SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

JUNE 18, 2019

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

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

8883 Joseph E. Mullin, Index 650535/17
Plaintiff-Appellant,

-against-

WL Ross & Co. LLC, et al.,
Defendants-Respondents.

_____

Press Koral LLP, New York (Matthew J. Press of counsel), for appellant.

Weil, Gotschal & Manges LLP, New York (Gregory Silbert of counsel), for respondents.

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Order, Supreme Court, New York County (Andrea Masley, J.), entered February 23, 2018, which granted defendants' motion to dismiss the complaint, unanimously modified, on the law, to deny the motion as to the breach of contract cause of action, insofar as based as on transactions alleged to have occurred on or after December 30, 2010, except as against defendant WL Ross & Co. LLC, and as to the breach of fiduciary duty cause of action, insofar as based on transactions alleged to have occurred on or after December 30, 2010, as against WL Ross & Co. LLC only, and as to all causes of action for accountings, and otherwise affirmed, without costs.

Construed liberally, as amplified by plaintiff's opposition affidavit and documentary evidence submitted on the motion (*see Rovello v Orofino Realty Co.*, 40 NY2d 633, 635 [1976]; *Jeudy v City of New York*, 142 AD3d 821, 821 [1st Dept 2016]; *511 W. 232nd Owners Corp. v Jennifer Realty Co.*, 98 NY2d 144, 151-152 [2002]), the complaint states a cause of action for breach of contract under the governing Delaware substantive law as against the other WL Ross entities (the Entities) (*see VLIW Tech., L.L.C. v Hewlett-Packard Co.*, 840 A2d 606, 612 [Del 2003]). It alleges, in sum, that each of the Entities was contractually required, under the several partnership and LLC agreements, to account properly for amounts in plaintiff's capital accounts and to make accurate distributions of carried interest and profits and that each of them failed to do so. In his opposition affidavit, plaintiff gives examples of questionable accounting, or distribution shortfalls, for nearly all of the Entities.

On appeal, plaintiff states that WL Ross & Co. LLC, against which the complaint ostensibly asserts a breach of contract claim, was not a party to any of the relevant contracts and that defendants cannot argue that the breach of fiduciary duty and accounting claims are duplicative of the breach of contract claim. We therefore affirm the dismissal of the breach of contract claim as against WL Ross & Co. LLC.

In support of his claim for breach of fiduciary duty, plaintiff alleges, in sum, that defendants manipulated the Entities' books and records so as to distribute to him less than he was entitled to in carried interest and profits. Because all these actions would have been breaches of the partnership and LLC agreements, the fiduciary duty claim is duplicative of the contract claim (*see CIM Urban Lending GP, LLC v Cantor Commercial Real Estate Sponsor, L.P.*, 2016 WL 768904, *3, 2016 Del Ch LEXIS 47, *6-7 [Del Ch 2016]) – except as against WL Ross & Co. LLC, because there is no breach of contract claim against it. Plaintiff avers that WL Ross & Co. LLC controlled the other defendants, either as parent or affiliate, and therefore owed plaintiff the same fiduciary duties as the other defendants in which he was a partner, and that WL Ross & Co. LLC breached this duty by causing defendants to manipulate plaintiff's accounts for the ultimate benefit of its principal, nonparty Wilbur L. Ross, Jr. Thus, a cause of action for breach of fiduciary duty is stated against WL Ross & Co. LLC, on the theory that "a fiduciary of a fiduciary is a fiduciary," and that "an entity that controls the fiduciary of another entity may be deemed a fiduciary of the entity" (*Arfa v Zamir*, 2008 NY Slip Op 51908[U], *3 [Sup Ct, NY County 2008], *affd* 75 AD3d 443 [1st Dept 2010]; *see Bay Ctr. Apts. Owner, LLC v Emery Bay PKI, LLC*, 2009 WL 1124451, *9-10,

2009 Del Ch LEXIS 54, *32-39 [Del Ch 2009]; *In re USACafes, L.P. Litig.*, 600 A2d 43, 48-50 [Del Ch 1991]). Under the circumstances alleged in the complaint, we find that the claim for breach of fiduciary duty against WL Ross & Co. LLC is governed by the six-year statute of limitations (*cf. IDT Corp. v Morgan Stanley Dean Witter & Co.*, 12 NY3d 132, 139-140 [2009]). Notwithstanding that there is no cause of action for breach of fiduciary duty against any defendant except WL Ross & Co. LLC, the mere existence of a fiduciary relationship otherwise gives rise to a claim for an accounting (see *Koppel v Wein, Lane & Malkin*, 125 AD2d 230, 234 [1st Dept 1986]; *see also Webster v Forest Hills Care Ctr., LLC,* 164 AD3d 1499, 1501 [2d Dept 2018]). This right, as distinguished from a claim for an accounting in which there is no fiduciary relationship, does not require a showing that there is no adequate remedy at law. It is automatic and springs from the fiduciary relationship itself. The plaintiff has alleged that all defendants have a fiduciary obligation to him. We hold here that the allegations are sufficient to support that claim of breach of fiduciary duty against WL Ross & Co. LLC. The bona fides of an underlying fiduciary relationship against the other defendants have not been raised on this appeal. While for other reasons we have dismissed the breach of fiduciary duty claims against the other defendants,

the allegations still support an independent claim for an accounting. Accordingly, the causes of action for accountings based upon the existence of a fiduciary relationship should not have been dismissed on this pleading motion as they allege valid causes of action

For purposes of a motion to dismiss under CPLR 3211(a)(5), defendants failed to establish that the claims for breach of contract against defendant Ross CG Associates, L.P. (Ross CGA) are untimely to the extent they are based on allegations that Ross CGA failed to make payments to plaintiff to which he was allegedly entitled as a partner on or after December 30, 2010, within the applicable six-year limitation period before the commencement of this action in December 2016 (*see* CPLR 213). Assuming, as we must, that the allegations of the complaint are true, a new claim would have accrued each time Ross CGA failed to make a payment to plaintiff when it became due (*see Lebedev v Blavatnik*, 144 AD3d 24, 28-29 [1st Dept 2016]). Contrary to Ross CGA's contention that plaintiff's claims for all payments accrued in October 2007, when Ross CGA claims to have begun treating him as a "withdrawn partner," the documentary evidence indicates that Ross CGA treated defendant as an active partner in certain ways until April 2014 (specifically, by continuing to send him K-1 tax statements and retaining his capital account). In addition,

absent from the record is any written notice — required under the Ross CGA partnership agreement — that plaintiff was withdrawing from, or being withdrawn from, Ross CGA. Accordingly, at this juncture, it cannot be determined, as a matter of law, that the claim against Ross CGA arises from "a single wrong that ha[d] continuing effects," rather than from "a series of independent, distinct wrongs" (*Henry v Bank of Am.*, 147 AD3d 599, 601 [1st Dept 2017] [internal quotation marks omitted]). It is not necessary at this juncture to parse out the extent to which plaintiff's broader, but undelineated, claims against Ross CGA (alleging failures to distribute carried interest and profits) are timely. As stated with regard to the claims against Ross CGA, while plaintiff's claims against all defendants are time-barred to the extent they are based on transactions that occurred before December 30, 2010 (i.e., more than six years before the commencement of this action), we need not, at this juncture, parse out the extent to which each cause of action is timely.

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

ENTERED: JUNE 18, 2019

CLERK

Sweeny, J.P., Manzanet-Daniels, Kapnick, Oing, Singh, JJ.

9626-
9627 The People of the State of New York,
Respondent,

-against-

Carl Testamark,
Defendant-Appellant.

Ind. 4011/13

_____

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

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

_____

Judgment, Supreme Court, New York County (Robert M. Stolz, J. at suppression hearing; Bonnie G. Wittner, J. at speedy trial motion, jury trial and sentencing), rendered December 8, 2015, convicting defendant of attempted assault in the first degree, assault in the second and third degrees, criminal possession of a weapon in the third degree, and two counts of criminal contempt in the second degree, and sentencing him to an aggregate term of 10 years, unanimously affirmed. Order, same court, (Bonnie G. Wittner, J.), entered on or about October 14, 2016, which denied defendant's motion to vacate the judgment, unanimously affirmed.

Defendant's speedy trial arguments are entirely unpreserved, and we decline to review them in the interest of justice. As an alternative holding, we find that the speedy trial motion was

properly denied. To the extent the record insufficiently establishes that a period beginning September 24, 2014 was excludable from its inception, we find that, at most, five days were includable, because the People filed a valid certificate of readiness on September 29 (*see People v Stirrup*, 91 NY2d 434, 440 [1998]). All the other periods challenged by defendant on appeal were the result of consent by the defense (*see* CPL 30.30[4][b]) or other excludable circumstances (*see* CPL 30.30[4][g]).

We reject, on the merits, defendant's claim that his counsel rendered ineffective assistance regarding the speedy trial motion. Defendant has not established prejudice because there is no reason to believe that, absent counsel's drafting errors in the motion, the motion had any chance of success (*see People v Caban*, 5 NY3d 143, 152 [2005]; *see also Strickland v Washington*, 466 US 668 [1984]).

We reject defendant's claim that the verdicts as to the counts relating to his attack on the victim with a scissors were 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 court properly denied defendant's suppression motions. Radio runs regarding an assault in progress at a specified apartment, along with defendant's act of putting up his hands to

surrender upon opening the apartment's door, objectively provided reasonable suspicion that he had committed a crime, justifying an investigatory detention. Given the rapidly developing and potentially dangerous situation, the officers were entitled to handcuff defendant briefly to ensure their safety, and this did not elevate the encounter to an arrest (*see People v Foster*, 85 NY2d 1012, 1014 [1995]; *People v Allen*, 73 NY2d 378, 379-380 [1989]). Only moments later, the reasonable suspicion ripened into probable cause when the victim stated that defendant attacked her. In any event, the record also supports the court's finding that the spontaneous statement defendant made in the presence of a defendant police officer at a later time and different place was attenuated from any illegality.

Defendant's argument under *Payton v New York* (445 US 573 [1980]) is unpreserved, and we decline to review it in the interest of justice. As an alternative holding, we reject it on the merits (*see e.g. People v Espinal*, 161 AD3d 556, 557 [1st Dept 2018], *lv denied* 32 NY3d 1064 [2018]).

In addition to the ineffectiveness claim that we have already addressed, defendant asserts that the attorneys who represented him at several stages of the proceedings rendered ineffective assistance by failing to make various motions or objections. These claims are unreviewable on direct appeal

because they involve matters not reflected in, or fully explained by, the record (*see People v Rivera*, 71 NY2d 705, 709 [1988]; *People v Love*, 57 NY2d 998 [1982]). Although defendant made a postconviction motion to vacate the judgment, which we have treated as a CPL 440.10 motion and included in this appeal, that motion did not include any of the present ineffectiveness claims, and the merits of those claims may not be addressed.

In the alternative, to the extent the existing record permits review, we find that defendant received effective assistance under the state and federal standards (*see People v Benevento*, 91 NY2d 708, 713-714 [1998]; *Strickland v Washington*, 466 US 668 [1984]). Defendant has not shown that any of counsel's alleged deficiencies fell below an objective standard of reasonableness, or that, viewed individually or collectively, they deprived defendant of a fair trial or affected the outcome of the case. To the extent defendant is independently seeking

reversal in the interest of justice based on unpreserved errors, we decline to extend such relief.

We perceive no basis for reducing the sentence.

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

ENTERED: JUNE 18, 2019

CLERK

Sweeny, J.P., Manzanet-Daniels, Kapnick, Oing, Singh, JJ.

9629-
9630 In re Elijah G., and Another,

Dependent Children Under the Age
of Eighteen Years, etc.,

Stephanie S.,
Respondent-Appellant,

Saint Dominic's Home and Administration
for Children's Services,
Petitioner-Respondent.

_____

Richard L. Herzfeld, P.C., New York (Richard L. Herzfeld of counsel), for appellant.

Warren & Warren, P.C., Brooklyn (Ira L. Eras of counsel), for respondent.

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

_____

Orders of disposition, Family Court, New York County (Emily Olshansky, J.), entered on or about November 13, 2017 and December 5, 2017, which, upon findings of permanent neglect, terminated respondent mother's parental rights to each of the subject children, and committed them to the care and custody of the Commissioner of Social Services and petitioner agency for purposes of adoption, unanimously affirmed, without costs.

The determination that the children were permanently neglected by the mother is supported by clear and convincing evidence (*see* Social Services Law § 384-b[7][a]). The agency

engaged in diligent efforts to encourage and strengthen the mother's relationship with the children by developing an individualized plan tailored to fit the mother's needs, including a program instructing about the dangers of allowing the children to be in the same home as a person using PCP, which can cause hallucinations and make people violent. The mother was given multiple referrals for domestic violence counseling, parenting skills and individual counseling, and was granted visitation (*see Matter of Cerenithy B. [Ecksthine B.]*, 149 AD3d 637 [1st Dept 2017], *lv denied* 29 NY3d 1106 [2017]). Despite these efforts, the mother failed to benefit from the services offered, as evidenced by her acknowledgment that after the children suffered serious burns, which the court found to have been deliberately inflicted, the mother did not bring the children to get medical attention for the burns in a timely manner, and generally continued to deny responsibility for the conditions that led to the children's removal, including maintaining a relationship with an individual who tested positive for PCP (*Matter of Unique M. [Veronica A.]*, 154 AD3d 590 [1st Dept 2017], *lv denied* 30 NY3d 909 [2018]).

A preponderance of the evidence supports the determination that termination of the mother's parental rights was in the best interests of the children (*see Matter of Star Leslie W.*, 63 NY2d

136, 147-148 [1984]). The record shows that the children have been in a stable, safe and loving foster home, with the maternal grandfather and maternal step-grandmother, for several years, where all of their special needs are being met, and that the foster parents wish to adopt them (*see Matter of Jayvon Nathaniel L. [Natasha A.]*, 70 AD3d 580 [1st Dept 2010]). The circumstances presented do not warrant a suspended judgment (*id.*).

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

ENTERED: JUNE 18, 2019

CLERK

Sweeny, J.P., Manzanet-Daniels, Kapnick, Oing, Singh, JJ.

9631 Eliezer Vazquez, Index 301727/13
Plaintiff-Respondent,

-against-

Jerome Gas Corp.,
Defendant-Appellant,

Jerome Petrol Realty LLC,
Defendant.

_____

Vigorito, Barker, Patterson, Nichols & Porter, LLP, Valhalla (Adonaid C. Medina of counsel), for appellant.

Shapiro Law Offices, PLLC, Bronx (Ernest S. Buonocore of counsel), for respondent.

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Order, Supreme Court, Bronx County (Norma Ruiz, J.), entered on or about July 5, 2018, which, insofar as appealed from, denied the motion of defendant Jerome Gas Corp. for summary judgment dismissing the complaint as against it, and precluded it from offering testimony at trial, unanimously affirmed, without costs.

Defendant did not establish its prima facie entitlement to judgment as a matter of law since it failed to show that it did not cause, create or have notice of the alleged icy condition on its property. In an affidavit, defendant's owner failed to state whether defendant received any complaints about the accident location, or when the area was last inspected and cleaned before plaintiff's fall (*see Rodriguez v Bronx Zoo Rest., Inc.*, 110 AD3d

412, 412-413 [1st Dept 2013]). The fact that defendant's owner was working on the day of the accident and did not see snow or ice on the property, does not satisfy defendant's burden to show that it lacked notice of a dangerous condition and that the condition did not exist for a sufficient length of time prior to the accident to permit defendant to discover and remedy it (*see Jackson v Whitson's Food Corp.*, 130 AD3d 461, 462 [1st Dept 2015]). In light of defendant's failure to make a prima facie showing, the summary judgment burden never shifted to plaintiff (*see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]).

The court did not abuse its discretion by precluding defendant from offering testimony at trial. The record shows that defendant violated two post note of issue discovery orders by not appearing for a deposition.

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

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

ENTERED: JUNE 18, 2019

CLERK

Sweeny, J.P., Manzanet-Daniels, Kapnick, Oing, Singh, JJ.

9632 Ante Vucetic, et al., Index 161936/14
Plaintiffs-Respondents, 595374/15

-against-

NYU Langone Medical Center,
Defendant,

NYU Hospitals Center, et al.,
Defendants-Appellants.

- - - - -

[And a Third Party Action]

- - - - -

NYU Hospitals Center, et al.,
Second Third-Party Plaintiffs,

-against-

Horizon Contracting, LLC,
Second Third-Party Defendant-Appellant.

_____

Gallo Vitucci Klar LLP, Woodbury (Ivan C. Torres of counsel), for NYU Hospital Center and Lend Lease (US) Construction LMB Inc., appellants.

Milber Makris Plousadis & Seiden, LLP, Woodbury (Joseph V. Cambareri of counsel), for Horizon Contracting, LLC, appellant.

Sacks and Sacks LLP, New York (Scott N. Singer of counsel), for respondents.

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Order, Supreme Court, New York County (James E. d'Auguste, J.), entered August 16, 2018, which granted plaintiffs' motion for partial summary judgment on the issue of liability on the Labor Law § 240(1) claim, unanimously affirmed, without costs.

Summary judgment was properly granted in this action where

plaintiff Ante Vucetic was injured when the A-frame ladder he was using to perform insulation work collapsed beneath him, causing him to fall to the ground (*see e.g. Tuzzolino v Consolidated Edison Co. of N.Y.*, 160 AD3d 568 [1st Dept 2018]; *Fletcher v Brookfield Props.*, 145 AD3d 434 [1st Dept 2016]). The record shows that the "safety devices provided to plaintiff did not properly protect him from an elevation-related hazard" (*Torres v Monroe College*, 12 AD3d 261, 262 [1st Dept 2004]). Furthermore, at the time of his fall, plaintiff was following his foreman's instructions and thus, he was not the sole proximate cause of the accident (*see Harris v City of New York*, 83 AD3d 104, 110-111 [1st Dept 2011]; *Kielar v Metropolitan Museum of Art*, 55 AD3d 456, 458 [1st Dept 2008]).

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

ENTERED: JUNE 18, 2019

CLERK

Sweeny, J.P., Manzanet-Daniels, Kapnick, Oing, Singh, JJ.

9633 The People of the State of New York, Respondent, Ind. 4798/16

-against-

Anthony Lopez, Defendant-Appellant.

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

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

_____

Judgment, Supreme Court, New York County (James M. Burke, J.), rendered July 11, 2017, convicting defendant, after a nonjury trial, of criminal trespass in the second degree, and sentencing him to a term of one year, 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]). Although defendant asserts that the People's case was based entirely on hearsay, that is, grand jury minutes, those minutes were received in evidence by stipulation. The evidence established defendant made a knowingly unlawful entry into the victims' apartment, by means of force and threats of violence.

Defendant did not preserve his claim that the court erred in failing to announce that it would be considering the lesser included offense of second-degree trespass (*see People v Jackson*, 166 AD2d 356 [1st Dept 1990], *lv denied* 77 NY2d 839 [1991]), and we decline to review it in the interest of justice. As an alternative holding, we find that defendant was not prejudiced in any way.

Defendant's challenge to the validity of his duly executed, open-court jury waiver is likewise unpreserved (*see People v Johnson*, 51 NY2d 986, 987 [1980]), and we decline to review it in the interest of justice. As an alternative holding, we find that defendant made a knowing, intelligent and voluntary waiver after an extensive and appropriate colloquy (*see People v Smith*, 6 NY3d 827, 828 [2006], *cert denied* 548 US 905 [2006]). Defendant asserts that because the only evidence consisted of grand jury minutes received by stipulation, and because there were no opening statements or summations, his trial was "bizarre" and "unrecognizable," so that these unusual features should have been addressed by the court in its jury waiver colloquy. However, this type of trial was permissible (*see People v Williams*, 161 AD2d 295 [1st Dept 1990]), and it did not require the court to make a special inquiry of defendant (*see People v Mills*, 103 AD2d 379 [2d Dept 1984]).

Finally, we note that, according to defendant, a fair reading of the record is that the court and parties had agreed in advance of the nonjury trial that a misdemeanor conviction would be appropriate. Even assuming that to be the case, there is every indication that defendant, a second felony offender ineligible for a misdemeanor plea, welcomed the opportunity to obtain a misdemeanor conviction by way of this abbreviated trial.

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

ENTERED: JUNE 18, 2019

CLERK

Sweeny, J.P., Manzanet-Daniels, Kapnick, Oing, Singh, JJ.

9634-
9634A-
9634B-
9634C

Index 190311/15

In re New York City Asbestos Litigation

- - - - -

Mary Murphy-Clagett, etc.,
Plaintiff-Respondent,

-against-

A.O. Smith Corporation, et al.,
Defendants-Appellants,

AERCO International, Inc., et al.,
Defendants.

_____

Quinn Emanuel Urquhart & Sullivan, LLP, New York (Kathleen M. Sullivan of counsel), for A.O. Smith Water Products, sued herein as A.O. Smith Corporation, appellant.

Clyde & Co US LLP, New York (Peter J. Dinunzio of counsel), for Burnham LLC, appellant.

Brennan Law Firm PLLC, New York (Kerry A. Brennan of counsel), for Peerless Industries, Inc., appellant.

Simmons Hanly Conroy LLC, New York (James M. Kramer of counsel), for respondent.

_____

Judgment, Supreme Court, New York County (Manuel J. Mendez, J.), entered January 30, 2019, upon a jury verdict awarding $25 million for the decedent's pain and suffering, $17 million to the decedent's son for loss of parental guidance, and $18 million to the decedent's daughter for loss of parental guidance, to the extent appealed from as limited by the briefs, upon plaintiff's

stipulation to reduce the damages awards, awarding $10 million for the decedent's pain and suffering, $9 million to the decedent's son for loss of parental guidance, and $10 million to the decedent's daughter for loss of parental guidance, unanimously modified, on the facts, to direct a new trial on damages unless plaintiff stipulates, within 30 days after the date of entry of this order, to further reduce the award for the decedent's pain and suffering to $4 million, the award for loss of parental services for the decedent's son to $1 million, and the award for loss of parental services for the decedent's daughter to $1 million, and otherwise affirmed, without costs. Appeals from orders, same court and Justice, entered December 16, 2018, October 1, 2018, on or about September 25, 2018, and on or about September 21, 2018, unanimously dismissed, without costs, as subsumed in the appeals from the judgment.

The jury's finding that, Pietro Macaluso, plaintiff's decedent was exposed to asbestos from the products manufactured by defendants is supported by legally sufficient evidence. The trial court properly permitted Macaluso to refresh his recollection with a list of manufacturers that he helped his counsel draw up in preparation for responding to interrogatories, and the issue whether his memory was properly refreshed was a matter of credibility for the jury to resolve (*People v*

Phillibert, 99 AD3d 531 [1st Dept 2012], *lv denied* 20 NY3d 1014 [2013]). The evidence adduced by defendant A.O. Smith Water Products Company was not dispositive as to whether plaintiff was exposed to its product (*see Penn v Amchem Prods.*, 85 AD3d 475 [1st Dept 2011]; *Taylor v A.C. & S., Inc.*, 306 AD2d 202 [1st Dept 2003]). The court's preclusion of defendant Burnham LLC from producing a witness from a similarly named company was harmless error in light of the court's admitting other evidence about that company and the possibility of "mistaken identity."

The jury's finding of recklessness is supported by legally sufficient evidence, and is not against the weight of the evidence (*see Matter of New York City Asbestos Litig.*, 121 AD3d 230, 247-248 [1st Dept 2014], *affd* 27 NY3d 1172 [2016], 27 NY3d 765 [2016]). The court correctly omitted settling defendant Johns-Manville from the verdict sheet, as defendants failed to show that any of the products the decedent was exposed to contained asbestos manufactured by Johns-Manville (*see Bigelow v Acands, Inc.*, 196 AD2d 436, 438 [1st Dept 1993]).

Plaintiff's expert testimony was sufficient to establish that the decedent's demolition of defendants' boilers resulted in exposure to asbestos dust in sufficient quantities to cause the decedent's mesothelioma (*see Matter of New York City Asbestos Litig. [Miller]*, 154 AD3d 441 [1st Dept 2017], *lv denied* 30 NY3d

909 [2018]). The court properly precluded evidence of an experiment conducted by a defense expert, as the conditions under which the experiment was performed were not sufficiently similar to those experienced by the decedent during his exposure, and thus the evidence could have misled the jury (*see Bradshaw v Lenox Hill Hosp.*, 158 AD3d 427 [1st Dept 2018]).

The evidence that the boilers contained asbestos-containing products from third parties, and/or that asbestos-containing products would be used in conjunction with defendants' products, was sufficient to render appropriate a jury charge on the duty to warn, and the content of the court's charges on the issue of duty was correct (*see e.g. Matter of New York City Asbestos Litigation [Sweberg]*, 2015 NY Slip Op 30043[U], *5-7 [Sup Ct, NY County 2015], *mod on other grounds* 143 AD3d 483 [1st Dept 2016], *lv dismissed* 28 NY3d 1165 [2017]).

However, we find that the damages award for the decedent's pain and suffering must be reduced as it deviates materially from what would be reasonable compensation (CPLR 5501[c]; *see New York City Asbestos Litig. [Miller]*, 154 AD3d at 441; *Penn v Amchem Prods.*, 85 AD3d at 475). Although this reduced award is "significant and exceeds amounts set in some of our precedents," it is supported by decedent's "severe and crippling symptoms" and "tremendous physical and emotional pain"] (*Matter of New York*

City Asbestos Litigation [Hackshaw], 143 AD3d 485, 486 [1st Dept 2016], *affd* 29 NY3d 1068 [2017]). The awards for loss of parental guidance to the decedent's children also deviate materially from what would be reasonable compensation (*see Adderley v City of New York*, 304 AD2d 485 [1st Dept 2003], *lv denied* 100 NY2d 511 [2003]; *Grevelding v State of New York*, 132 AD3d 1332 [4th Dept 2015], *lv denied* 27 NY3d 905 [2016]; *Vasquez v County of Nassau*, 91 AD3d 855 [2d Dept 2012]). We thus remand for a new trial on damages unless plaintiff stipulates to reduce the awards as indicated.

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

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

ENTERED: JUNE 18, 2019

CLERK

Sweeny, J.P., Manzanet-Daniels, Kapnick, Oing, Singh, JJ.

9635-
9636 Index 654723/17

In re The Provident Loan Society of New York,
Petitioner-Respondent,

-against-

190 East 72nd Corporation,
Respondent-Appellant.

_____

Stroock & Stroock & Lavan LLP, New York (Kevin L. Smith of counsel), for appellant.

Greenberg Traurig, LLP, New York (James W. Perkins of counsel), for respondent.

_____

Order and judgment (one paper), Supreme Court, New York County (Barbara Jaffe, J.), entered October 17, 2018, in favor of petitioner against respondent, confirming an appraisal determination of the value of land pursuant to the parties' lease at $14,583,000 and fixing the per annum rent at $1,215,250 for the 10-year period beginning May 1, 2017, unanimously affirmed, with costs. Appeal from order and judgment (one paper), same court and Justice, entered on or about July 23, 2018, which granted the petition to confirm the appraisal determination and denied respondent's motion to dismiss the petition, unanimously dismissed, without costs, as subsumed in the appeal from the October 17, 2018 order and judgment.

In this special proceeding commenced pursuant to CPLR 7601,

the court correctly determined that the parties' lease did not require that the determination of the two party-appointed appraisers and the third "independent disinterested" appraiser be unanimous. The appraisers' determination of the value of the land was final and binding, regardless of whether one of the party-appointed appraisers signed the determination under dissent. A contrary reading of the lease would produce a result that is "absurd, commercially unreasonable, or contrary to the reasonable expectations of the parties" (*Matter of Lipper Holdings v Trident Holdings*, 1 AD3d 170, 171 [1st Dept 2003] [internal citations omitted]).

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

ENTERED: JUNE 18, 2019

CLERK

Sweeny, J.P., Manzanet-Daniels, Kapnick, Oing, Singh, JJ.

9637-
9638 Index 312822/15

Philip A. Hofmann,
Plaintiff-Respondent,

-against-

Dina F. Hofmann,
Defendant-Appellant.

_____

The McPherson Firm, PC, New York (Laurie J. McPherson of counsel), for appellant.

Garr Silpe, P.C., New York (Steven M. Silpe of counsel), for respondent.

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Judgment of divorce, Supreme Court, New York County (Louis Crespo, Special Referee), entered July 13, 2018, insofar as it awarded defendant wife 25% of plaintiff husband's interest in certain shares and investments associated with his former employer (the Oaktree Assets), directed defendant to pay 50% of the taxes attendant to 2018 income derived from the Oaktree Assets, declined to reallocate certain marital funds spent pursuant to stipulations during the pendency of the action or to award defendant pendente lite support retroactive to the date of commencement, declined to award defendant post-divorce maintenance, and awarded defendant approximately 41% of her counsel fees, unanimously modified, on the law and the facts, to award defendant 50% of the marital value of the Oaktree Assets

and credit her $6,500 for marital funds spent on plaintiff's security deposit, and otherwise affirmed, without costs. Appeal from order, same court and Referee, entered May 8, 2018, unanimously dismissed, without costs, as subsumed in the appeal from the judgment.

Defendant is entitled to 50% of plaintiff's interest in certain shares and investments he acquired during his employment at a global investment firm, Oaktree Capital Management LLC (Oaktree), where he worked for almost the entire duration of the parties' 16½ year marriage. The trial evidence establishes that plaintiff, while a top-level executive, was still an "at will" employee, who did not have a recognized "partnership interest" at Oaktree. Rather, he was given, as financial incentive for continued employment and compensation for his performance, the opportunity to purchase "indirect equity" in the company, which he paid for with marital funds, to receive a set percentage of "carried interest distributions" for specified funds under his management, and to make personal investments in institutional funds (collectively, the Oaktree Assets). As the Oaktree Assets constituted compensation, their marital value should be distributed in the same manner as the parties' other marital assets, rather than treated as a "closely held" business interest (*see Lijun Feng v Jansche*, 170 AD3d 409 [1st Dept 2019]).

Contrary to plaintiff's contention, the record supports the Referee's finding that defendant made significant contributions to the marriage as a parent and homemaker, allowing plaintiff to pursue his career and amass significant wealth. Accordingly, we modify the judgment to award defendant 50% of the value of the Oaktree Assets (*see Greenwald v Greenwald*, 164 AD2d 706, 715 [1st Dept 1991], *lv denied* 78 NY2d 855 [1991]).

In light of the foregoing, defendant's argument that the court erred in requiring her to pay 50% of the tax liability associated with the Oaktree Assets, when she was awarded only 25% of their value, is moot. The argument is in any event unavailing. The court reasonably apportioned equal tax liability to the parties before the equitable distribution of the Oaktree Assets, at which time their tax liability would shift in accordance with their distributive shares. Before the equitable distribution, the income derived from these assets was used equally by the parties to pay for marital expenses.

The Referee's denial of post-divorce maintenance to defendant is supported by the record, which shows that defendant's distributive award – now substantially increased – would generate cash flow sufficient to render her self-supporting (*see Naimollah v De Ugarte*, 18 AD3d 268, 271 [1st Dept 2005]; *see also Grumet v Grumet*, 37 AD3d 534, 535 [2d Dept 2007], *lv denied*

9 NY3d 818 [2008]).

We agree with the Referee's determination that defendant is not entitled to credits for plaintiff's use of marital funds. Pursuant to a so-ordered stipulation during the pendency of the action, the parties each took an advance against equitable distribution and agreed to pay for certain expenses, such as housing and automobile expenses, from marital income or assets. The Referee providently exercised his discretion in declining to reallocate these expenses, which the parties agreed were marital, particularly in light of defendant's distributive award. However, we find that defendant is entitled to 50% of plaintiff's security deposit, given the expectation that he will be refunded those monies. Accordingly, we modify to award defendant a credit of $6,500.

To the extent defendant seeks maintenance and child support retroactive to the commencement of the action, we find that it is not warranted (*see Grumet*, 37 AD3d at 536). Defendant never moved for pendente lite support. The parties entered into two stipulations in which they agreed that each would withdraw approximately $2.2 million against equitable distribution to use for personal and marital expenses, and there is no evidence that either defendant's or the children's needs were not met.

The Referee providently exercised his discretion in awarding

defendant approximately 41% of her counsel fees, in view of her substantial distributive award and the evidence that payment of her remaining counsel fees will not affect her ability to meet her living expenses (*see e.g. Wyser-Pratte v Wyser-Pratte*, 68 AD3d 624, 626 [1st Dept 2009]). There is no support in the record for defendant's contention that she is entitled to a larger award because plaintiff's conduct was unreasonable.

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

ENTERED: JUNE 18, 2019

CLERK

Sweeny, J.P., Manzanet-Daniels, Kapnick, Oing, Singh, JJ.

9639 The People of the State of New York, Ind. 4701/12
Respondent,

-against-

Wilberto Hernandez,
Defendant-Appellant.

_____

Christina A. Swarns, Office of the Appellate Defender, New York (Victorien Wu 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 (Richard Carruthers, J. at plea; James M. Burke at sentencing), rendered April 12, 2017,

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

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

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

ENTERED: JUNE 18, 2019

CLERK

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

Sweeny, J.P., Kapnick, Oing, Singh, JJ.

9640 Gjonaj Realty & Management Corp., et al.,
Plaintiffs-Respondents,

-against-

Capacity Group of NY LLC, et al.,
Defendants-Appellants.

Index 24265/17E

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

Berson & Budashewitz, LLP, New York (Jeffrey A. Berson of counsel), for respondents.

Order, Supreme Court, Bronx County (Fernando Tapia, J.), entered on or about July 2, 2018, which, to the extent appealed from as limited by the briefs, denied defendants' motion to dismiss the complaint on the ground of collateral estoppel, unanimously affirmed, without costs.

Plaintiffs sue their insurance brokers for negligently misrepresenting that they forwarded legal documents which related to an underlying personal injury action to the insurance carrier.

In an appeal in the underlying personal injury action, we denied plaintiffs' motion to vacate a default judgment against them, in part, because plaintiffs failed to demonstrate a reasonable excuse for their default in answering or otherwise appearing in that action (*see Gecaj v Gjonaj Realty & Mgt. Corp.*,

149 AD3d 600 [1st Dept 2017]). We found that plaintiffs' proffered excuse for their default - that they relied on the representations of defendants that the pertinent litigation documents had been forwarded to the appropriate insurance carrier, when in fact, they failed to do so - was not reasonable, given the nature of the documents (including a summons and complaint and two motions for a default judgment) and the length of time that plaintiffs had been receiving them.

Relying on that decision, defendants contend that plaintiffs should be collaterally estopped to relitigate in this action the issue of the reasonableness of their reliance on defendants' representations (*see generally Buechel v Bain*, 97 NY2d 295, 303-304 [2001], *cert denied* 535 US 1096 [2002]; *Staatsburg Water Co. v Staatsburg Fire Dist.*, 72 NY2d 147, 153 [1988]). However, we did not rule on the reasonableness of plaintiffs' reliance on defendants' representations or on the merits of the cause of action for negligent misrepresentation asserted herein as a whole. Indeed, we acknowledged plaintiffs' commencement of this action as a potential mechanism for vindicating their rights (*see Gecaj*, 149 AD3d at 608).

Our decision in *Gecaj* does not collaterally estop plaintiffs to litigate the reasonableness of their reliance on defendants' representations, because the requisite "identity of issue which

has necessarily been decided in the prior action and is decisive of the present action" (*Buechel v Bain*, 97 NY2d at 304) is lacking (*compare Harcztark v Drive Variety, Inc.*, 21 AD3d 876, 876-877 [2d Dept 2005] ["Whether there is a reasonable excuse for a default is a discretionary, sui generis determination to be made by the court based on all relevant factors, including the extent of the delay, whether there has been prejudice to the opposing party, whether there has been willfulness, and the strong public policy in favor of resolving cases on the merits"], quoted in *Gecaj*, 149 AD3d at 603, *with Kimmell v Schaefer*, 89 NY2d 257, 264 [1996] ["In determining whether justifiable reliance exists in a particular case, a fact finder should consider whether the person making the representation held or appeared to hold unique or special expertise; whether a special relationship of trust or confidence existed between the parties; and whether the speaker was aware of the use to which the

information would be put and supplied it for that purpose"], *and* PJI 3:21 and Comment III ["Reasonable Reliance"]).

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

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

ENTERED: JUNE 18, 2019

CLERK

Sweeny, J.P., Manzanet-Daniels, Kapnick, Oing, Singh, JJ.

9641 Ibrahima Diakite, Index 301001/13
Plaintiff-Appellant,

-against-

PSAJA Corp., et al.,
Defendants-Respondents.

_____

Budin, Reisman, Kupferberg & Bernstein, LLP, New York (Gregory C. McMahon of counsel), for appellant.

Robert D. Grace, Brooklyn, for respondents.

_____

Order, Supreme Court, Bronx County (Allison Y. Tuitt, J.), entered on or about April 20, 2018, which granted defendants' motion for summary judgment dismissing the complaint based on plaintiff's inability to establish that he suffered a serious injury within the meaning of Insurance Law § 5102(d), unanimously affirmed, without costs.

Defendants satisfied their prima facie burden of showing that plaintiff did not sustain a serious injury to his cervical spine, lumbar spine, or right shoulder by submitting the reports of their neurologist and orthopedic surgeon, who found that plaintiff had normal range of motion and opined that any alleged injuries had resolved with no permanent or residual effects (*see Holloman v American United Transp. Inc.*, 162 AD3d 423, 423 [1st Dept 2018]; *Frias v Gonzalez-Vargas*, 147 AD3d 500, 500 [1st Dept

2017]). Defendants also submitted a radiologist's report which opined that plaintiff's MRIs showed degenerative conditions, including osteophytes, disc desiccation and hypertrophic spurring (*see Andrade v Lugo*, 160 AD3d 535, 535-536 [1st Dept 2018]; *Moore-Brown v Sofi Hacking Corp.*, 151 AD3d 567, 567 [1st Dept 2017]). Defendants also observed a three year gap in treatment, from eight months after the accident, April 2013, to December 2016, which plaintiff failed to explain (*Pommells v Perez*, 4 NY3d 566, 572, 576 [2008]).

In opposition, plaintiff failed to raise a triable issue on causation. He submitted unaffirmed medical records, which showed that his own diagnostic studies revealed degeneration and osteoarthritis in his spine, and a report of an expert who examined him four years after the accident. The expert failed to refute or address the findings of preexisting degeneration in plaintiff's own medical records, or explain how the accident, rather than preexisting conditions, was the cause of the alleged spinal injuries (*Andrade*, 160 AD3d at 536; *Lee v Lippman*, 136 AD3d 411, 412 [1st Dept 2016]). The expert's bare statement was similarly insufficient to raise an issue of fact as to whether the shoulder condition was causally related to the accident (*see Walker v Whitney*, 132 AD3d 478, 479 [1st Dept 2015]).

Given the insufficient evidence that the subject accident caused plaintiff's back and shoulder injuries, he cannot establish his 90/180-day injury claim (*see Henchy v VAS Express Corp.*, 115 Ad3d 478, 480 [1st Dept 2014]).

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

ENTERED: JUNE 18, 2019

CLERK

Sweeny, J.P., Manzanet-Daniels, Kapnick, Oing, Singh, JJ.

9642- Index 159713/15
9643 Eamonn Cassidy,
Plaintiff,

-against-

Greater New York Automobile Dealers Association, Inc., et al.,
Defendants.
- - - - -
George P. Johnson Company,
Third-Party Plaintiff-Appellant,

-against-

Freeman Decorating Services, Inc., et al.,
Third-Party Defendants-Respondents.

Law Office of James J. Toomey, New York (Evy L. Kazansky of counsel), for appellant.

Forchelli Deegan Terrana LLP, Uniondale (Russell G. Tisman of counsel), for respondents.

Judgment, Supreme Court, New York County (Manuel J. Mendez, J.), entered May 7, 2018, dismissing the third-party complaint and bringing up for review an order, same court and Justice, entered May 2, 2018, which granted the motion of third-party defendant Freeman Expositions, Inc., formerly known as Freeman Decorating Services, Inc. (Freeman) to dismiss the action as against it, unanimously reversed, on the law, without costs, the judgment vacated, the complaint reinstated, and the motion

denied.

Viewing the facts of the third-party complaint in the light most favorable to third-party plaintiff and assuming the truth of the allegations for the purpose of CPLR 3211(a)(7), we find that it states valid claims for both contractual and common law indemnification (*see Goshen v Mutual Life Ins. Co. of N.Y.*, 98 NY2d 314, 326-327 [2002]; *Basis Yield Alpha Fund [Master] v Goldman Sachs Group, Inc.*, 115 AD3d 128, 134-135 [1st Dept 2014]). Nor is dismissal warranted under CPLR 3211(a)(1). The documentary evidence does not utterly refute the allegations in the third-party complaint (*see Leon v Martinez*, 84 NY2d 83, 87-88 [1994]; *Lopez v Fenn*, 90 AD3d 569, 570 [1st Dept 2011]). In addition, Freeman has not established, as a matter of law, a defense to the third-party common law indemnification claim based on a claimed special employee relationship between itself and plaintiff (*see Holmes v Business Relocation Servs., Inc.*, 25 NY3d

955, 956 [2015]; *Cartagena v Access Staffing, LLC*, 151 AD3d 580, 581 [1st Dept 2017]).

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

ENTERED: JUNE 18, 2019

CLERK

Sweeny, J.P., Manzanet-Daniels, Kapnick, Oing, Singh, JJ.

9644-
9644A The People of the State of New York, Respondent,

SCI 3641/15
1455/16

-against-

Maurice Marria,
Defendant-Appellant.

_____

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

_____

Judgments, Supreme Court, New York County (Larry Stephen, J.), rendered May 25, 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: JUNE 18, 2019

CLERK

Sweeny, J.P., Manzanet-Daniels, Kapnick, Oing, Singh, JJ.

9645 Kathleen M. Elias, et al., Index 160714/15
Plaintiffs-Appellants,

-against-

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

_____

Rubenstein & Rynecki, Brooklyn (Harper A. Smith of counsel), for appellants.

Zachary W. Carter, Corporation Counsel, New York (Zachary S. Shapiro of counsel), for respondents.

_____

Order, Supreme Court, New York County (Alexander M. Tisch, J.), entered July 6, 2018, which, to the extent appealed from as limited by the briefs, granted defendants' motion for summary judgment and dismissed plaintiffs' state and federal claims of assault, battery, and excessive force, and the derivative claim of loss of services, unanimously reversed, on the law, without costs, and the motion denied.

On December 20, 2014, plaintiff Kathleen M. Elias went to Bryant Park to ice skate with her family. While waiting in line, plaintiff took a few "swigs" of brandy. Bryant Park security then refused to allow her on the ice because she was intoxicated and asked her to leave the park. Plaintiff became belligerent, arguing with security staff and the NYPD. The parties sharply dispute whether plaintiff physically assaulted a police officer

prior to being arrested. The parties also dispute how plaintiff came to be lying face down on the ground, and whether she actively resisted arrest. During the course of handcuffing and arresting plaintiff, plaintiff's wrist was fractured.

Defendants met their initial burden on summary judgment with respect to the excessive force-related claims by providing the deposition testimony of NYPD officers Mukhtarzada and Winters. They testified that plaintiff was intoxicated, belligerent, refused to cooperate with police instructions, drew the attention of a crowd, and actively resisted arrest (*see N.M. v City of New York*, 2019 NY Slip Op 02981 [1st Dept Apr. 23, 2019]; *Walker v City of New York*, 148 AD3d 469, 470 [1st Dept 2017]; *Wilson v City of New York*, 147 AD3d 664, 664 [1st Dept 2017]).

However, plaintiff sufficiently raised a triable issue of fact as to the reasonableness of the use of force by the police. Claims that law enforcement used excessive force during an arrest are analyzed under the Fourth Amendment and its standard of objective reasonableness (*Koeiman v City of New York*, 36 AD3d 451, 453 [1st Dept 2007], *lv denied* 8 NY3d 814 [2007]; *see also Mendez v The City of New York*, 137 AD3d 468, 471-472 [1st Dept 2016]). Use of force "must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight" (*Graham v Connor*, 490 US 386, 396 [1989]).

"The calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments -- in circumstances that are tense, uncertain, and rapidly evolving -- about the amount of force that is necessary in a particular situation" (*id.* at 396-397). "The determination of an excessive force claim requires consideration of all of the facts underlying the arrest, including the severity of the crime at issue, whether the suspect posed an immediate threat to the safety of the officers, and whether the suspect was actively resisting arrest" (*Koeiman*, 36 AD3d at 453 [paraphrasing *Graham*, 490 US at 396]; *see also Pacheco v City of New York*, 104 AD3d 548, 549-550 [1st Dept 2013]).

In this case, plaintiff presented competent proof, in the form of deposition testimony by plaintiff, her husband, and a security supervisor who witnessed the event, that immediately prior to her arrest she was sitting on a chair and did not assault any police officer. As the parties sharply dispute the circumstances leading up to the arrest, "the question of whether the use of force was reasonable under the circumstances is generally best left for a jury to decide" (*Holland v City of Poughkeepsie*, 90 AD3d 841, 844 [2d Dept 2011]; *see also Relf v City of Troy*, 169 AD3d 1223, 1224 [3d Dept 2019]; *Wright v City of Buffalo*, 137 AD3d 1739, 1742 [4th Dept 2016]).

Plaintiff also presented competent evidence that she suffered from a potentially compensable injury, a fractured wrist, as a result of police action. Both Police Officer Bernstein and plaintiff testified that she went to Bellevue Hospital on the evening of her arrest, had an x-ray performed on her wrist, and received a splint. Plaintiff further testified that, two days later, an orthopedic surgeon diagnosed her as having a fractured wrist.

The loss of services claim should also be reinstated as it was only dismissed because it was derivative in nature.

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

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

ENTERED: JUNE 18, 2019

CLERK

Sweeny, J.P., Manzanet-Daniels, Kapnick, Oing, Singh, JJ.

9646 New York City School Construction Authority, Index 656691/16

Plaintiff-Appellant,

-against-

New South Insurance Company,
Defendant-Respondent.

_____

Fabiani Cohen & Hall, LLP, New York (John V. Fabiani of counsel), for appellant.

Law Office of James J. Croteau, New York (James J. Croteau of counsel), for respondent.

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Order, Supreme Court, New York County (Joel M. Cohen, J.), entered November 13 2018, which granted defendant New South Insurance Company's (New South) motion for summary judgment dismissing the complaint, and denied plaintiff New York City School Construction Authority's (SCA) cross motion for summary judgment, unanimously modified, on the law, to declare that defendant has no obligation to defend or indemnify plaintiff in the underlying action, and otherwise affirmed, without costs.

The language regarding New South's coverage of SCA under the New South policy is straightforward and unambiguous. Since the accident occurred while the subject vehicle was parked, and not "while driving," SCA is not a covered "Insured" under the New South policy. The Court of Appeals holding in *Argentina v Emery*

World Wide Delivery Corp. (93 NY2d 554, 558-560, 563 [1999]) does not compel a different result. In *Argentina*, the Court held that loading and unloading a vehicle constitutes "use or operation" of a vehicle for the purposes of holding an owner liable under VTL § 388(1). Here, by contrast to *Argentina*, SCA is not the vehicle owner, and the owner, Sukhman Construction Inc., is not a party to the underlying action. Moreover, *Argentina* expressly stated that an insurance policy "need not cover the liability of a third party for accidents occurring in the loading or unloading of the vehicle" (93 NY2d at 560).

We modify solely to declare in defendant's favor, rather than dismiss (*see Hirsch v Lindor Realty Corp.*, 63 NY2d 878 [1984]).

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

ENTERED: JUNE 18, 2019

CLERK

Sweeny, J.P., Manzanet-Daniels, Kapnick, Oing, Singh, JJ.

9647 In re Allen Patterson, Index 100451/17
Petitioner-Appellant,

-against-

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

Stewart Lee Karlin Law Group, P.C., New York (Daniel E. Dugan of counsel), for appellant.

Zachary W. Carter, Corporation Counsel, New York (Jane L. Gordon of counsel), for respondents.

Order and judgment (one paper), Supreme Court, New York County (Nancy M. Bannon, J.), entered August 23, 2018, which denied the petition to annul a determination of respondent City of New York Civil Service Commission, dated December 16, 2016, affirming a determination of the New York City Administration for Children's Services (ACS), dated September 22, 2016, terminating petitioner's employment for misconduct and incompetence, and to annul a determination of the Civil Service Commission, dated March 6, 2017, affirming a determination of the New York City Department of Citywide Administrative Services, dated October 6, 2016, disqualifying petitioner from employment with the New York City Taxi and Limousine Commission based on ACS's findings, denied petitioner's motion to amend the petition, and dismissed the proceeding brought pursuant to CPLR article 78, unanimously

affirmed, without costs.

Petitioner failed to establish that respondents acted in excess of their jurisdiction (*see* Civil Service Law § 76[1], [3]; *Matter of Almanzar v City of N.Y. City Civ. Serv. Commn.*, 166 AD3d 522, 524 [1st Dept 2018]). Although petitioner submitted both a conditional resignation and a handwritten resignation letter while disciplinary charges were pending against him, ACS properly elected to disregard the resignation and continue to prosecute the charges against him (*see* 4 NYCRR 5.3[b]).

The proposed amended petition lacks merit (*see generally Garcia v New York-Presbyt. Hosp.*, 114 AD3d 615 [1st Dept 2014]). Petitioner, a probationary employee of the Department of Finance, who could be dismissed for almost any reason, or no reason at all, failed to allege facts that would establish that he was dismissed in bad faith or for an improper or impermissible reason (*see Matter of Castro v Schriro*, 140 AD3d 644, 647 [1st Dept 2016], *affd* 29 NY3d 1005 [2017]).

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

ENTERED: JUNE 18, 2019

CLERK

Sweeny, J.P., Manzanet-Daniels, Kapnick, Oing, Singh, JJ.

9648 The People of the State of New York, Ind. 2015/14
Respondent,

-against-

Glenn Bowman,
Defendant-Appellant.

_____

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

Darcel D. Clark, District Attorney, Bronx (Diana J. 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 (Robert A. Neary, J. at plea and sentencing), rendered March 22, 2017,

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

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

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

ENTERED: JUNE 18, 2019

CLERK

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

Sweeny, J.P., Manzanet-Daniels, Kapnick, Oing, Singh, JJ.

9650N Malka Kubersky, Index 155666/16
Plaintiff-Respondent,

-against-

Cameron Industries, Inc., et al.,
Defendants-Appellants.

_____

Schlacter & Associates, New York (Jed R. Schlacter of counsel), for appellants.

Schwartz Perry & Heller, LLP, New York (Brian Heller of counsel), for respondent.

_____

Order, Supreme Court, New York County (Barbara Jaffe, J.), entered November 16, 2018, which denied defendants' motion for summary judgment dismissing the complaint, and granted plaintiff leave to amend her complaint, unanimously affirmed, without costs.

Plaintiff alleges she was employed by defendant Cameron from April of 2014 to October of 2014, when she was wrongfully terminated due to her participation in an unemployment hearing before the New York State Department of Labor. She commenced this action, alleging unlawful retaliation in violation of Labor Law § 215(1)(a), in July 2016, and served notice on the New York Attorney General of her action in September 2017. Defendants then moved for summary judgment, arguing that plaintiff had failed to provide notice of her action to the attorney general

"at or before commencement" of it, as required by Labor Law § 215(2)(b).

In *Columbia Gas of N.Y. v New York State Elec. & Gas Corp.* (28 NY2d 117, 129 [1971]), which involved a similar provision in General Business Law § 340 requiring service of notice of an action on the attorney general "at or before commencement," the Court of Appeals concluded that the notice requirement "may not be considered a condition precedent to the plaintiff's cause of action," since the "requirement that notice be given is designed solely to apprise the Attorney General that such an action was commenced so that he would be aware of the circumstances" (*id.*).

In keeping with the precedent set by *Columbia Gas*, this Court finds that plaintiff's failure to serve notice on the attorney general until one year after commencing the action against her former employers, but during the course of litigation, does not require dismissal of her action (*see Figura v North Country Janitorial, Inc.*, 53 Misc 3d 881 [Sup Ct, Warren County 2016]; *Aurelien v Albert Augustine Ltd.*, 2012 NY Slip Op 32901[U], *1 [Sup Ct, NY County 2012]; *see also Bernstein v 1995 Assoc.*, 217 AD2d 512 [1st Dept 1995] [interpreting notice provision of NYC Administrative Code § 8-502 consistent with *Columbia Gas*]; *but see Silver v Equitable Life Assur. Socy. of U.S.*, 168 AD2d 367 [1st Dept 1990] [dismissing action under Civil

Rights Law § 40-c due to failure to provide notice to Attorney General, without considering *Columbia Gas*]).

We note that the legislature is presumed to have been familiar with existing decisional law, including *Columbia Gas*, when it subsequently enacted Labor Law § 215(2)(b), and chose to use the same language used in General Business Law § 340 to require notice of the civil action be given to the Attorney General (*see Matter of Knight-Ridder Broadcasting v Greenberg*, 70 NY2d 151, 157 [1987]). In contrast, when enacting notice of claim provisions (*e.g.* General Municipal Law § 50-c[1]), the legislature has included express language making clear that notice to the municipality is a condition precedent to bringing an action against that municipality (*see Bernstein, supra*; *Columbia Gas*, 33 AD2d 1057, 1058-1059 [3d Dept 1970]).

We have considered the remaining arguments and find them unavailing.

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

ENTERED: JUNE 18, 2019

CLERK

Gische, J.P., Webber, Kahn, Kern, JJ.

9651 Marcia Meyers, Index 116747/10
Plaintiff-Appellant,

-against-

Four Thirty Realty, LLC,
Defendant-Respondent.

_____

Sokolski & Zekaria, P.C., New York (Daphna Zekaria of counsel), for appellant.

Horing Welikson & Rosen, P.C., Williston Park (Niles C. Welikson of counsel), for respondent.

_____

Order, Supreme Court, New York County (Arlene P. Bluth, J.), entered July 5, 2018, which granted defendant's motion for summary judgment declaring the subject apartment exempt from rent regulation and dismissing the balance of the complaint, declared the apartment exempt from rent regulation, and dismissed the complaint in its entirety, unanimously reversed, on the law, the motion denied, and the declaration vacated.

The court providently exercised its discretion in permitting defendant to make a third motion for summary judgment after the conclusion of discovery that was found necessary by this Court in a prior appeal (*Meyers v Four Thirty Realty*, 127 AD3d 501, 502 [1st Dept 2015]; *see Forte v Weiner*, 214 AD2d 397, 398 [1st Dept 1995], *lv dismissed* 86 NY2d 885 [1995]). On the instant motion, defendant submitted an order issued by the Division of Housing

and Community Renewal (DHCR) in February 1995, which it claims was newly discovered, allowing for deregulation of the apartment upon the expiration of the then existing lease.

In the prior appeal brought by defendant, we determined that, as defendant conceded, plaintiff is entitled to a rent-stabilized lease because the building was receiving J-51 tax benefits at the time the apartment was deregulated, but absent a fuller record, any determination of the proper base date rent was premature (127 AD3d at 501, 502). Defendant did not seek to appeal that determination.

The 1995 order was available to defendant, regardless of whether it actually knew about it. Even accepting defendant's claim, that it was unaware of the 1995 order when it made that concession or filed its prior appeal, we perceive no public policy or other reason to disregard defendant's decision to concede the issue (*see Martin v City of Cohoes*, 37 NY2d 162, 165 [1975]; *Kent v Bedford Apts. Co.*, 237 AD2d 140 [1st Dept 1997]). Defendant had a full and fair opportunity to litigate whether the apartment was properly deregulated, and elected to concede that it was subject to rent stabilization.

Not only are the parties bound by our prior order on the issue of the apartment's regulated status, there were no extraordinary circumstances that would have permitted the motion

court to disregard our order (*Carmona v Mathisson*, 92 AD3d 492, 492-493 [1st Dept 2012]). Under these circumstances, we need not consider whether the parties are otherwise bound by DHCR's erroneous 1995 order.

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: JUNE 18, 2019

CLERK

Gische, J.P., Webber, Kahn, Kern, JJ.

9652 In re Cheron B., Jr.,

A Child Under the Age of Eighteen Years, etc.

Vanessa G.,
Respondent-Appellant,

Administration for Children's Services
Petitioner-Respondent,

Cheron B.
Respondent.

_____

Douglas H. Reiniger, New York, for appellant.

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

Diaz & Moskowitz, PLLC, New York (Hani M. Moskowitz of counsel), attorney for the child.

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Order, Family Court, New York County (Karen I. Lupuloff, J.), entered on or about August 4, 2017, which granted petitioner's motion to excuse it from making reasonable efforts to reunify respondent mother and the subject child, unanimously affirmed, without costs.

There is no dispute that respondent's parental rights as to her older children were involuntarily terminated, and thus, petitioner satisfied its initial burden to show that reasonable efforts at reunification were not required (*see* Family Ct Act § 1039-b[b][6]). In opposition, respondent failed to submit any

evidence showing that reasonable efforts would be in the best interests of the child, would not be contrary to the child's health and safety, and were likely to result in reunification in the foreseeable future (*id.*; *see Matter of Alexandryia M.B. [Heather C.]*, 130 AD3d 1022 [2d Dept 2015]).

Respondent's claim of judicial bias is not preserved, and, in any event, it is not supported by the record (*see Matter of Maureen H. v Samuel G.*, 104 AD3d 470 [1st Dept 2013]).

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: JUNE 18, 2019

CLERK

Gische, J.P., Webber, Kahn, Kern, JJ.

9653-
9654 SpringPrince, LLC,
Plaintiff-Respondent,

-against-

Elie Tahari, Ltd.,
Defendant-Appellant.

Index 653698/18

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Aaronson Rappaport Feinstein & Deutsch, LLP, New York (Deirdre E. Tracey of counsel), for appellant.

Joseph T. Mullen, Jr. & Associates, New York (Paul Biedka of counsel), for respondent.

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Judgment, Supreme Court, New York County (Andrew Borrok, J.), entered December 10, 2018, to the extent appealed from as limited by the briefs, awarding plaintiff the aggregate amount of $175,212.52 as against defendant, unanimously affirmed, with costs. Appeal from order, same court and Justice, entered on or about November 21, 2018, which granted plaintiff's CPLR 3213 motion, unanimously dismissed, without costs, as subsumed in the appeal from the judgment.

The purpose of CPLR 3213 is "to provide quick relief on documentary claims so presumptively meritorious that a formal complaint is superfluous, and even the delay incident upon waiting for an answer and then moving for summary judgment is needless" (*Weissman v Sinorm Deli*, 88 NY2d 437, 443 [1996]). A

guaranty of a payment under a lease can fall within the parameters of CPLR 3213 (*Board of Mgrs. of the Saratoga Condominium v Shuminer*, 148 AD3d 609, 610, 611 [1st Dept 2017]).

Plaintiff's motion for summary judgment in lieu of complaint was properly granted against defendant based on the guaranty in the lease. Here, there is no dispute that defendant guaranteed the payment of the tenant's rent obligations, and that the tenant ceased making rent payments thereunder. Thus, defendant is obligated under the guaranty for the tenant's default under the lease.

Defendant asserts that it is relieved of its obligations as guarantor under the lease based on the fact that subsequent to the signing of the lease and guaranty, the tenant and landlord signed an agreement to reduce the tenant's rent obligations for a period of time, to which defendant alleges it did not consent. However, such assertion is unavailing. "Under general contract rules, an obligation may not be altered without the consent of the party who assumed the obligation" (*Bier Pension Plan Trust v Estate of Schneierson*, 74 NY2d 312, 315 [1989], citing *Becker v Faber*, 280 NY 146, 148-149 [1939]). Indeed, contracting parties "may not alter the surety's undertaking to cover a different obligation without the surety's consent" (*Bier, 74* NY2d at 315). "An obligation is altered when the debtor is discharged from the

original contract and a new contract is substituted in its place. The test is whether there is a new contract which will be enforced by the courts" (*id.*). However, "[i]ndulgence or leniency in enforcing a debt when due is not an alteration of the contract" (*id.* at 316). The Court of Appeals has held that "an agreement merely to remit part of the performance due from the principal without changing its character as by lessening the amount of rent to be paid under a guaranteed lease . . . will not discharge the surety" (*Becker*, 280 NY at 150).

The subsequent agreement between the tenant and the landlord reducing the tenant's rent obligations did not discharge defendant's obligations under the guaranty as it merely constituted leniency on the part of the landlord and did not create a new contract between the parties.

We have considered defendant's remaining arguments, including its argument, which was raised for the first time on

appeal, that plaintiff's motion should be denied because it was procedurally defective, and find them to be unavailing.

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

ENTERED: JUNE 18, 2019

CLERK

Gische, J.P., Webber, Kahn, Kern, JJ.

9655 Johanna Beltran Jones, Index 305121/14
Plaintiff-Appellant,

-against-

Icahn Associates Corp., et al.,
Defendants,

Inwood Opportunity LLC, et al.,
Defendants-Respondents.

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Pena & Kahn, PLLC, Bronx (Diane Welch Bando of counsel), for appellant.

Gordon & Silber, PC, New York (Andrew B. Kaufman of counsel), for respondents.

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Order, Supreme Court, Bronx County (Kenneth L. Thompson, Jr. J.), entered on or about May 18, 2018, which granted defendants Inwood Opportunity LLC and Icahn Charter School 3's motion for summary judgment dismissing the complaint and any cross claims against them, unanimously affirmed, without costs.

Defendants Inwood Opportunity LLC and Icahn Charter School 3 established prima facie entitlement to summary judgment (*see Weinberger v 52 Duane Assoc., LLC*, 102 AD3d 618, 619 [1st Dept 2013]). Defendants submitted evidence sufficient to establish that a rainstorm had started prior to plaintiff's fall, and that the fall was the result of rainwater that had been tracked into the school building and onto the stairs by students descending

the stairs toward a basement cafeteria within 10 minutes of the accident (*see id.*; *Richardson v S.I.K. Assoc., L.P.*, 102 AD3d 554 [1st Dept 2013]; *Hussein v New York City Tr. Auth.*, 266 AD2d 146 [1st Dept 1999]; *Abraham v Port Auth. of N.Y. & N.J.*, 29 AD3d 345, 347 [1st Dept 2006]). Defendants also established that they did not create the hazard at issue, which had been present for approximately 10 minutes, and had no actual or constructive notice of it.

In opposition, plaintiff failed to raise a triable issue of fact. Defendants placed mats by the entryways, which were cleaned on a nightly basis, and an employee of defendants who informed people to be careful was stationed by the entryway. While defendants were aware that rainwater had been tracked into the building and onto the stairs in the past, a general awareness that the stairs could become wet during inclement weather is insufficient to raise a triable issue of fact as to whether defendants had constructive notice of the specific condition that caused the accident here (*see Naulo v New York City Bd. of Educ.*, 71 AD3d 651, 652 [2d Dept 2010]; *Abraham*, 29 AD3d at 347; *Solazzo v New York City Tr. Auth.*, 21 AD3d 735, 736 [1st Dept 2005], *affd* 6 NY3d 734 [2005]; *Grib v New York City Hous. Auth.*, 132 AD3d 725 [2d Dept 2015]). Defendants were not required to cover all of the school floors with mats nor were they required to

continuously mop up all of the moisture resulting from the tracked-in rain (*Naulo* at 651; *Hussein* at 146-147). Plaintiff's contention that she may have slipped on water that had been tracked up from the downstairs cafeteria is speculative and does not create an issue of fact warranting the denial of summary judgment (*see generally Talamas v Metropolitan Transp. Auth.*, 120 AD3d 1333, 1335 [2d Dept 2014]).

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

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

ENTERED: JUNE 18, 2019

CLERK

Gische, J.P., Webber, Kahn, Kern, JJ.

9657 In re Marie Addoo, Index 101569/14
Petitioer-Appellant,

-against-

NYC Board of Education,
Respondent-Respondent.

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Marie Addoo, appellant pro se.

Zachary W. Carter, Corporation Counsel, New York (Barbara Graves-Poller of counsel), for respondent.

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Judgment, Supreme Court, New York County (Shlomo Hagler, J.), entered December 22, 2015, denying the petition, inter alia, to annul respondent's determination, dated November 5, 2014, which upheld petitioner's "Unsatisfactory" annual performance review rating for the 2013-2014 school year, and dismissing the proceeding brought pursuant to CPLR article 78, unanimously affirmed, without costs.

Contrary to petitioner's argument, there was no discontinuance of employment (*see e.g. People v Grasso*, 54 AD3d 180, 211 [1st Dept 2008]). Petitioner voluntarily resigned. Petitioner failed to show that the U-rating was arbitrary and capricious or made in bad faith (*see Matter of Murname v Department of Educ. of the City of N.Y.*, 82 AD3d 576 [1st Dept 2011]). Respondent's determination to uphold the U-rating has a

rational basis in the record, which shows repeated instances of pedagogical deficiencies during the 2013-2014 school year, as well as a failure to improve.

To the extent petitioner challenges her pension calculation, respondent is not the proper party against which to bring her claims (*see e.g. Rowell v Teachers' Retirement Bd. of Teachers' Retirement Sys. of City of N.Y.*, 123 AD2d 558 [1st Dept 1986], *lv denied* 69 NY2d 604 [1987]). These claims could not in any event be entertained, because petitioner failed to exhaust her administrative remedies (*see Feher v John Hay Coll. of Criminal Justice*, 37 AD3d 307 [1st Dept 2007], *lv dismissed in part, denied in part* 9 NY3d 885 [2007], *cert denied* 552 US 1187 [2008]).

We have considered petitioner's remaining arguments and find them either unpreserved or otherwise unavailing.

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

ENTERED: JUNE 18, 2019

CLERK

Gische, J.P., Webber, Kahn, Kern, JJ.

9658 The People of the State of New York, Ind. 328/17
Respondent,

-against-

Taequan Brown,
Defendant-Appellant.

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

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

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An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Michael Obus, J. at plea; Laura Ward, J. at sentencing), rendered June 22, 2017,

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

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

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

ENTERED: JUNE 18, 2019

CLERK

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

Gische, J.P., Webber, Kahn, Kern, JJ.

9660 In re Centennial Insurance Company Index 402424/10

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Superintendent of Financial Services
of the State of New York,
Petitioner-Respondent,

-against-

Landlease (US) Construction LMB, Inc.,
formerly known as Bovis Lend Lease LMB.
Inc.,
Respondent-Appellant.

_____

Sheppard Mullin Richter & Hampton LLP, New York (Malani J. Cademartori of counsel), for appellant.

Gottesman, Wolgel, Flynn, Weinberg & Lee, New York (Lawrence L. Flynn of counsel), for respondent.

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Order, Supreme Court, New York County (Arlene P. Bluth, J.), entered May 9, 2018, which, insofar as appealed from, held, pursuant to CPLR 4403, that petitioner Superintendent of Financial Services of the State of New York, the Liquidator of Centennial Insurance Company, properly classified respondent's claim as a Class Seven claim instead of as a Class Two claim under Insurance Law Section 7434(a)(1)(ii) with respect to priority of payments out of the New York State Property/Casualty Insurance Security Fund, unanimously affirmed, without costs.

Petitioner liquidator properly classified respondent's claim seeking a distribution from the assets being distributed in the

Centennial liquidation proceeding as a Class Seven claim because respondent did not submit by January 16, 2015, evidence in support of an allowance of its claim, as required under the court's December 2013 order that validly set that date as the deadline by which it was entitled to submit the documentation necessary for the allowance of the claim (*see Matter of Liquidation of Midland Ins. Co.*, 145 AD3d 601 [1st Dept 2016]; *Matter of Midland Ins. Co.*, 32 Misc 3d 1211[A], 2011 NY Slip Op 51261[U] [Sup Ct, New York County 2011]).

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

ENTERED: JUNE 18, 2019

CLERK

Gische, J.P., Webber, Kahn, Kern, JJ.

9661 Black Diamond Capital Management, LLC, et al.,
Plaintiffs-Respondents,

-against-

Oppenheimer Master Loan Fund, LLC, et al.,
Defendants,

Eaton Vance Corp., et al.,
Defendants-Appellants.

Index 652519/15

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Brown Rudnick LLP, New York (Sigmund S. Wissner-Gross of counsel), for appellants.

Richards Kibbe & Orbe LLP, New York (David W.T. Daniels of counsel), for respondents.

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Order, Supreme Court, New York County, (Andrea Masley, J.), entered January 23, 2019, which, to the extent appealed from, denied defendants Eaton Vance Corp. and Eaton Vance Floating Rate Portfolio's (together, Eaton), motion for summary judgment, unanimously affirmed, with costs.

Summary judgment was correctly denied as to plaintiffs' tortuous interference with contract claim against Eaton. Issues of fact remain as to whether the right of first refusal (ROFR) upon which Eaton relies was a valid and enforceable agreement, whether Eaton knew about plaintiff's agreement with the Oppenheimer defendants when it exercised the ROFR, and whether Eaton was justified in interfering with plaintiffs' agreement

with the Oppenheimer defendants (*Lama Holding Co. v Smith Barney, Inc.*, 88 NY2d 413, 424 [1996]).

Plaintiffs' claims for specific performance and injunctive relief are appropriate despite the fact that there is no privity of contract between plaintiffs and Eaton (*see Health-Loom Corp. v Soho Plaza Corp.*, 272 AD2d 179, 183 [1st Dept 2000]). These claims also center on whether Eaton purported to purchase the security at issue with knowledge that plaintiffs allegedly had enforceable rights.

The "protected purchaser" provision of UCC 8-303 does not entitle Eaton to summary judgment. The three requirements for protected purchaser status are that the purchaser has (1) "[g]ive[n] value"; (2) "not ha[d] notice of any adverse claim to the security"; and (3) "[o]btain[ed] control of" the security (UCC 8-303[a]). The UCC 8-102(a)(1) definition of an "adverse claim," as amended in the 1994 revisions to the UCC and adopted in New York in 1997, is "a claim that a claimant has a property interest in a financial asset and that it is a violation of the rights of the claimant for another person to hold, transfer, or deal with the financial asset" (UCC 8-102[a][1]). As stated in the commentaries, this definition was intended to reject case law that "might have been read to suggest that any wrongful action concerning a security, even a simple breach of contract, gave

rise to an adverse claim" (UCC 8-102(a)(1), Comment 1). "Absent unusual circumstances, . . . [an] action for breach [of contract] would not give rise to a property interest in securities" (UCC 8-102[a][1], Comment 1). However, where intentional or tortious conduct has resulted in a breach, the "principles of equitable remedies" dictate that a purchaser would not be able to avail itself of the protections of UCC 8-303. A different result would permit a party to knowingly induce the breach of an agreement to transfer a security and claim "protected purchaser" status, leaving the injured party with no recourse to obtain the actual security.

The present case involves more than a simple breach of contract. The securities at issue are unique as they are part of a closely held corporation and concern controlling rights (*see e.g. Kurtz v Zion*, 61 AD2d 778, 779 [1st Dept 1978]). Additionally, the record does not establish, as a matter of law, that Eaton's conduct in interfering with plaintiffs' agreement to purchase the securities was unintentional and done without knowledge of plaintiffs' rights. Issues of fact remain as to

whether Eaton tortiously interfered with plaintiffs' contractual rights.

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

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

ENTERED: JUNE 18, 2019

CLERK

Gische, J.P., Webber, Kahn, Kern, JJ.

9662 The People of the State of New York, Ind. 3298/17
Respondent,

-against-

Jose Torres,
Defendant-Appellant.

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

Cyrus R. Vance, Jr., District Attorney, New York (Jennifer Westphal 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 (Laura A Ward, J. at plea; Patricia Nunez, J. at hearing and sentencing), rendered February 6, 2018,

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

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

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

ENTERED: JUNE 18, 2019

CLERK

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

Gische, J.P., Webber, Kahn, Kern, JJ.

9663 The People of the State of New York, Respondent,

Ind. 1241/14

-against-

Larry Calderon,
Defendant-Appellant.

_____

Marianne Karas, Thornwood, for appellant.

Darcel D. Clark, District Attorney, Bronx (Paul A. Andersen of counsel), for respondent.

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Judgment, Supreme Court, Bronx County (Steven L. Barrett, J.), rendered July 12, 2017, convicting defendant, upon his plea of guilty, of manslaughter in the first degree, and sentencing him, as a second violent felony offender, to a term of 14 years, unanimously affirmed.

Defendant's challenges to his guilty plea do not fall within the narrow exception to the preservation requirement (*see People v Conceicao*, 26 NY3d 375, 382 [2015]), and we decline to review these unpreserved claims in the interest of justice. As an alternative holding, we find that the record as a whole establishes that the plea was knowingly, intelligently, and voluntarily made (*see e.g. People v Luckey*, 149 AD3d 414 [1st Dept 2017], *lv denied* 29 NY3d 1082 [2017]). The alleged defects in the plea allocution are, at most, matters of form rather than

substance that do not undermine the validity of the plea.

Defendant made a valid waiver of his right to appeal (*see People v Bryant*, 28 NY3d 1094 [2016]), which forecloses review of his excessive sentence claim. Regardless of whether defendant validly waived his right to appeal, we perceive no basis for reducing the sentence.

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

ENTERED: JUNE 18, 2019

CLERK

Gische, J.P., Webber, Kahn, Kern, JJ.

9665 EVEMeta, LLC Index 651484/16
Plaintiff-Respondent-Appellant,

-against-

Siemens Convergence Creators Corporation,
Defendant-Appellant-Respondent,

Siemens Convergence Creators Holding GmbH,
et al.,
Defendants.

_____

Pepper Hamilton LLP, New York (Angelo A. Stio III of counsel), for appellant-respondent.

Hughes Hubbard & Reed LLP, New York (Hagit Muriel Elul of counsel), for respondent-appellant.

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Order, Supreme Court, New York County (Eileen Bransten, J.), entered on or about October 5, 2018, which, to the extent appealed from as limited by the briefs, denied the part of defendant Siemens Convergence Creators Corporation's motion pursuant to CPLR 3211(a)(7) to dismiss as against it the claims for tortious interference with contract, tortious interference with prospective economic advantage, unfair competition, punitive damages, and attorneys' fees, and granted the part of the motion seeking to dismiss as against it the claims for fraudulent misrepresentation, fraudulent concealment, and civil conspiracy, unanimously modified, on the law, to grant the motion as to the claims for tortious interference with prospective economic

advantage and attorneys' fees, and otherwise affirmed, without costs.

The complaint states a cause of action for tortious interference with contract by alleging that defendant Siemens was aware of the Master Services Agreement between plaintiff and defendant Synacor, Inc. and caused Synacor to breach the agreement and that the breach resulted in loss of revenue to plaintiff (*see Lama Holding Co. v Smith Barney*, 88 NY2d 413, 424 [1996]).

Contrary to Siemens's contentions, the complaint adequately alleges that the Master Services Agreement would not have been breached "but for" Siemens's conduct (*see Carlyle, LLC v Quik Park 1633 Garage LLC*, 160 AD3d 476 [1st Dept 2018]). In an effort to show that Synacor was independently predisposed to breach the agreement, Siemens argues that the relevant events began in December 2015, when Synacor asked plaintiff about renegotiating pricing. However, Siemens neglects to mention that the complaint alleges that Synacor's interest in renegotiating pricing – the first step in the alleged chain of events that led to plaintiff's exclusion from the trilateral arrangement – resulted from Siemens's improper disclosure of pricing information, allegedly in violation of the Software Distribution Agreement. There are no allegations in the complaint that would

establish or suggest that Synacor would have raised questions about pricing if Siemens had not engaged in improper disclosure of the information.

Moreover, the complaint alleges that Synacor, having already invested a year in developing and marketing Siemens's direct video streaming service (known as "over-the-top" or OTT platform), could not have obtained continued rights to sell it but for Siemens's active participation in the scheme to cut plaintiff out of the business and that, had Siemens not agreed to supply the OTT platform to Synacor outside of the back-to-back contract structure with plaintiff, Synacor would not have breached the Master Services Agreement. At a minimum, and particularly at this pleading stage, the inference can reasonably be drawn from these allegations that Siemens approached Synacor with pricing information and offered a "different and better partnership arrangement which eliminated plaintiff[] from the equation" (*see Antonios A. Alevizopoulos & Assoc., Inc. v Comcast Intl. Holdings, Inc.*, 100 F Supp 2d 178, 187 [SD NY 2000]).

The complaint also states a cause of action for unfair competition. It alleges that the defendants acted to misappropriate EVEMeta's(EveMeta) labors, skill, business judgment, knowhow and expenditures, after gaining their benefit through Evemeta's brokering of the Synacor deal and its use of

its technical knowledge and labor in developing an integrated OTT platform to permit Siemens's OTT product to operate on the systems of Synacor and its clients. Plaintiff alleges that its own proprietary integration and encoding technology was critical to ensure the functioning of the OTT platform, because neither Synacor nor Siemens possessed such capability. As the motion court observed, the inescapable inference from these statements in the complaint is that without Evemeta's knowhow, Siemens and Synacor would not have been able to proceed with the project. Granting the plaintiff every possible favorable inference (*Leon v Martinez*, 84 NY2d 83, 87-88 [1994]), at this pleadings stage, the complaint states a claim for unfair competition. Moreover, contrary to the argument advanced by defendant Siemens, the parties' Software Distribution Agreement does not conclusively establish that the encoding software is not "distributor work product" that belongs to plaintiff and not to Siemens.

However, the remaining tort claims fail to state causes of action. The tortious interference with prospective economic advantage claim does not allege conduct directed at the parties with whom plaintiff claims to have had potential relationships (*see Carvel Corp. v Noonan*, 3 NY3d 182, 192 [2004]; *DeLaurentis v Malley*, 161 AD3d 514 [1st Dept 2018]).

The court correctly dismissed the fraudulent

misrepresentation and fraudulent concealment claims as duplicative of the breach of contract claim. These claims arise from the very allegations that underlie the contract claim – allegations that defendants were insincere about the nature of the contractual arrangement for the future (*see First Bank of Ams. v Motor Car Funding*, 257 AD2d 287, 291-292 [1st Dept 1999]). In particular, like the contract claim, these fraud claims rest on allegations that Siemens negotiated in secret with Synacor to cut plaintiff out of the business and failed to disclose to plaintiff that it was not merely negotiating with Synacor an amendment concerning a potential change of control but was colluding with Synacor to eliminate plaintiff from the business.

The conspiracy claim was correctly dismissed because New York does not recognize an independent cause of action in tort for conspiracy (*Waggoner v Caruso*, 68 AD3d 1, 6 [1st Dept 2009], *affd* 14 NY3d 874 [2010]). Moreover, the underlying tort alleged in the conspiracy claim is fraud, and the fraud claims were correctly dismissed (*see Williams v Williams*, 149 AD3d 1145 [2d Dept 2017], *lv denied* 30 NY3d 913 [2018]; *Blanco v Polanco*, 116 AD3d 892, 896 [2d Dept 2014]).

As the claim of tortious interference with contract was correctly sustained, plaintiff may demand punitive damages. However, the claim for attorneys' fees should be dismissed.

Plaintiff cites no statute or contract provision that entitles it to attorneys' fees (*see Chapel v Mitchell*, 84 NY2d 345 [1994]). In *Jeffries Avlon, Inc. v Gallagher* (149 Misc 2d 552, 553 [Sup Ct, NY County 1991]), fees were contemplated as part of an award for punitive damages for a tort of which malice was an element. Malice is not an element of tortious interference with contract (*Shared Communications Servs. of ESR, Inc. v Goldman Sachs & Co.*, 23 AD3d 162 [1st Dept 2005]).

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

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

ENTERED: JUNE 18, 2019

CLERK

Gische, J.P., Webber, Kahn, Kern, JJ.

9666 Evelyn Rodriguez, Index 100718/16
Plaintiff-Respondent,

-against-

Joseph Kalata, et al.,
Defendants-Appellants.

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Michael J. Good, Brooklyn, for appellants.

Michael Stepper, New York, for respondent.

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Order and judgment (one paper), Supreme Court, New York County (Barbara Jaffe, J.), entered June 4, 2018, to the extent appealed from as limited by the briefs, awarding plaintiff treble damages upon a finding of fraud in connection with rent overcharges, unanimously modified, on the law, to vacate the award of treble damages and to remand the matter for recalculation of treble damages based solely on overcharges in the two years preceding the filing of the overcharge claim, and otherwise affirmed, without costs.

In administrative proceedings before the Division of Housing and Community Renewal (DHCR), defendants disputed the legal rent for the apartment in filed registrations back to 2002, and DHCR properly reviewed those registrations to determine the legal regulated rent. DHCR's findings are entitled to preclusive effect (*see Gersten v 57 7th Ave. LLC*, 88 AD3d 189, 201-202 [1st

Dept 2011], *appeal withdrawn* 18 NY3d 954 [2012]). DHCR's determinations and the documentary evidence also support a finding of fraudulent intent, and defendants' bare assertion of good faith is insufficient to raise an issue of fact. However, the treble damages award should have been limited to the overcharges for the two years preceding the filing of the overcharge complaint (Rent Stabilization Code [9 NYCRR] § 2526.1[a][2][i]; *Matter of Mangano v New York State Div of Hous. & Community Renewal*, 30 AD3d 267, 268 [1st Dept 2006]).

Grounds for holding defendant Kalata liable were established by evidence that defendant 424 East Assets Inc. was inactive as a corporation during the relevant years (*see generally Elkaim v Elkaim*, 176 AD2d 119 [1st Dept 1991], *appeal and lv dismissed* 78 NY2d 1072 [1991]), and Kalata signed the initial lease with plaintiff in his personal capacity.

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

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

ENTERED: JUNE 18, 2019

CLERK

Gische, J.P., Webber, Kahn, Kern, JJ.

9667 The People of the State of New York, Respondent,

Ind. 3264/05

-against-

Glenn Jenkins,
Defendant-Appellant.

_____

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

Cyrus R. Vance, Jr., District Attorney, New York (Kelly L. Smith of counsel), for respondent.

_____

Order, Supreme Court, New York County (Gilbert C. Hong, J.), entered on or about March 13, 2018, 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.

The court providently exercised its discretion when it declined to grant a downward departure (*see People v Gillotti* 23 NY3d 841, 861 [2014]). The mitigating factors cited by defendant, while significant, were adequately taken into account by the risk assessment instrument or were outweighed by the extreme seriousness of the underlying crime and defendant's prior criminal history, which indicated a danger that a reoffense by defendant would cause a high degree of harm (*see e.g. People v Roldan*, 140 AD3d 411 [1st Dept 2016], *lv denied* 28 NY3d 904

[2016]).

Defendant's challenge to the procedure used by the court in making its determination is unpreserved and without merit (*see People v Diaz*, 143 AD3d 552 [1st Dept 2016]).

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

ENTERED: JUNE 18, 2019

CLERK

Gische, J.P., Webber, Kahn, Kern, JJ.

9668N Perella Weinberg Partners LLC, et al., Plaintiffs-Appellants, Index 653488/15

-against-

Michael A. Kramer, et al., Defendants.

- - - - -

[And a Third-Party Action]

- - - - -

Cody Leung Kaldenberg, et al., Nonparty Respondents.

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Boies Schiller Flexner LLP, New York (Jonathan D. Schiller of counsel), for appellants.

Arkin Solbakken LLP, New York (Lisa C. Solbakken of counsel), for respondents.

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Order, Supreme Court, New York County (O. Peter Sherwood, J.), entered July 23, 2018, which, after in camera review, determined that certain emails were protected by the attorney-client privilege, unanimously affirmed, with costs.

Nonparty respondents were seeking legal advice through third parties and had a reasonable expectation that their communications would remain confidential, as the communications set forth specific legal questions (*see Spectrum Sys. Intl. Corp. v Chemical Bank*, 78 NY2d 371, 377-378 [1991]; *People v Osorio*, 75 NY2d 80, 84 [1989]). That neither nonparty respondent had a retainer agreement is of no moment because, so long as the

communications are for the purpose of rendering legal advice, the privilege applies even in the absence of a retainer agreement (*see Spectrum Sys. Intl. Corp.* at 378-379; *Seyler v T-Sys. N. Am., Inc.*, 771 F Supp 2d 284, 287 [SD NY 2011]).

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

ENTERED: JUNE 18, 2019

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SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

Dianne T. Renwick, J.P.
Sallie Manzanet-Daniels
Peter Tom
Ellen Gesmer, JJ.

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Ind. 643/10

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The People of the State of New York,
Respondent,

-against-

Kareem Santiago,
Defendant-Appellant.
_____x

Defendant appeals from a judgment of the Supreme Court, New York County (Marcy Kahn, J. at independent source hearing; Roger S. Hayes, J. at jury trial and sentencing), rendered September 22, 2016, convicting defendant of criminal possession of stolen property in the fourth degree, and imposing sentence.

Robert S. Dean, Center for Appellate Litigation, New York (Mark W. Zeno of counsel), for appellant.

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

TOM, J.

In this case we are tasked with determining whether the record supports defendant's conviction on a theory of constructive possession of stolen property recovered from a location where he had only a transient, yet indisputable, presence in the company of two other suspects, notwithstanding that he was not convicted of the underlying robbery.

The victim testified that she was returning from work between 12:30 and 1 a.m. on February 6, 2015. After exiting the subway station at 86th Street, she walked north and turned left onto West 90th Street. As she passed Amsterdam Avenue, a young man suddenly approached her, grabbed her left arm and punched her, causing her to fall. The assailant attempted to pull her purse off of her shoulder. At the same time, two other young men appeared; one kicked her while the other one, later identified as defendant, stood close by. The area was well lit, and the victim had a clear and unobstructed view of the perpetrators, including their faces. After the men beat the victim, the initial assailant wrested away her pocketbook, and all three men fled together towards Columbus Avenue. The victim immediately entered the nearby building where she lived, and the concierge called the police.

Sergeant Laquidara responded with Lieutenant Lavin to the

vicinity of 90th Street between Columbus and Amsterdam Avenues at shortly after 1 a.m. pursuant to the 911 call. Testimony by responding officers described a parking garage on 90th Street that ran through to 91st Street and had a park over its roof. The car entrance to the garage was on 90th Street, and a pedestrian entrance was adjacent to the park on 91st Street, which was at a higher elevation than 90th Street. Sergeant Laquidara testified that as the officers searched under benches and generally around the rooftop park, they approached a gate that opened on to a staircase that descended into the garage. As they did so, Sergeant Laquidara saw three heads pop up by the staircase. One of them exclaimed, "Oh s-t; the cops," as a marked police vehicle passed by. The officers immediately lowered themselves to the ground. As the police car passed, the three men retreated down the staircase. There was nowhere for them to go except through a door at the bottom.

Sergeant Laquidara drove his vehicle around the block to the vehicle entrance to the garage to ensure that no one entered or exited from that location, as Lieutenant Lavin went down the staircase. Aside from this entrance and the door at the bottom of the staircase, there was no other way into or out of the garage. When Sergeant Laquidara entered the garage, he observed only two doors, one to the staircase and the other to a locked

room. He recovered an open blue pocketbook matching the description of the victim's stolen pocketbook from on top of a trash can outside of the locked door. The police department's Emergency Services Unit soon forced open the locked door, inside of which was a small boiler room. Three men were found inside. Defendant and one other man had been hiding in a "hole" about three feet deep and about three feet by three feet wide that had been covered by a grate. Defendant and his companion, when removed, were described by Laquidara as "filthy" and "oily."

Detective King testified that he and his partner had been canvassing the neighborhood with the victim when they proceeded to the garage. Detective King observed the blue pocketbook as the ESU arrived. No civilians entered or exited the garage. Detective King entered the boiler room behind the ESU officers. He took possession of the first person taken into custody, after which two more men, covered in dirt and ash, were removed from the room. Detective King identified defendant in court as one of the two men. Detective Christopher Mitchell also testified that after ESU officers forced open the door to the locked room, he entered, and, after the first man was escorted from the room, he observed defendant, who was flailing his arms as police reached for him, and another man crouching in the three-foot-deep hole.

After the men were removed from the room, the officers

looked inside for evidence. Detective Mitchell observed two sets of keys, two cell phones and a handgun on a ledge of the boiler. While still inside the room, another officer handed him a debit card bearing the victim's name. Although Detective Mitchell did not know where inside the room the debit card had been picked up, he was certain on cross-examination that it was found inside the locked boiler room where defendant had been hiding.

Initially, the People established, by clear and convincing evidence, that the victim had a basis for her in-court identification of defendant independent of a previously suppressed showup procedure. A number of factors support the independent source finding (*see Manson v Brathwaite*, 432 US 98, 114 [1977]; *People v Williams*, 222 AD2d 149, 152-153 [1st Dept 1996], *lv denied* 88 NY2d 1072 [1996]), even when viewed in the light of modern scientific knowledge regarding identifications. The victim had an unobstructed view of defendant and the other two perpetrators, under good lighting, at close range, and had sufficient time to observe them while she was being attacked. Her attention was focused on the perpetrators, she gave accurate general descriptions of the three men, and she also recalled particularized identifying characteristics relating to their sizes and builds. Furthermore, the victim, who had rejected two other separate groups of people pointed out by the police during

their canvass of the area, immediately recognized defendant and his codefendants.

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 and reasonable inferences to be drawn therefrom established defendant's joint constructive possession of the victim's debit card, together with the codefendants (*People v Manini*, 79 NY2d 561, 573 [1992]; *see* Penal Law 10.00[8]). Defendant's acquittal of robbery does not warrant a different conclusion (*see People v Rayam*, 94 NY2d 557 [2000]; *People v Chandler*, 104 AD3d 618, 619 [1st Dept 2013], *lv denied* 21 NY3d 1002 [2013]).

On appeal, defendant speculates that the stolen debit card was not recovered from the boiler room, and he contends that there is no evidentiary basis on which to impute to him criminal possession of it. Defendant also relies on his acquittal of the robbery to exonerate him of possessing the fruits of the robbery. However, we find no reasonable basis in the record for speculating that the victim's debit card might have been recovered from some other location with which defendant had no nexus. Police testimony made clear that the stolen debit card

was in the boiler room, simultaneous with defendant's apprehension. The evidence is also indisputable that defendant was a participant in the activity that led to the stolen property being constructively possessed by all three codefendants.

The victim's testimony established that defendant was with the other two men as they beat and robbed her, even if he did not directly contribute to the violence, and that he fled with them. The record elsewhere established that defendant remained with them as they tried to avoid detection by police when, shortly after the robbery, they were outside of the garage, which was in the immediate vicinity of the robbery location, and that the suspects attempted to escape detection by entering the garage. Police testimony made it clear that defendant and his companions were tracked as they entered the garage, which no one else entered during the relevant time period, and from which they had no means of egress that could not be observed by responding police. The victim's open pocketbook effectively functioned as a beacon directing police attention to the locked room. In order to gain access, the ESU had to basically break down the door. Defendant's presence, his hiding in an oily sump pit inside with the two robbers, and his attempt to physically resist detention compel the conclusion that defendant manifested a consciousness of guilt. Police testimony thus clearly established that

defendant had been a participant in the criminal venture and that he exercised dominion and control over the room where the perpetrators were essentially trapped in close proximity to the stolen property, and thereby exercised dominion and control over, and thus joint constructive possession of, the property itself.

In any event, the jury was presented with this evidence, there was no conflicting evidence addressing the recovery of the stolen evidence, and the jurors had ample opportunity to evaluate the officers' credibility. In performing our weight-of-the-evidence review, we decline to "take the place of the jury in passing on questions of the reliability of witnesses and credibility of testimony" (*People v Griffin*, 63 AD3d 635, 638 [1st Dept 2009], *lv denied* 13 NY3d 835 [2009]); the jury's findings on these questions must be accorded "[g]reat deference" (*People v Romero*, 7 NY3d 633, 645 [2006]). We find no reason on this record to disturb the jury's verdict.

Accordingly, the judgment of the Supreme Court, New York County (Marcy Kahn, J. at independent source hearing; Roger S. Hayes, J. at jury trial and sentencing), rendered September 22, 2016, convicting defendant of criminal possession of stolen

property in the fourth degree, and sentencing him to a term of one year, should be affirmed.

All concur.

Judgment Supreme Court, New York County (Marcy Kahn, J. at independent source hearing; Roger S. Hayes, J. at jury trial and sentencing), rendered September 22, 2016, affirmed.

Opinion by Tom, J. All concur.

Renwick, J.P., Manzanet-Daniels, Tom, Gesmer, JJ.

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

ENTERED: JUNE 18, 2019

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