SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

JANUARY 24, 2019

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

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

7765 & M-5479 The People of the State of New York, Respondent, Ind. 4781/13

-against-

Gary Harris,
Defendant-Appellant.

Robert S. Dean, Center for Appellate Litigation, New York (Alexandra L. Mitter of counsel), for appellant.

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

Judgment, Supreme Court, New York County (Charles H. Solomon, J. at speedy trial motion and first colloquy on self-representation; Michael Obus, J. at second colloquy; Laura A. Ward, J. at third colloquy, jury trial and sentencing), rendered July 21, 2016, as amended November 15, 2016, convicting defendant of criminal sale of a controlled substance in the third degree, and sentencing him, as a second felony drug offender previously convicted of a violent felony, to a term of six years, unanimously affirmed with respect to defendant's speedy trial

claim, and the appeal therefrom otherwise dismissed as moot.

The court properly denied defendant's speedy trial motion. In a postreadiness situation, delays not attributable to the People are excludable (*People v Anderson*, 66 NY2d 529, 536 [1985]). Because defendant elected to proceed pro se, but with standby counsel, the postreadiness delays caused by the unavailability of counsel cannot be attributable to the People, and were thus correctly excluded. We find it unnecessary to decide whether, in a prereadiness situation, a pro se defendant's standby counsel's consent to adjournments qualifies under CPL 30.30(4)(b) in the absence of express personal consent by the defendant. Once the delays relating to counsel are excluded, the remaining periods cited by defendant would not reach the threshold required for dismissal when added to time included by the court. In any event, we also find that these periods are not attributable to the People. Finally, we note that the motion court made express rulings on the relevant issues, and that defendant's procedural arguments are unavailing.

We are advised that, by order dated October 2, 2018, Supreme Court granted defendant's motion to vacate the judgment of conviction pursuant to CPL 440.10. Thus, with respect to the non-speedy trial claims, defendant's direct appeal from the judgment

of conviction must be dismissed as moot (*see People v Jackson*, 29 AD3d 328 [1st Dept 2006]).

M-5479 - *People v Gary Harris*

Motion to dismiss appeal denied as academic in light of the result reached herein.

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

ENTERED: JANUARY 24, 2019

CLERK

Renwick, J.P., Richter, Manzanet-Daniels, Gische, Tom, JJ.

7547N Metropolitan Bridge & Scaffolds Corp.,
Plaintiff-Respondent,

-against-

New York City Housing Authority,
Defendant-Appellant.

- - - - -

New York City Housing Authority,
Defendant-Third-Party Plaintiff-Appellant,

-against-

Liberty Architectural Products Co., Inc., et al.,
Third-Party Defendants-Respondents.

Index 653507/13

Kelly D. MacNeal, New York (Lauren L. Esposito of counsel), for appellant.

Mastropietro Law Group, PLLC, New York (Eric W. Gentino of counsel), for respondents.

Order, Supreme Court, New York County (Eileen Bransten, J.), entered April 2, 2018, which, to the extent appealed from as limited by the briefs, granted plaintiff and third-party defendants' motion to compel defendant/third-party plaintiff New York City Housing Authority (NYCHA) to comply with discovery orders to the extent of ordering NYCHA to produce discovery material previously redacted on the ground of attorney-client privilege by April 5, 2018 and to pay a fine of $300 per day for

each day thereafter that it failed to disclose the material, to pay $3,000 as a sanction for its behavior during discovery and for violation of prior court orders, and to certify that it did not possess additional documents responsive to the discovery demands or court orders, modified, on the facts and as an exercise of discretion, to vacate the $300 per day fine and the requirement that defendant furnish a certification pursuant to *Jackson v City of New York* (185 AD2d 768 [1st Dept 1992], and otherwise affirmed, without costs.

Plaintiff Metropolitan Bridge & Scaffolds Corp. and defendant NYCHA entered into three contracts whereby Metropolitan agreed to supply certain sidewalk sheds and related items for use at various Housing Authority projects throughout the City and to perform certain maintenance obligations.

Plaintiff commenced the first-party action seeking payment for its contractual retainage, which it alleges NYCHA refuses to pay, as well as for extra work ordered by NYCHA.

In 2015, NYCHA filed a third-party complaint against the individual third-party defendants alleging seven causes of action. The gist of the third-party complaint is that third-party defendants engaged in an alleged conspiracy to defraud NYCHA by submitting fraudulent certifications attesting that

plaintiff's former owners had not been charged or convicted of a crime. NYCHA alleges that Metropolitan and the third-party defendants misled NYCHA to believe that Metropolitan was solely owned by Mark Cersosimo, when it was owned by other third-party defendants who had pled guilty to giving unlawful gratuities to a public servant during performance of contract work for the City, which disqualified them from being awarded federally-funded NYCHA contracts.

Third-party defendants maintain that they informed NYCHA that the charges against Metropolitan's former owners had been terminated with a conditional discharge based upon the payment of less than $200 in court costs. They assert that NYCHA extended all three of the contracts with Metropolitan while having full knowledge of these facts.

On June 13, 2017, the parties appeared before the court for a status conference. Counsel for third-party defendants informed the court that NYCHA had produced "almost no relevant documents," despite the fact that witnesses were about to be deposed. Counsel noted that it was critical he have documents relevant to NYCHA's internal deliberation and decision-making process prior to depositions. The court agreed, and made clear that it "want[ed] every single one of the documents listed . . . to be

turned over by the end of th[e] week." The court warned that if the documents were not turned over in accordance with the order, the counterclaims would be dismissed.

When the parties next appeared for a status conference, on September 5, 2017, the relevant documents had yet to be produced. The court warned NYCHA's counsel in no uncertain terms: "I want every last document that you have concerning any and all, and any possible review that you have done, any possible inspection, anything you have done concerning any one of the named [d]efendants . . . I want everything turned over." The court informed counsel that it wanted a *Jackson* certification.

On October 10, 2017, NYCHA was ordered to provide the outstanding discovery within 10 days.

In November, on the eve of depositions, NYCHA produced more than 700 heavily and in some cases impermissibly redacted documents, and withheld another group of more than 400 documents as privileged. In January 2018, after depositions had commenced, plaintiff and third-party defendants received another belated production of relevant documents. NYCHA also furnished the *Jackson* certification as ordered.

The motion court granted in part plaintiff's and third-party defendants' motion to compel NYCHA's compliance with the

previously-entered discovery orders. The court found an "at issue" waiver of attorney-client privilege. The court ordered NYCHA to pay a $3,000 fine for its violations of the June 13, 2017 and September 5, 2017 discovery orders, and a sanction of $300 per day for each day thereafter it failed to produce the material.

The gravamen of NYCHA's complaint is that third-party defendants allegedly defrauded NYCHA's law department into awarding contracts based on false representations. To prevail at trial, NYCHA must establish that it reasonably relied on the alleged misrepresentation in the relevant forms and certifications. The court correctly found that having placed the knowledge of its law department at issue, NYCHA waived attorney-client privilege with respect to the subject documents. NYCHA cannot seek to prevent the disclosure of evidence showing that its attorneys – the very individuals who performed the bid review function for NYCHA – recommended that NYCHA award the contracts to plaintiff despite knowledge of the operative facts (*see Village Bd. of Vil. of Pleasantville v Rattner*, 130 AD2d 654, 655 [2d Dept 1987] ["(w)here a party asserts . . . reliance upon the advice of counsel, the party waives the attorney-client privilege with respect to all communications to or from counsel

concerning the transactions for which counsel's advice was sought"]).

Further, NYCHA may not rely on attorney-client privilege while selectively disclosing other self-serving privileged communications (*see Deutsche Bank Trust Co. of Ams. v Tri-Links Inv. Tr.*, 43 AD3d 56, 64 [1st Dept 2007]; *Orco Bank v Proteinas Del Pacifico*, 179 AD2d 390, 390 [1st Dept 1992] [the plaintiff "waived the attorney-client privilege by placing the subject matter of counsel's advice in issue and by making selective disclosure of such advice"]).

The dissent admits that the withheld information is relevant to a defense of justification, and does not address the argument that entirely independently of at-issue waiver, NYCHA waived attorney-client privilege through its selective disclosure of allegedly privileged information.

The motion court providently exercised its discretion in finding that NYCHA's conduct during discovery warranted sanctions. NYCHA offered no convincing explanation for its violations of the June 13, 2017 and September 5, 2017 discovery orders, nor for its belated production of documents thereafter. We modify to vacate the sanction imposing an additional penalty of $300 per day as it is unnecessary and unduly punitive.

We take issue with the dissent's conclusion, unsupported by the record, that NYCHA's delays were based on good faith claims of lack of clarity as to its discovery obligations; in any event, it is unnecessary to demonstrate willful and contumacious behavior in order to impose a sanction like a monetary sanction or preclusion, as opposed to a more drastic sanction such as the striking of a pleading (*see Vandashield Ltd. v Isaacson*, 146 AD3d 552 [1st Dept 2017]; *Christian v City of New York*, 269 AD2d 135 [1st Dept 2000]; *New v Scores Entertainment*, 255 AD2d 108 [1st Dept 1998]).

The affidavit that NYCHA submitted with the requisite certification that it made a good faith effort to search for the documents specified in the order was sufficient (*see Jackson v*

City of New York, 185 AD2d 768 [1st Dept 1992]); no further certification is necessary.

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

TOM, J. (dissenting)

This appeal concerns a discovery dispute that resulted in Supreme Court sanctioning NYCHA. Although the majority has significantly reduced the sanction, I would reverse and deny the motion to compel because an "at issue" waiver of the attorney-client privilege did not occur (*see IDT Corp. v Morgan Stanley Dean Witter & Co.*, 107 AD3d 451 [1st Dept 2013]), and at minimum, NYCHA acted in good faith based on its claims of privilege and uncertainty over its discovery obligations. Accordingly, I respectfully dissent.

Plaintiff and NYCHA entered into three contracts pursuant to which plaintiff was to supply sidewalk sheds for use at various NYCHA properties. Plaintiff commenced this action to recover certain payments it claims were owed under the contracts. NYCHA asserted counterclaims, and commenced a third-party action, alleging that plaintiff and various third-party defendants including Liberty Architectural Products Co., Inc. (Liberty), conspired to defraud NYCHA into awarding plaintiff Metropolitan Bridge and Scaffolds Corp (Metropolitan) the three contracts.

More specifically, NYCHA alleges that plaintiff and the third-party defendants (respondents) misled NYCHA to believe that Metropolitan was solely owned by Mark Cersosimo, when it was

owned by other third-party defendants who had pleaded guilty to giving unlawful gratuities to a public servant during performance of contract work for the City, which disqualified them from being awarded federally funded NYCHA contracts.

Respondents contend that NYCHA was informed in 2010 that charges against two of plaintiff's former owners had been terminated with a conditional discharge based upon the payment of less than $200 in court costs, but that NYCHA, nevertheless, extended all three of the contracts with plaintiff.

The relevant document request, dated January 18, 2017, asked NYCHA for "[c]opies of all determinations by NYCHA that Metropolitan was a responsible vendor for the 2009, 2010 and 2011 Contracts. . . ." At a June 13, 2017 status conference, respondents argued that NYCHA had not produced discovery addressing its investigations and deliberations concerning its awards of the contracts to plaintiff, and they made a verbal request for "determinations, formal or informal, draft or not, et cetera, and it's defined in our demands regarding responsibility determinations, et cetera." The court directed NYCHA to produce those documents, but suggested that respondents give NYCHA a list of the specific documents requested.

In July 2017, after the parties engaged in correspondence

seeking to clarify what the court had ordered, respondents moved to strike NYCHA's third-party complaint for failure to comply with the June 2017 discovery order. However, respondents never provided a list of specific requests as discussed.

Although the court declined to strike the pleadings, on September 5, 2017 it instructed NYCHA to turn over all of its investigations and any documents concerning any of the third-party defendants. NYCHA then supplied numerous documents, although many were redacted based on various claimed privileges.

Respondents demanded complete copies of certain redacted documents and NYCHA responded by submitting unredacted copies to the court for in camera review and produced a privilege log. Following the court's October 10, 2017 order directing NYCHA to produce documents ("all audits, reviews, investigations, internal or otherwise, from 2007 to present"), and to "produce a Jackson Affidavit attesting to the extent of their search," on November 21, 2017, NYCHA produced over 700 pages of additional documents, while withholding over 400 documents based on the purported public interest privilege and law enforcement privilege. Separately, on December 4, 2017, NYCHA submitted a *Jackson* affidavit with respect to its efforts to comply with the discovery orders pursuant to *Jackson v City of New York*, (185

AD2d 768 [1st Dept 1992]).

Thereafter, at a December 12, 2017 hearing, the court questioned the claims of privilege and requested memoranda of law on the issue. Respondents then moved to compel the production of certain redacted and withheld documents, as well as for discovery sanctions, arguing that NYCHA had waived attorney-client privilege by asserting fraud claims that placed the subject matter of the privileged communications "at-issue."

Supreme Court found an "at-issue" waiver had occurred because NYCHA had purportedly made its law department's determinations with regard to the contracts central to the case, and that respondents would be unable to defend against the fraud claims without these documents. As for sanctions, the court issued a $3,000 sanction against NYCHA to cover past behavior, and directed that NYCHA's failure to produce all non-privileged material by April 5, 2018 will result in a fine of $300 a day.

The court erred in finding that respondents established that an "at issue" waiver of the attorney-client privilege occurred (*see IDT Corp. v Morgan Stanley Dean Witter & Co.*, 107 AD3d at 452). NYCHA disavows any intention to use its privileged materials to prove its claims and does not allege that the fraud claims were based upon advice from or determinations made by

NYCHA attorneys, but rather on misrepresentations by respondents. The mere fact that NYCHA obtained legal advice before awarding the contracts, and that such advice has "relevance" to the defense against the fraud claims, does not mean that such advice is a "central issue" in litigating or "necessary to defending" against the claim, where, there is evidence from non-privileged material that is sufficient to support the defense.

Accordingly, while the privileged information that respondents seek is relevant to NYCHA's fraud counterclaims, respondents failed to show that the information is necessary to determine the validity of the counterclaims or to defend against them (*see Nomura Asset Capital Corp. v Cadwalader, Wickersham & Taft LLP*, 62 AD3d 581 [1st Dept 2009]). In other words, respondents can show that NYCHA was in possession of all the facts constituting the purported fraud at the time it approved the contracts and that NYCHA did not justifiably rely on the alleged false representations based on their possession of those facts, and without invading the attorney-client privilege.

More specifically, respondents state that NYCHA "had explicit notice of the criminal charges and disposition of the matter no later than November 30, 2010," but still extended the contracts, and admit that NYCHA has produced documents that

reveal that it "knew about the operative facts necessary to support its fraud- and conspiracy-related theories when it decided to award the contracts to Metropolitan." Thus, there is no basis to conclude that privileged internal deliberations are so critical to the defense to warrant a breach of the attorney-client privilege.

In any event, at the very least, NYCHA substantially complied with its discovery obligations and had a good faith basis to continue arguing that certain documents were privileged and that there had not been an "at issue" waiver. Further, NYCHA's delays were based on good faith claims of lack of clarity of its discovery obligations. The court did not make an express finding, and the record does not support the conclusion, that NYCHA's delays in producing documents and its redactions of information were willful, contumacious or in bad faith (*see*

Sidelev v Tsal-Tsalko, 52 AD3d 398 [1st Dept 2008]). Thus, I would find that the issuance of sanctions on NYCHA was an improvident exercise of discretion.

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

ENTERED: JANUARY 24, 2019

CLERK

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

8191 The People of the State of New York, Ind. 4315/15
Respondent,

-against-

Carl Smalls,
Defendant-Appellant.

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

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

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Edward McLaughlin, J.), rendered June 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 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: JANUARY 24, 2019

CLERK

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

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

8192 Betty Petersen, Index 305483/14
Plaintiff-Respondent,

-against-

Long Island University, A
New York Educational Corporation,
Defendant-Appellant.

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Law Office of Vincent D. McNamara, East Norwich (Charles D. Teixeira of counsel), for appellant.

Morrison & Wagner, LLP, New York (Eric Morrison of counsel), for respondent.

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Order, Supreme Court, Bronx County (Julia I. Rodriguez, J.), entered on or about June 6, 2017, which denied defendant's motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

Defendant failed to establish entitlement to judgment as a matter of law in this action where plaintiff was injured when she slipped and fell on ice on a sidewalk on defendant's campus. Plaintiff and a security officer employed by defendant both testified that there were icy patches on the sidewalk where plaintiff slipped, and there was conflicting testimony as to whether the area was salted prior to plaintiff's fall. Defendant's janitorial supervisor testified as to what measures

were taken after a snowfall, but could not recall whether he inspected the spot where plaintiff fell on the day of the accident, and thus, had no personal knowledge as to its condition prior to plaintiff's accident. Testimony relating to a general cleaning routine is insufficient to demonstrate that the routine was followed on the day of the accident (*see Perez v New York City Hous. Auth.*, 114 AD3d 586 [1st Dept 2014]; *De La Cruz v Lettera Sign & Elec. Co.*, 77 AD3d 566 [1st Dept 2010]).

Defendant's assertion that snow removal operations were performed by it, and the failure to remove all snow and ice from a sidewalk is not negligence, is unavailing. Plaintiff testified that the area where she fell was not salted, and thus, there is a triable issue concerning whether defendant's snow removal methods were adequate.

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

ENTERED: JANUARY 24, 2019

CLERK

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

8193-
8194 In re Chandler A., and Another,

Dependent Children Under Eighteen Years of Age, etc.,

Carlton A.,
Respondent-Appellant,

Administration for Children's Services,
Petitioner-Respondent.

_____

Larry S. Bachner, New York, for appellant.

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

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

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Order of disposition, Family Court, Bronx County (Elenor C. Reid, J.), entered on or about March 27, 2018, which, upon a finding that respondent father neglected the subject children, released the children to the custody of their mother and, inter alia, ordered continuation of respondent's supervised visitation with the children, unanimously affirmed, without costs. Appeal from fact-finding order, same court and Judge, entered on or about October 31, 2017, unanimously dismissed, without costs, as subsumed in the appeal from the order of disposition.

The finding of neglect is supported by a preponderance of

the evidence (*see* Family Court Act §§ 1012[f][i][B]; 1046[b][i]), which showed that respondent physically assaulted the children's mother on Easter Sunday in the children's presence. The mother's testimony that respondent hit her in the face with the back of his hand, punched her in the nose, drawing blood, and yanked her by the hair was corroborated by the elder child's out-of-court statements to the agency caseworker (*see Matter of Cristalyn G. [Elvis S.]*, 158 AD3d 563 [1st Dept 2018]). The court's determination that the mother testified credibly and the father's sweeping denials of physical violence against the mother were not credible is entitled to deference (*see Matter of Irene O.*, 38 NY2d 776 [1975]; *Matter of Aaron C. [Grace C.]*, 105 AD3d 548 [1st Dept 2013]).

The record also demonstrates that the children were at risk of substantial harm due to this single egregious incident of violence (*see Matter of Allyerra E. [Alando E.]*, 132 AD3d 472, 474 [1st Dept 2015], *lv denied* 26 NY3d 913 [2015]). Both parents admitted that the children were upset; the mother testified that the children were very scared and nervous, that the elder child yelled, "Stop it", during the fight, and that she locked herself and the children in the bathroom to wait for the police (*see e.g. Matter of Isaiah D. [Mark D.]*, 159 AD3d 534 [1st Dept 2018];

Matter of Macin D. [Miguel D.], 148 AD3d 572 [1st Dept 2017]).

The court providently exercised its discretion in denying respondent's request for an adjournment of the dispositional hearing. The court held the hearing over two separate dates during which it gathered testimony from an agency caseworker and collected an updated report on respondent's progress with respect to agency-referred services. Respondent was represented by counsel, had multiple opportunities to be heard, and was heard, by the court, and failed to indicate the necessity for an adjournment.

The court's determination that it is in the best interests of the children that respondent have only supervised visitation is supported by a preponderance of the evidence (*see e.g. Matter of Darren S. [Darren S.]*, 133 AD3d 534, 535 [1st Dept 2015]; *Matter of Marrero v Johnson*, 89 AD3d 596 [1st Dept 2011]).

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

ENTERED: JANUARY 24, 2019

CLERK

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

8195 In re Chiffon Fitzpatrick, Index 100273/17
Petitioner-Appellant,

-against-

1199 Housing Corp., etc.,
Respondent-Respondent.

Chiffon Fitzpatrick, appellant pro se.

Borah, Goldstein, Altschuler, Nahins & Goidel, P.C., New York (Andrew I. Bart of counsel), for respondent.

Judgment, Supreme Court, New York County (Manuel J. Mendez, J.), entered August 23, 2017, denying the petition to annul the determination of the Department of Housing Preservation and Development of the City of New York (HPD), dated November 23, 2016, which denied petitioner's application for succession rights to a Mitchell-Lama apartment, and dismissing the proceeding brought pursuant to CPLR article 78, unanimously affirmed, without costs.

HPD's denial of petitioner's application for succession rights to a Mitchell-Lama apartment has a rational basis and is not arbitrary and capricious (*see* CPLR 7803[3]; *Matter of Pell v Board of Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester County*, 34 NY2d 222, 231

[1974]). It is undisputed that petitioner was not listed as a co-tenant on the income affidavits for the entire two-year period immediately preceding the death of the tenant of record (from February 1, 2014 to February 1, 2016) (*see Matter of Borekas v New York City Dept. of Hous. Preserv. & Dev.*, 151 AD3d 539 [1st Dept 2017], *lv denied* 29 NY3d 1106 [2017]; *see also* 28 RCNY 3-02[p][3]). The evidence of petitioner's primary residence is not so overwhelming that the absence of an income affidavit listing her may be overlooked (*see Borekas*, 151 AD3d at 539-540; *see also Matter of Murphy v New York State Div. of Hous. & Community Renewal*, 21 NY3d 649, 655 [2013]). Petitioner's individual 2014 tax returns specify a Pennsylvania address only and show her as a resident of Pennsylvania only (*see* 28 RCNY 3-02[n][4][I], [iv]; *Matter of Hochhauser v City of N.Y. Dept. of Hous. Preserv. & Dev.*, 48 AD3d 288 [1st Dept 2008]. Although other evidence supports petitioner's residence in New York, it was reasonable for HPD to resolve the inconsistencies in the record against petitioner (*see Matter of Quan v New York City Dept. of Hous. Preserv. & Dev.*, 70 AD3d 528 [1st Dept 2010], *lv denied* 17 NY3d 703 [2011]).

Petitioner's belated attempt to assert succession rights on

behalf of her daughter is unpreserved, as this argument was not raised before HPD (*see Matter of Hairston v New York City Hous. Auth.*, 144 AD3d 416 [1st Dept 2016]).

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

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

ENTERED: JANUARY 24, 2019

CLERK

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

8196-
8197 Index 651097/15

Gansett One, LLC, et al.,
Plaintiffs-Appellants,

-against-

Husch Blackwell, LLP, et al.,
Defendants-Respondents,

Robert E. Ham, et al.,
Defendants.

Epstein Ostrove, LLC, New York (Elliot D. Ostrove and Richard L. Plotkin of the bar of the State of New Jersey, admitted pro hac vice, of counsel), for appellants.

Wheeler Trigg O'Donnell LLP, Denver, CO (Carolyn J. Fairless of the bar of the State of Colorado, admitted pro hac vice, of counsel), for respondents.

Judgment, Supreme Court, New York County (O. Peter Sherwood, J.), entered December 6, 2017, dismissing the complaint, unanimously reversed, on the law, without costs, the judgment vacated, and the claims for aiding and abetting fraud and negligent supervision reinstated. Appeal from order, same court and Justice, entered November 28, 2017, which granted defendants Husch Blackwell, LLP and Diane T. Carter's (defendants) motion to dismiss the complaint with prejudice pursuant to CPLR 3016(b) and 3211(a)(7), unanimously dismissed, without costs, as subsumed in the appeal from the judgment.

The complaint fails to state a claim for fraudulent misrepresentation, because the only representation attributed to defendants – Diane T. Carter's statement that nonparty Kamran Nezami was the most conservative person she knew – is "nonactionable opinion that provide[s] no basis for a fraud claim" (*Mandarin Trading Ltd. v Wildenstein*, 16 NY3d 173, 179 [2011]). For the same reason, the complaint fails to state a claim for negligent misrepresentation (*see McBride v KPMG Intl.*, 135 AD3d 576, 580 [1st Dept 2016]).

The complaint fails to state a claim for fraudulent omission or concealment, because it fails to allege that defendants had a duty to disclose material information to plaintiffs (*see Mandarin*, 16 NY3d at 179). Under New York law, on which plaintiffs rely on appeal, a law firm does not have an "ethical obligation to disclose what knowledge it might have had concerning its client's alleged impending fraud" (*National Westminster Bank v Weksel*, 124 AD2d 144, 148 [1st Dept 1987], *lv denied* 70 NY2d 604 [1987]; *see also Eurycleia Partners, LP v Seward & Kissel, LLP*, 12 NY3d 553, 562 [2009]).

The complaint fails to state a claim for negligent misrepresentation, because it does not allege a special relationship between plaintiffs – the buyers of membership

interests from Nezami – and defendants (Nezami's attorneys) (*see Gregor v Rossi*, 120 AD3d 447, 448 [1st Dept 2014]). On appeal, plaintiffs claim that such a relationship existed because defendants sent them opinion letters. However, this is not pleaded in the complaint. In any event, it would not avail plaintiffs, because the opinion letters say that they were prepared for a nonparty and were not to be relied on by third parties, and there is no connection between plaintiffs' losses and defendants' opinion that physicians could invest in pharmacies (*see Laub v Faessel*, 297 AD2d 28, 30 [1st Dept 2002]).

However, the complaint states a claim for aiding and abetting fraud. Contrary to defendants' contention, the complaint adequately alleges that Nezami fraudulently induced plaintiffs to invest in his companies via various misrepresentations and omissions. It also sufficiently alleges that defendants had actual knowledge of the fraud (*see e.g. Oster v Kirschner*, 77 AD3d 51, 55 [1st Dept 2010]; *Weinberg v Mendelow*, 113 AD3d 485, 488 [1st Dept 2014]). The complaint alleges that Carter was the one who came up with the idea of disguising Nezami's embezzlement from his companies as "loans" or "draws," that she and/or other lawyers at Husch Blackwell drafted promissory notes and security agreements documenting these

supposed loans, that it was due to Carter's advice that the loans/draws were not included on the financial statements shown to plaintiffs, and that Carter was present at one or more meetings where it was specifically said that plaintiffs should not be told of Nezami's embezzlement lest they fail to invest or withdraw their investments. Finally, the complaint sufficiently alleges substantial assistance; it alleges that defendants drafted the very purchase agreements by which plaintiffs bought membership interests from Nezami – agreements that, it is alleged, contained misrepresentations (*see Oster*, 77 AD3d at 52-53, 56-57).

The complaint also states a claim against Husch for negligently supervising Carter (*see e.g. Kenneth R. v Roman Catholic Diocese of Brooklyn*, 229 AD2d 159, 161 [2d Dept 1997], *cert denied* 522 US 967 [1997], *lv dismissed* 91 NY2d 848 [1997]).

In view of the foregoing, plaintiffs' argument that dismissal should have been without prejudice so that they could amend the complaint applies to the fraud and negligent misrepresentation claims only. However, amendment cannot cure the fundamental deficiencies in these claims, i.e., as indicated, the failure to allege that defendants – as opposed to Nezami – made any misrepresentations to plaintiffs or the fact that

defendants had no duty under New York law to disclose their clients' wrongdoing to plaintiffs (*see e.g. Laub*, 297 AD2d at 32).

Plaintiffs' contention that the motion court misapplied law of the case is of no moment; the doctrine of law of the case does not apply to a court reviewing an order on appeal (*People v Evans*, 94 NY2d 499, 503 n 3 [2000]).

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

ENTERED: JANUARY 24, 2019

CLERK

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

8198 Richard Keeney, et al., Index 21315/12E
Plaintiffs-Appellants,

-against-

New York City Housing Authority,
Defendant-Respondent.

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Raneri, Light & O'Dell, PLLC, White Plains (Kevin D. O'Dell of counsel), for appellants.

Wilson Elser Moskowitz Edelman & Dicker LLP, New York (Patrick J. Lawless of counsel), for respondent.

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Order, Supreme Court, Bronx County (Llinét M. Rosado, J.), entered October 12, 2017, which granted defendant's motion to dismiss the complaint and denied plaintiffs' cross motion to deem the notice of claim timely served nunc pro tunc, unanimously affirmed, without costs.

The court properly granted defendant's motion to dismiss and denied plaintiffs' cross motion to deem the notice of claim timely served nunc pro tunc because plaintiffs failed to show that defendant received a notice of claim by facsimile within 90 days of the accident.

Plaintiff's submission of an affidavit by an associate of plaintiffs' former counsel, who asserted that he sent the notice of claim to defendant on October 20, 2011 by facsimile, was

insufficient to meet plaintiffs' burden to show that defendant received the notice of claim on that date, because he failed to disclose the telephone number to which he faxed the notice of claim, submit a copy of the facsimile he sent to defendant or identify the individual he spoke with in order to confirm that the notice was actually received by defendant on that date. Even if his affidavit was entitled to a general presumption of regularity (*see* CPLR 4520), that presumption was overcome by the affidavits defendant submitted in opposition to the cross motion, which plaintiffs failed to rebut with any additional evidence showing that service of the notice of claim was made by facsimile on October 20, 2011 (*see De Zego v Donald F. Bruhn, M.D., P.C.*, 67 NY2d 875, 877 [1986]).

The court properly denied plaintiffs' cross motion to the extent that it alternatively sought to have the notice of claim, untimely served by certified mail on October 27, 2011, deemed timely served nunc pro tunc. Even if defendant had received the reports and witness statements from nonparty the New York City Police Department during the statutory period, knowledge of the accident does not constitute notice to defendant of plaintiffs' intention to file a civil suit based on a negligence claim (*see Zapata v New York City Hous. Auth.*, 115 AD3d 606 [1st Dept

2014]; *Lopez v New York City Hous. Auth.*, 193 AD2d 473 [1st Dept 1993]).

Contrary to plaintiffs' contention, there was no basis to equitably estop defendant from seeking dismissal of the complaint simply because it engaged in litigation, including conducting a 50–h hearing, and did not raise plaintiffs' failure to properly serve a timely notice of claim as an affirmative defense in its answer (*see Lozano v New York City Hous. Auth.*, 153 AD3d 1173 [1st Dept 2017]). Plaintiffs' failure to petition for leave to serve a late notice of claim within one year and 90 days of the date that their claims accrued deprived the court of the authority to grant such relief, and plaintiffs did not assert that the statutory conditions for extending the time to file a late notice were present in this case (*see Matter of Carpenter v*

New York City Hous. Auth., 146 AD3d 674 [1st Dept 2017], *lv denied* 29 NY3d 911 [2017]; *Adkins v City of New York*, 51 AD2d 944 [1st Dept 1976], *affd* 43 NY2d 346 [1977]).

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

ENTERED: JANUARY 24, 2019

CLERK

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

8199 The People of the State of New York, Respondent, Ind. 1258N/16

-against-

Keith Barner, Defendant-Appellant.

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

Judgment, Supreme Court, New York County (Michael R. Sonberg, J.), rendered November 22, 2016, unanimously affirmed.

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

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

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

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

ENTERED: JANUARY 24, 2019

CLERK

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

8200 The People of the State of New York, Ind. 1251/16
Respondent,

-against-

Andre Rice,
Defendant-Appellant.

_____

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

Darcel D. Clark, District Attorney, Bronx (Diana Lewis 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 (Linda Poust Lopez, J. at pleas; Shari Michels, J. at sentencing), rendered June 30, 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: JANUARY 24, 2019

CLERK

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

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

8201 Nationstar Mortgage LLC, Index 452981/15
Plaintiff-Respondent,

-against-

Badrul Islam, et al.,
Defendants,

NY Prime Holding LLC,
Defendant-Appellant,

Steven Zalewski & Associates, P.C., Kew Gardens (Matthew J. Routh of counsel), for appellant.

Sandelands Eyet, LLP, New York (Peter A. Swift of counsel), for respondent.

Order, Supreme Court, New York County (Carol R. Edmead, J.), entered June 20, 2017, which denied defendant NY Prime Holding LLC,'s (Prime) motion to vacate an order granting plaintiff's motion for summary judgment on default, unanimously affirmed, without costs.

Although Prime demonstrated a reasonable excuse for failing to oppose plaintiff's motion for summary judgment, it did not demonstrate a potentially meritorious defense based on plaintiff's lack of standing to bring this mortgage foreclosure action (*see Expo Dev. Corp. v 824 S.E. Blvd. Realty Corp.*, 113 AD3d 549, 549 [1st Dept 2014]; CPLR 5015[a]). In support of its

summary judgment motion, plaintiff established prima facie that it had standing to bring this foreclosure action by submitting an affidavit of an employee with personal knowledge of its business records, who averred that the underlying note was in its physical possession at the time the action was commenced and who annexed a true copy of the original note (*see Bank of N.Y. Mellon v Knowles*, 151 AD3d 596, 597 [1st Dept 2017]; *JPMorgan Chase Bank, N.A. v Weinberger*, 142 AD3d 643, 644-645 [2d Dept 2016]; *JPMorgan Chase Bank, N.A. v Roseman*, 137 AD3d 1222, 1223 [2d Dept 2016]). Where the original note is proffered, "it is unnecessary to give factual details of the delivery to establish that possession was obtained prior to a particular date" (*Knowles*, 151 AD3d at 597).

Although Prime further asserted that it was entitled to discovery concerning plaintiff's possession of the note and the underlying assignments, it did not show that facts essential to

justify opposition exist but could not be stated, such that plaintiff would not be entitled to summary judgment (CPLR 3212[f]).

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

ENTERED: JANUARY 24, 2019

CLERK

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

8202-
8203 Index 653698/16

Richard Pu,
Plaintiff-Appellant,

-against-

Antonio Dow, et al.,
Defendants-Respondents.

Richard Pu, New York, for appellant pro se.

The Charrington Firm, PC, Rosedale (Karen H. Charrington of counsel), for respondents.

Order, Supreme Court, New York County (Debra A. James, J.), entered July 20, 2018, which, to the extent appealed from as limited by the briefs, granted defendants' motion for summary judgment dismissing the complaint, unanimously affirmed, with costs. Appeal from order, entered May 11, 2018, unanimously dismissed, without costs, as taken from a superseded order.

Plaintiff is not entitled to recover attorneys' fees from defendants, because the parties entered into a retainer agreement providing that plaintiff would recover a contingency fee based on the amount, if any, recovered in a rescission action that plaintiff agreed to bring on defendants' behalf, and no amount was recovered in that action (*see Shaw v Manufacturers Hanover Trust Co.*, 68 NY2d 172, 176 [1986]). Defendants discharged

plaintiff after their main claims were dismissed, leaving only meritless claims, which they withdrew after hiring new counsel. Moreover, defendant Antonio Dow paid a substantial amount in settlement of the counterclaims brought against him. Thus, plaintiff was not wrongfully deprived of any fee to which he was entitled under the parties' agreement, and defendants were not unjustly enriched by not paying any fee. Having entered into a valid and enforceable agreement providing for contingent fee recovery only, plaintiff's argument that he is entitled under quasi-contract theories to recover a fee based on his hourly rate is without merit (*see generally 2 MG W. 100 LLC v St. Michael's Prot. Episcopal Church*, 127 AD3d 624, 626 [1st Dept 2015]).

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: JANUARY 24, 2019

CLERK

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

8204 The People of the State of New York, Ind. 2612/14
Respondent, 178/14

-against-

Kryzie King,
Defendant-Appellant.

_____

Robert S. Dean, Center for Appellate Litigation, New York (John Loran Palmer of counsel), for appellant.

Cyrus R. Vance, Jr., District Attorney, New York (R. Jeannie Campbell-Urban 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 (Robert Stolz, J.), rendered October 21, 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: JANUARY 24, 2019

CLERK

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

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

8205 Ariel Sanchez, et al., Index 303776/14
Plaintiffs-Appellants,

-against-

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

_____

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

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

_____

Order, Supreme Court, Bronx County (Julia I. Rodriguez, J.), entered on or about September 21, 2017, which, to the extent appealed from as limited by the briefs, granted defendants' motion for summary judgment, and denied plaintiffs' cross motion for leave to amend the complaint, unanimously affirmed, without costs.

The court correctly dismissed plaintiffs' claims for false arrest and false imprisonment, given defendants' prima facie showing that the officers lawfully stopped the vehicle due to a problem with a taillight (*see People v Diaz*, 232 AD2d 289, 289 [1st Dept 1996], *lv denied sub nom. People v Martinez*, 89 NY2d 944 [1997]), and that they obtained probable cause to search the car upon detection of a strong odor of pine or ammonia indicative

of street level phencyclidine (PCP) (*see People v Darby*, 263 AD2d 112, 113-114 [1st Dept 2000], *lv denied* 95 NY2d 795 [2000]; *People v Smith*, 66 AD3d 514 [1st Dept 2009], *lv denied* 13 NY3d 942 [2010]). Plaintiffs' conclusory submissions in opposition to defendants' motion failed to raise a triable issue of fact.

The existence of probable cause for the arrest also defeats plaintiffs' claim for malicious prosecution (*see Broughton v State of New York*, 37 NY2d 451, 458 [1975], *cert denied sub nom. Schanbarger v Kellogg*, 423 US 929 [1975]), and the individual officers are also entitled to qualified immunity because the evidence supports the objective reasonableness of the instant stop, search, and arrest (*see Delgado v City of New York*, 86 AD3d 502, 510 [1st Dept 2011]).

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

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

ENTERED: JANUARY 24, 2019

CLERK

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

8207 The People of the State of New York, Ind. 633/11
Respondent,

-against-

Lloyd Parks,
Defendant-Appellant.

_____

Justine M. Luongo, The Legal Aid Society, New York (Steven R. Berko of counsel), for appellant.

Darcel D. Clark, District Attorney, Bronx (Kyle R. Silverstein of counsel), for respondent.

_____

Judgment, Supreme Court, Bronx County (Patricia A. Williams, J.), rendered October 25, 2013, convicting defendant, after a nonjury trial, of two counts of sexual abuse in the first degree, and sentencing him to concurrent terms of two years, unanimously affirmed.

Defendant's legal sufficiency claim is unpreserved, and we decline to review it in the interest of justice. As an alternative holding, we reject it on the merits. We also find that the verdict was not against the weight of the evidence

(*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). The evidence supported the inference that defendant's conduct after he exerted forcible compulsion constituted "sexual contact" (Penal Law 130.00[3]). We have considered and rejected defendant's remaining arguments.

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

ENTERED: JANUARY 24, 2019

CLERK

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

8208 In re Manuel Becerril, Petitioner, Index 102055/15

-against-

New York City Housing Authority, Respondent.

Thomas A. Bucaro, New York, for petitioner.

Kelly D. MacNeal, New York (Andrew M. Lupin of counsel), for respondent.

Determination of respondent (NYCHA), dated July 31, 2015, which denied petitioner's Remaining Family Member (RFM) grievance, unanimously confirmed, the petition denied, and the proceeding brought pursuant to CPLR article 78 (transferred to this Court pursuant to CPLR 7803[4] and 7804[g] by order of Supreme Court, New York County [Barbara Jaffe, J.], entered July 12, 2017) dismissed, without costs.

NYCHA's denial of petitioner's RFM grievance is supported by substantial evidence (*see Matter of Peterson v Olatoye*, 138 AD3d 521, 522 [1st Dept 2016]). Contemporaneous entries in the tenant data summaries and interview records show that petitioner left his mother's (the tenant of record) household in September 1979 and never received written permission to return (*see Matter of*

Vereen v New York City Hous. Auth., 123 AD3d 478 [1st Dept 2014]). The hearing officer, who was not bound by the strict rules of evidence observed in the courts, properly received and relied upon those records (*see Matter of Seeley v City of New York*, 269 AD2d 205 [1st Dept 2000]; *Matter of Blanco v Popolizio*, 190 AD2d 554, 555 [1st Dept 1993]). Moreover, petitioner is not listed on any of his mother's affidavits of income (*see Matter of Blas v Olatoye*, 161 AD3d 562 [1st Dept 2018], citing *Matter of Carmona v New York City Hous. Auth.*, 134 AD3d 404, 405 [1st Dept 2015], *lv denied* 26 NY3d 1114 [2016]).

NYCHA's alleged knowledge of petitioner's unauthorized occupancy does not estop it to deny petitioner RFM status (*Matter of Adler v New York City Hous. Auth.*, 95 AD3d 694 [1st Dept 2012], *lv dismissed* 20 NY3d 1053 [2013]; *see also Matter of McBride v New York City Hous. Auth.*, 140 AD3d 415 [1st Dept 2016]).

Petitioner contends that NYCHA deprived him of due process by failing to appoint a guardian ad litem (GAL) for him before the administrative hearing, at Steps I or II of the grievance process. On the record before us, this contention is unavailing. Petitioner made no request for a reasonable accommodation for his disability, i.e., the early appointment of a GAL (*see e.g.*

Jacobsen v New York City Health & Hosps. Corp., 22 NY3d 824 [2014]). The record does not establish that petitioner's intellectual and mental health disabilities were so debilitating as to have been apparent to NYCHA staff members who interacted with him during the grievance process (*see e.g.* Administrative Code of City of NY [New York City Human Rights Law] § 1-807[15]). Petitioner failed to show that the earlier appointment of a GAL would have affected the outcome of the proceedings. Despite the GAL's zealous representation at the administrative hearing, petitioner was unable to offer testimony or documentation sufficient to overcome the deficiencies in his case, in particular, his mother's failure to list him as a household member in years' worth of annual income affidavits. Nor did petitioner's disabilities entitle him to bypass NYCHA succession rules and the hundreds of thousands of persons, including numerous disabled persons, ahead of him on the waiting list to succeed to his mother's apartment (*see Rosello v Rhea*, 89 AD3d 466, 467 [1st Dept 2011]; *see also Felix v New York City Tr. Auth.*, 324 F3d 102, 107 [2d Cir 2003] [Americans with Disabilities Act does not authorize preference for disabled persons]).

The record belies petitioner's additional argument that he

was deprived of due process by the hearing officer's failure to scrutinize the evidence sufficiently and issuance of a perfunctory determination devoid of analysis.

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: JANUARY 24, 2019

CLERK

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

8210N Genaro Vasquez-Santos, Index 158793/13
Plaintiff-Respondent,

-against-

Leena Mathew,
Defendant-Appellant.

- - - - -

[And A Third Party Action]

McDonald & Safranek, New York (Kenneth E. Pinczower of counsel), for appellant.

William Schwitzer & Associates, P.C., New York (Howard R. Cohen of counsel), for respondent.

Order, Supreme Court, New York County (Adam Silvera, J.), entered June 7, 2018, which, to the extent appealed from as limited by the briefs, denied defendant's motion to compel access by a third-party data mining company to plaintiff's devices, email accounts, and social media accounts, so as to obtain photographs and other evidence of plaintiff engaging in physical activities, unanimously reversed, on the law and the facts, without costs, and the motion granted to the extent indicated herein.

Private social media information can be discoverable to the extent it "contradicts or conflicts with [a] plaintiff's alleged restrictions, disabilities, and losses, and other claims" *(Patterson v Turner Const. Co.,* 88 AD3d 617, 618 [1st Dept

2011]). Here, plaintiff, who at one time was a semi-professional basketball player, claims that he has become disabled as the result of the automobile accident at issue, such that he can no longer play basketball. Although plaintiff testified that pictures depicting him playing basketball, which were posted on social media after the accident, were in games played before the accident, defendant is entitled to discovery to rebut such claims and defend against plaintiff's claims of injury. That plaintiff did not take the pictures himself is of no import. He was "tagged," thus allowing him access to them, and others were sent to his phone. Plaintiff's response to prior court orders, which consisted of a HIPAA authorization refused by Facebook, some obviously immaterial postings, and a vague affidavit claiming to no longer have the photographs, did not comply with his discovery obligations. The access to plaintiff's accounts and devices, however, is appropriately limited in time, i.e., only those items posted or sent after the accident, and in subject matter, i.e.,

those items discussing or showing **plaintiff** engaging in basketball or other similar physical activities *(see Forman v Henkin,* 30 NY3d 656, 665 [2018]; *see also Abdur-Rahman v Pollari,* 107 AD3d 452, 454 [1st Dept 2013]).

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

ENTERED: JANUARY 24, 2019

CLERK

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

8211N In re Sol Neil Corbin, File 4795/15A
Deceased.

- - - - -

Irwin Jacobs,
Petitioner-Respondent,

-against-

David J. Corbin,
Respondent-Appellant.

_____

Seward & Kissel, LLP, New York (Lori A. Sullivan of counsel), for appellant.

Ferguson Cohen LLP, White Plains (Timothy J. Joyce of counsel), for respondent.

_____

Order, Surrogate's Court, New York County (Rita Mella, S.), entered October 27, 2017, which granted petitioner's application for payment of a $100,000 bequest, unanimously affirmed, with costs.

The Supreme Court properly granted petitioner's application. Respondent claims that an accounting was warranted prior to payment of the $100,000 bequest to petitioner so that respondent, as executor, could establish that the estate was insolvent was based on conclusory claims that additional, unspecified, undocumented administration expenses had been incurred (*see Matter of Ehmer*, 272 AD2d 542, 543 [2d Dept 2000]). As the

Surrogate's Court noted, respondent's receipt of closing letters from the New York State Department of Taxation and Finance and the Internal Revenue Service rendered moot any claims that further estate taxes might need to be paid. Thus, the Surrogate's Court correctly concluded that there were sufficient funds in the residuary estate to pay petitioner at that stage, two years after the decedent had died and more than nine months after the letters testamentary had issued.

Moreover, the Surrogate's Court properly reasoned that at that stage, an accounting would cause further delay, incur unnecessary expense, and possibly deplete the estate of sufficient funds to pay the bequest.

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

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

ENTERED: JANUARY 24, 2019

CLERK

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

8212 In re Robert Thomas, Ind. 5090/04
[M-5514] Petitioner, OP 164/18

-against-

Hon. Robert Mandelbaum, etc., et al.,
Respondents.

Robert Thomas, petitioner pro se.

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

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

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

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

Justice Robert Mandelbaum has elected, pursuant to CPLR 7804(i), not to appear in this proceeding.

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

ENTERED: JANUARY 24, 2019

CLERK

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

Dianne T. Renwick, J.P.
Rosalyn H. Richter
Sallie Manzanet-Daniels
Judith J. Gische
Peter Tom, JJ.

7539
Index 158084/17

_____x

In re New York Community Bank,
Petitioner-Respondent,

-against-

Bank of America, N.A.,
Respondent,

Ari Chitrik, also known as Aaron Chitrik Purec, et al.,
Respondents-Appellants.
_____x

Respondents appeal from the order and judgment (one paper) of the Supreme Court, New York County (Arlene P. Bluth, J.), entered March 1, 2018, granting petitioner New York Community Bank's application for an order directing respondent Bank of America, N.A. to turn over the contents of the subject safe deposit box to satisfy a judgment against respondent Ari Chitrik.

Heller, Horowitz & Feit, P.C., New York (Stuart A. Blander of counsel), for appellants.

Zeichner Ellman & Krause LLP, New York (David S.S. Hamilton and Stuart A. Krause of counsel), for respondent.

GISCHE, J.

This appeal requires us to consider whether a presumption of joint tenancy with rights of survivorship in a safety deposit box also extends to its contents where only one of the persons who rented the box is a judgment debtor. Most of the jurisprudence concerning the statutory presumption of joint tenancy (Banking Law § 675[b]), relates to cash deposits in bank accounts, not deposits of property into safe deposit boxes. We find the safety deposit box rental agreement controlling on the issue of ownership and that the judgment creditor, New York petitioner (NYCB) established that the notice respondents are joint tenants of the contents of the box, with rights of survivorship. The notice respondents failed to come forward with evidence to the contrary, making the box's contents subject to the judgment creditor's levy.

In June 2012, NYCB obtained a money judgment against notice respondent Ari Chitrik a/k/a Aaron Chitrik Purec. The judgment, with interest, is now in excess of $11 million. After receiving responses to its information subpoenas from respondent garnishee Bank of America, N.A. (BOA), NYCB commenced this turnover proceeding (CPLR 5225[b]) against Ari and his wife, respondent Rachel Chitrik-Purec. Rachel is not a judgment debtor with

respect to that judgment and she contends that she opened this safe deposit box account in her sole name, adding Ari as a corenter, solely as a matter of convenience.

This appeal is from Supreme Court's order directing the Sheriff and/or BOA to break open the safe deposit box and turn its contents over to satisfy NYCB's judgment against Ari. Rachel obtained the safe deposit box in September 2014, in Ari's presence, with each of them presenting personal identification to open the safe deposit account. Each of them also signed a safe deposit box rental agreement. The rental agreement identifies each of them as "Renters" of the box and BOA "Customers." Rachel is referred to in the rental agreement as "Customer 1" and Ari as "Customer 2." By signing the rental agreement, Ari and Rachel as "undersigned Renter(s)" agreed to rent the safe deposit box "in accordance with . . . this Safe Deposit Rental Agreement ('the Rental Agreement')" and also agreed "to be bound by the Safe Deposit Box Rental Agreement Rules and Regulations (the 'Rules')," which are incorporated by reference. Although the rental agreement names Rachel as the "account title" holder and also lists her as the "filing name," the rules do not use those terms. Instead, the rules interchangeably use the terms "you," "your," and "Renter," throughout. A "Renter" is further defined

as "each Renter or Co-Renter identified in the [rental agreement]." By signing the rental agreement and its incorporated rules, Rachel and Ari expressly agreed that

> "access to a Box rented in the names of two or more persons, whether or not husband and wife, shall be under the control of each of them individually or their duly authorized and qualified legal representative(s) or other qualified successors(s), in case of death, insolvency or other legal disability . . . as fully as though the Box was rented in his or her name alone; and each may have access to the Box and the right to surrender the Box; and the surviving Renter or the legal representative of the deceased Renter may enter the Box, remove all contents thereof, release the Bank on behalf of all Renters, and terminate the Rental Agreement."

CPLR 5225(b) provides for an expedited special proceeding by which a judgment creditor can recover "money or other personal property" belonging to a judgment debtor "against a person in possession or custody of money or other personal property in which the judgment debtor has an interest" in order to satisfy a judgment (*Matter of Signature Bank v HSBC Bank USA, N.A.*, 67 AD3d 917, 918 [2d Dept [2009]). When two or more persons open a bank account, making a deposit of cash, securities, or other property, a presumption of joint tenancy with right of survivorship arises (Banking Law § 675[b]; *Matter of Friedman*, 104 AD2d 366 [1984], *affd* 64 NY2d 743 [1984]). The presumption extends to safe

deposit boxes held jointly (*Matter of First Am. Tit. Ins. Co. v Kenderian*, 157 AD3d 891, 892 [2d Dept 2018]). If the presumption is applied, each named tenant "is possessed of the whole of the account so as to make the account vulnerable to the levy of a money judgment by the judgment creditor of one of the joint tenants" *Viggiano v Viggiano*, 136 AD2d 630, 630 [2d Dept 1988]; Banking Law § 675[b]).

By relying on the terms of the rental agreement, NYCB met its burden of establishing Ari and Rachel as joint tenants with rights of survivorship of the safe deposit box account. The safe deposit box is controlled by each of them, each of them has access to the box at all times, and each of them can deposit property into the box or remove property from it without each other's permission. Should either one of them die, the survivor would have access to the box and could remove all its contents (*Matter of Brown*, 86 Misc 187 [NY Sur Ct 1914], *affd* 167 AD 912 [2d Dept 1915], *affd* 217 NY 621 [1916]).

The statutory presumption of joint ownership, however, may be rebutted by showing that the true situation as to ownership is different and that the account was established in joint names solely as a matter of convenience, not with the intention of conferring any beneficial property interest on the other

individual (*Pinasco v Del Pilaf Ara*, 219 AD2d 540, 540 [1st Dept 1995]). This argument was raised by Rachel before Supreme Court and now, on appeal. To defeat the presumption, however, there must be direct proof that no joint tenancy was intended (*Signature Bank*, 67 AD3d at 918). Neither Ari nor Rachel offered sworn affidavits in opposition to NYCB's petition. They relied on an attorney's affirmation to present their claim that Rachel only added Ari's name to the rental agreement as a matter of convenience and that the contents of the box are her separate property. "[A]n affirmation submitted by an attorney who has no personal knowledge of the facts is without evidentiary value" (*Conti v City of Niagara Falls Water Bd.*, 82 AD3d 1633, 1634 [4th Dept 2011]). Such indirect evidence does not rebut the presumption of joint tenancy in the box or require a hearing. Supreme Court correctly ordered that the Sheriff break open the box because it presumably contained property that was subject to levy (*Carples v Cumberland Coal & Iron Co.*, 240 NY 187, 191-193 [1925]; *Viggiano*, 136 AD2d at 631). Unlike Supreme Court, however, we do not find any ambiguity in the rental agreement, and it was unnecessary for the court to have given BOA's responses to the information subpoena credence in resolving the issue of ownership. Given the limited postjudgment discovery

purpose of an information subpoena, it should not have been relied on to make that legal determination (CPLR 5224[a][3]; *see e.g., Rosenblatt v HSBC Bank USA, N.A.*, 47 Misc3d 1003 [Sup Ct, NY County 2015] [erroneous information provided by the bank]).

Rachel's claim that Ari has no ownership interest in the contents of the box and the contents are her separate property does not defeat NYCB's rights to levy upon its contents (*Carples*, *supra* at 191-192). Rachel knew its contents, but did not disclose that information or establish that its contents actually belong solely to her or to a third party (*see Uribe v Merchants Bank of N.Y.*, 239 AD2d 128, 128 [1st Dept 1997], *affd* 91 NY2d 336 [1998]). Thus, NYCB's prima facie establishment of a joint tenancy in the safe deposit box account is evidence that Ari and Rachel also "possess" its contents, making the whole of the account subject to NYCB's levy (*Viggiano* at 630).

Accordingly, the order and judgment (one paper) of the Supreme Court, New York County (Arlene P. Bluth, J.), entered March 1, 2018, granting petitioner New York Community Bank's

application for an order directing respondent Bank of America, N.A. to turn over the contents of the subject safe deposit box to satisfy a judgment against respondent Ari Chitrik, should be affirmed, with costs.

All concur.

Order and judgment (one paper) Supreme Court, New York County (Arlene P. Bluth, J.), entered March 1, 2018, affirmed, with costs.

Opinion by Gische, J. All concur.

Renwick, J.P., Richter, Manzanet-Daniels, Gische, Tom, JJ.

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

ENTERED: JANUARY 24, 2019

CLERK