SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

JUNE 25, 2019

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Sweeny, J.P., Manzanet-Daniels, Kahn, Gesmer, JJ.

4552 The People of the State of New York, Ind. 3326/11
Respondent,

-against-

Jose Bermudez,
Defendant-Appellant.

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

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

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Judgment, Supreme Court, Bronx County (Patricia DiMango, J.), rendered August 6, 2013, convicting defendant, upon his plea of guilty, of robbery in the second degree, and sentencing him to a term of 3½ years, unanimously reversed, on the law, the plea vacated, and the matter remanded for further proceedings.

This Court previously remitted this matter to Supreme Court for a hearing on *Peque* grounds (*People v Peque*, 22 NY3d 168, 200 [2013], *cert denied sub nom. Thomas v New York*, 574 US —, 135 S Ct 90 [2014]), and held this appeal in abeyance for that purpose

(154 AD3d 410, 411 [1st Dept 2017]). Supreme Court (Ralph Fabrizio, J. at hearing) found that there is a reasonable possibility that defendant would not have pleaded guilty had the court advised him of the possibility of deportation as a result of his plea, and the People do not seek to challenge that determination. Accordingly, we vacate the conviction and remand this matter for further proceedings consistent with this decision and order.

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

ENTERED: JUNE 25, 2019

CLERK

Renwick, J.P., Manzanet-Daniels, Webber, Oing, JJ.

9692 The People of the State of New York, Respondent, Ind. 4213/05

-against-

Jeison Rodriguez, Defendant-Appellant.

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

Cyrus R. Vance, Jr., District Attorney, New York (Andrew E. Seewald of counsel), for respondent.

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Judgment, Supreme Court, New York County (Laura A. Ward, J.), rendered July 21, 2014, convicting defendant, upon his plea of guilty, of attempted robbery in the first degree, and sentencing him to a term of 3½ years, unanimously modified, on the law, to the extent of vacating the sentence and remanding for a youthful offender determination, and otherwise affirmed.

Defendant's claim that his plea was invalid because the court failed to inquire about a possible affirmative defense to attempted first-degree robbery, when he indicated during the plea allocution that the apparent firearm he displayed during the robbery was a toy, does not come within the narrow exception to the preservation requirement (*see People v Toxey*, 86 NY2d 725 [1995]; *People v Lopez*, 71 NY2d 662, 665 [1988]), and we decline

to review this unpreserved claim in the interest of justice. As an alternative holding, we find no basis for any relief, because the factual allocution did not "cast[] significant doubt upon the defendant's guilt or otherwise call[] into question the voluntariness of the plea" (*id.* at 666).

As the People concede, defendant is entitled to an express youthful offender determination (*see People v Rudolph*, 21 NY3d 497 [2013]).

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

ENTERED: JUNE 25, 2019

CLERK

Renwick, J.P., Manzanet-Daniels, Webber, Oing, JJ.

9693 Dan Cohen, etc., et al., Index 655689/16E
Plaintiffs-Appellants,

-against-

Samuel I. Glass, et al.,
Defendants-Respondents.

_____

Alexander M. Dudelson, Brooklyn, for appellants.

Weiss Zarett Brofman Sonnenklar & Levy, P.C., New Hyde Park (Michael J. Spithogiannis of counsel), for respondents.

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Order, Supreme Court, New York County (Melissa A. Crane, J.), entered January 25, 2018, which granted defendants' motion to dismiss the complaint, unanimously affirmed, without costs.

The motion court correctly determined that the issues raised in this action are identical to those sought to be litigated in plaintiffs' prior action, which was dismissed as time barred, a determination from which plaintiffs did not appeal (see *Nationwide Mut. Ins. Co. v U.S. Underwriters Ins. Co.*, 151 AD3d 504, 505-506 [1st Dept 2017]). Because a dismissal on the ground that the statute of limitations has expired is a determination on the merits for res judicata purposes, the dismissal of the prior lawsuit precludes this action (*see Smith v Russell Sage Coll.*, 54 NY2d 185, 194 [1981]).

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

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

ENTERED: JUNE 25, 2019

CLERK

Renwick, J.P., Manzanet-Daniels, Webber, Oing, JJ.

9694-
9695 In re Irena K.,
Petitioner-Respondent,

-against-

Francesco S.,
Respondent-Appellant.

_____

Law Offices of Paul W. Matthews, New York (Paul W. Matthews of counsel), for appellant.

Beth E. Goldman, New York Legal Assistance Group, New York (Amanda M. Beltz of counsel), for respondent.

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Order, Family Court, New York County (Karen I. Lupuloff, J.), entered on or about August 28, 2018, which, upon a fact-finding determination that respondent father committed the family offenses of assault in the second degree, criminal obstruction of breathing or blood circulation (two counts), sexual misconduct (two counts), coercion in the second degree (two counts), and harassment in the second degree, and granted a five-year order of protection in favor of petitioner, unanimously modified, on the law, to vacate the findings of assault in the second degree, criminal obstruction of breathing or blood circulation (both counts), and sexual misconduct (one count), and otherwise affirmed, without costs.

The findings that respondent committed the family offenses of harassment in the second degree (Penal Law § 240.26[3]) and coercion in the second degree (two counts) (Penal Law § 135.60[9]) are supported by a fair preponderance of the hearing evidence (*see generally Matter of Everett C. v Oneida P.*, 61 AD3d 489 [1st Dept 2009]; Family Court Act § 832). The record shows, inter alia, that respondent threatened petitioner that he would take the steps necessary to cause her to lose her immigration status and rights to the child if she stopped prostituting herself to him, thereby evincing respondent's intent to harass and alarm petitioner (Penal Law § 240.26[3]) and his inducing petitioner to engage in a sexual relationship with him by instilling fear in her (Penal Law § 135.60[9]). The court's credibility determinations are supported by the record, and there is no basis for disturbing them (*see Matter of Lisa S. v William V.*, 95 AD3d 666 [1st Dept 2012]).

The record supports a finding of one count only of sexual misconduct (Penal Law § 130.20[1]). Although the family offense petition alleges that respondent raped petitioner twice, petitioner admitted at the hearing that, during the first incident, she was expecting payment in exchange for sex and never showed respondent, either physically or verbally, that she did

not consent to sex.

However, the finding of assault in the second degree (Penal Law § 120.05[2]) is not supported by evidence that, when respondent bit petitioner's ear lobe during sex, his teeth constituted a dangerous instrument, i.e., that he intended to cause petitioner a serious physical injury (Penal Law § 10.00[10], [13]).

Nor does the evidence support the finding of criminal obstruction of breathing or blood circulation (two counts) (Penal Law § 121.11[b]). Petitioner testified that she had difficulty breathing when respondent covered her nose or mouth during sex. However, she admitted that, when she told him to stop or told him that she was in pain, he stopped immediately. Petitioner did not tell respondent that she was having trouble breathing on the two relevant occasions when he covered her mouth during sex. We acknowledge that she may have been afraid or uncomfortable. Nevertheless, her testimony fails to establish that respondent intended to impede her normal breathing or blood circulation (*compare Matter of Kenrick C.*, 143 AD3d 600, 601 [1st Dept 2016] [sustaining finding of criminal obstruction of breathing or blood circulation against appellant who "threw his sister to the floor and began 'squeezing' her neck until she could barely breathe"]).

The issuance of a five-year order of protection was appropriate in view of the presence of aggravating circumstances constituting an immediate and ongoing danger to petitioner (Family Court Act § 827[a][vii]).

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

ENTERED: JUNE 25, 2019

CLERK

Renwick, J.P., Manzanet-Daniels, Webber, Oing, JJ.

9696 Linda Warshaw, Index 302489/17
Plaintiff-Respondent,

-against-

Steven Warshaw,
Defendant-Appellant.

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Warshaw Burstein, LLP, New York (Sophie Jacobi-Parisi of counsel), for appellant.

Law Office of Yonatan Levoritz, New York (Yonatan Levoritz of counsel), for respondent.

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Order, Supreme Court, New York County (Douglas E. Hoffman, J.), entered August 23, 2018, which, insofar as appealed from as limited by the briefs, awarded plaintiff wife pendente lite spousal maintenance of $11,668 per month, unanimously affirmed.

While Supreme Court awarded plaintiff pendente lite maintenance of $11,668 per month, it also required her to pay, from that sum, 50% of the costs of the parties' rent (at the time of the award, the parties continued to live together), utilities and household help, and 100% of her own personal expenses. Using the figures for these expenses in the parties' sworn Net Worth Statements, we find that plaintiff's net monthly award is

approximately $4,307 per month.[1] This amount is less than the $4,375 per month plaintiff sought. It is also less than the $4,600 per month that she, to whom the court appropriately imputed zero income, and who is not receiving child support, would receive upon application of the statutory guideline formula to defendant's income capped at $184,000 (*see* Domestic Relations Law [DRL] § 236[B][5-a][c][2][a]-[f]). Accordingly, defendant's arguments on appeal are largely academic.

Were we to address these arguments, we would find them unavailing. Defendant correctly argues that the court should not have relied upon an income average (*see Azizo v Azizo*, 51 AD3d 438 [1st Dept 2008]). However, the court was not required to rely solely on defendant's representations of his financial status (*see e.g. Lennox v Weberman*, 109 AD3d 703, 703-704 [1st Dept 2013]; *see also Rogers v Rogers*, 52 AD3d 354 [1st Dept

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[1] Defendant's Net Worth Statement reports rent of $7,326, utilities of $497, and household help costs of $2,200 per month, or $10,023 total. Fifty percent of the total is $5,011.50. Thus, the award to plaintiff is reduced to $6,656.50. From this sum, she must also pay 100% of her personal expenses, which total $2,350 per month: her Net Worth Statement reflects $300 per month for clothing, $500 per month for unreimbursed medical, $500 per month for health club, $150 per month for activities for herself, and $900 per month for beauty/spa. Subtracting $2,350 from $6,656.50, plaintiff will be left with $4,306.50 per month.

2008]), and it appropriately looked beyond defendant's most recent tax return to consider his earnings history. Given that defendant is 70% owner and officer of a business he co-owns with his two brothers, the court reasonably considered the possibility that defendant, whose income declined precipitously after plaintiff commenced this action, might wield some control over the timing and amount of his compensation.

The court also properly declined to impute income to plaintiff. Defendant cited the master's degree she earned from New York University in 2008. However, he did not adequately account for the fact that plaintiff has been out of the work force for years. He offered no proof of income earned by her before she left the work force to raise the parties' children. The employment and salary statistics that he cites concerning new graduates of the program offer little insight into what a 43-year-old parent reentering the workforce after or while raising three young children might be expected to earn.

We reject defendant's contention that plaintiff offered "no evidence" to show that she cannot obtain full-time work. Plaintiff attested that she could not do so because she has limited childcare assistance. At the time of the proceedings before Supreme Court, the parties' youngest child was two years

old, and plaintiff stated that the nanny only worked twice a week.

We reject defendant's contention that the court misapplied DRL § 236(B)(5-a)(d). The court articulated the factors set forth in subsection (h)(1) upon which it relied in setting its award (*cf. Al E. v Joann E.*, 55 Misc 3d 1212[A], 2017 NY Slip Op 50543[U] [Sup Ct, Kings County, May 1, 2017] [calculation of maintenance award over the income cap is not based on "an automatic formula but is based upon a set of factors enunciated in DRL 236(B)(5-1)(h)(1)"]). Moreover, as noted, defendant's arguments as to this issue are academic, because the award to plaintiff is less than it would have been even if the formula had been applied to defendant's income "up to and including the income cap" (DRL § 236[B][5-a][d][1]).

Defendant argues that the court abused its discretion in awarding plaintiff more than she sought. However, plaintiff is not responsible for the expenses the court imposed upon her, and her net award is less than she sought.

Given the ambiguities surrounding defendant's actual financial situation, defendant's arguments based on the interests of justice cannot be evaluated on the record before us. Defendant's claim that plaintiff has taken steps to forestall a

financial trial in this case is unsubstantiated. The motion practice he describes was not excessive, and he failed to identify any tactics that plaintiff allegedly engaged in to prevent financial discovery. Thus, defendant has offered no reason to depart from the general rule that the best remedy for any perceived inequities in a pendente lite award is a speedy trial (*see e.g. Torres v Torres*, __ AD3d __, 2019 NY Slip Op 03014 [1st Dept April 23, 2019]).

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 25, 2019

CLERK

Renwick, J.P., Manzanet-Daniels, Webber, Oing, JJ.

9697 The People of the State of New York, Ind. 2252/15
Respondent,

-against-

Terrence Wharton,
Defendant-Appellant.

_____

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

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

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Judgment, Supreme Court, New York County (Jill Konviser, J.), rendered February 28, 2017, convicting defendant, after a jury trial, of attempted robbery in the first degree, and sentencing him to a term of 4½ years, unanimously affirmed.

The verdict was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348–349 [2007]). There is no basis for disturbing the jury's credibility determinations, including its resolution of alleged inconsistencies between the victims' testimony and a surveillance videotape.

The court properly declined to submit attempted robbery in the third degree to the jury, because there was no reasonable view of the evidence, viewed most favorably to defendant, that he attempted to take property by force, but not by displaying what

appeared to be a firearm (*see generally People v Rivera*, 23 NY3d 112, 120 [2014]). Both victims testified that defendant displayed what appeared to be a handgun, and there was no reason for the jury to selectively discredit only that portion of each victim's testimony (*see e.g. People v Davis*, 47 AD3d 506, 507 [1st Dept 2008], *lv denied* 10 NY3d 861 [2008]). There was nothing in the videotape, or in the testimony of a witness who saw only part of the incident, to warrant a different conclusion.

We perceive no basis for reducing the sentence.

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

ENTERED: JUNE 25, 2019

CLERK

Renwick, J.P., Manzanet-Daniels, Webber, Oing, JJ.

9698 In re Robert Stewart, Index 154169/17
Petitioner-Appellant,

-against-

New York City Department
of Education,
Respondent-Respondent.

_____

Levine & Blit, PLLC, New York (Justin S. Clark of counsel), for appellant.

Zachary W. Carter, Corporation Counsel, New York (Tahirih M. Sadrieh of counsel), for respondent.

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Order and judgment (one paper), Supreme Court, New York County (Nancy M. Bannon, J.), entered July 2, 2018, granting respondent's cross motion to dismiss the petition to, inter alia, annul respondent's determination, dated October 24, 2016, not to hire petitioner as a cleaner and to direct respondent to reconsider petitioner's application for employment, and dismissing the proceeding brought pursuant to CPLR article 78, unanimously affirmed, without costs.

The court properly dismissed this proceeding as untimely (CPLR 217[1]). The proceeding was commenced more than four months after the agency's determination to deny petitioner's renewed application for employment became final and binding on

petitioner (*see Matter of Carter v State of N.Y., Exec. Dept., Div. of Parole*, 95 NY2d 267, 270 [2000]; *Matter of Cauldwest Realty Corp. v City of New York*, 160 AD2d 489 [1st Dept 1990]).

Contrary to petitioner's contention, the limitations period did not begin to run on the date of the General Municipal Law § 50-h hearing held in connection with a notice of claim he filed against respondent concerning his claim for damages arising from discrimination in violation of Correction Law § 752, as he cannot "circumvent the statute of limitations by demanding that an agency change its determination and seeking mandamus to compel when that demand is refused" (*Matter of Imandt v New York State Unified Ct. Sys.*, 168 AD3d 1051, 1053 [2d Dept 2019]). The notice of claim "was at best a plea for reconsideration, which neither tolled the Statute of Limitations nor began anew the time within which review could be sought" (*Matter of Miller v McGough*, 97 AD2d 416, 416 [2d Dept 1983]; *see Matter of Lubin v Board of Educ. of City of N.Y.*, 60 NY2d 974, 976 [1983]). Furthermore, t

he record does not support petitioner's claim that he made a demand for compliance with a duty enjoined on respondent by law at the 50-h hearing.

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

ENTERED: JUNE 25, 2019

CLERK

Renwick, J.P., Manzanet-Daniels, Webber, Oing, JJ.

9699 Ursula Smith, Index 25032/16E
Plaintiff,

-against-

562 Morris Realty LLC,
Defendant-Respondent,

562 Morris Holdings, LLC,
Defendant-Appellant.

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Wylie Stecklow PLLC, New York (Wylie M. Stecklow of counsel), for appellant.

Clausen Miller P.C., New York (Melinda S. Kollross of counsel), for respondent.

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Order, Supreme Court, Bronx County (Mary Ann Brigantti, J.), entered July 2, 2018, which, to the extent appealed from as limited by the briefs, granted the motion of defendant 562 Morris Realty LLC (Realty) for reargument, and upon reargument, denied the motion of defendant 562 Morris Holdings LLC (Holdings) to dismiss the complaint and all cross claims as against it, unanimously reversed, on the law, with costs, and Holdings' motion to dismiss granted. The Clerk is directed to enter judgment accordingly.

Holdings submitted documentary evidence that it did not own, lease, or otherwise control the premises where plaintiff's

accident took place, having sold it over one month earlier to Realty, thereby refuting the factual allegations in the complaint, and conclusively disposing of plaintiff's claim as against it (*see Jackson v Board of Educ. of City of N.Y.*, 30 AD3d 57, 60 [1st Dept 2006]; *Mullen v Zoebe, Inc.*, 205 AD2d 597 [2d Dept 1994]). Furthermore, the documents regarding the holdover proceeding and stipulation entered clearly demonstrated that defendant Realty was on notice of the illegally installed washing machine in the apartment directly above plaintiff's. In opposition, Realty failed to establish that it had insufficient time to remedy the condition, and proffered no evidence of any efforts to investigate or cure, in support of its claim that Holdings could be liable pursuant to a prior owner exception (*see Bittrolff v Ho's Dev. Corp.*, 77 NY2d 896 [1991]; *Brazell v Wells Fargo Home Mtge., Inc.*, 42 AD3d 409, 410-411 [1st Dept 2007]; *cf. Sarfowaa v Claflin Apts.*, 284 AD2d 228 [1st Dept 2001]).

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

ENTERED: JUNE 25, 2019

CLERK

Renwick, J.P., Manzanet-Daniels, Webber, Oing, JJ.

9700 In re Independence House Tenants' Association, et al.,
Petitioners,

-against-

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

Index 154058/17

Jack L. Lester, New York, for petitioners.

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

Kellner, Herlihy, Getty & Friedman, LLP, New York (Jeanne Williams of counsel), for West Side Federation for Senior and Supportive Housing, respondent.

Determination of respondent New York City Housing Preservation and Development (HPD), dated August 7, 2017, which directed an increase in rent charge, unanimously confirmed, the petition denied, and the proceeding brought pursuant to CPLR article 78 (transferred to this Court by order of the Supreme Court, New York County [Lynn R. Kotler, J.], entered on or about April 13, 2018), unanimously dismissed, without costs.

Although this proceeding was improperly transferred to this Court, because the determination was not made pursuant to an administrative hearing (*see Independence Plaza N. Tenants Assn. v*

Roberts, 276 AD2d 427 [1st Dept 2000]; *Matter of Halperin v City of New Rochelle*, 24 AD3d 768, 770-771 [2d Dept 2005], *lv denied* 7 NY3d 708 [2006]; CPLR 7803[4]; 7804[g]), we nevertheless address the merits of the petition in the interests of judicial economy (*see Matter of DeMonico v Kelly*, 49 AD3d 265 [1st Dept 2008]).

HPD's determination has a rational basis in the record, namely, the projections of revenue and expenses, which are supported by various underlying financial documents and reports, the owner's audited financial statements, and an engineer's report and assessment addressing the physical needs of the building and the scope of the repair work necessary (*see Matter of Duane St. Assoc. v Roberts*, 276 AD2d 427 [1st Dept 2000]; *Matter of Brookdale Hosp. Ctr. Tenants Assn. v Goldman*, 99 AD2d 702, 703 [1st Dept 1984]; *Matter of Greene v Goodwin*, 46 AD2d 69, 73 [2d Dept 1974], *affd* 36 NY2d 886 [1975]; *Matter of Podhaizer v Eimicke*, 141 AD2d 546 [2d Dept 1988], *lv denied* 72 NY2d 810 [1988]).

HPD's consideration of the availability of Section 8 vouchers when making its determination, which took into account the availability of funds and tenants' continued access to rental units within their means, does not render the determination arbitrary and capricious or an abuse of discretion (*see Winthrop*

Gardens v Goodwin, 58 AD2d 764 [1st Dept 1977]; *Brookdale*, 99 AD2d at 703). HPD's failure to address petitioners' arguments about the potential availability of alternative funding sources in its determination also does not render the determination arbitrary (*see Duane St. Assoc.*, 276 AD2d at 427). HPD reviewed and considered the testimony presented at a public hearing on the rent increase, where the issue of alternative funding sources was raised.

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

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

ENTERED: JUNE 25, 2019

CLERK

Renwick, J.P., Manzanet-Daniels, Webber, Oing, JJ.

9701 The People of the State of New York, Respondent,

-against-

Elmo Rivadeneira, Defendant-Appellant.

Ind. 6029/06

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

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

Judgment, Supreme Court, New York County (Michael J. Obus, J.), rendered November 18, 2016, convicting defendant, upon his plea of guilty, of rape in the first degree and attempted rape in the first degree, and sentencing him to an aggregate term of 25 years, unanimously modified, on the law, to the extent of reducing the amounts of the mandatory surcharge to $250 and the crime victim assistance fee to $20, respectively, and otherwise affirmed.

Defendant made a valid waiver of his right to appeal (*see People v Bryant*, 28 NY3d 1094 [2016]), which forecloses review of his claims that he was denied the right to counsel in connection with his decision whether to testify before the grand jury and that his sentence is excessive.

Regardless of whether defendant validly waived his right to appeal, his right to counsel claim relating to the grand jury proceeding falls within the category of claims requiring preservation (*see People v Garay*, 25 NY3d 62, 67 [2015], *cert denied* 577 US —, 136 S Ct 501 [2015]), and we decline to review this unpreserved claim in the interest of justice. As an alternative holding, we find that it was forfeited by defendant's guilty plea (*see People v Hansen*, 95 NY2d 227, 231 [2000]), and that it is unreviewable for lack of a sufficient record (*see People v McLean*, 15 NY3d 117, 119 [2010]; *People v Kinchen*, 60 NY2d 772, 773-774 [1983]).

Furthermore, regardless of the validity of the appeal waiver, we perceive no basis for reducing the sentence.

However, because defendant committed these crimes before the

effective dates of statutory amendments increasing the mandatory surcharge and crime victim assistance fees, his sentence is unlawful to the extent indicated.

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

ENTERED: JUNE 25, 2019

CLERK

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

9702 Marion Scott Real Estate, Inc., Index 653953/14
Plaintiff-Respondent,

-against-

Riverbay Corporation,
Defendant-Appellant.

_____

Spolzino, Smith, Buss & Jacobs, LLP, Yonkers (Jeffrey D. Buss of counsel), for appellant.

Redmond Law PLLC, New York (Jennifer Redmond and Steven E. Spada of counsel), for respondent.

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Judgment, Supreme Court, New York County (Paul Wooten, J.), entered March 12, 2018, against defendant in plaintiff's favor, and bringing up for review an order (same court and Justice), entered June 27, 2016, which granted plaintiff's motion for partial summary judgment on its second cause of action for breach of contract, unanimously reversed, on the law, with costs, the judgment vacated, and the motion denied.

Summary judgment was not warranted on plaintiff's second cause of action for breach of contract, because the record, presently undeveloped by discovery, precludes a conclusion, as a matter of law, that plaintiff performed its obligations under parties' contract (*see Harris v Seward Park Hous. Corp.*, 79 AD3d 425, 426 [1st Dept 2010]). In addition, defendant raises

counterclaims which are "inextricably interwoven and inseparable" from plaintiff's second cause of action, and the present record does not permit resolution of whether plaintiff or defendant breached the parties agreement (*see Boston Concessions Group v Criterion Ctr. Corp*, 200 AD2d 543 [1st Dept 1994]).

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

ENTERED: JUNE 25, 2019

CLERK

Renwick, J.P., Manzanet-Daniels, Webber, Oing, JJ.

9703 Board of Managers of 150 East 72nd Street Condominium,
Plaintiff-Respondent,

-against-

Vitruvius Estates, LLC,
Defendant-Appellant,

Harry Macklowe,
Defendant.

Index 160831/16

_____

Desiderio, Kaufman & Metz, PC, New York (Jeffrey R. Metz of counsel), for appellant-respondent.

Stempel Bennett Claman & Hochberg, P.C., New York (Richard L. Claman of counsel), for respondent-appellant.

_____

Order, Supreme Court, New York County (O. Peter Sherwood, J.), entered June 15, 2018, which, insofar as appealed from as limited by the briefs, denied defendant Vitruvius Estates, LLC's (defendant) motion to dismiss the first, second, and third causes of action, unanimously affirmed, with costs.

Plaintiff contends that defendant, sponsor of the condominium offering plan, underfunded plaintiff's reserve fund by using the wrong value for "total price" in the calculation of the amount of the fund (*see* Administrative Code of City of NY §§ 26-703[b][i] ["three percent of the total price"]; 26-702[b][2] ["the sum of the cost of all units in the offering at the last

price which was offered to tenants in occupancy prior to the effective date of the plan"]). Plaintiff also contends that the aggregate price of the four commercial units in the condominium building should be factored into the calculation of the amount of the reserve fund.

While we affirm, we do so on different grounds. With respect to the correct value for "total price," we find, contrary to the motion court, that "the last price which was offered to tenants in occupancy prior to the effective date of the plan" was the tenant discount price contained in the Fifth Amendment to the Condominium Offering Plan. Although the discount price in the Fifth Amendment was made effective simultaneously with the acceptance of the amendment for filing, the fact that the price was made available retroactively to any tenant who had purchased a unit under the original plan or any amendment preceding the Fifth Amendment renders it the lowest price offered "prior to the effective date of the plan." Construing the ordinance to provide for calculation of "total price" based on a retroactively applicable discounted price promotes public policy by "encourag[ing] the sponsor to lower the insider price[,] which inures to the benefit of the tenants in occupancy," and "gives the sponsor an incentive to fund the entire reserve fund at

closing[,] which is beneficial to all shareholders" (*45 E. 89th St. Tenants Assn. v Dwelling Mgrs.*, Sup Ct, NY County, Oct. 28, 1991], Schlesinger, J., index No. 028332/90, at 5, *affd for reasons stated below* 191 AD2d 403 [1st Dept 1993]).

With respect to the commercial units, we find, contrary to the motion court, that they should be included in the calculation of "total price." Administrative Code § 26-702(b)(2) defines "total price" as "the sum of the cost of all units in the offering." The word "all" is unambiguous; the provision does not on its face distinguish between residential and commercial units. Accordingly, we need not, as defendant urges, look to the principle of in pari materia or otherwise look beyond the plain words of the legislation (*see Doctors Council v New York City Employees' Retirement Sys.*, 71 NY2d 669, 674 [1988]; McKinney's Cons Laws of NY, Book 1, Statutes § 221[a], Comment).

We find that the complaint adequately pleads a cause of action for breach of contract (*see* CPLR 3013).

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

ENTERED: JUNE 25, 2019

CLERK

Renwick, J.P., Manzanet-Daniels, Webber, Oing, JJ.

9704 The People of the State of New York, SCI 4087/16
Respondent,

-against-

Christopher Santos,
Defendant-Appellant.

_____

Janet E. Sabel, The Legal Aid Society, New York (Eve Kessler 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 (Kevin McGrath, J. at plea; Tamiko Amaker, J. at sentencing), rendered January 17, 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 25, 2019

CLERK

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

Renwick, J.P., Manzanet-Daniels, Webber, Oing, JJ.

9705-
9706-
9707 Index 652412/16

By Design LLC,
Plaintiff-Respondent,

-against-

Samsung Fire & Marine Insurance Co. Ltd.
(U.S. Branch), et al.,
Defendants-Appellants.

_____

Fleischner Potash LLP, New York (William M. Billings of counsel), for appellants.

Reed Smith LLP, New York (Brian A. Sutherland of counsel), for respondent.

_____

Orders, Supreme Court, New York County (Charles E. Ramos, J.), entered December 28, 2018, and December 5, 2018, which, inter alia, granted plaintiff's motion for partial summary judgment declaring that it is entitled to coverage under the insurance policy issued by defendant Samsung Fire & Marine Insurance Co. Ltd. (U.S. Branch) for merchandise destroyed in a warehouse fire, and ordered defendants to pay plaintiff a sum in excess of $2 million, plus prejudgment and postjudgment interest, costs and disbursements, and denied defendants' motion for summary judgment dismissing the complaint, unanimously affirmed, with costs. Appeal from order, same court and Justice, entered

December 6, 2018, unanimously dismissed, without costs, as academic. Appeal from November 13, 2018 transcript, unanimously dismissed, without costs, as taken from a non-appealable paper.

The policy's "Consolidation, Deconsolidation & Containerization" (CD&C) clause provides, "Notwithstanding anything contained elsewhere herein to the contrary . . ., the insurance provided hereunder shall cover goods while on premises of . . . warehousemen . . . for the purpose of consolidation, deconsolidation, containerization, decontainerization, distribution, redistribution . . . after discharge from overseas vessel . . . for a period not exceeding 45 . . . days after arrival at such premises." The plain language of this clause means that the coverage afforded under it is distinct from coverage for goods in long-term storage at a warehouse (*see Gilbane Bldg. Co./TDX Constr. Corp. v St. Paul Fire & Mar. Ins. Co.*, 143 AD3d 146, 151 [1st Dept 2016], *affd* 31 NY3d 131 [2018]). Although the above-quoted terms are not defined in the policy, defendants' underwriter and corporate designee testified that the $5 million limit for "Consolidation" under "Additional Coverage" was applicable to the entirety of the CD&C clause. Defendants' preliminary report acknowledged that 19 containers of pre-sold goods could not be directly delivered to the retailer upon

arrival in the United States and were delivered to nonparty Jordan Logistics Inc., "where they were intended to be held for a limited time." Thus, even if the undefined words are ambiguous, the undisputed extrinsic evidence shows that the $5 million limit applies to the CD&C clause and that this clause affords coverage to the goods that were destroyed in the fire at the Jordan Logistics warehouse (*see Burgos v Metro-North Commuter R.R.*, 40 AD3d 377, 377-78 [1st Dept 2007]).

Defendants did not raise below the argument that the $5 million limit applies solely to consolidation in the letter denying coverage of their answer to the complaint (*see Benjamin Shapiro Realty Co. v Agricultural Ins. Co.*, 287 AD2d 389, 389 [1st Dept 2001]). In any event, the argument is unavailing, because the terms of a contract must be read in context (*CT Inv. Mgt. Co., LLC v Chartis Specialty Ins. Co.*, 130 AD3d 1, 7 [1st Dept 2015]), and "no contractual clause is to be construed as being superfluous" (*Lend Lease [US] Constr. LMB Inc. v Zurich Am. Ins. Co.*, 136 AD3d 52, 66 [1st Dept 2015], *affd* 28 NY3d 675 [2017]). Defendants' reading of the CD&C clause renders the

terms deconsolidation, containerization, decontainerization, distribution, and redistribution superfluous.

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

ENTERED: JUNE 25, 2019

CLERK

Renwick, J.P., Manzanet-Daniels, Webber, Oing, JJ.

9708 The People of the State of New York, Ind. 240/15
Respondent,

-against-

Colin Doherty,
Defendant-Appellant.

_____

Robert S. Dean, Center for Appellate Litigation, New York (Jacqueline Meese-Martinez of counsel), for appellant.

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

_____

Judgment, Supreme Court, New York County (Michael R. Sonberg, J.), rendered March 9, 2016, convicting defendant, after a jury trial, of three counts of criminal contempt in the first degree, seven counts of criminal contempt in the second degree, and two counts of stalking in the fourth degree, and sentencing him to an aggregate term of one to three years, unanimously affirmed.

We reject defendant's challenges to the sufficiency and weight of the evidence supporting the first-degree contempt convictions (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). Initially, we find no basis for disturbing the jury's credibility determinations, and we do not find that defendant's acquittals of other charges (*see People v Abraham*, 22 NY3d 140, 147 [2013];

People v Rayam, 94 NY2d 557 [2000]; *People v Johnson*, 73 AD3d 578, 580 [1st Dept 2010], *lv denied* 15 NY3d 893 [2010]) warrant a different result.

With regard to the convictions under Penal Law § 215.51(b)(ii) and (iii), the jury could reasonably have found that defendant intended to place the victim in reasonable fear of physical injury. While not overtly threatening, defendant's behavior in general and the subject text message in particular, when viewed in context, demonstrated an "inherent menace" such that threats of physical injury could reasonably be implied (*see People v Young*, 141 AD3d 551, 553 [2d Dept 2016], *lv denied* 28 NY3d 975 [2016]; *People v Clark*, 65 AD3d 755, 758 [3d Dept 2009], *lv denied* 13 NY3d 906 [2009]; *compare People v Demisse*, 24 AD3d 118, 119 [2005], *lv denied* 6 NY3d 833 [2006] [distressing, but nonthreatening declarations of love held insufficient]).

Defendant admitted that he was aware that an order of protection was in place, and that it prohibited him from contacting the victim in any manner. Defendant nonetheless attempted to enter the victim's apartment building twice, even though he and the victim had not seen each other in over three years, she never gave him her address and took precautions to avoid his finding her, and he admittedly knew that she did not

want him there. Defendant also called the victim multiple times and sent numerous text messages, using different phone numbers, even though she consistently did not respond and he admittedly knew that she did not want to be in a relationship with him. The content of many of these text messages was sexually explicit, and at least one described a bondage act that defendant admitted had never been part of their sexual relationship. The tone of these messages was also aggressive and suggestive of an intent to commit rape.

Accordingly, the jury could have found that defendant intentionally placed the victim in fear of injury, even though he had not physically harmed her in the past. We have considered and rejected defendant's remaining arguments regarding these two counts.

With regard to the conviction under Penal Law § 15.51(b)(iv), the jury could reasonably have found that defendant's multiple phone calls to the victim during the relevant period had no purpose of legitimate communication (*see generally People v Shack*, 86 NY2d 529, 538 [1995]). While the sole voice message left by defendant was not, standing alone, threatening, intimidating, or coercive, the absence of a legitimate purpose for these calls could reasonably be inferred

from their context, including defendant's contemporaneous non-phone-call communications and behavior and the fact that his advances were clearly unwelcome (*see People v Coyle*, 186 Misc 2d 772, 774 [Nassau Dist Ct 2000] ["attempting to communicate one's desire to establish a sexual relationship" does not constitute a "legitimate purpose" where it is clear that such communications are unwelcome, because "no one is 'entitled' to make sexual advances he or she knows are unwanted"]; *People v Spruill*, 2015 NY Slip Op 51354[U], *5 [Crim Ct, NY County 2015] [content of contemporaneous text messages "can be consulted to the extent it bears on the question of the defendant's intent"]).

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

ENTERED: JUNE 25, 2019

CLERK

Renwick, J.P., Manzanet-Daniels, Webber, Oing, JJ.

9709 Bernard Meiterman, et al., Index 100942/17
Plaintiffs-Respondents,

-against-

Corporate Habitat, et al.,
Defendants-Appellants,

John Does 1-5, et al.,
Defendants.

_____

Law Office of D. Paul Martin PLLC, New York (D. Paul Martin of counsel), for Corporate Habitat and Yacov Smouha, appellants.

Law Offices of Jason J. Rebhun, P.C., New York (Jason J. Rebhun of counsel), for Da Development Group and David Shenfeld, appellants.

Bernard Meiterman, respondent pro se.

Jay Domb, respondent pro se.

Glenn Isaacs, respondent pro se.

_____

Order, Supreme Court, New York County (Barbara Jaffe, J.), entered September 24, 2018, which denied defendants' motions to dismiss the complaint pursuant to CPLR 3106(b) and CPLR 3211(a)(1),(3), and (7), and granted pro se plaintiffs' cross motion for leave to file an amended complaint to the extent of directing plaintiffs to file a second proposed (first) amended complaint, unanimously reversed, on the law, without costs, defendants' motions granted and plaintiffs' motion denied. The

Clerk is directed to enter judgment accordingly.

Plaintiffs, the individuals who own the membership interests in a New York State limited liability corporation formed for the purpose of purchasing and developing certain real property, allege fraud and negligent misrepresentation in connection with their negotiations with defendants to purchase those membership interests and the attendant right of the LLC to purchase the property.

The court erred in concluding that plaintiffs are the real parties in interest and have standing to sue in their own names (*see Centaur Props., LLC v Farahdian*, 29 AD3d 468 [1st Dept 2006]).

In any event, the vague and general allegations in the original and amended pleadings that defendants misled plaintiffs about defendant's financial abilities and defendant's intent to consummate the transaction being negotiated are conclusory and fail to satisfy the standard for pleading fraud under CPLR 3016(b) (*see Eurycleia Partners, LP v Seward & Kissel, LLP*, 12 NY3d 553, 559 [2009]; *Cronos Group Ltd. v XComIP, LLC*, 156 AD3d 54, 61 [1st Dept 2017]). The complaint fails to state a cause of action for negligent misrepresentation, because plaintiffs do not allege the existence of a special or privity-like

relationship (*see J.A.O. Acquisition Corp. v Stavitsky*, 8 NY3d 144, 148 [2007]). As the proposed amendments are palpably insufficient as a matter of law, plaintiffs' motion for leave to amend should be denied (*see Davis & Davis v Morson*, 286 AD2d 584 [1st Dept 2001]).

Plaintiffs' arguments that the appeal is defective due to improper service and that defendants submitted an incomplete record on appeal are without merit.

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

ENTERED: JUNE 25, 2019

CLERK

Renwick, J.P., Manzanet-Daniels, Webber, Oing, JJ.

9710 Tomasa Rosario, Index 302699/15
Plaintiff-Respondent,

-against-

New York City Housing Authority,
Defendant-Appellant.

_____

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

Peña & Kahn, PLLC, Bronx (Dianne Welch Bando of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (Llinet M. Rosado, J.), entered on or about April 10, 2018, which denied defendant's motion for summary judgment dismissing the complaint, unanimously reversed, on the law, without costs, and the motion granted. The Clerk is directed to enter judgment accordingly.

Defendant established its prima facie entitlement to judgment as a matter of law in this action for personal injuries sustained when plaintiff slipped and fell on snow or ice on the walkway in front of defendant's building. Defendant submitted, inter alia, climatological records and a meteorologist's affidavits showing that there was a winter storm in progress at the time of plaintiff's fall (*see Wexler v Ogden Cap Props., LLC*, 154 AD3d 640 [1st Dept 2017], *lv denied* 31 NY3d 909 [2018]).

In opposition, plaintiff failed to raise a triable issue of fact as to whether defendant's caused or had notice of the alleged hazardous condition. Her claim that the icy condition pre-existed the storm, and her conclusory assertion that defendant's snow removal efforts were not adequate, do not raise triable issues of fact, particularly given the climatological data demonstrated sustained rain and above freezing temperatures the day before the accident (*see e.g. Moreno v Trustees of Columbia Univ. in the City of N.Y.*, 161 AD3d 501 [1st Dept 2018]).

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

ENTERED: JUNE 25, 2019

CLERK

Renwick, J.P., Manzanet-Daniels, Webber, Oing, JJ.

9711N Anna Condo, Index 300341/14
Plaintiff-Appellant,

-against-

George Condo,
Defendant-Respondent.

_____

Dentons US LLP, New York (Anthony B. Ullman of counsel), for appellant.

Blank Rome LLP, New York (Sheila Ginsberg Riesel of counsel), for respondent.

_____

Order, Supreme Court, New York County (Matthew F. Cooper, J.), entered October 23, 2018, which denied plaintiff's application to vacate a default, unanimously affirmed, without costs.

The Special Master presiding over these postjudgment matrimonial proceedings pursuant to a so-ordered stipulation between the parties providently exercised her discretion in declining to vacate plaintiff's default. Plaintiff failed to demonstrate a reasonable excuse for her failure to meet the stated deadline for submitting her "first round selections" of marital artwork for purposes of equitable distribution (*see* CPLR 5015[a]; *see generally Nimkoff v Nimkoff*, 120 AD3d 1099 [1st Dept 2014], *lv dismissed* 26 NY3d 1023 [2015]). Moreover, the fact

that plaintiff waited nine months before making application to vacate the default "evinces an intentional default, which is not excusable" (*Dimopoulos v Caposella*, 118 AD3d 739, 741 [2d Dept 2014]; *see also John Wiley & Sons, Inc. v Grossman*, 132 AD3d 559, 560 [1st Dept 2015]), particularly against the backdrop of this highly contentious litigation.

We rejected plaintiff's remaining argument, that the court erred in so-ordering the Special Master's decision and order, in a prior appeal (__ AD3d __, 2019 NY Slip Op 03466 [1st Dept 2019]).

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

ENTERED: JUNE 25, 2019

CLERK

Renwick, J.P., Manzanet-Daniels, Webber, Oing, JJ.

9712N Martha Lorentti-Herrera, et al., Index 155417/18
Plaintiffs-Respondents,

-against-

Alliance for Health, Inc., etc.,
Defendant-Appellant.

_____

Jackson Lewis P.C., New York (Felice B. Ekelman of counsel), for appellant.

Virginia & Ambinder, LLP, New York (LaDonna M. Lusher of counsel), for respondents.

_____

Order, Supreme Court, New York County (Melissa A. Crane, J.), entered on or about February 11, 2019, which, to the extent appealed from as limited by the briefs, denied defendant's motion to compel arbitration and stay the action with respect to plaintiff Eugenia Barahona Alvarado and other, similarly situated plaintiffs, unanimously affirmed, without costs.

Plaintiff Alvarado is not bound by the arbitration provision in the collective bargaining agreement (CBA) between defendant and the 1199SEIU United Healthcare Workers East Union (the Union), because the arbitration provision limits mandatory arbitration to disputes between an employee and employer "concerning the interpretation or application of a specific term" of the CBA, and the complaint asserts claims for violations of

the Labor Law and for breach of contracts outside of the CBA (*see Tamburino v Madison Sq. Garden, LP*, 115 AD3d 217, 222-223 [1st Dept 2014]; *Brady v Williams Capital Group, L.P.*, 64 AD3d 127, 131 [1st Dept 2009], *mod on other grounds* 14 NY3d 459 [2010]).

Although defendant and the Union entered into a memorandum of agreement (MOA) in February 2016 that modified the CBA to mandate arbitration for Labor Law claims, plaintiff's employment with defendant ended on approximately August 24, 2015, and neither she nor any other class member who was not employed by defendant when the MOA was entered into is bound by the MOA's arbitration provision *see Konstantynovska v Caring Professionals, Inc.*, __ AD3d __, 2019 NY Slip Op 03676, *1 [1st Dept, May 9, 2019] [class members not bound by MOA "because they were no longer defendant's employees when it was executed, they were not parties to that agreement, and there is no evidence that the Union was authorized to proceed on their behalf"]).

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

ENTERED: JUNE 25, 2019

CLERK

Gische, J.P., Tom, Kapnick, Kern, Moulton, JJ.

9713 The People of the State of New York, Ind. 2601/15
Respondent,

-against-

Kenneth Credle,
Defendant-Appellant.

_____

Robert S. Dean, Center for Appellate Litigation, New York (Nicolas Duque Franco of counsel), for appellant.

Darcel D. Clark, District Attorney, Bronx (Nicole Neckles of counsel), for respondent.

_____

Judgment, Supreme Court, Bronx County (Miriam R. Best, J.), rendered September 7, 2017, convicting defendant, upon his plea of guilty, of criminal possession of a weapon in the fourth degree, and sentencing him to a term of one year, unanimously affirmed.

Defendant made a valid waiver of his right to appeal (*see People v Bryant*, 28 NY3d 1094 [2016]). The waiver of the right to appeal includes a waiver of the right to challenge any ruling on a suppression motion (*People v Marrero*, 40 AD3d 321 [1st Dept 2007], *lv denied* 9 NY3d 867 [2007]). Regardless of whether defendant made a valid waiver of his right to appeal, we find that the court properly denied his suppression motion. There is

no basis for disturbing the court's credibility determinations, which are supported by the record (*see People v Prochilo*, 41 NY2d 759, 761 [1977]).

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

ENTERED: JUNE 25, 2019

CLERK

Gische, J.P., Tom, Kapnick, Kern, Moulton, JJ.

9714-
9715 Melissa Perez,
Plaintiff-Respondent,

-against-

Raymours Furniture Company, Inc.,
Defendant-Respondent,

Bay Plaza Community Center, LLC, et al.,
Defendants-Appellants.

- - - - -

[And a Third-Party Action]

Index 21480/16E
43310/17E

_____

Law Offices of Tobias & Kuhn, New York (Michael V. DiMartini of counsel), for appellants.

Law Offices of Stephen B. Kaufman, Bronx (Angelique Pesce of counsel), for Melissa Perez, respondent.

Law Office of Tromello & Fishman, Tarrytown (Silvia C. Souto of counsel), for Raymours Furniture Company, Inc., respondent.

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Order, Supreme Court, Bronx County (Fernando Tapia, J.), entered November 28, 2018, which, to the extent appealed from as limited by the briefs, granted the motion of defendant Raymours Furniture Company, Inc. (Raymours) for summary judgment dismissing the complaint and all cross claims as against it, unanimously affirmed, without costs. Order, same court and Justice, entered November 28, 2018, which denied the motion of defendants Bay Plaza Community Center, LLC (Bay Plaza) and SP

Center, LLC (SP) for summary judgment dismissing the complaint as against them, unanimously affirmed, without costs.

In this personal injury action arising from a slip and fall on ice, Supreme Court properly denied the owner defendants' (Bay Plaza and SP) motion for summary judgment dismissing the complaint. Although the meteorological records and the expert meteorological affidavits demonstrate that there was a storm in progress when the accident happened, a warehouse associate employed by Raymours testified at his deposition that he saw ice on the ground the loading dock about a week before plaintiff's fall and defendants submitted no evidence as to when the area was last inspected or cleaned before the accident. In these circumstances, there are triable issues of fact as to whether plaintiff's fall was caused by pre-existing ice on the ground or the storm in progress and whether Bay Plaza and SP had a reasonable time to remedy any alleged icy condition before the date of plaintiff's fall (*see Bagnoli v 3GR/228 LLC*, 147 AD3d 504, 505 [1st Dept 2017]; *Guzman v Broadway 922 Enters., LLC*, 130 AD3d 431, 432 [1st Dept 2015]).

Dismissal of the complaint and all cross claims against Raymours was, however, warranted because there is no evidence that its employees caused or created the icy condition and the

lease agreement is clear that Raymours, as a tenant, was not obligated to maintain the area where plaintiff allegedly fell (*see Bednark v New York City Tr. Auth.*, 138 AD3d 584 [1st Dept 2016]).

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

ENTERED: JUNE 25, 2019

CLERK

Gische, J.P., Tom, Kapnick, Kern, Moulton, JJ.

9716 In re Michael J.M.,
Petitioner-Appellant,

-against-

Antoinette T.,
Respondent-Respondent.

_____

Leslie S. Lowenstein, Woodmere, for appellant.

Cahill Gordon & Reindel LLP, New York (Merriam Mikhail of counsel), for respondent.

_____

Order, Family Court, New York County (George L. Jurow, J.H.O.), entered on or about January 24, 2018, which, after a hearing, denied petitioner father's motion for unsupervised visitation, unanimously affirmed, without costs.

The Family Court's determination that continuing supervised visitation at the father's aunt's house was in the best interest of the subject child has a sound and substantial basis in the record and should not be disturbed (*Linda R. v Ari Z.*, 71 AD3d 465, 465-466 [1st Dept 2010]). Despite having multiple opportunities over a year-long period, petitioner failed to educate himself about how to address the child's special needs, and how to provide proper care for her when she is with him. The daughter has serious developmental disabilities including

cerebral palsy, autism, asthma, sleep apnea, and speech defects. She attends a special school designed to address her needs, and she has a history of not reporting high fevers which have required medical attention. As the father's aunt is a nurse, visits at her home ensure proper care in case of a medical emergency.

Notably, the court recognized that the father had made strides to understand and meet his child's special needs, but he was not yet equipped to care for her alone. The father was granted leave to reapply to modify the custody order if he sufficiently educated himself about how to address the child's needs.

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

ENTERED: JUNE 25, 2019

CLERK

Gische, J.P., Tom, Kapnick, Kern, Moulton, JJ.

9717 Amalgamated Dwellings, Inc., et al., Index 160393/16
Plaintiffs-Appellants,

-against-

John Dergosits,
Plaintiff,

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

_____

Anderson Kill P.C., New York (Peter I. Livingston of counsel), for appellants.

Zachary W. Carter, Corporation Counsel, New York (Nwamaka Ejebe of counsel), for City of New York, respondent.

Sills Cummis & Gross P.C., New York (Mitchell D. Haddad of counsel), for Hillman Housing Corporation, respondent.

_____

Order, Supreme Court, New York County (W. Franc Perry, J.), entered February 7, 2018, which granted defendants' motions to dismiss the complaint, unanimously affirmed, without costs.

This General Municipal Law (GML) § 51 taxpayer claim against the City and Hillman, seeking to set aside the 1949 Deed and related declaratory and injunctive relief, alleges that the conveyance of the street beds to Hillman in 1949 violated the terms of the deed. Plaintiffs further alleged that the City's failure to exercise its reversionary interest to recover the property after Amalgamated put the City on notice of this in 2007

resulted in a gratis donation of the property to Hillman at taxpayer expense. These claims are dismissed as untimely, for the reasons stated by the motion court.

The City was on notice that some of the conveyed property did not abut Hillman's property at the time of the 1949 deed; any claim by Amalgamated and its shareholders related to that conveyance, whether as property owners or as taxpayers, has long expired. In any event, we further find that any failure by the City to exercise its reversionary right under these circumstances, more than 60 years after the conveyance, does not constitute the fraud or illegality necessary to support a taxpayer action pursuant to GML § 51 (*see Mesivta of Forest Hills Inst. v City of New York*, 58 NY2d 1014 [1983]).

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

ENTERED: JUNE 25, 2019

CLERK

Gische, J.P., Tom, Kapnick, Kern, Moulton, JJ.

9718 Dawn Jones, et al., Index 655023/16
Plaintiffs-Appellants,

-against-

Madison Plaza Commercial
Owners LLC, et al.,
Defendants-Respondents.

_____

The Law Office of Marjory Cajoux, Brooklyn (Marjory Cajoux of counsel), for appellants.

French & Casey, LLP, New York (Susan A. Romano of counsel), for Madison Plaza Commercial Owners LLC, respondent.

Bradley S. Gross, New York, for 1825 Madison Retail, LLC, respondent.

_____

Order, Supreme Court, New York County (Debra James, J.), entered on or about March 14, 2018, which, inter alia, granted defendant 1825 Madison Retail, LLC's motions for summary judgment dismissing the amended complaint and for summary judgment in lieu of complaint as to liability on a counterclaim to enforce a guaranty, unanimously reversed, on the law, and the motions denied.

Plaintiff's failure to redraft the complaint in strict compliance with court's October 18, 2017 order did not prejudice the parties or the court and it was not a basis for dismissal of the pleading (CPLR 3013; see *Cole v Mandell Food Stores, Inc.*, 93

NY2d 34, 40 [1999]). Accordingly, the cause of action for replevin is reinstated against defendant 1825 Madison.

In addition, defendant 1825 Madison was not entitled to expedited CLPR 3213 treatment on its counterclaim for enforcement of the lease guaranty. Although the individual plaintiff's unconditional personal guaranty of the payment of rent, additional rent, and other charges under the lease is an instrument for the payment of 'money only' within the meaning of CPLR 3213 (*see Chase Manhattan Bank, N.A. v Marcovitz,* 56 AD2d 763 [1st Dept 1977], *lv denied* 42 NY2d 807 [1977]), there is a genuine dispute of material fact as to the amount due, if any, under the guaranty because plaintiff has shown discrepancies in the amount allegedly owed by the commercial tenant (*Moon 170 Mercer, Inc. v Vella*, 122 AD3d 544, 545 [1st Dept 2014]).

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

ENTERED: JUNE 25, 2019

CLERK

Gische, J.P., Tom, Kapnick, Kern, Moulton, JJ.

9719 Urania Vullo, Index 160997/14
Plaintiff-Respondent,

-against-

Hillman Housing Corporation,
Defendant-Appellant,

Manhattan Autocare, et al.,
Defendants.

_____

Litchfield Cavo LLP, New York (Michael K. Dvorkin of counsel), for appellant.

Joseph T. Mullen Jr. & Associates, New York (Neil A. Zirlin of counsel), for respondent.

_____

Order, Supreme Court, New York County (Alexander M. Tisch, J.), entered March 8, 2018, which, to the extent appealed from, denied defendant Hillman Housing Corporation's (Hillman) motion for summary judgment, unanimously affirmed, without costs.

Plaintiff alleges that in October of 2014 she tripped an fell on a metal protrusion and/or sign post stump on a sidewalk outside a building owned by Hillman. After receiving a DOT violation related to the condition of the sidewalk, Hillman had hired an outside contractor to perform cement sidewalk resurfacing work between August and October of 2014.

Although the "general rule is that a party who retains an

independent contractor . . . is not liable for the independent contractor's negligent acts," an exception arises when the hiring party "is under a specific nondelegable duty" (*Kleeman v Rheingold*, 81 NY2d 270, 273-274 [1993]). Here, Hillman, as the property owner, had a nondelegable duty to maintain the sidewalk, including the sidewalk around the subject sign post stump (*Bronfman v East Midtown Plaza Hous. Col, Inc.*, 151 AD3d 639 [1st Dept 2017]; Administrative Code of City of NY § 7-210).

Contrary to Hillman's contention, the motion court did not conclude that Hillman is, in fact, liable for any alleged wrongs committed by the independent contractor in performing cement sidewalk resurfacing work. Rather, the motion court correctly found that under these circumstances the record raises issues of fact as to whether the cement work ordered by this defendant, the property owner, caused or exacerbated a hazardous tripping condition, and whether Hillman had actual or constructive knowledge of the metal protrusion on the sidewalk outside its building. Factual issues are also presented as to whether the condition was open and obvious, or, alternatively the defect trivial (*Nigro v Cirvinara, LLC*, 106 AD3d 428 [2013]).

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

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

ENTERED: JUNE 25, 2019

CLERK

Gische, J.P., Tom, Kapnick, Kern, Moulton, JJ.

9720 In re Tamika Blythe-Baugh, Index 650246/17
Petitioner-Appellant,

-against-

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

_____

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

Zachary W. Carter, Corporation Counsel, New York (Elizabeth I. Freedman of counsel), for respondents.

_____

Order (denominated Decision and Judgment), Supreme Court, New York County (Barbara Jaffe, J.), entered on or about January 26, 2018, which granted respondents' motion to confirm an arbitrator's award terminating petitioner's employment as a teacher, denied the petition and dismissed the proceeding brought pursuant to CPLR article 75, unanimously affirmed, without costs.

Education Law § 3020-a(5) provides that judicial review of a hearing officer's findings is limited to the grounds set forth in CPLR 7511(b). However, where the parties have submitted to compulsory arbitration, as here, judicial scrutiny is stricter in that the determination must be in accord with due process, supported by adequate evidence, be rational, and not arbitrary and capricious under CPLR article 78 (*see City School Dist. of*

the City of N.Y. v McGraham, 17 NY3d 917, 919 [2011]; *Matter of Gongora v New York City Dept. of Educ.*, 98 AD3d 888, 889-890 [1st Dept 2012]).

The arbitrator's decision was based on sufficient evidence, was rational, and was not arbitrary or capricious. Petitioner did not dispute the absences and lateness noted in specifications 1 through 6, which the arbitrator properly found were excessive, and as to which the arbitrator noted that petitioner failed to seek a medical accommodation until shortly before the charges were filed against her. Moreover, petitioner did not provide medical documentation supporting her claim that the absences and lateness were causally related to her medical condition.

With respect to the corporal punishment specification, the arbitrator credited the student's testimony, and a hearing officer's determination of credibility is largely unreviewable (*see Matter of Paul v New York City Dept. of Educ.*, 146 AD3d 705 [1st Dept 2017]).

Termination of petitioner's employment does not shock the conscience given her repeated and prolonged attendance issues, which were the subject of two prior disciplinary proceedings, and her other substantial misconduct (*see Lackow v Department of Educ. [or "Board"] of City of N.Y.*, 51 AD3d 563, 569 [1st Dept

2008]). "That reasonable minds might disagree over what the proper penalty should have been does not provide a basis for vacating the arbitral award or refashioning the penalty" (*see Matter of Bolt v New York City Dept. of Educ.*, 30 NY3d 1065 [2018]).

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

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

ENTERED: JUNE 25, 2019

CLERK

Gische, J.P., Tom, Kapnick, Kern, JJ.

9721-
9722 Index 190079/15

Noreen E. Ford, as Executrix of the Estate of Frank M. Gondar, Jr.,
Plaintiff-Respondent,

-against-

A.O. Smith Water Products, et al.,
Defendants,

Burnham LLC,
Defendant-Appellant.

_____

Simpson Thacher & Bartlett LLP, New York (Michael J. Garvey of counsel), for appellant.

Belluck & Fox, LLP, New York (Seth A. Dymond of counsel), for respondent.

_____

Judgment, Supreme Court, New York County (Martin Shulman, J.), entered August 21, 2017, upon a jury verdict against defendant Burnham LLC, and, after remittitur and stipulation by plaintiff, awarding plaintiff $5 million for past pain and suffering over a period of 17 months and $2 million for future pain and suffering for one month, unanimously modified, on the facts, to vacate the award for future pain and suffering and order a new trial of those damages, unless plaintiff stipulates, within 30 days after entry of this order, to reduce the award for future pain and suffering to $500,000, and to entry of an amended

judgment in accordance therewith, and otherwise affirmed, without costs.

This litigation arises out of the decedent's exposure to asbestos over the course of 20 years from dust caused by the removal of asbestos insulation placed on defendant Burnham LLC's boilers. Plaintiff's experts' testimony was sufficient to establish that the quantities of asbestos in the dust to which the decedent was exposed were sufficient to cause his mesothelioma (*see Matter of New York City Asbestos Litig.*, 154 AD3d 441, 441 [1st Dept 2017], *lv denied* 30 NY3d 909 [2018]; *Matter of New York City Asbestos Litig.*, 143 AD3d 485, 486 [1st Dept 2016], *affd* 29 NY3d 1068 [2017]; *Matter of New York City Asbestos Litig.*, 148 AD3d 233, 236 [1st Dept 2017], *affd* 32 NY3d 1116 [2018]).

Under the circumstances of this case, we find that the award for future pain and suffering deviates materially from what would be reasonable compensation (CPLR 5501[c]; *see generally Matter of New York City Asbestos Litig.*, 121 AD3d 230, 255 [1st Dept 2014], *affd* 27 NY3d 1172 [2016]; *Penn v Amchem Prods.*, 85 AD3d 475 [1st Dept 2011]). While plaintiff presented evidence at trial that the decedent's symptoms were becoming substantially worse and would continue to do so, the jury found that the decedent would

live only one more month, and its award of damages for future pain and suffering were intended to provide compensation for that period (*see* CPLR 4111[e]).

However, we find that the award, as reduced by stipulation, for past pain and suffering over a period of approximately 17 months is not excessive (CPLR 5501[c]; *Matter of New York City Asbestos Litig.*, 143 AD3d at 486; *Peraica v A.O. Smith Water Prods. Co.*, 143 AD3d 448, 451 [1st Dept 2016], *lv dismissed* 28 NY3d 1167 [2017]; *Matter of New York City Asbestos Litig.*, 154 AD3d at 441). The jury and the trial court, having had an opportunity to hear testimony firsthand, concluded that a substantial award was appropriate in light of the decedent's unique characteristics and the extent of his suffering. The record shows that the decedent's symptoms were severe, that he suffered from tremendous emotional and physical pain, and that he had been particularly active before the onset of symptoms.

The jury's verdict and allocation of 25% liability to Burnham, although Burnham did not actually manufacture the asbestos or distribute it directly, was not against the weight of

the evidence (*see generally Matter of New York City Asbestos Litig.*, 143 AD3d at 485; *Peraica*, 143 AD3d at 451).

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

ENTERED: JUNE 25, 2019

CLERK

Gische, J.P., Tom, Kapnick, Kern, Moulton, JJ.

9723 In re Sandro Lamberti, Index 102013/15
Petitioner-Appellant,

-against-

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

_____

Glass & Hogrogian, LLP, New York (Bryan D. Glass of counsel), for appellant.

Zachary W. Carter, Corporation Counsel, New York (Claibourne Henry of counsel), for respondents.

_____

Judgment (denominated an order), Supreme Court, New York County (Lucy Billings, J.), entered December 12, 2017, denying the petition to annul respondents' determination dated October 29, 2015, to terminate petitioner's probationary employment, and dismissing the proceeding brought pursuant to CPLR article 78, unanimously affirmed, without costs.

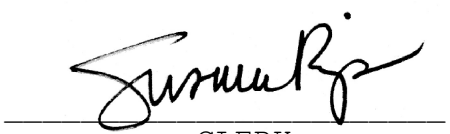
There is no basis for finding that the termination of petitioner's probationary employment "was for a constitutionally impermissible purpose, violative of a statute, or done in bad faith" (*Matter of Mendez v New York City Dept. of Educ.*, 28 NY3d 993, 994 [2016]; *see Matter of Brown v City of New York*, 280 AD2d 368, 370 [1st Dept 2001]). The evidence that petitioner received both "ineffective" and "developing" ratings on more than one

occasion supports the conclusion that the determination was not made in bad faith (*see Matter of Leka v New York City Law Dept.*, 160 AD3d 497 [1st Dept 2018]). Nor was petitioner entitled to notice of the possibility that his probationary employment would be terminated, beyond the required 60-day notice that he was given (Education Law § 2573[1]).

Furthermore, petitioner was provided with support, and any alleged deviations from internal procedures did not deprive him of a substantial right or undermine the fairness and integrity of the rating process (*see Cooper v City of New York*, 158 AD3d 553, 554 [1st Dept 2018]). To the contrary, the record demonstrates evidence of petitioner's persistent and unresolved issues despite ongoing efforts by school administration to help him improve his instructional methods.

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

ENTERED: JUNE 25, 2019



CLERK

Gische, J.P., Tom, Kapnick, Kern, Moulton, JJ.

9724- Ind. 263/14
9724A The People of the State of New York,
Respondent,

-against-

Victor Estrella,
Defendant-Appellant.

_____

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

Darcel D. Clark, District Attorney, Bronx (Julia L. Chariott of counsel), for respondent.

_____

Judgment, Supreme Court, Bronx County (Margaret L. Clancy, J.), rendered July 21, 2016, convicting defendant, upon his plea of guilty, of attempted rape in the first degree, and sentencing him to a term of 3½ years, with 15 years' postrelease supervision, unanimously affirmed, without costs. Order, same court and Justice, entered on or about December 20, 2016, which adjudicated defendant a level two sexually violent sex offender pursuant to the Sex Offender Registration Act (Correction Law art 6-C), unanimously affirmed, without costs.

As to the appeal from the judgment of conviction, we find that defendant made a valid waiver of his right to appeal. Even if he did not, we perceive no basis for reducing the term of

postrelease supervision.

As to defendant's civil appeal from his sex offender adjudication, we conclude that the court providently exercised its discretion when it declined to grant a downward departure (*see People v Gillotti*, 23 NY3d 841 [2014]). The mitigating factors cited by defendant were adequately taken into account by the risk assessment instrument or outweighed by the seriousness of the underlying offense against a child.

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

ENTERED: JUNE 25, 2019

CLERK

Gische, J.P., Tom, Kapnick, Kern, Moulton, JJ.

9725- Ind. 954/13
9726- SCI 3416/13
9727 The People of the State of New York,
Respondent,

-against-

Robert Olivarez,
Defendant-Appellant.

_____

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

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

_____

Judgments, Supreme Court, New York County (Melissa C. Jackson, J.), rendered September 18, 2013, convicting defendant, upon his plea of guilty, of bail jumping in the second degree, and same court (Richard M. Weinberg, J.), rendered February 20, 2014, convicting him, upon his plea of guilty, of criminal sale of a controlled substance in the third degree, and sentencing him to concurrent jail terms of six months; and order, same court (Jackson, J.), entered on or about February 5, 2015, which denied defendant's CPL 440.10 motion to vacate the September 18, 2013 judgment of conviction, unanimously affirmed.

Defendant has not established that the narrow exception to the preservation requirement applies to his *Peque* claim (*see*

People v Peque, 22 NY3d 168, 182-183 [2013], *cert denied sub nom. Thomas v New York*, 574 US __, 135 S Ct 90 [2014]). He was informed of his potential deportation by a notice of immigration consequences that the People served at arraignment on defense counsel in defendant's presence (*see People ex rel. Knowles v Smith*, 54 NY2d 259, 266 [1981]), six months before defendant's plea of guilty to bail jumping in the second degree, thus giving him the opportunity to raise the issue, and rendering his claim unpreserved (*see e.g. People v Barry*, 149 AD3d 494 [1st Dept 2017], *lv denied* 29 NY3d 1123 [2017]). We decline to review his claim in the interest of justice. In any event, we see no reason to extend *Peque* relief to defendant. While *Peque* warnings ordinarily are required whether a defendant is a citizen or not (*People v Palmer*, 159 AD3d 118, 121 [1st Dept 2018]), defendant purposefully misrepresented to counsel and both plea courts that he was a United States citizen; thus, the fact that the court presiding over his combined plea and sentencing in his bail jumping case failed to advise him of the potential deportation consequences of his plea does not warrant *Peque* relief (*People v Brazil*, 123 AD3d 466, 467 [1st Dept 2014], *lv denied* 25 NY3d 1198 [2015]; *see Palmer*, 159 AD3d at 122).

Unlike in *Palmer*, where we afforded *Peque* relief

notwithstanding defendant's original claim that he was a citizen, nothing in the record here alerted the court to question defendant's representation that he was born in New York. Nor does the record suggest that defendant suffered from the delusions the defendant in *Palmer* did (159 AD3d at 121). Defendant was unequivocally declared fit to proceed, and he answered all questions coherently during all proceedings.

Nor, in these circumstances, did defense counsel render ineffective assistance by failing to discover that defendant was not a citizen, and then advise him that his guilty plea would result in his mandatory deportation, or negotiate an immigration-friendly plea (*see Padilla v Kentucky*, 559 US 356 [2010]). Defense counsel asked defendant his status prior to entry of his guilty plea, and defendant – as he admits in his CPL 440.10 motion – falsely said that he was born in New York. Counsel was not obliged to probe further, particularly where defendant previously received a written notice of immigration consequences that advised noncitizens to consult with counsel regarding any possible adverse immigration consequences resulting from a guilty plea.

We have considered defendant's remaining contentions and find them unavailing or not properly before this Court.

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

ENTERED: JUNE 25, 2019

CLERK

Gische, J.P., Tom, Kapnick, Kern, Moulton, JJ.

9729- Index 653878/16
9730 Michael Lord,
Plaintiff-Appellant,

-against-

Marilyn Model Management, Inc.,
Defendant-Respondent.

_____

Wrobel Markham LLP, New York (Daniel F. Markham of counsel), for appellant.

Pillsbury Winthrop Shaw Pittman LLP, New York (Kenneth W. Taber of counsel), for respondent.

_____

Judgment, Supreme Court, New York County (Debra A. James, J.), entered July 13, 2018, dismissing the complaint with prejudice, and bringing up for review an order, same court and Justice, entered July 5, 2018, which granted defendant's motion to dismiss the complaint, unanimously reversed, on the law, without costs, the judgment vacated, and the motion denied as to the claims for breach of contract, promissory estoppel and Labor Law Article 6. Appeal from order, same court and Justice, entered July 5, 2018, unanimously dismissed, without costs, as subsumed in the appeal from the judgment.

As alleged in the complaint, plaintiff was an experienced modeling scout and was induced to leave his job and join

defendant by an offer of employment at a salary of $190,000, plus discretionary bonuses and profit sharing. The parties negotiated an employment agreement that contained, among its other terms, a provision for six months' severance if plaintiff were terminated without cause. The agreement, dated as of September 15, 2015, recited that it could be signed in counterparts. Plaintiff signed it on August 18, 2015, and emailed the signed copy to two of defendant's board members. One board member promptly replied, by email, "Welcome aboard. We'll countersign over the next few days."

Although defendant never signed the agreement, plaintiff nonetheless began working for defendant on September 1, 2015, and both sides proceeded to perform their obligations under the agreement. Defendant paid plaintiff the stated salary (albeit through a U.K. subsidiary, on account of plaintiff's lack of a French visa), and plaintiff performed as required under the agreement, including relocating from New York to Paris. Plaintiff performed diligently until March 1, 2016, when defendant terminated his employment without cause. Defendant refused to pay the six months' severance provided for in the agreement.

These allegations sufficiently state a cause of action for

breach of contract (*see Furia v Furia*, 116 AD2d 694, 695 [2d Dept 1986]). They set forth the parties' intent to enter into a contract and the contract's terms (*see Kolchins v Evolution Mkts., Inc.*, 128 AD3d 47, 59 [1st Dept 2015], *affd* 31 NY3d 100 [2018]; *see also Brown Bros. Elec. Contrs. v Beam Constr. Corp.*, 41 NY2d 397, 399-400 [1977]; *accord Kolchins*, 31 NY3d at 106).

The fact that defendant never signed the agreement is not, at this pleading stage, an impediment to a finding that the parties intended to be bound (*see Kolchins*, 31 NY3d at 107-108; *Flores v Lower E. Side Serv. Ctr., Inc.*, 4 NY3d 363, 369 [2005]; *Kowalchuk v Stroup*, 61 AD3d 118, 125 [1st Dept 2009]). There is nothing in the agreement stating that it will not be binding until executed by both sides (*see Kowalchuk*, 61 AD3d at 125). The counterparts clause provides that each party may indicate its assent by signing a separate counterpart; it does not state that the parties can assent only by signing. The merger and written amendments clauses provide only that the agreement, and any subsequent amendments, must be in writing; they do not state that the parties may convey their assent only by affixing signatures.

The complaint also sufficiently alleges causes of action for promissory estoppel (*see Pearce v Manhattan Ensemble Theater, Inc.*, 528 F Supp 2d 175, 181 [SD NY 2007]) and recovery of

severance as unpaid wages under Labor Law article 6 (*see Wachter v Kim*, 82 AD3d 658, 663 [1st Dept 2011]). However, plaintiff fails to sufficiently allege a claim for unjust enrichment as he does not allege he was not paid for the work he actually performed (*see Mandarin Trading Ltd. v Wildenstein*, 16 NY3d 173, 182 [2011]).

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

ENTERED: JUNE 25, 2019

CLERK

Gische, J.P., Tom, Kapnick, Kern, Moulton, JJ.

9731- Ind. 1373/16
9731A The People of the State of New York, 1375/16
Respondent,

-against-

Abram Ojofeitimi,
Defendant-Appellant.

_____

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

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

_____

An appeal having been taken to this Court by the above-named appellant from judgments of the Supreme Court, New York County (Mark Dwyer, J.), rendered March 7, 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 judgments so appealed from be and the same are hereby affirmed.

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

ENTERED: JUNE 25, 2019

CLERK

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

Gische, J.P., Tom, Kapnick, Kern, Moulton, JJ.

9732 Atlas MF Mezzanine Borrower, LLC, etc., Plaintiff-Respondent, Index 651657/17

-against-

Macquarie Texas Loan Holder LLC, etc., et al., Defendants-Appellants,

- - - - -

Global Integrity Investors, LLC, Proposed Intervener-Appellant.

_____

Dechert LLP, New York (Gary J. Mennitt of counsel), for Macquarie Texas Loan Holder LLC, appellant.

Quinn Emanuel Urquhart & Sullivan LLP, New York (Andrew J. Rossman of counsel), for KKR REPA AIV-2 L.P. and KRE LRP Osprey Venture LLC, appellants.

Mitchell Madden, LLP, Dallas (Mitchell Madden of the bar of the State of Texas, admitted pro hac vice, of counsel, for Global Integrity Investors, LLC, appellant.

Meister Seelig & Fein LLP, New York (Stephen B. Meister of counsel), for respondent.

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Order, Supreme Court, New York County (Charles E. Ramos, J.), entered April 17, 2018, which denied proposed intervenor's (Global) motion to intervene, unanimously affirmed.

Global did not demonstrate that it will be bound by any judgment in this action (*see* CPLR 1012[a][2]). Indeed, its issues are not before the court in this action (*see East Side Car*

Wash v K.R.K. Capitol, 102 AD2d 157, 160 [1st Dept 1984], *appeal dismissed* 63 NY2d 770 [1984]). Whereas plaintiff's claims involve a $71 million mezzanine loan from defendant Macquarie Texas Loan Holder LLC to plaintiff Atlas Borrower, Global's claims involve a completely separate $3 million loan to nonparty Atlas Apartment Holdings, LLC (Holdings). Moreover, Global is litigating its rights against Holdings in an action pending in Texas (*see id.; Ocelot Capitol Mgt., LLC v Hershkovitz*, 90 AD3d 464, 465 [1st Dept 2011]). Additionally, as any claim by Global as to excess proceeds is speculative, Global's reliance on CPLR 1012(a)(3), which provides that a party has the right to intervene in an action "when the action involves the disposition or distribution of, or the title or a claim for damages for injury to, property and the person may be affected adversely by the judgment," is misplaced. Nor, contrary to Global's

contention, do its claims and this action have a common question of fact or law (CPLR 1013; *see Taw Intl. Leasing v Overseas Private Inv. Corp.*, 57 AD2d 799 [1st Dept 1977]).

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

ENTERED: JUNE 25, 2019

CLERK

Gische, J.P., Tom, Kapnick, Kern, Moulton, JJ.

9735 Jonathan R., Index 300603/14
Plaintiff-Respondent,

-against-

Meredith S.,
Defendant-Appellant.

_____

Law Office of Kenneth Joelson, PLLC, New York (Kenneth Joelson of counsel), for appellant.

Aronson Mayefsky & Sloan, LLP, New York (David Aronson of counsel), for respondent.

Andrew J. Baer, New York, attorney for the child.

_____

Order and partial judgment of divorce (one paper), Supreme Court, New York County (Matthew F. Cooper, J.), entered October 23, 2017, which, to the extent appealed from as limited by the briefs, awarded the parties joint legal custody of their child with separate decision-making zones and set forth a parental access schedule, unanimously affirmed, without costs.

The court's determination to award the parties shared legal custody of the child with each party having final authority over separate decision-making zones has a sound and substantial basis in the record, and the mother has identified no grounds to disturb the determination (*see Eschbach v Eschbach*, 56 NY2d 167, 173-174 [1982]; *Matter of Nelissa O. v Danny C.*, 70 AD3d 572, 573

[1st Dept 2010]). The court properly considered the totality of the circumstances and the best interests of the child (*Eschbach*, 56 NY2d at 171, 174).

Contrary to the mother's assertions, the court properly awarded the parties joint custody with separate decision-making zones, given the parties' antagonistic relationship (*Matter of Elizabeth S. v Edgard N.*, 150 AD3d 585, 586 [1st Dept 2017]; *Tatum v Simmons*, 133 AD3d 550, 551 [1st Dept 2015]).

The court appropriately considered the evaluation of the court-appointed forensic psychiatrist (*see Matter of John A. v Bridget M.*, 16 AD3d 324, 332 [1st Dept 2005], *lv denied* 5 NY3d 710 [2005]), who concluded that both parties were fit parents, as well as all the other evidence, in reaching its conclusion. However, the court was not bound to follow the recommendation of the forensic evaluator (*id.* at 332). The forensic report did not address the question of zones of decision-making, and during his testimony the expert admitted that he did not know whether such zones were even an option in New York. Although the forensic psychiatrist expressed some concern that the zones could sometimes overlap, he conceded that utilizing such a system might "incentivize" co-parenting. The court considered the expert's recommendation against the risk that the father would be

marginalized by the grant of sole custody to the mother and that any resulting power imbalance would remove any incentive for the parties to be more inclusive in the decision-making process. It appropriately concluded that the risk of marginalization outweighed the challenges presented by the overlapping zones of decision-making.

The mother's arguments with respect to certain holidays and make-up time were never raised during the hearing or in her post-trial memorandum and are unpreserved for appellate review (*Matter of Grant v Terry*, 104 AD3d 854 [2d Dept 2013]). In any event, the schedule, as a whole, provides each parent with substantial and meaningful time with the child.

It is clear from the record that the child was heard from directly by the court at the hearing and through his attorney throughout the proceedings and in the post-trial summations. The court stated in its decision that it considered the child's position. There is nothing to indicate that the court disregarded the child's testimony or that his input was not considered.

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

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

ENTERED: JUNE 25, 2019

CLERK

Gische, J.P., Tom, Kapnick, Kern, Moulton, JJ.

9736 Deutsche Bank National Trust Company, etc.,
Plaintiff-Respondent,

-against-

Carmen Cruz,
Defendant-Appellant,

Annette Oliveras, etc., et al.,
Defendants.

Index 35504/13E

Richland & Falkowsi, PLLC, Washingtonville (Daniel H. Richland of counsel), for appellant.

Order, Supreme Court, Bronx County (Ben R. Barbato, J.), entered July 25, 2018, which, inter alia, granted plaintiff's motion, and denied defendant Cruz's cross motion to dismiss the complaint pursuant to CPLR 3215(c), unanimously reversed, on the law, without costs, the motion denied, the cross motion granted, and the complaint dismissed. The Clerk is directed to enter judgment accordingly.

The language of CPLR 3215(c), requiring dismissal of an action where judgment is not sought within a year of a default is not discretionary, but mandatory (*HSBC Bank USA, N.A. v Grella*, 145 AD3d 669, 671 [2d Dept 2016]). The statute excepts cases where "sufficient cause" is shown, but a plaintiff opposing

dismissal is required "to proffer a reasonable excuse for the delay in timely moving for a default judgment and to demonstrate that the cause of action is potentially meritorious" (*HSBC Bank*, 145 AD3d at 671; *see Selective Auto Ins. Company of N.J. v Nesbitt*, 161 AD3d 560 [1st Dept 2018]). In this foreclosure action, plaintiff failed to explain why it did not move for a default judgment for over three years after satisfaction of the prior mortgage was recorded. Plaintiff's assertion that it was in continued litigation regarding the prior mortgage until December 2017, is belied by documentary evidence that the other mortgagee acknowledged plaintiff's lien priority as of October 2015. As such, it fails to constitute a reasonable excuse for delay (*see Private Capital Group, LLC v Hosseinipour*, 170 AD3d 909, 911 [2d Dept 2019]).

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

ENTERED: JUNE 25, 2019

CLERK

Gische, J.P., Tom, Kapnick, Kern, Moulton, JJ.

9737N MPEG LA, L.L.C., Index 162716/15
Plaintiff-Respondent,

-against-

Toshiba America Information Systems, Inc.,
Defendant-Appellant,

Toshiba Corporation,
Defendant.

_____

Gibbons P.C., New York (William P. Deni of counsel), and Finnegan Henderson Farabow Garrett & Dunner, Atlanta, GA (Shawn Chang of the bar of the State of Georgia, admitted pro hac vice, of counsel), for appellant.

Windels Marx Lane & Mittendorf, LLP, New York (John D. Holden of counsel), for respondent.

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Order, Supreme Court, New York County (Charles E. Ramos, J.), entered January 7, 2019, which denied defendant's motion to compel discovery, unanimously affirmed, without costs.

The motion court providently exercised its discretion by denying the motion to compel the production of documents that have no bearing on the issues in this breach of contract action (*see Andon v 302-304 Mott St. Assoc.*, 94 NY2d 740, 745 [2000]). Moreover, the court providently determined that some of the

document requests were vague and overbroad (*see e.g. Lerner v 300 W. 17th St. Hous. Dev. Fund Corp.*, 232 AD2d 249 [1st Dept 1996]).

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

ENTERED: JUNE 25, 2019

CLERK

CORRECTED OPINION - JUNE 25, 2019

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

Dianne T. Renwick, J.P.
Judith J. Gische
Peter Tom
Troy K. Webber
Anil C. Singh, JJ.

9073
Ind. 4069/07

_____x

The People of the State of New York,
Respondent,

-against-

Willie Harris,
Defendant-Appellant.

_____x

Defendant appeals from the judgment of the Supreme Court, New York County (William A. Wetzel, J.), rendered February 21, 2008, as amended July 21, 2008, convicting him, upon his plea of guilty, of criminal possession of stolen property in the fourth degree, and imposing sentence.

Seymour W. James, Jr., The Legal Aid Society, New York (Michael C. Taglieri and Justine M. Luongo of counsel), for appellant.

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

WEBBER, J.

We find that the court properly denied defendant's suppression motion. The court correctly determined that the requirements for the search of a closed container incident to a lawful arrest were met.

Police Officer Joseph Ayala testified that he and Police Officer Theresa Figueroa were patrolling on foot on Lexington Avenue in Manhattan on August 10, 2007, after "many reports with regards to grand larcenies and also petit larcenies" in the area.

According to Ayala, at approximately 3:20 p.m., he noticed defendant and codefendant Taylor Chauncey on the corner of 75th Street and Lexington Avenue. The men caught Ayala's attention because defendant was holding a large, green rolling suitcase while Chauncey was putting "something" into it. Based on his experience, Ayala believed that the two men were engaged in suspected larcenous behavior.

Defendant and Chauncey walked toward a clothing store named "Shen," located at 990 Lexington Avenue. Chauncey entered the store and placed four items into a "booster bag," which is a "box wrapped in a black plastic bag" with a "hollow" bottom. Defendant was standing in the doorway holding the door open, speaking with an employee. Chauncey then walked out of the store, and defendant followed him. Defendant and Chauncey

stopped at the corner of 72nd Street and Lexington Avenue, where Chauncey took the items out of the booster bag and placed them in the suitcase that defendant was holding.

Defendant then entered a clothing store named "San Francisco Clothing" located at 975 Lexington Avenue, while Chauncey remained outside. Defendant took two sweaters, placed them underneath his "big white T-shirt," exited the store and walked down the street with Chauncey. When the two men stopped, defendant removed the two sweaters from underneath his T-shirt and put them into the suitcase.

Defendant and Chauncey proceeded to walk in and out of a few other stores, and then entered a clothing store named "Lingerie on Lex." About 20 seconds later, Chauncey exited the store and walked a few steps down the street. About five minutes later, defendant exited the store and joined Chauncey. Defendant removed several items of clothing from underneath his T-shirt and put them into the suitcase. Thus, according to the testimony, defendant and Chauncey walked into and out of at least three identified and several other unidentified stores.

Shortly thereafter, Ayala and between six and eight other plainclothes police officers approached defendant and Chauncey. When they approached, defendant immediately let go of the

suitcase he was holding, and resisted arrest.[1] Defendant and Chauncey were both handcuffed. A knife was recovered from defendant's right rear pants pocket.[2] Ayala then "quickly opened up" the suitcase and "saw a lot of clothing inside." He then immediately closed the suitcase. Defendant and Chauncey were transported to the precinct. At the precinct, the suitcase was searched.

The officer's testimony, and the reasonable inferences that could be drawn therefrom, established that defendant's arrest and the search of the suitcase he was carrying were contemporaneous, that the suitcase was in defendant's grabbable area, and that it was not in the exclusive control of the police (*see People v Smith*, 59 NY2d 454 [1983]). Furthermore, the police properly inspected the suitcase for their own safety and to prevent any destruction of evidence.

It is axiomatic that a search incident to a lawful arrest is an exception to the warrant requirement. In the context of warrantless searches of a closed container that is within a defendant's "grabbable area," the People must show that the

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[1]While Ayala testified that defendant "resisted" arrest, there were no further statements as to exactly how defendant resisted arrest.

[2]A knife was also recovered from codefendant Chauncey.

search was "not significantly divorced in time or place from the arrest" (*People v Jimenez*, 22 NY3d 717, 721-722 [2014] [internal quotation marks omitted]). The People must also demonstrate the presence of exigent circumstances (*People v Gokey*, 60 NY2d 309, 312 [1983]). The exigent circumstances requirement is met if the search was conducted in the interest of "the safety of the public and the arresting officer, and the protection of evidence from destruction or concealment" (*id.*).

Here, as the officers approached defendant, he immediately dropped the suitcase he was holding. The suitcase, which fell to defendant's feet, was in defendant's "grabbable area" at the time of his arrest (*see People v Smith*, 59 NY2d at 459 ["(a)t the time of arrest (the) defendant was holding the briefcase in his hand; its contents were, therefore, readily accessible to him"]; *see People v Velez*, 154 AD3d 527, 528 [1st Dept 2017] ["(n)otwithstanding that (the) defendant had been handcuffed by the time the wallet was searched, the wallet was within his grabbable area and had not been reduced to the exclusive control of the police], *lv denied* 30 NY3d 1109 [2018]). This is in sharp contrast to *People v Thompson* (118 AD3d 922, 923 [2d Dept 2014]), cited by the dissent. There, the defendant, who was wearing a backpack, was observed engaging in a marijuana sale to an unknown male. After approaching the defendant and after a brief

conversation, the defendant attempted to punch the officer and attempted to flee. The officer gave chase, momentarily grappling with the defendant, causing the backpack to fall to the ground. Following the defendant's ultimate arrest, the officer returned to where the backpack had fallen, searched it and recovered a semiautomatic pistol. The Appellate Division, Second Department, found that the backpack, which was some 36 feet from where the defendant was ultimately arrested, was not within the defendant's grabbable area and therefore the warrantless search was unlawful. Clearly, here the suitcase was within inches of defendant. Further, the search of defendant's suitcase was reasonable as it was in close temporal and spatial proximity to his arrest (*Smith*, 59 NY2d at 459 ["(t)he arrest and search of the briefcase were for all practical purposes conducted at the same time and in the same place"]; *People v Wylie*, 244 AD2d 247, 251 [1st Dept 1997] [search reasonable where it "occurred immediately after the defendant was arrested" and "was conducted right there on the street, a short distance from the defendant"], *lv denied* 91 NY2d 946 [1998]).

Officer Ayala's testimony that a knife was recovered from both defendant and Chauncey also established that there were exigent circumstances justifying the search of the suitcase (*see People v Velez*, 154 AD3d at 528 [search reasonable where "the

officers had already recovered one razor blade from defendant"]; *People v Capellan*, 38 AD3d 393, 394 [1st Dept 2007] ["(t)he search was also proper as incident to a lawful arrest since a weapon had just been recovered from defendant's person and the bag remained in his grabbable area, and not in the exclusive control of the police"] *lv denied* 9 NY3d 873 [2007]).

Contrary to the suggestion by the dissent, an officer need not affirmatively testify to the exigency (*see People v Diaz*, 107 AD3d 401, 402 [1st Dept 2013], *lv dismissed* 22 NY3d 996 [2013], 22 NY3d 1137 [2014]). Rather, the exigent circumstances need only be inferred from the circumstances of the arrest (*see People v Jimenez*, 22 NY3d at 722; *People v Diaz*, 107 AD3d at 402; *People v Watkins*, 256 AD2d 159, 159-160 [1st Dept 1998], *lv denied* 93 NY2d 859 [1999]). Here, Ayala reasonably could have feared defendant posed a risk as defendant and his codefendant were armed with knives. Further, Ayala testified that defendant resisted arrest. Under the circumstances, it would have been reasonable for Ayala to have been fearful that defendant posed a threat.

Ayala's search of the suitcase was also justified to prevent the loss or destruction of evidence, as Ayala believed defendant and codefendant Chauncey had stolen clothing from approximately three stores and placed the clothing in the suitcase (*see People*

v Burgos, 81 AD3d 558, 559 [1st Dept 2011] ["(t)he police properly inspected the backpack for their own safety and to prevent any possible loss, destruction or alteration of evidence"], *lv denied* 17 NY3d 793 [2011]). The dissent continues to ignore the facts that the suitcase was large enough to conceal a weapon and that the officer had just seen defendant stealing merchandise and placing it in the suitcase. Officer Ayala did not know whether there were weapons contained in the bag.

The dissent argues that at the time of the search of the suitcase, defendant was handcuffed and surrounded by more than eight armed police officers. According to the dissent, this shows there were no exigent circumstances. First, there was absolutely no testimony that defendant was surrounded by more than eight officers when the suitcase was searched. Ayala testified that he and his fellow officer approached defendant and the codefendant. He testified that he did not know where the other officers were located.

The testimony of Officer Ayala established that the suitcase was not in the exclusive control of the police at the time of the search. It remained at defendant's feet where he dropped it. Additionally, it has been consistently held that "[w]hether in fact defendant could have had access to the briefcase at the moment it was being searched is irrelevant" (*Smith*, 59 NY2d at

459). Rather, the inquiry is whether defendant could have had access to the suitcase at the time of his arrest (*see People v Gokey*, 60 NY2d at 312).

That defendant was handcuffed in no way negates a finding of exigent circumstances justifying a warrantless search (*see People v Velez*, 154 AD3d at 528). Although defendant was handcuffed during the search of the suitcase, there was a "realistic possibility" that he could have used means other than his hands - "such as kicking or shoving the arresting officer - to disrupt the arrest process in order to gain a weapon or destroy evidence" (*Wylie*, 244 AD2d at 251; *see also People v Estrella*, 288 AD2d 133, 133-134 [1st Dept 2001], *lv denied* 97 NY2d 754 [2002]).

Further, the reasonableness of the search is enhanced by the fact that the suitcase itself was evidence, was an instrumentality of the crime, and contained further evidence of the crime, namely the proceeds of the theft (*see Wylie*, 244 AD2d at 251). Defendant and the codefendant were observed taking property from at least three clothing stores and placing the property in the suitcase.

"[T]he justification for searches incident to a valid arrest are not only borne out of protection for police officers, but are also conducted for the purposes of discovering (1) the fruits of the crime; (2) instrumentalities used to commit the crime; (3) contraband, the possession of which constitutes a crime; or (4) material which constitutes evidence of the crime or evidence that the person arrested has committed it" (*People v Lewis*, 26 NY2d

547, 552 [1970]).

Ayala testified that he quickly opened the suitcase, saw clothing inside, which he believed had been stolen from the various stores, closed the suitcase and then transported it to the precinct. This was a brief inspection to determine the contents of the suitcase and to ensure that it did not conceal any weapons in addition to the knife recovered from defendant's person and that recovered from the codefendant. It was not a full-blown search.

Accordingly, the judgment of the Supreme Court, New York County (William A. Wetzel, J.), rendered February 21, 2008, as amended July 21, 2008, convicting defendant, upon his plea of guilty, of criminal possession of stolen property in the fourth degree, and sentencing him, as a second felony offender, to a term of 1½ to 3 years, should be affirmed.

All concur except Renwick, J.P. and Gische, J. who dissent in an Opinion by Renwick, J.P.

RENWICK, J.P. (dissenting)

"The protections embodied in article I, § 12 of the New York State Constitution serve to shield citizens from warrantless intrusions on their privacy interests, including their personal effects" (*People v Jimenez*, 22 NY3d 717, 719 [2014]; *see also People v Gokey*, 60 NY2d 309, 312 [1983]). This appeal raises the recurrent issue of whether the police lawfully conducted a warrantless search of a closed container. The People justified the police conduct as a lawful warrantless search of a container incident to arrest even though it occurred after defendant and his companion had been arrested, handcuffed and surrounded by more than eight armed police officers, In the context of warrantless searches of closed containers incident to arrest, the People bear the burden of demonstrating the presence of exigent circumstances in order to invoke this exception to the warrant requirement. Unlike the majority, I would find that the People failed to meet their burden in this case as a matter of law, and thus defendant's motion to suppress should have been granted. I therefore respectfully dissent.

The relevant facts at the suppression hearing established the following. On August 10, 2007, Police Officer Ayala, of the Manhattan North Larceny Unit, was on tour with his partner, Officer Figueroa, on Lexington Avenue, walking around the

neighborhood looking for shoplifting. At the northwest corner of 75th Street, Ayala saw defendant and Taylor Chauncey on the corner. It was summer, and defendant was dressed in summer clothes, but Chauncey was wearing a long, black coat, which was odd. As Ayala watched, Chauncey was putting something inside a large rolling suitcase that defendant was holding. The two men proceeded south on the west side of Lexington Avenue and stopped at a clothing store, Shen. There, Chauncey stepped into the store for two to three minutes and put several items into a "booster bag" he carried - a bottomless box wrapped in a plastic bag - and the two continued south, subsequently transferring the items to the rolling suitcase.

The two men continued this process, crossing the street to San Francisco Clothing, at 975 Lexington. There, defendant entered the store for about two minutes and, after coming out, transferred two sweaters from beneath the large white T-shirt he was wearing to the rolling suitcase. At 831 Lexington, both men entered a store called Lingerie on Lex, but Chauncey stepped back out to look up and down the street. Approximately five to seven minutes later, defendant also left the store and met Chauncey at the corner of 63rd and Lexington, again transferring items from inside his T-shirt to the rolling suitcase. Ayala never saw what the men were doing inside the last store.

The surveillance continued for some time. Eventually, at around 3:30 p.m., Ayala and his partner decided to arrest defendant and Chauncey when they reached the northwest corner of 62nd Street and Lexington Avenue. Ayala was the lead arresting officer. However, Ayala estimated that, besides his partner and he, six to eight officers approached defendant and Chauncey.[1] When Ayala approached defendant, the officer did not have his gun drawn; defendant was grabbing the handle of the suitcase, and there was some resistance, which the officer did not describe in any way. Instead, Officer Ayala testified that when he grabbed defendant's hand, defendant dropped the bag at once. After the arrest, Ayala frisked defendant and found a pocket knife in defendant's back pocket. At no time during the surveillance or during the apprehension did Ayala observe defendant display a knife to anyone. After defendant and Chauncey were handcuffed, Ayala opened the suitcase at the scene and saw "a lot of clothing inside [it]." Back at the precinct, the officers opened the suitcase for a more detailed inspection, finding a large amount of clothing presumably from the three stores.

[1] Police Officer Ayala testified that, besides his partner (Figueroa) and himself, "there [were] two other teams from [his] [u]nit." Ayala then estimated that the[re] were "about six or seven, maybe eight" police officers from his unit at the scene of the arrest.

After a hearing on the motion to suppress, the court denied suppression, but not for the reasons stated by the majority here. The court determined that defendant's arrest was supported by probable cause. It then found that "no [w]arrant was necessary," ruling,

> "*Gokey* is not applicable to a case like this where the probable cause involved stolen property inside the bag, itself. The bag wasn't coincidental. This wasn't a car stop and there was a bag in the car. They had observed this bag being employed as the place where the stolen property was being secreted, and no [w]arrant was necessary."

On appeal, the People acknowledge that the court erred by effectively ruling that a warrantless search of the container properly follows from the mere fact that it contains proceeds from a crime. Nevertheless, the People argue that suppression was still proper because the record establishes exigent circumstances for the warrantless search of the container. For the reasons explained below, I disagree with the majority's conclusion that the record establishes exigent circumstances for the warrantless search of the container.

"[A]ll warrantless searches presumptively are unreasonable per se," and, "[w]here a warrant has not been obtained, it is the People who have the burden of overcoming" this presumption of unreasonableness (*People v Hodge*, 44 NY2d 553, 557 [1978]). In

People v Gokey (60 NY2d at 309), the Court of Appeals explicitly stated that exigent circumstances are a prerequisite to a search incident to an arrest and that the search is limited to a defendant's effects in his immediate control or "grabbable area." "Under the State Constitution, an individual's right of privacy in his or her effects dictate that a warrantless search incident to arrest be deemed unreasonable unless justified by the presence of exigent circumstances" (*Gokey*, 60 NY2d at 312). The Court identified two circumstances that may be considered exigent: where the safety of the police and the public is at stake, and when there is a need to prevent evidence from being destroyed or concealed (*id.*).

After Gokey, the Court of Appeals remained silent on the search-incident-to-arrest exception in the context of closed containers for over three decades. Finally, in *People v Jimenez* (22 NY3d at 717), the Court of Appeals readdressed the issue. It found that two separate requirements must be met in order for a warrantless search to be justified. First, the search must be conducted within close space and time of the arrest. The second, and equally important," requirement is that exigent circumstances must be affirmatively demonstrated (*id.* at 721-722).

In *Jimenez*, the Court of Appeals held that the warrantless search was improper. In *Jimenez*, police officers responding to a

reported burglary in an apartment building encountered the defendant in the building's lobby. After the building's superintendent made gestures indicating to the officers that they should stop the defendant, the officers asked the defendant why she was in the building. The defendant was arrested for trespassing after she provided contradictory answers. While placing her under arrest, an officer removed the defendant's purse from her shoulder. The officer perceived the purse to be heavy and opened it, revealing a gun. The Court held that the gun should have been suppressed because the People failed to establish exigent circumstances justifying a warrantless search of the purse incident to arrest. The Court noted that neither of the police officers who testified at the suppression hearing stated that he feared for his safety or for the integrity of any destructible evidence, and, while affirmative testimony is not necessary, such a belief would not have been objectively reasonable under the circumstances. As this Court later pointed out in *People v Morales* (126 AD3d 43, 46 [1st Dept 2015]), "*Jimenez* reinforces the principle that containers cannot be searched incident to arrest unless the People affirmatively demonstrate exigency."

Unlike the majority, I would find that the People failed to establish the requisite exigent circumstances justifying a

warrantless search of the suitcase. When defendant's suitcase was searched, he and his companion had already been handcuffed and placed under arrest. Both defendants were surrounded by 8 to 10 armed police officers. Neither defendant could have realistically threatened the officers' safety, nor made any meaningful contact with the suitcase's contents. Indeed, Officer Ayala, the arresting officer, did not testify that the suitcase was searched out of fear for the officers' safety or for the integrity of any destructible evidence (*see Jimenez*, 22 NY3d at 722-723). Nor is the conclusion that defendant retained the capacity to harm the officers or destroy evidence objectively inferrable under the circumstances here where defendant was under the forceful restraint of handcuffs and surrounded by multiple officers.

The circumstances here - that defendant had been arrested, handcuffed, and surrounded by multiple police offices, and that the suitcase was seized from defendant - constitute compelling evidence that the container had been reduced to the exclusive control of the police, thereby dissipating any concern the police may have had about its contents. In fact, this Court and others have consistently found no exigency, under similar circumstances, where the People failed to affirmatively establish that concerns of safety or destruction of evidence remained, despite the fact

that the defendant had been subdued and the container was in the police's exclusive control (*see e.g. People v Thompson*, 118 AD3d 922, 924 [2d Dept 2014] [search of backpack not justified where the defendant was secured and the backpack was not within his immediate control]; *People v Diaz*, 107 AD3d 401 [1st Dept 2013] [search of backpack unlawful because the defendant was handcuffed at the time of the search and it was no longer in his control], *lv dismissed* 22 NY3d 996 [2013], 22 NY2d 1137 [2014]; *People v Evans*, 84 AD3d 573 [1st Dept 2011] [police officers did not fear for their safety since they were making a nonviolent arrest for smoking marijuana in public and the backpack was searched after the defendant had been handcuffed; it was found to be in exclusive control of the police]; *People v Hendricks*, 43 AD3d 361 [1st Dept 2007] [warrantless search of a paper bag was improper because the defendant had already been handcuffed and the officer testified that he did not believe that the bag contained a weapon]; *People v Julio*, 245 AD2d 158 [1st Dept 1997] [search of bag unlawful where it was in the exclusive control of the police and the defendant was unable to reach it because he was handcuffed and surrounded by police officers], *lv denied* 91 NY2d 942 [1998]).

Still, the majority argues that the search of the suitcase was justified because defendant offered some resistance

(unexplained by the officers), and a pocket knife was found in his back pocket.[2] The majority's argument is not persuasive. With regard to resistance, Officer Ayala did not testify to the degree or type of resistance in which the defendant engaged that justified searching the suitcase despite that the suitcase was in the control of the officer and defendant had been handcuffed and surrounded by more than eight officers. Similarly, with regard to safety, this case involved a simple pocket knife found in defendant's pants pocket and discovered after the arrest. Officer Ayala did not testify that he observed defendant brandish or display any weapon to anyone to suggest that the suitcase might have contained a weapon. Nor did the officer state that any other exigent circumstances existed at the time of arrest. In fact, there was no testimony whatsoever as to why the search of the suitcase was conducted.

Under the circumstances, the majority's suggestion that any danger to the arresting officers or danger of evidence being destroyed had not dissipated even though defendant had been subdued (handcuffed and surrounded by at least eight officers) cannot be reconciled with the record. Nor does it comply with

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[2] Neither the police nor the prosecution attributed anything illegal to defendant's possession of the pocket knife found in his back pocket.

the Court of Appeals requirement, as reaffirmed in *People v Jimenez*, that the exigency must be reasonably believed to exist and affirmatively demonstrated. Quite the contrary, once defendant had been subdued and the suitcase placed under the control of the police officers, there was no reasonable possibility that defendant could have reached it (*see People v Thompson*, 118 AD3d at 924; *People v Diaz*, 107 AD3d at 401; *People v Evans*, 84 AD3d at 573; *People* v Julio, 245 AD2d at 158.

That defendant had been safely secured by the police at the scene is minimized by the majority, which upholds the search because the officers had a reasonable belief that the suitcase contained proceeds from a crime. Of course, that the arresting officer reasonably believed that the suitcase contained proceeds from a crime allows a court to consider whether any threat posed by the suitcase amounts to an exigency. However, this fact does not eliminate the immediate exigency requirement in order to justify a warrantless search (*Jimenez*, 22 NY3d at 722). "Once the [suitcase] was 'safely in the possession of the arresting officer, there was absolutely no reason why a warrant for a search of the [suitcase] contents could not have been obtained if there had in fact been any basis to suppose that the [suitcase] contained . . . evidence of the crime for which the arrest had been made'" (*People v Hendricks*, 43 AD3d at 364, quoting *People v*

Rosado, 214 AD2d 375, 376 [1st Dept 1995], *lv* denied 86 NY2d 740 [1995]).

Finally, the cases relied upon by the majority are either factually distinguishable from this case or should not be relied upon by this Court. For instance, the majority relies primarily upon *People v Velez* (154 AD3d 527 [1st Dept 2017], *lv denied* 30 NY3d 1109 [2018]) and *People v Estrella* (288 AD2d 133 [1st Dept 2001], lv denied 97 NY2d 754 [2002]), which are easily distinguishable. In *Velez*, this Court upheld a search of defendant's wallet for a possible weapon where the defendant was arrested for an attack involving a razor blade, and a wallet was in his grabbable area. In *Estrella*, prior to the arrest, the police had been informed by the victim and by a witness that the defendant had used a knife in the commission of a sexual crime and had secreted it in his duffle bag. The arrest took place on a crowded subway platform. Under the circumstances, this Court upheld the search of the bag and the recovery of two knives.

Thus, both *Velez* and *Estella* involved specific attendant circumstances, including violent crimes in which the assailants used a weapon. Here, however, the arrest entailed no violent crime, just shoplifting during which no weapon was displayed (*see People v Evans*, 84 AD3d 573 [police officers did not fear for their safety since they were making a non-violent arrest for

smoking marijuana in public]). Moreover, defendant was subdued and handcuffed, and the container was no longer within his control to permit him to reach for any evidence located in the container (*id.*). Common sense dictates that if a closed container does not present an exigency, a search of that container does not address an exigency.

The majority also relies upon *People v Wylie* (244 AD2d 247 [1st Dept 1997], *lv denied* 91 NY2d 946 [1998]), a case decided by this Court almost two decades before *Jimenez*. *Wylie* was also cited by this Court in *Jimenez* (98 AD3d 886 [1st Dept 2012]). *Jiminez* was reversed by the Court of Appeals. Thus, the approach to the exigency requirement used in *Wylie* and again applied by this Court in *Jimenez* is misguided and does not comport with current Court of Appeals precedent, and we should decline to follow it.

In *Wylie*, the defendant was suspected of being involved in a "phony robbery" (*id.* at 248). Initially, an employee of the Love Store in Manhattan reported to the police that while he was bringing a bag with the Love Store logo containing $7,000 of the store proceeds to a bank, a man attacked him in the bank lobby and stole the bag of money. Eventually, the store employee admitted to the police that it was a "phony robbery" that he had set up with "Paul Wylie," the defendant. The store employee

provided a description of “Paul Wylie” and his home address to the police. Two police officers drove to the defendant's home and parked 50 to 100 feet from the entrance. When they observed a man meeting “Paul Wylie’s” description come out of the building and walk toward them, one officer got out of the police car with his gun holstered, approached defendant and asked him if he was “Paul Wylie.” When the defendant responded that he was, the officer told him to put his hands behind his back and placed him under arrest. The defendant was handcuffed and a search of his “right coat jacket” [sic] revealed a plastic bag with the Love Store logo. Inside the plastic bag, the arresting officer found a brown paper bag containing two bundles of money totaling $3,000 (*id.* at 248).

The motion court granted suppression of the money. Although the court determined that the defendant's arrest was supported by probable cause, it held that "once the defendant was placed in handcuffs, the police had a duty to secure a search warrant in order to search the bag, which was a closed container for Fourth Amendment purposes” (*id.* at 248). The motion court, citing *People v Gokey* (60 NY2d 309), stated that the warrantless search was illegal because the officers’ actions did not evince a fear that the bag contained a weapon or that the evidence inside the bag might be destroyed (*Wylie* at 248). The *Wylie* Court reversed

the suppression. The *Wylie* court, however, made no reference to what specific actions the defendant undertook, or what specifics from the crime, made it immediately necessary to search the bag. Instead, the *Wylie* Court generally stated:

> "[T]he search in the present case occurred immediately after the defendant was arrested and handcuffed. Indeed, the search was conducted right there on the street, a short distance from the defendant. [The] [d]efendant easily could have reached for a weapon or attempted to rid himself of the money during the arrest itself, and the momentary delay in actually handcuffing defendant does not alter this result . . . . Moreover, a determined arrestee may use means other than his hands--such as kicking or shoving the arresting officer--to disrupt the arrest process in order to gain a weapon or destroy evidence. Such actions are a realistic possibility when the search occurs within close proximity to the arrest, as was the case here" (*id.* at 251).

The majority cannot, and does not, dispute that the approach utilized by the *Wylie* court is inconsistent with *People v Jimenez*. There, as indicated, the Court of Appeals made it abundantly clear that the exigency requirement is not merely met because the search was conducted within close space and time from the arrest (*Jimenez* at 721). "The second, and equally important, requirement is that exigent circumstances must be affirmatively demonstrated" (*id.* at 722). The Court of Appeals in *Jimenez* added that although "an officer need not affirmatively testify as to the safety concerns" posed by the exigency, the exigency "must be affirmatively demonstrated" (*id.* at 722-723). There must be a

"robust evidentiary showing" to satisfy the search-incident-to-arrest exception (id.).

This Court in *Wylie* incorrectly reasoned that the exigency must not be affirmatively demonstrated because, when an arrest and search happened in close space and time, an exigency will always be present. Under *Wylie*'s faulty reasoning, the only real inquiry is whether the search happened immediately. The *Wylie* Court never explained why the search of the container was immediately necessary, but instead attempted to use the inherently hostile nature of an arrest to demonstrate urgency. The Court made this point itself by stating that "a determined arrestee may use means other than his hands" to create a danger (*Wylie*, 244 AD2d at 251). Thus, *Wylie* assumes the existence of exigent circumstances and automatically authorizes a search by taking the position that an arrest is inherently an emergency circumstance, and an arrestee can always pose a threat, even if handcuffed.

The misplaced focus by this Court in *Wylie* has been rejected by the Court of Appeals in *Jimenez* which, as aforementioned, held that the exigency "must be affirmatively demonstrated" by a "robust evidentiary showing" (*Jimenez* at 722, 724). Indeed, the *Wylie* approach would allow the exigency exception to the warrant rule to reduce and limit the inquiry only to whether the search

took place in close space and time to the crime, a decision that would remain entirely with the arresting officer and which would indeed result in a case of the exception swallowing the rule. We should decline to follow *Wylie* to the extent it is inconsistent with the Court of Appeals' pronouncement in *People v Jimenez,* and correct this anomaly.

In promulgating the exigency requirement, the Court of Appeals recognized that a constitutionally protected privacy interest remained in a closed container even after a defendant's arrest (*People v DeSantis*, 46 NY2d 82, 88 [1978], cert denied 443 US 912 [1979] ["To be sure, the arrest of [the] defendant, standing alone, did not destroy whatever privacy interests he had in the contents of the suitcase"]). Although case law instructs that there must be some reasonable basis to believe that a closed container presents an exigency (*see People v Jimenez*, 22 NY3d at 719; *People v Gokey*, 60 NY2d at 312), the majority obviates this requirement by effectively finding here that the mere possibility that an exigency might exist is sufficient to overcome a defendant's constitutional rights within the context of a closed container. This view must be rejected for the exigency requirement to fulfill its purpose that the privacy interest in a closed container can only be overcome by the need to dispel an actual exigency.

For the foregoing reasons, unlike the majority, I would grant defendant's motion to suppress the merchandise recovered from his rolling suitcase. Because the criminal possession of stolen property charges are based on the evidence obtained by means of the unlawful search of the rolling suitcase, the indictment should be dismissed (*see e.g. People v Diaz*, 107 AD3d at 401).

Judgment, Supreme Court, New York County (William A. Wetzel, J.), rendered February 21, 2008, affirmed.

Opinion by Webber, J. All concur except Renwick, J.P. and Gische, J. who dissent in an Opinion by Renwick, J.P.

Renwick, J.P., Gische, **Tom**, Webber, Singh, JJ.

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

ENTERED: JUNE 25, 2019

CLERK