, originally may have been cognate with animus, the meanings have diverged substantially over time. Unless "animated" is paired with "by hostility" or a similar qualification, I don't see how a concept as ambiguous as a governing spirit adds clarity to what actually seems to be a more precise meaning - hostility as a synonym for animus. In any event, the facts of *Schwenk*, I think, would have established the requisite gender animus without the interpretive license. There, the prison guard manifested a pattern of aggressive sexual displays, enticements and finally a physical attack against the female-oriented male transsexual, coupled with a consistent verbal sexual hostile aggressiveness. Hence, there was no need to reach further than the facts to locate the necessary gender-based animus.

In a pair of cases closer to home, so to speak, the Southern District of New York has required a much more demanding showing to survive dismissal of VGM claims. In *Garcia v Comprehensive Ctr., LLC* (2018 WL 3918180, 2018 US Dist Lexis 138983 [SD NY 2018]), the court dismissed a New York City VGM claim notwithstanding that the plaintiff's supervisor acted with overt hostility to her, was verbally crude in a sexual manner and seemed to insinuate that the conditions of her employment would improve if she granted him sexual favors. The facts clearly showed that the defendant was hostile to the plaintiff and

expressed that hostility in gender-based sexual terms even if he did not physically assault her sexually. The court concluded, nevertheless, that the pleadings failed to sufficiently allege that the defendant's actions were motivated by animosity or malevolent ill will towards women, as distinct from gender-based hostility towards this woman. The decision in *Hughes v Twenty-First Century Fox, Inc.* (304 F Supp 3d 429, 455 [SD NY 2018]), describing the VGM law as seldom used and observing the relative absence of case law, also interpreted its gender animus requirement in terms of feelings of animosity and malevolent ill will towards women, as distinct from this woman. The facts, starting with a rape but followed by an extended ongoing sexual relationship which, the plaintiff alleged, became professionally necessary but remained coercive, may have had some unspoken salience in how the VGM pleadings were evaluated. However, the decision here, too, seemed to look broadly at whether the pleadings established that the defendant was hostile towards women as a gender in a collective sense. Despite the egregious conduct alleged in that case and the alleged retaliation against the plaintiff when she broke off what she characterized as a coerced sexual relationship with Fox's Charles Payne, the court dismissed the VGM claim in the absence of specific allegations that the defendant harbored animosity towards women, seemingly as a category.

I do not read the VGM law as requiring such a categorical requirement. In this I join the majority. As the majority suggests, when a defendant has perpetrated a crime of sexual violence against a woman, requiring for pleading purposes that the plaintiff also establish at least the rudiments of a broad-based hostility against women in a categorical sense, this might impose almost insuperable barriers to the plaintiff stating a claim under this law. This could effectively eviscerate the remedial goals of the VGM law.

Since I think that we can dispense with that categorical requirement, we need not reach to deem the sexual assault itself to satisfy the requirement of sexual hostility. That strikes me as a conflation of two somewhat different showings - that gender was the reason for the sexual assault, as rape obviously is, and that, additionally, an animus - a hostility - against the victim related to *her gender*, not the female gender generally, which motivated the sexual assault.

I think that the facts of this case, including defendant's alleged satisfaction in inducing fear in plaintiff and his threatening accusation that she had, in effect, invited his sexual aggression, amply support both showings. Hence, I am reluctant to reach as far as the majority does to equate the required animus with the lack of consent itself.

Order, Supreme Court, New York County (Robert R. Reed, J.), entered August 15, 2018, modified, on the law, to grant defendant's motion to strike the Jane Doe allegations, and otherwise affirmed, without costs.

Opinion by Moulton, J. All concur except Tom, J.P. who concurs in a separate Opinion.

Tom, J.P., Gesmer, Kern, Moulton, JJ.

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

ENTERED: DECEMBER 26, 2019

CLERK

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

John W. Sweeny, Jr., J.P.
Rosalyn H. Richter
Barbara R. Kapnick
Cynthia S. Kern
Anil C. Singh, JJ.

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Fireman's Fund Insurance Company,
et al.,
Plaintiffs-Respondents,

-against-

State National Insurance Company,
Defendant-Appellant.

_____x

Defendant appeals from an order of the Supreme Court, New York County (Nancy M. Bannon, J.), entered July 10, 2018, which granted plaintiffs' motion for summary judgment declaring that they are additional insureds under an insurance policy issued by defendant to nonparty Upgrade, and are entitled to coverage under that policy in connection with the underlying personal injury action, and that the policy is primary, and so declared, and denied defendant's cross motion for summary judgment, inter alia, declaring that it is not obligated to defend or indemnify plaintiffs in the underlying action.

Stonberg Moran LLP, New York (Sherri N. Pavloff of counsel) and Farber Brocks & Zane L.L.P., Garden City (Tracy L. Frankel of counsel), for appellant.

Kritzer Law Group, Smithtown (Karl Zamurs of counsel), for respondents.

KAPNICK, J.

At issue in this appeal is whether plaintiffs Windsor Apartments, Inc. (Windsor) and Argo Real Estate, LLC (Argo) are additional insureds under a policy issued by defendant State National Insurance Company (State National) to nonparty Upgrade Contracting Company, Inc. (Upgrade), arising out of the operations of Upgrade in connection with an underlying personal injury action. Because the language of the additional insured endorsement must be construed broadly, the motion court correctly held that plaintiffs Windsor and Argo are additional insureds under the policy, and that the coverage provided under that policy is primary.

The underlying personal injury action involved a trip and fall in October 2014 at premises owned by plaintiff Windsor and managed by plaintiff Argo. Prior to the accident, Windsor had contracted with Upgrade to perform "exterior restoration of exposed concrete catwalks . . . and other repairs" in connection with a renovation project at the premises to restore the outside passageways on each floor of the building. Upgrade's work had been completed prior to the accident. The contract called for Upgrade to waterproof the walking surfaces including the catwalks, but did not obligate Upgrade to choose the paint color for the waterproofing project. The contract required Upgrade to obtain insurance for its work and to name Windsor, Argo, the

architect, and others specified in the contract as additional insureds on a primary basis. The Upgrade contract also required Upgrade to indemnify and hold harmless the owner, its agents, and employees "from . . . all claims, losses, damages or liability arising out of or in connection with the operations and performance of the Work specified under this Contract."

Defendant State National issued a commercial general liability (CGL) policy to Upgrade during the relevant time period. The policy contained a "Blanket Additional Insured" Endorsement that limited coverage to operations performed by or on behalf of Upgrade:

> "It is agreed that this Policy shall include as additional Insureds any person or organization to whom the Named Insured [Upgrade] has agreed by written contract to provide coverage, but only with respect to operations performed by or on behalf of the Named Insured and only with respect to occurrences subsequent to the making of such written contract."

The State National policy also stated that its coverage was primary, with exceptions not applicable here, for damages arising out of the premises or operations for which an entity is added as an additional insured.

The policy issued by plaintiff Fireman's Fund Insurance Company (Fireman's) to Windsor and Argo provided that coverage was excess when its insureds, Windsor and Argo, have other primary insurance available to them covering liability for damages arising out of the premises or operations for which they

have been added as an additional insured.

In 2015, Mary Jane Schudde commenced the underlying action against Windsor, Argo (and eventually against the architectural firm [Bertolini] as well) in Supreme Court, Orange County, alleging that she sustained injuries when she fell while attempting to pass through a door leading from an interior vestibule to an outdoor passageway on the 14th floor of the subject premises. There was a single step down from the vestibule to the passageway. The complaint alleged negligence against Windsor for the lack of color differentiation on the flooring surfaces, thereby creating an illusion of a flat surface, specifically as follows:

> "[I]n painting the surface beyond the threshold strip of the aforesaid door, the riser and the passageway floor with the same high solid battleship gray paint creating the exact color and texture of all surfaces in an area where there is a change in elevation, where the riser height is relatively low causing an individual with normal depth perception to be less likely to perceive the change in elevation quickly enough to accommodate that person's step forward and under circumstances where the change of elevation occurs a very short distance from the door threshold onto the passageway surface rendering the change in elevation not immediately apparent . . .; in failing to incorporate visual clues at the leading edge of the threshold step; in failing to place a sign so as to warn of the elevation change when leaving the vestibule onto the passageway; in failing to resurface or paint the tread and passageway with contrasting colors; in failing to have installed on the nosing or leading edge of the tread so as to be viewable in de[s]cent a coloring identifying a step or change in elevation."

Windsor and Argo commenced a third-party action for contractual indemnification against Upgrade and the architectural

firm.

Fireman's third-party administrator tendered the defense and indemnification of Windsor and Argo to State National on July 6, 2015, alleging that Upgrade changed the existing contrasting colors on the steps and the catwalks and painted them the same color.[1] After the third-party administrator provided a copy of the Upgrade contract and photographs of the accident site, State National refused tender on September 11, 2015 on the ground that, among other things, it did not appear that Upgrade was responsible for choosing the paint colors.

By summons and complaint dated October 5, 2015, Windsor and Argo (and their insurer Fireman's) commenced this declaratory judgment action, seeking additional insured coverage for the underlying action. Discovery in the underlying action revealed that Upgrade performed masonry, roofing and waterproofing, and that Upgrade had bid on the specifications provided for in the project after the waterproofing product to be used - "Kemper Waterproofing System" - had already been chosen. Kemper is a grainy, multi-layer process in which two clear membranes are applied, topped by a sealer that, in this instance, was battleship gray in color. Upgrade provided a sample board with a

[1]That Upgrade painted over steps and a catwalk that previously had contrasting colors, with one color, supports plaintiffs' assertion that Schudde's accident was with respect to Upgrade's "operations" as per the additional insured endorsement.

final gray coat on it that was shown to the building's board of directors for final approval.

In July 2017, all of the defendants in the personal injury action moved for summary judgment dismissing the complaint, and Upgrade moved for summary judgment dismissing the third-party complaint. By decision and order dated September 25, 2017, Supreme Court, Orange County denied defendants' motions but granted summary judgment to Upgrade and dismissed the third-party complaint. Regarding the claim for common law indemnification, the court held that because Schudde's claim against Windsor was predicated solely on Windsor's own negligence, Windsor could not obtain common-law indemnification from Upgrade. It also dismissed the claim for contractual indemnification, noting that Upgrade had simply followed the architect's plans and specifications to waterproof the entire passageway in one color and that there had been no proof of negligence on the part of Upgrade.

Following discovery in this declaratory judgment action, plaintiffs moved for summary judgment and a declaration that State National (Upgrade's insurer) must provide additional insured coverage to Windsor and Argo. Defendant cross-moved for summary judgment seeking a declaration that it was not obligated to defend and indemnify Windsor or Argo because they are not additional insureds under the policy in light of Supreme Court's

grant of summary judgment to Upgrade dismissing the third-party complaint in the *Schudde* action.

By order dated July 9, 2018, Supreme Court granted plaintiffs' motion for summary judgment and denied defendant's cross-motion for summary judgment. The court reasoned that the additional insured endorsement required only that the accident arose from the work performed by Upgrade, not that the injuries were caused by that work. It concluded that notwithstanding dismissal of the third-party complaint against Upgrade in the underlying action, Windsor and Argo are additional insureds because the accident "arose out of" Upgrade's operations of painting the steps and the floor where plaintiff fell.

The broadly worded additional insured endorsement in Upgrade's policy provides coverage to Windsor and Argo "with respect to operations performed by or on behalf of" Upgrade. The endorsement in *Worth Constr. Co., Inc. v Admiral Ins. Co.* (10 NY3d 411 [2008]), relied upon by appellant, was similar in that it provided coverage to the general contractor, Worth, with respect to subcontractor Pacific's operations, in constructing a staircase in an apartment complex. However, the facts of that case are significantly distinguishable. The plaintiff in the *Worth* underlying personal injury action was an ironworker. He alleged that he slipped on fireproofing that had been installed on the completed staircase by a different subcontractor (not

Pacific, the named insured). By its own admission, Worth had conceded that the accident did not arise out of Pacific's work or operations and agreed that its third-party claim against Pacific should be dismissed (*id.* at 414-415). The Court thus held that Worth was not an additional insured. While noting that "[g]enerally, the absence of negligence, by itself, is insufficient to establish that an accident did not 'arise out of' an insured's operations" and that "[t]he focus of a clause such as the additional insured clause here 'is not on the precise cause of the accident but the general nature of the operation in the course of which the injury was sustained'" (*id.* at 416 [internal citations omitted]), the Court concluded that Worth was not covered under Pacific's policy:

> "Here, it is evident that the general nature of Pacific's operations involved the installation of a staircase and handrails. An entirely separate company was responsible for applying the fireproofing material. At the time of the accident, Pacific was not on the job site, having completed construction of the stairs, and was awaiting word from Worth before returning to affix the handrails. The allegation in the complaint that the stairway was negligently constructed was the only basis for asserting any significant connection between Pacific's work and the accident. Once Worth admitted that its claims of negligence against Pacific were without factual merit, it conceded that the staircase was merely the situs of the accident. Therefore, it could no longer be argued that there was any connection between Murphy's accident and the risk for which coverage was intended" (*id.*).

Here, however, in contrast, the waterproofing was applied by Upgrade, not a different contractor, and the pathway was not just

the situs of the accident. Rather, plaintiff alleges that she fell *because* of the pathway, specifically because the waterproofing applied by Upgrade was all the same color. The application of the waterproofing was clearly within Upgrade's operations, even though Upgrade did not choose the color.

In *Regal Constr. Corp. v National Union Fire Ins. Co. of Pittsburgh, PA* (15 NY3d 34 [2010]), the Court of Appeals interpreted a similar clause, which provided additional insured coverage to a construction manager with respect to liability arising out of the general contractor Regal's ongoing operations. There, unlike in *Worth*, the Court held that the additional insured endorsement did apply (*id.* at 39). One of Regal's employees - the project manager - had slipped at the work site on a floor joist that had recently been painted by the construction manager's employee. The Court held that the injury "arose out of" Regal's general contractor's operations even though the accident was allegedly caused by the construction manager's negligence (*id.* at 38). The Court reasoned that *Regal* was "factually distinct" from *Worth*:

> "Here, there was a connection between the accident and Regal's work, as the injury was sustained by Regal's own employee while he supervised and gave instructions to a subcontractor regarding work to be performed. That the underlying complaint alleges negligence on the part of [the construction manager] and not Regal is of no consequence, as [the construction manager's] potential liability for [plaintiff's] injury 'ar[ose] out of' Regal's operation and, thus, [the construction manager] is entitled to a defense and indemnification according

to the terms of the CGL policy" (*id*. at 38).

Notably, the dissenting opinion in this Court in *Regal* applied a narrow interpretation of the meaning of the word "operations," much like appellant does here (64 AD3d 461, 467 [1st Dept 2009][McGuire, J., dissenting]).[2] The Court of Appeals disagreed with the dissent's analysis and affirmed the majority's holding that the additional insured endorsement applied.

In this case, as in *Regal*, but unlike in *Worth*, there was a connection between the accident and the named insured's operations. The connection in *Regal* was that the person who was injured was a Regal employee who was injured on the job site, although not through any negligence of Regal. The connection here is that the plaintiff slipped and fell on a walkway that had been waterproofed by Upgrade, although her fall was not caused by any negligence on Upgrade's part. The reasoning of *Regal* is properly applied here even though the injured party (Ms. Schudde) was a visitor to the premises and not an employee of any party.[3]

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[2]The dissent posited that if the injured Regal employee had alleged only that "he tripped and fell as a result of banana peels carelessly left on the joist by an employee of [the construction manager]," it would be hard to see how the construction manager could be an additional insured under the Regal policy. The dissent further reasoned that the underlying complaint in the Regal action "cannot be distinguished from that hypothetical complaint because it . . . does not allege any conduct by Regal on the basis of which Regal's liability to [its employee] might be found" (64 AD3d at 466).

[3] See discussion of cases involving employees in *Turner Constr. Co. v Am. Mfrs. Mut. Ins. Co.* (485 F Supp 2d 480, 489 [SD

In both cases, there was no negligence on the part of the named insured in performing its operations, but the accident "arose out of" those operations. Thus here, as in *Regal*, the additional endorsement coverage applies.[4]

Turner Constr. Co. v Am. Mfrs. Mut. Ins. Co. (485 F Supp 2d 480 [SD NY 2007], *affd* 341 F Appx 684 [2d Cir 2009]), where the Second Circuit applied New York law and relied on *Worth*, is instructive. In that case, Turner entered into a construction management consulting agreement for renovation work at a synagogue in Manhattan. Trident Mechanical Systems, Inc. (Trident) was the synagogue's heating ventilation and air conditioning (HVAC) contractor on the renovation project.

The agreement between the synagogue and Trident provided that the synagogue and Turner be named as additional insureds under Trident's insurance policies with respect to liability arising out of "your work" (*id.* at 484). A fire occurred at the synagogue which was started by an employee of Aris, the roofing subcontractor, which was working on the roof that had been cut

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NY 2007]), *affd* 341 F Appx 684 [2d Cir 2009]), where the court held that whether the plaintiff in the personal injury action is an employee actively on the job does not change the analysis.

[4] The Court of Appeals recently emphasized that there is a material difference between the phrases "caused by" and "arising out of"(*Burlington Ins. Co. v NYC Tr. Auth.*, 29 NY3d 313, 323-324 [2017]).

out for the installation of the air conditioning units to be installed by Trident. On the date of the incident, the Aris employee was using a propane torch, which started the fire.

To recover amounts paid to the synagogue under its fire insurance policy, Wausau Business Insurance Company, as subrogee of the synagogue, brought an action against Turner, the construction manager for the renovation project; Amis, Inc., the general contractor; and Aris, the roofing contractor. At a bifurcated liability trial, the jury apportioned liability as follows: Turner, 50%; Aris, 30%; Amis, 15%, Central Synagogue, 5%; Trident, 0% (*id.* at 483).

A settlement was reached prior to the damages portion of the trial, and Turner paid all of the settlement amounts for each party. It then sought indemnification from Trident's insurer as an additional insured under Trident's policy. Because the jury in the tort action involving Trident, Turner and others had found that Trident was not negligent, the District Court ruled that res judicata barred Turner's indemnification action.

On appeal, Turner argued that the verdict absolving Trident of negligence in its work at the synagogue was irrelevant to the insurers' duty to indemnify Turner because the policy provided for indemnification if Turner's liability arose out of the named insured Trident's work, not simply Trident's negligent work. The Second Circuit agreed, holding that "[w]hether a party was

'negligent' in its performance of work is a question distinct from whether that work caused an accident or exacerbated the damages of such accident" (*Turner Constr. Co. v Kemper Ins.* Co., 198 Fed Appx at 30). The Circuit Court remanded to the District Court for a determination as to whether Turner's liability arose out of Trident's work. Upon remand, the District Court found:

> "Turner's liability for the resulting property damage at the Synagogue . . . arose out of, or was connected to, Trident's work, even though Trident was held not to be negligent. The resulting damages, for which Turner was held liable, were incident to and had connection with Trident's work, which was insured by the Policies" (485 F Supp 2d at 489-490).

Significantly, the District Court rejected the insurer's argument that cases involving a contractor's employee (as was the case in *Regal*) are distinguishable from those that do not when a court is interpreting an additional insured endorsement.

> "[A]lthough the Defendants have sought to distinguish the subcontractor's employee's injury cases cited by Turner [ ], these cases all stand for the proposition that liability of a general contractor can arise from the non-negligent work of a subcontractor where the subcontractor's work is involved or implicated in the injury. That an injured employee is actively on the job does not change the 'arising out of' analysis, which 'focuses not upon the precise cause of the accident, as defendants urge, but upon the general nature of the operation in the course of which the injury was sustained'"(485 F Supp 2d at 489 [citation omitted]).

The Second Circuit subsequently affirmed the grant of summary judgment to Turner, citing *Worth*, "on the basis that Turner's liability for the fire 'arose out of' the work of Trident and was

thus covered by insurance policies that Trident had procured" (341 Fed Appx at 686).

In sum, since the injury to the plaintiff in the underlying action here "arose out of" Upgrade's operation of painting the walkways, plaintiffs are additional insureds under the State National policy and the policy is primary in connection with the underlying action.

Accordingly, the order of the Supreme Court, New York County (Nancy M. Bannon, J.), entered July 10, 2018, which granted plaintiffs' motion for summary judgment declaring that they are additional insureds under an insurance policy issued by defendant to nonparty Upgrade, and are entitled to coverage under that policy in connection with the underlying personal injury action, and that the policy is primary, and so declared, and denied defendant's cross motion for summary judgment, inter alia, declaring that it is not obligated to defend or indemnify plaintiffs in the underlying action, should be affirmed, without costs.

All concur.

Order, Supreme Court, New York County (Nancy M. Bannon, J.),

entered July 10, 2018, affirmed, without costs.

Opinion by Kapnick, J. All concur.

Sweeny, J.P., Richter, Kapnick, Kern, Singh, JJ.

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

ENTERED: DECEMBER 26, 2019

CLERK

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

Sallie Manzanet-Daniels, J.P.
Peter Tom
Barbara R. Kapnick
Ellen Gesmer
Anil C. Singh, JJ.

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Mamidou Barry, as Administrator of the Estate of Mariama Bah,
Plaintiff-Appellant,

-against-

Christopher C. Lee, M.D., et al.,
Defendants-Respondents.
_____x

Plaintiff appeals from a judgment of the Supreme Court, Bronx County (Joseph E. Capella, J.), entered April 16, 2019, dismissing the complaint, and bringing up for review an order, same court and Justice, entered March 29, 2019, which granted defendants' motion for summary judgment dismissing the complaint.

Landers & Cernigliaro, P.C., Carle Place (Stanley A. Landers of counsel), for appellant.

Wilson Elser Moskowitz Edelman & Dicker LLP, New York (Judy C. Selmeci of counsel), for respondents.

MANZANET-DANIELS, J.

Plaintiff's expert affidavit raises triable issues of fact that cannot be resolved on this motion for summary judgment.

The 37-year-old decedent was a mother of six who had recently given birth. She was admitted to defendant Bronx-Lebanon Hospital Center before noon on February 8, 2017. Defendant Dr. Lee diagnosed her soon thereafter as suffering from a pulmonary embolism, an acute condition requiring prompt emergency treatment. She was both tachycardic and tachypnic and complained of dizziness and shortness of breath. She remained tachycardic, which is an indicator that a patient is hemodynamically unstable, during the entire time she was at the hospital. The dissent assumes that because decedent's systolic blood pressure was above 90 that she was "hemodynamically stable," apparently misapprehending the term.[1] Decedent was exhibiting signs of distress including a rapid heartbeat, an elevated rate of breathing, and shortness of breath, all signs of

[1]Hemodynamic instability is defined as perfusion failure or one or more out-of-range vital sign measurements. Signs of hemodynamic instability include shortness of breath and a rapid heart rate (both of which were exhibited by decedent). Low blood pressure is considered a late sign (*see* Stedman's Medical Dictionary). Indeed, plaintiff's expert noted that "[t]he fact that Ms. Bah's heart rate, 151 upon admission, remained consistently high is [an] indication that she was hemodynamically unstable."

an effort to maintain oxygenation.[2]

Despite the prognosis, staff waited hours for blood tests and an angiogram to confirm the diagnosis. The staff did not administer tissue plasminogen activator (tPA), which can dissolve clots and open arteries in 10-15 minutes. While defendants' expert opined that it would have been inappropriate to administer tPA based on decedent's blood pressure readings, plaintiff's expert squarely disagreed. Defendants' main premise is that tPA, which has the potential to create uncontrollable bleeding, is contraindicated for a patient who is already bleeding; however, neither Dr. Lee nor defendants' expert ever stated that tPA was contraindicated for decedent because she had reported postpartum bleeding.

Dr. Lee testified that, although there is a six-hour window within which tPA must be given following the appearance of symptoms, he did not order it in decedent's case even after receiving CT scan test results confirming his initial differential diagnosis that decedent had a pulmonary embolism

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[2]The dissents misstates our position. We are not "adopting" either party's position. We merely note that plaintiff has raised questions of fact sufficient to defeat the summary judgment motion, including as to whether the information available to defendants supported a determination that she was hemodynamically unstable, and therefore appropriately treated with a thrombolytic therapy such as tissue plasminogen activator.

because "[w]e do not, as physicians, give tPA for PE [pulmonary embolism]." Dr. Lee did not expand on this testimony, but its plain inference is that his practice was not to administer tPA for pulmonary embolism under any circumstance.[3]

At 3:59 – nearly four hours after she arrived at the emergency department – decedent was put on heparin, a drug that prevents clots but cannot quickly dissolve them. Defendants' expert attempts to explain the delay in administering heparin by opining that staff was awaiting the results of blood tests to rule out clotting risks. Those tests, which were normal, were reported 1½ -2½ hours before staff began administration of heparin.[4] To the extent that Dr. Lee may have meant, but did not

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[3]The dissent claims that this is a "mischaracteriz[ation]" of Dr. Lee's testimony, but it is the plain meaning of a direct quote from his sworn testimony, and the opposing writer offers no other possible interpretation of those words. It may be, as discussed below, that Dr. Lee meant something different from what he said, but the dissent also does not identify any additional testimony of Dr. Lee's that clarifies this statement. In any event, to the extent that Dr. Lee's testimony is susceptible of more than one meaning, this further demonstrates a triable issue of fact precluding summary judgment.

[4]Contrary to the dissent's claim that plaintiff's expert failed to address defendants' claims regarding the risk of hemorrhage, Dr. Sixsmith noted that decedent's blood test results reported at 12:46 p.m. were normal, thus suggesting decedent was not anemic. Similarly, the dissent's claim that Dr. Sixsmith did not address how decedent met the criteria for tPA treatment is incorrect. She noted that the medical literature she cited suggests thrombolytic therapy for patients with acute pulmonary embolism and low bleeding risk, and noted that Dr. Lee's

say, that tPA was contraindicated for decedent because she had told him of postpartum bleeding, Dr. Lee testified that he had received decedent's blood test results confirming that she was not anemic approximately 1½ hours before he received the CT scan results confirming his diagnosis of pulmonary embolism. Accordingly, by the time the pulmonary embolism diagnosis was confirmed, he was aware that her postpartum bleeding was not severe enough to cause her to be anemic.

At 4:20, over four hours after she had been admitted to the hospital and diagnosed as suffering from a pulmonary emobolism, decedent became bradycardic and her oxygen saturation level plummeted and she went into cardiac arrest. It was only then, two minutes prior to cardiac arrest, that staff administered tPA. The treatment rendered to decedent, in the words of plaintiff's expert, was "too little too late."

Defendants' expert noted that decedent's elevated D-Dimer assay results were associated with venous thrombosis, but opined that it was appropriate to await confirmation of the diagnosis via CT angiogram. He noted that heparin was ordered by Dr. Lee at 3:29, within five minutes of learning of the results of the angiogram. Defendants' expert opined that treatment of decedent

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diagnosis of pulmonary embolism and the blood test results met these criteria.

with heparin under the circumstances was appropriate, but conceded that the process of breaking down a clot with heparin "occurs slowly over time, generally taking place over a period of days to weeks." Defendants' expert opined that tPA was not indicated unless a patient had a confirmed diagnosis of pulmonary embolism and persistently less than 90 systolic blood pressure and that decedent was not a candidate for the drug. In his opinion, the benefits of tPA did not outweigh the risks of bleeding and death.

A plaintiff is only required to raise a triable issue of fact as to causation where the defendant makes a prima facie showing that a claimed departure was not a proximate cause of the plaintiff's injuries (*see Stukas v Streiter*, 83 AD3d 18, 30 [2d Dept 2011]). While defendants' expert opines that treatment of decedent was in accordance with the standard of care, he offers no opinion on causation other than to state that administration of heparin earlier would not have changed the results and that decedent's rapid deterioration and death was not due to any act or omission on the part of defendants. He does not address the proposition that prompt administration of tPA would have increased decedent's chances of survival.[5]

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[5]The dissent states that defendants' expert opined that "decedent's outcome would not have been different if. . . she had

The dissent suggests that defendants' expert opined that tPA was contraindicated because of decedent's postpartum bleeding; the dissent, however, relies on a partial quote from defendants' expert's affidavit. The complete sentence is: "The patient reported ongoing vaginal bleeding in her post-partum state, which increased her risk for bleeding complications *with Heparin*" (emphasis added). This statement has no bearing on whether he believed that tPA was contraindicated.

Since defendants' claim of entitlement to summary judgment rests on their allegation that tPA was contraindicated based on decedent's report of postpartum bleeding, but neither Dr. Lee nor defendants' expert so stated, defendants have failed to make a prima facie showing of entitlement to judgment as a matter of law by establishing the absence of a triable issue of fact as to whether there was a departure from accepted standards of medical practice. Accordingly, plaintiff was not required to present evidence that such a departure was a proximate cause of Ms. Bah's death (*see Foster-Sturrup v Long*, 95 AD3d 726 [1st Dept 2012]).

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been administered a thrombolytic drug." This is inaccurate. While defendants' expert states that decedent was not a candidate for tPA based on her blood pressure readings, as discussed above, he does not state anywhere in the record that administration of tPA, before she went into cardiac arrest, would have made no difference to her outcome.

Even assuming, arguendo, that defendants made a prima facie case, the affidavit of plaintiff's expert raises triable issues of fact requiring a trial. Plaintiff's expert opined that it was a departure not to order stat blood work after the diagnosis of pulmonary embolism had been made, and a departure not to promptly administer a thrombolytic drug (tPA or similar) to bust the clots that were impeding blood flow to decedent's lungs. She opined that it was a departure to wait three hours for the CT angiogram and a departure not to administer heparin until 3 hours and 46 minutes after the diagnosis of pulmonary embolism had been made. She further opined that decedent's vital signs indicated that she was hemodynamically unstable, making her a candidate for tPA treatment far earlier than she received it. She opined that these departures specifically caused decedent to lose a substantial probability to survive, sufficiently placing both negligence and causation in issue (*see e.g. Flaherty v Fromberg*, 46 AD3d 743, 745 [2d Dept 2007] ["(a)s to causation, the plaintiff's evidence may be deemed legally sufficient even if its expert cannot quantify the extent to which the defendant's act or omission decreased the plaintiff's chance of a better outcome or increased his injury, as long as evidence is presented from which the jury may infer that the defendant's conduct diminished the plaintiff's chance of a better outcome or increased his

injury"]).

Given the timeline and the delays in administering care (not only in administering tPA, but in administering heparin or other treatment) and the specific departures from the standard of care delineated by plaintiff's expert, it is disingenuous to assert that her opinion is "conclusory" and insufficient to raise an issue of fact as to causation.[6] Indeed, the plain import of plaintiff's expert's opinion is that administration of tPA would have dissolved the clot within 10-15 minutes and averted cardiac arrest. A pulmonary embolism blocks the normal flow of blood and is life-threatening for that very reason. Plaintiff's expert's opinion has raised a triable issue of fact as to whether, had defendants acted promptly instead of waiting over four hours to administer heparin (let alone tPA), this tragic result might have been averted.

Accordingly, the judgment of the Supreme Court, Bronx County (Joseph E. Capella, J.), entered April 16, 2019, dismissing the complaint, and bringing up for review an order, same court and Justice, entered March 29, 2019, which granted defendants' motion for summary judgment dismissing the complaint, should be

[6]The dissent does not dispute that plaintiff's expert's affidavit raises triable issues of fact as to departures from the standard of care.

reversed, on the law, without costs, the judgment vacated, defendants' motion denied, and the complaint reinstated. Appeal from the foregoing order, unanimously dismissed, without costs, as subsumed in the appeal from the judgment.

All concur except Tom and Singh, JJ. who dissent in an Opinion by Singh, J.

SINGH, J. (dissenting)

I respectfully dissent as Supreme Court properly granted defendants' motion for summary judgment dismissing the complaint. First, defendants established that decedent's mortality risk from the administration of a thrombolytic drug due to hemorrhage was greater than her mortality risk from a pulmonary embolism before her rapid deterioration. Second, plaintiff fails to address defendants' assertion that decedent's outcome would not have been different if she had been diagnosed with a pulmonary embolism earlier; or had been administered heparin earlier; or had been administered a thrombolytic drug earlier. Third, plaintiff fails to address defendants' detailed evaluation of decedent's risk of death from pulmonary embolism as opposed to her risk of death from hemorrhage if she had been treated with a thrombolytic drug. Finally, plaintiff fails to state that defendants' acts or omissions were a proximate cause of decedent's death, ignoring the issue of causation altogether.

This action arises from the death of a 37-year-old who was admitted to defendant Bronx-Lebanon Hospital Center just after noon on February 8, 2017. Defendant Dr. Lee was the emergency room physician who examined and treated the patient. Among other things, decedent complained of chest pain, dizziness, sudden heart palpitations and shortness of breath. Decedent also noted

that she had given birth one month earlier and since then had experienced vaginal bleeding. By 12:13 p.m. decedent was assessed to be experiencing a pulmonary embolism. At that point the hospital records note that she was alert and oriented and no longer in distress.[1]

Dr. Lee conducted various tests to confirm that she indeed was experiencing a pulmonary embolism, and her condition was confirmed by 3:29 p.m. Decedent was treated with a heparin injection at 3:59 p.m., followed by a heparin drip which was started at 4:02 p.m. The wait between her confirmed diagnosis at 3:29 p.m. and the commencement of heparin treatment was per "hospital protocol,"[2] which required conducting a number of other relevant tests to confirm a patient's low risk of hemorrhage. Throughout this process, decedent was reported as in "stable condition" and not in "acute distress."

Shortly thereafter, decedent's condition rapidly

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[1] Although the majority contends that "[d]ecedent was exhibiting signs of distress . . . to maintain oxygenation," it does not clarify that these signs quickly disappeared and only reappeared at 4:22 p.m., right before she suffered cardiac arrest as evidenced by her medical charts in the record.

[2] The majority mischaracterizes Dr. Lee's testimony, stating that it was his practice "not to administer tPA for [pulmonary embolism] under any circumstance." However, Dr. Lee said nothing of the sort. He testified that her case did not warrant a thrombolytic. In any event, Dr. Lee's subsequently administrated a thrombolytic when decedent was confirmed to be experiencing a pulmonary embolism and her condition deteriorated.

deteriorated. At 4:25 p.m., decedent went into cardiac arrest. In response, hospital personnel administered a thrombolytic drug. Decedent was pronounced dead at 5:08 p.m.

The gravamen of plaintiff's medical malpractice claim is that defendants should have promptly treated decedent with a thrombolytic drug, such as tissue plasminogen activator (tPA) or strepokinase, instead of, or in addition to, heparin before she went into cardiac arrest.

Defendants moved for summary judgment supported by an expert affirmation from Dr. Mark Silberman, an internist certified in emergency and pulmonary medicine. Dr. Silberman made a prima facie showing that the decision to treat decedent with heparin and not a thrombolytic drug was not a departure from the standard of care and did not proximately cause decedent's death (*Frye v Montefiore Med. Ctr.*, 70 AD3d 15, 24 [1st Dept 2009]; *Foster-Sturrup v Long*, 95 AD3d 726, 727-728 [1st Dept 2012]).

Dr. Silberman opined that, given that decedent was hemodynamically stable, was not in acute distress, but had "reported ongoing vaginal bleeding in her post-partum state, which increased her risk for bleeding complications with heparin," it was important "to confirm the presence of [a pulmonary embolism] prior to exposing the patient to the risks posed by Heparin." While the majority notes that this statement

just applies to the administration of heparin, it fails to address the remainder of Dr. Silberman's affidavit where he states that "tPA was contraindicated" in decedent's specific case.

Moreover, plaintiff's expert cites to medical journals that also make the same point. Additionally, while the majority is correct in contending that defendants never argue that "tPA was contraindicated based on decedent's report of postpartum bleeding," defendants state that tPA was contraindicated for decedent for a variety of other reasons, including the fact that decedent did not "ha[ve] shock manifested by abnormally low blood pressure, persistently less than 90 systolic," and that she was consistently listed as in "stable condition."

Specifically, Dr. Silberman opined that decedent was not a candidate for treatment with a thrombolytic drug, which undisputedly carries an even greater risk of hemorrhage. Thus, decedent's chance of survival would have actually *decreased* if she had been administered a thrombolytic drug before her rapid deterioration, because her risk of dying from complications from a hemorrhage would have been greater than her risk of dying from pulmonary embolism. I note that plaintiff's expert fails to discuss or refute this contention, completely ignoring the topic of proximate cause of decedent's death, and her risk of

hemorrhage if given tPA.

Dr. Silberman also explained when it would be appropriate to administer a thrombolytic drug, stating that "[t]hese medications are indicated in [a] patient who first had a confirmed diagnosis of pulmonary embolism, and second has shock manifested by abnormally low blood pressure, persistently less than 90 systolic." However, because decedent was hemodynamically stable with consistent normal blood pressure measurements since her admission, presented no labored breathing, was speaking in full sentences up until 4:22 p.m., and exhibited a hemorrhage risk, she "did not meet the criteria for the administration of thrombolytic therapy" as her mortality risk from pulmonary embolism did not supersede the risks presented by a thrombolytic drug.

I do not agree with the majority that Dr. Silberman offered "no opinion on causation," and that he did "not address the proposition that prompt administration of tPA would have increased decedent's chances of survival." In fact, Dr. Silberman gave a lengthy and detailed discussion on the use of thrombolytics, and concluded that "decedent's rapid deterioration . . . and subsequent death was not to any act or omission on the part of [d]efendants." Most significantly, Dr. Silberman opined that decedent's outcome would not have been different if she had

been diagnosed with a pulmonary embolism earlier, had been administered heparin earlier, or had been administered a thrombolytic drug.

Plaintiff opposed summary judgment upon an expert affirmation by Dr. Diane Sixsmith, a physician certified in internal and emergency medicine. She opined that although defendants' diagnosis and course of testing were correct, defendant provided untimely and improper treatment. She disagreed with Dr. Silberman's opinion that a thrombolytic drug was an improper course of treatment, discussing various medical journals that indicated when it was appropriate to administer a thrombolytic. However, she failed to identify how decedent met most of these criteria.

Dr. Sixsmith disagreed that decedent had been hemodynamically stable, stating that "[t]he fact that [decedent's] heart rate, 151 upon admission, remained consistently high is indication that she was hemodynamically unstable." Dr. Sixsmith opines that this was sufficient nexus for defendants to administer a thrombolytic, as "[h]emodynamically unstable PE patients are candidates for treatment with [thrombolytics]."

The majority, seemingly adopting Dr. Sixsmith's implicit rejection of Dr. Silberman's definition of hemodynamically

stable, contends that since decedent was tachycardic (with an elevated heartrate), she was hemodynamically unstable "during the entire time she was at the hospital." However, this contention is not supported by the record. Although the majority asserts that I misapprehended the term hemodynamically stable by stating that decedent was hemodynamically stable since her systolic blood pressure remained consistently above 100 from 10:55 a.m. until 4:04 p.m., my definition of the term is supported by the record and is based on the affirmations of both Dr. Silberman *and* Dr. Sixsmith.

In contrast, the majority resorts to defining the term from a medical source outside the record, and this does not give defendants an opportunity to refute it. Further, I note that Dr. Sixsmith had the opportunity to challenge Dr. Silberman's definition and chose not to do so, tacitly acknowledging the significance of the undisputed fact that decedent's systolic blood pressure remained consistently above 100 from 10:55 a.m. until 4:04 p.m. I note that Dr. Sixsmith quotes from a medical journal that adopts Dr. Silberman's definition that "[t]hrombolytic therapy should be used in patients with Acute PE associated with hypotension (systolic BP <90 mm HG) who do not have a high bleeding risk."

Dr. Sixsmith opines that since decedent had been

administered a thrombolytic drug *after* suffering cardiac arrest, this indicates that there was *never* a risk in administering a thrombolytic drug, and the wait in administering one was a departure. She tersely concludes that this departure, among others, was "a cause of injury to [decedent] and specifically caused her to lose a substantial probability to survive." The majority argues that had defendants acted otherwise, "this tragic result might have been averted," because thrombolytics can "dissolve clots and open arteries in 10-15 minutes." However, there is no support in the record for a conclusion that in decedent's case the prompt administration of a thrombolytic would have increased her chances of survival, which required case-by-case analysis before administering a thrombolytic.

Additionally, the majority contends that the administration of a thrombolytic would have "averted cardiac arrest." There is no support for this statement in the record. Dr. Sixsmith does not reach this conclusion. In fact, Dr. Sixsmith does not even discuss the chances of cardiac arrest or hemorrhage occurring had a thrombolytic or heparin been administered earlier. Instead she simply concludes that the delay in completing testing, paired with the delay in administering a thrombolytic, and the delay in the administration of heparin, "specifically caused [decedent] to

lose a substantial probability to survive[3]." This statement far from establishes the requisite nexus between the malpractice allegedly committed and the harm suffered.

Dr. Sixsmith undermines her own assertions by annexing three excerpts from medical articles she relied upon in her assessment. These excerpts clearly state that thrombolytics are appropriate when patients exhibit "a low bleeding risk," and "who do not have a high bleeding risk." Significantly, the articles specifically state that "[p]atients with submassive PE are more challenging, and clinicians must carefully evaluate their clinical trajectory, comorbidities, and bleeding risk before administering thrombolytic therapy . . . [such patients] require case-by-case analysis" as to their course of treatment." Thus, Dr. Sixsmith not only fails to address whether or not decedent met the criteria of a "a low bleeding risk," but also agrees with defendants' case-by-case analysis, simply concluding that the failure to administer thrombolytic drugs "caused [decedent] to lose a substantial probability to survive," without explanation

[3] The majority argues that the staff "waited hours for blood tests and an angiogram to confirm the diagnosis," and attempts to correlate that with causation. However, Dr. Sixsmith relies on a medical article that states that "[p]atients with submassive PE are more challenging, and clinicians must carefully evaluate their clinical trajectory, comorbidities, and bleeding risk before administering thrombolytic therapy". Notably, plaintiff's expert agrees with Dr. Lee's course of testing, and simply contends that defendants took too long to complete them.

or correlation.

Additionally, Dr. Sixsmith fails to explicitly state that the departures she highlights proximately caused decedent's death, and that decedent would have had a substantial probability of survival had a thrombolytic drug been administered. Dr. Sixsmith does not address Dr. Silberman's detailed evaluation of decedent's risk of death from pulmonary embolism as opposed to her risk of death from hemorrhage if she had been treated with a thrombolytic drug. It is also undisputed that thrombolytics create an increased risk of hemorrhage.

In sum, Dr. Sixsmith's opinion on causation was insufficient to defeat defendants' motion for summary judgment, as her conclusory affirmation fails to address the specific assertions made by Dr. Silberman (*see e.g. Foster-Sturrup*, 95 AD3d at 728-729 [the plaintiff's expert affirmation failed to raise an issue of fact where it was conclusory and did not adequately address the defendants' expert affirmation]).

Accordingly, Supreme Court's order granting defendants summary judgment should be affirmed.

Judgment, Supreme Court, Bronx County (Joseph E. Capella, J.), entered April 16, 2019, bringing up for review an order,

same court and Justice, entered March 29, 2019, reversed, on the law, without costs, the judgment vacated, defendants' motion denied, and the complaint reinstated. Appeal from the foregoing order, dismissed, without costs, as subsumed in the appeal from the judgment.

Opinion by Manzanet-Daniels, J.P. All concur except Tom and Singh, JJ. who dissent in an Opinion by Singh, J.

Manzanet-Daniels, J.P., Tom, Kapnick, Gesmer, Singh, JJ.

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

ENTERED: DECEMBER 26, 2019

CLERK