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

10156 The People of the State of New York, Ind. 3380/16
Respondent,

-against-

Patrick Johnson,
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 (Michael J. Yetter of counsel), for respondent.

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Appeal from judgment, Supreme Court, New York County (Michael R. Sonberg, J.), rendered March 7, 2017, convicting defendant, upon his plea of guilty, of criminal possession of a controlled substance in the third degree, and sentencing him to a term of two years, held in abeyance, and the matter remanded for further proceedings in accordance herewith.

Defendant was deprived of effective assistance when his counsel advised his client that because of his plea, he "will most likely be deported, since it is clear that defendant's drug-related conviction would trigger mandatory deportation under 8 USC § 1227 (a)(2)(B)(i) (*see Padilla v Kentucky*, 559 US 356, 368-369 [2010]; *People v Pequero*, 158 AD3d 421 [1st Dept 2018]; *People v Doumbia*, 153 AD3d 1139 [1st Dept 2017]; *People v Corporan*, 135 AD3d 485 [1st Dept 2016]). The remarks made by counsel on the record to the judge, as to what he advised his client with regard to the immigration consequences of his plea,

are sufficient to permit review on direct appeal (*see Doumbia*, 153 AD3d at 1139). Thus, we hold this matter in abeyance to afford defendant the opportunity to move to vacate his plea upon a showing that there is a reasonable probability that he would not have pleaded guilty had he been made aware of the deportation consequences of his plea.

The People's reliance on *People v Pastor* (28 NY3d 1089 [2016]) is misplaced. In *Pastor*, the Court of Appeals simply held that the defendant's contention "that his attorney misadvised him about the immigration consequences of his plea" should be raised by way of a CPL 440.10 motion as the plea record on its face did not support his contention that he received "mis-advice" (*id*. at 1091). Unlike *Pastor*, the record here is sufficient to permit review on direct appeal.

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

TOM, J. (dissenting)

I disagree with the majority's conclusion that trial counsel provided defendant with ineffective assistance as a matter of law on the basis of the existing record as well as the majority's basis for remanding, which fails to account for CPL 440.10. Hence, I respectfully dissent.

The majority is reaching its conclusion on the basis of the existing record. The record indicates that defendant was provided at his arraignment with a notice of the immigration consequences of a conviction. During a plea colloquy with the court and the prosecutor, counsel, who appeared with defendant, evinced his awareness that the drug offense charged would result in an automatic deportation, as counsel discussed with the court and the prosecutor. Hence, we cannot speculate that counsel may have been unaware of the consequences of a conviction and on such a basis may have misinformed defendant. During a subsequent appearance, counsel informed the court that he intended to discuss the plea with defendant "next Saturday," that "[t]here's immigration issues but I don't think the [i]mmigration issues, they are going to be there one way or the other. I expect we will be able to take this plea but I want to discuss fully with" defendant. Discussing with defendant "fully" what counsel had acknowledged to the court - that deportation was automatic - at least suggests a basis for an informed, proper, advisement.

During the subsequent plea proceeding, counsel informed the

court that he had "advise[d] [defendant] of the immigration consequences, that he is here and will most likely be deported with a felony plea, and I have given him everything." This phrasing, "most likely," needs to be explored, but this was an informal discussion between counsel and the court in which defendant did not participate.

Defendant himself then tried to bargain with the court for a sentence that would, in the aggregate, amount to the same time, two years, but would be broken up into two consecutive one-year terms. Counsel explained that defendant's request was "because of the immigration issues that are involved," another indication that defendant fully understood the ramifications of a plea from a deportation perspective. When the court explained that the requested sentence could not be imposed, defendant inquired into the maximum term he faced. When the court advised that it was nine years, defendant accepted the two-year offer and allocuted to the facts of the crime. The court inquired whether defendant had "discussed the immigration consequences" with counsel of pleading guilty; defendant answered yes, and that he "wish[ed] to plead guilty regardless of any adverse immigration consequences that may result."

This was not an uninformed defendant; however, in view of some of this Court's recent decisions that require a rigorous catechism by which counsel informs the defendant of the certainty of deportation upon conviction of designated categories of crimes

(*see e.g. People v Rodriguez*, 165 AD3d 546 [1st Dept 2018] *People v Pequero*, 158 AD3d 421 [1st Dept 2018]), there exists a possibility that defendant was not fully informed. However, ascertaining that requires further fact-finding.

Procedurally, it seems clear that when an ineffective assistance of counsel claim is raised by a defendant, if "the record does not make clear, irrefutably, that a right to counsel violation has occured, the claimed violation can be reviewed only on a post-trial motion under CPL 440.10, not on direct appeal" (*People v McLean*, 15 NY3d 117, 121 [2010]). Defendant's present claim that his counsel provided him with ineffective assistance regarding the immigration consequences of his plea (*see Padilla v Kentucky*, 559 US 356 [2010]) is unreviewable on direct appeal because it involves matters not reflected in the record regarding the full extent of counsel's immigration advice. Contrary to the position taken by the majority, I am convinced that without an expansion of the record, it is impossible to determine whether an isolated immigration-related phrase in counsel's colloquy with the court - not with defendant - regarding a possible disposition reflected the advice defendant actually received from his counsel. Accordingly, since defendant has not made a CPL 440.10 motion, the merits of this claim may not be addressed on appeal (*see People v Pastor*, 28 NY3d 1089, 1091 [2016]; *compare People v Doumbia*, 153 AD3d 1139 [1st Dept 2017] [content of actual advice placed on the record]).

Moreover, the People served defendant with a notice of immigration consequences, the court provided immigration warnings, and during the plea colloquy defendant confirmed that he wanted to plead guilty regardless of any adverse immigration consequences.

Although the majority is remanding for findings as to prejudice, I believe that is premature. It may even be unnecessary depending on the outcome of the CPL 440 proceeding, should defendant be advised to pursue that relief. In that event, the motion court should be able to examine prejudice if it first finds ineffective assistance of counsel.

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

ENTERED: NOVEMBER 19, 2019

DEPUTY CLERK

Friedman, J.P., Kapnick, Kern, Singh, JJ.

10258 NL Brands Holdings LLC, et al, Index 656682/16
Plaintiffs-Appellants,

-against-

Nanette Lepore, et al.,
Defendants-Respondents.

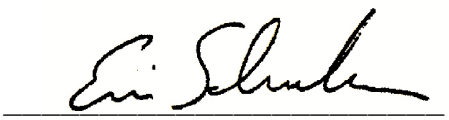
_____

An appeal having been taken to this Court by the above-named appellants from an order of the Supreme Court, New York County (Charles E. Ramos, J.), entered on or about August 27, 2018,

And said appeal having been argued by counsel for the respective parties; and due deliberation having been had thereon, and upon the stipulation of the parties hereto dated October 31, 2019,

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

ENTERED: NOVEMBER 19, 2019



DEPUTY CLERK

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

10287 Lynn McCabe, Index 156813/16
Plaintiff-Appellant,

-against-

Avalon Bay Communities, Inc.,
et al.,
Defendants-Respondents.

Seiden & Kaufman, Carle Place (Steven J. Seiden of counsel), for appellant.

Lewis Brisbois Bisgaard & Smith LLP, New York (Jeremy Pollack of counsel), for respondents.

Order, Supreme Court, New York County (Gerald Lebovits, J.), entered on or about December 5, 2018, which granted defendants' motion for summary judgment dismissing the complaint, unanimously reversed, on the law, without costs, and the motion denied.

Plaintiff was allegedly injured when she fell forward onto her face and shoulder after tripping on a raised sidewalk flag. In describing the accident, plaintiff testified at her deposition that the tip of her sneaker hit the raised sidewalk like "a brick wall" and "went into the little gap." However, in response to defense counsel's question, she agreed that her "foot" did not go "down inside the gap." In her affidavit opposition to the motion for summary judgment, plaintiff stated, "I don't believe my toe struck the bottom of the gap but I am sure the wide gap enabled my foot to strike more of the raised portion of the sidewalk."

Defendants moved for summary judgment, arguing that the condition was trivial, open and obvious, and not inherently

dangerous. Defendants submitted an expert affidavit, photographs, and deposition testimony. The expert concluded that the height differential in the sidewalk caused by the raised flag ranged between 7/16 of an inch and 13/16 of an inch.

In opposition, plaintiff pointed to a map of the property, a budget report, her photographs, and deposition testimony.[1] Plaintiff noted that defendants' maintenance manager had marked blue dots on a map during his inspection of the property months before her accident. The map appears to depict two blue dots in the vicinity of her fall. Plaintiff stressed that the maintenance manager testified that he marked the map with blue dots to indicate the areas where he expected that concrete repairs would be made. Plaintiff also pointed to the property's budget report, which referred to, months before her fall, the "High" priority need to repair large deteriorated sections of "Concrete Walks and Curbs." She further noted that some of her photographs depict a circle of white paint on the raised portion of the sidewalk, which she noticed immediately after her fall. The white circle was important, plaintiff argued, in light of defendants' maintenance manager's testimony that the contractor

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[1]At her deposition, plaintiff testified that she measured the height differential of the raised sidewalk flag as close to one inch. In her affidavit in opposition to summary judgment, she explained that she also measured the distance between the top of the raised sidewalk and the bottom of the gap, which she claimed was almost two inches. Defendants' expert did not measure the width or the depth of the gap, because defendants asserted that plaintiff did not testify that the gap was related to her fall.

probably painted the circle to mark the spot so that defendants could look at it or repair it.

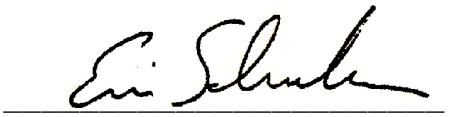
Supreme Court erred in concluding that the defect was trivial as a matter of law. When moving for summary judgment, a defendant must make "a prima facie showing that the defect is, under the circumstances, physically insignificant and that the characteristics of the defect or the surrounding circumstances do not increase the risks it poses" (*Hutchinson v Sheridan Hill House Corp.*, 26 NY3d 66, 79 [2015]). "[T]here is no . . . per se rule that a defect must be of a certain minimum height or depth in order to be actionable" (*id.* at 77 [internal quotation marks omitted], citing *Trincere v County of Suffolk*, 90 NY2d 976, 977 [1997]). A finding that a condition is a trivial defect must "be based on all the specific facts and circumstances of the case, not size alone" (*Hutchinson*, 26 NY3d at 77). The issue is generally a jury question because it is a fact-intensive inquiry (*id.*).

Even assuming that defendants met their burden of proof, plaintiff raised issues of fact for trial (*see e.g. Suarez v Emerald 115 Mosholu LLC*, 164 AD3d 1130 [1st Dept 2018] [plaintiff raised an issue of fact even though the height differential of a raised sidewalk flag was approximately five eighths of an inch]). Issues of fact include whether any portion of plaintiff's sneaker went into the gap and, if so, how far. Moreover, the jury is entitled to consider the evidence that defendants themselves may

have determined that the condition was hazardous, which may in turn bear on whether the defect was in fact trivial. Notably, defendants' maintenance manager testified that he marked the blue dots on the property map because there was "[p]robably . . . something of concern.

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

ENTERED: NOVEMBER 19, 2019



DEPUTY CLERK

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

10290 Dan Nainan, et al., Index 160751/15
Plaintiffs-Respondents,

-against-

715-723 Sixth Avenue Owners Corp., et al.,
Defendants-Appellants,

101 West 23 Owners I, LLC, et al.,
Defendants.

_____

Robert I. Cantor, PLLC, New York (Robert I. Cantor of counsel), for appellants.

Law Office of Andrew M. Wong, New York (Andrew M. Wong of counsel), for respondents.

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Order, Supreme Court, New York County (Alan C. Marin, J.), entered on or about May 6, 2019, which denied defendants-appellants' (defendants) motion for summary judgment dismissing the causes of action for breach of fiduciary duty, intentional misrepresentation, and negligent infliction of emotional distress as against them, unanimously modified, on the law, to grant the motion as to the cause of action for negligent infliction of emotional distress, and otherwise affirmed, without costs.

This is a shareholder derivative action in which plaintiffs contend that defendants, who are the coop, five former coop board members, and the former managing agent, failed to act in the shareholders' best interest when they negotiated the coop's apartment building for sale because the board was controlled by an interested director and an individual member of the board received a direct financial benefit from the transaction (*see*

*Barbour v Knecht*, 296 AD2d 218, 224-225 [1st Dept 2002]).

Defendants rely on the business judgment rule to support summary judgment in their favor. A board's decision is not entitled to protection under the business judgment rule, however, when the action taken "has no legitimate relationship to the welfare of the cooperative, deliberately singles out individuals for harmful treatment, is taken without notice or consideration of the relevant facts, or is beyond the scope of the board's authority" (*see Matter of Levandusky v One Fifth Ave. Apt. Corp.*, 75 NY2d 530, 5408 [1990]). Although defendants contend that they did not breach their fiduciary duties, that they did not engage in any wrongdoing, and that their actions are protected by the business judgment rule, there are issues of fact that preclude summary dismissal of the breach of fiduciary duty claim on that basis *(Levandusky* at 538).

Plaintiffs argue that the board ignored the coop's bylaws by deciding to enter into a contract for the sale of the coop without obtaining shareholder approval and that the board members used scare tactics to force the shareholders into agreeing to sell the coop. Plaintiffs contend shareholders were prohibited from selling their apartments while two of the board members were permitted and proceeded to sell theirs. Plaintiffs claim that the board failed to negotiate the best possible price for the sale. Moreover, plaintiffs allege that one director acted as the broker for the transaction, thereby obtaining an independent

financial benefit from the transaction, a fact that was not disclosed to the shareholders. These facts raise issues regarding whether defendants acted outside the scope of their authority and were motivated by factors other than the interest of the coop corporation (*see Woo v Irving Tenants Corp.*, 276 AD2d 380 [1st Dept 2000]).

Issues of fact preclude summary dismissal of the intentional misrepresentation claim based on defendants' intentional concealment from plaintiffs of the fact that they were marketing all of the shares of the cooperative (*see American Baptist Churches of Metro. N.Y. v Galloway*, 271 AD2d 92, 100 [1st Dept 2000]). We reject defendants' argument that they had no duty to disclose that fact to shareholders who, for example, sought board approval of planned renovations to their units. In addition to the evidence that defendants intentionally concealed a material fact, plaintiffs presented evidence that certain of them relied on the board members' representations that the cooperative's land lease was not in jeopardy and that those plaintiffs suffered damages as a result of their reliance (*see Swersky v Dreyer & Traub*, 219 AD2d 321, 326 [1st Dept 1996], *appeal withdrawn* 89 NY2d 983 [1997]). Whether plaintiffs' reliance was reasonable and what damages, if any, plaintiffs sustained as a result of the board members' failure to disclose a material fact are issues for the trier of fact.

The cause of action for negligent infliction of emotional

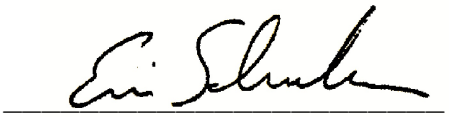
distress should be dismissed, because plaintiffs' only evidence with respect to this claim is plaintiff Victoria Mezzich's affidavit, which describes conduct that, while likely very upsetting to her and not to be condoned, as a matter of law, did not cause her to fear for her safety (*see Bernstein v E. 51st St.*

*Dev. Co., LLC*, 78 AD3d 590, 591 [1st Dept 2010]).

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

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

ENTERED: NOVEMBER 19, 2019



DEPUTY CLERK

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

10352 The People of the State of New York, Ind. 3112/13
Respondent,

-against-

Fidel Vega,
Defendant-Appellant.

_____

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

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

_____

Judgment of resentence, Supreme Court, New York County (A. Kirke Bartley, Jr., J.), rendered January 12, 2018, resentencing defendant, as a second violent felony offender, to an aggregate term of 11 years, unanimously affirmed.

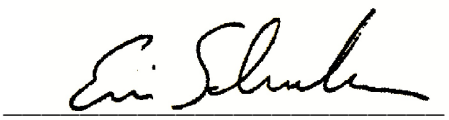
The court was not required to conduct a plenary sentencing proceeding when, upon granting the People's CPL 440.40 motion, the court reinstated defendant's original 2014 sentence, which had been set aside in 2016 on grounds later invalidated by the Court of Appeals in *People v Smith* (28 NY3d 191 [2016]). The court had no authority to revisit its original exercise of sentencing discretion, because the original sentence was in accordance with law, defendant had begun serving it, and the court had no discretion to do anything but reimpose it (*see People v Williams*, 14 NY3d 198, 212 [2010], *cert denied* 562 US 947 [2010]; *People v Lara*, 167 AD3d 446 (1st Dept 2018), *lv denied* 32 NY3d 1206 [2019]).

To the extent defendant is claiming that he is entitled, at a plenary resentencing proceeding, to challenge the constitutionality of his predicate felony conviction on a ground not necessarily foreclosed by the *Smith* decision, that claim is unavailing. Such a challenge would be untimely because defendant failed to raise it at the time of his predicate felony adjudication (*see* CPL 400.15[7][b]; *People v Lara*, 167 AD3d at 448; *People v Odom*, 63 AD3d 408, 409 [1st Dept 2009], *lv denied* 13 NY3d 798 [2009]).

Because of the procedural posture of the sentencing issue on defendant's prior appeal (155 AD3d 462 [1st Dept 2017], *affd* 33 NY3d 1002 [2019]), this Court has not yet had occasion to review the original 2014 sentence for excessiveness. We now decline to reduce it in the interest of justice.

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

ENTERED: NOVEMBER 19, 2019



DEPUTY CLERK

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

10353 Joseph J. Smyth, Index 157795/13
Plaintiff-Appellant,

-against-

Tracy Murphy, et al.,
Defendants-Respondents.

_____

Hasapidis Law Offices, Scarsdale (Annette G. Hasapidis of counsel), for appellant.

Wade Clark Mulcahy, LLP, New York (Vivian S. Turetsky of counsel), for respondents.

_____

Order, Supreme Court, New York County (Lynn R. Kotler, J.), entered December 5, 2018, which denied plaintiff's motion to set aside the verdict in favor of defendants on the issue of liability, unanimously reversed, on the law, without costs, the motion to set aside the verdict granted, a verdict directed in favor of plaintiff on the issue of liability, and the matter remanded for a trial on the issue of damages.

There is no valid line of reasoning and permissible inferences that could possibly support the jury's verdict based on the evidence presented at trial (*see Cohen v Hallmark Cards*, 45 NY2d 493, 498-499 [1978]). Defendant Tracy Murphy acknowledged that plaintiff's vehicle was stopped when she struck

plaintiff's vehicle in the rear. Murphy's claim that plaintiff had stopped at a yellow light does not constitute a nonnegligent explanation for the accident (*see Elihu v Nicoleau*, 173 AD3d 578 [1st Dept 2019]; *Matos v Sanchez*, 147 AD3d 585 [1st Dept 2017]).

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

ENTERED: NOVEMBER 19, 2019

DEPUTY CLERK

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

10354 Cast Iron Co., LLC, Index 655399/16
Plaintiff-Respondent,

-against-

Cast Iron Corp.,
Defendant-Appellant.

_____

Seyfarth Shaw LLP, New York (Jeremy A. Cohen of counsel), for appellant.

John E. Osborn, P.C., New York (Daniel H. Crow of counsel), for respondent.

_____

Order, Supreme Court, New York County (Jennifer Schecter, J.), entered August 7, 2018, which denied defendant landlord's motion for partial summary judgment on its claim for a declaration that plaintiff tenant is required to perform certain repairs under the lease, unanimously affirmed, with costs.

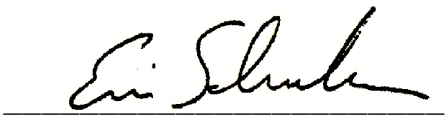
The motion court properly concluded that the lease does not unambiguously require the commercial tenant to perform structural repairs to the sidewalk vault adjacent to the leased premises. Although the lease requires the tenant to "maintain" the vault, such a lease provision, without more, does not impose an obligation on the tenant to make structural repairs (*see Excelsior 57th Corp. v Excel Assoc.*, 126 AD3d 479, 480 [1st Dept 2015]). Moreover, given that the provision of the lease at issue draws a clear distinction between the landlord's obligation to "maintain and repair the Building both exterior and interior" and the tenant's obligation to "maintain and make all necessary non-

structural repairs to the Premises," the words "maintain" and "repair" cannot be conflated and treated as synonyms (*see Searle Blatt & Co. v Zurich Holding Co.*, 241 AD2d 303 [1st Dept 1997]). Accordingly, defendant landlord did not establish entitlement to partial summary judgment on its claim for declaratory relief.

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

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

ENTERED: NOVEMBER 19, 2019



DEPUTY CLERK

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

10355-
10356 US Bank National Association, etc., Index 651282/12
651854/14
Plaintiff,

-against-

UBS Real Estate Securities, Inc.,
Defendant.

- - - - -

Ace Securities Corp., etc., et al.,
Plaintiffs-Appellants,

-against-

DB Structured Products, Inc.,
Defendant-Respondent.

_____

Kasowitz Benson Torres LLP, New York (David J. Abrams of counsel), for US Bank National Association, appellant.

McKool Smith, P.C., New York (Zachary W. Mazin of counsel), for Ace Securities Corp, Home Equity Loan Trust, HSBC Bank USA and National Association, appellants.

Skadden, Arps, Slate, Meagher & Flom LLP, New York (Alexander C. Drylewski of counsel), for UBS Real Estate Securities, Inc., respondent.

Simpson Thacher & Bartlett LLP, New York (William T. Russell, Jr. of counsel), for DB Structured Products, Inc., respondent.

_____

Order, Supreme Court, New York County (Marcy S. Friedman, J.), entered on or about March 29, 2016, which granted defendant DB Structured Products, Inc.'s motion to dismiss the complaint pursuant to CPLR 3211(a)(5) with prejudice, unanimously affirmed, with costs. Order, same court and Justice, entered July 28, 2016, which granted defendant UBS Real Estate Securities, Inc.'s motion to dismiss the amended complaint pursuant to CPLR 3211, unanimously affirmed, with costs.

The dispositive issue in both appeals is whether the trustee of a residential mortgage-backed securities trust is a "plaintiff" within the meaning of CPLR 205(a) when the prior action was commenced by the trust's certificateholders. In *U.S. Bank N.A. v DLJ Mtge. Capital, Inc.* (141 AD3d 431 [1st Dept 2016], *affd* 33 NY3d 84 [2019] ["*HEAT*"]), we concluded that "the trustee [was] not entitled to refile the claims pursuant to CPLR 205(a), because it [was] not a 'plaintiff' under that statute" (*id.* at 433). Our decision "could not have been clearer, and that decision is still good law and binding upon us under principles of stare decisis" (*First Hudson Capital, LLC v Seaborn*, 54 AD3d 251, 252 [1st Dept 2008], *appeal dismissed* 11 NY3d 894 [2008]). Plaintiff Ace Securities Corp.'s attempt to distinguish *HEAT* is unavailing. Neither plaintiff has demonstrated the "compelling circumstances" required to depart from stare decisis (*see People v Aarons*, 305 AD2d 45, 56 [1st Dept 2003], *affd* 2 NY3d 547 [2004]; *see also Dufel v Green*, 198 AD2d 640 [3d Dept 1993], *affd* 84 NY2d 795 [1995]).

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

ENTERED: NOVEMBER 19, 2019

DEPUTY CLERK

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

10358 The People of the State of New York, Ind. 1662/16
Respondent,

-against-

Hugo Sabillion,
Defendant-Appellant.

_____

Janet E. Sabel, The Legal Aid Society, New York (Harold V. Ferguson, Jr. of counsel), for appellant for appellant.

_____

Judgment, Supreme Court, Bronx County (Raymond Bruce, J.), rendered May 8, 2017, unanimously affirmed.

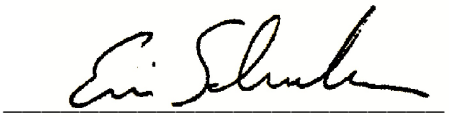
Application by defendant's counsel to withdraw as counsel is granted (*see Anders v California*, 386 US 738 [1967]; *People v Saunders*, 52 AD2d 833 [1st Dept 1976]). We have reviewed this record and agree with defendant's assigned counsel that there are no non-frivolous points which could be raised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

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

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

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

ENTERED: NOVEMBER 19, 2019



DEPUTY CLERK

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

10359 The People of the State of New York, Ind. 2068/16
Respondent,

-against-

Shykeim Terry,
Defendant-Appellant.

_____

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

Darcel D. Clark, District Attorney, Bronx (David A. Slott of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (Ralph Fabrizio, J.), entered on or about May 18, 2018, which adjudicated defendant a level one sexually violent offender pursuant to the Sex Offender Registration Act (Correction Law art 6-C), unanimously affirmed, without costs.

The court properly designated defendant a sexually violent offender because he was convicted of an enumerated offense, and it lacked discretion to refrain from doing so (*see People v Bullock*, 125 AD3d 1 [1st Dept 2014], *lv denied* 24 NY3d 915 [2015]).

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

ENTERED: NOVEMBER 19, 2019

DEPUTY CLERK

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

10360- Index 153111/15
10361- 155728/16
10362 On the Way to Brooklyn, LLC, et al., 152021/17
Plaintiffs-Appellants,

-against-

Charles Korn, et al.,
Defendants-Respondents,

Home of the Sages of Israel,
Defendant.

- - - - -

Louis Atlas, et al.,
Proposed Intervenors-Plaintiffs.

- - - - -

On the Way to Brooklyn, LLC,
Plaintiff-Appellant,

-against-

The Home of the Sages of Israel, Inc.,
Defendant.

- - - - -

In re The Home of the Sages of Israel, Inc.,
Petitioner-Appellant.

- - - - -

On the Way to Brooklyn, LLC, et al.,
Intervenors-Appellants,

Louis Atlas, et al.,
Intervenors-Respondents.

_____

Emery Celli Brinckerhoff & Abady LLP, New York (Andrew G. Celli, Jr. of counsel), for On the Way to Brooklyn, LLC and Peter Fine, appellants.

Harris Beach PLLC, Albany (Victoria A. Grafeo of counsel), for Home of the Sages of Israel, Inc., appellant.

Jaroslawicz & Jaros PLLC, New York (David Jaroslawicz of counsel), for Charles Korn, Nathan Berkowitz, Aron From, Azriel Siff, Moses Wachsman, Dov Tropper, Aron Koplowitz, Baruch Zalmen Lichenstein, Irwin Benjamin, and Bernard Wachsman, respondents.

Abrams Fensterman, Fensterman, Eisman, Formato, Ferrara, Wolf & Carone, LLP, Lake Success (Matthew Didora of counsel), for 2016 Board of Trustees of Home of The Sages of Israel, Inc., respondent.

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Order, Supreme Court, New York County (Erika M. Edwards, J.), entered October 17, 2017 which, inter alia, dismissed with prejudice the petition for approval of the sale of property to intervenor On the Way to Brooklyn, LLC, unanimously affirmed, without costs. Order, same court and Justice, entered October 18, 2017, which granted defendant The Home of the Sages of Israel, Inc.'s motion to dismiss On the Way to Brooklyn, LLC's complaint, unanimously affirmed, without costs. Order, same court and Justice, entered October 18, 2017, which, inter alia, dismissed On the Way to Brooklyn, LLC and Peter Fine's complaint as moot, unanimously affirmed, without costs.

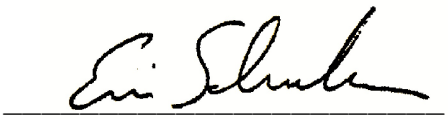
In a well-reasoned decision, the court properly denied approval of the sale of petitioner's property to intervenors On the Way to Brooklyn, LLC and Peter Fine. The court properly rejected appellants' contentions that petitioner had amended its bylaws and ceased operating a house of worship prior to the proposed sale and that petitioner's board of directors, elected by individuals from petitioner's community of interest in 2012,

had sole authority to act on petitioner's behalf and to approve the sale.

We have considered appellants' remaining contentions and find that they are unavailing.

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

ENTERED: NOVEMBER 19, 2019



DEPUTY CLERK

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

10363 In re Kwesi P.,

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

_____

Law Office of Cabelly & Calderon, Jamaica (Lewis S. Calderon of counsel), for appellant.

Georgia M. Pestana, Acting Corporation Couunsel, New York (Deborah E. Wassel of counsel), for presentment agency.

_____

Order of disposition, Family Court, New York County (Adetokunbo O. Fasanya, J.), entered on or about June 19, 2018, which adjudicated appellant a juvenile delinquent, upon his admission that he committed an act that, if committed by an adult, would constitute criminal facilitation in the fourth degree, and placed him on probation for a period of 12 months, unanimously reversed, on the law, without costs, and the matter remanded for a new fact-finding hearing on both petitions covered by the disposition.

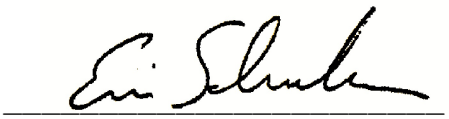
As the presentment agency concedes, appellant's admission was defective because the court's allocution of appellant's mother failed to advise her of the rights appellant was waiving as a result of his admission and the dispositional consequences of appellant's admission (*see* Family Ct Act § 321.3[1]). However, because appellant violated his probation, which was extended and remains in effect, we agree with the presentment

agency that the petition should not be dismissed, and that the matter should be remanded for a new fact-finding determination on both petitions covered by the disposition (*see Matter of Joseph P.*, 229 AD2d 318, 318 [1st Dept 1996]).

We find it unnecessary to reach any other issues.

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

ENTERED: NOVEMBER 19, 2019



DEPUTY CLERK

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

10364 The People of the State of New York, Ind. 1808/15
Respondent,

-against-

Keith Myers,
Defendant-Appellant.

_____

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

Darcel D. Clark, District Attorney, Bronx (Capri Reid of counsel), for rspondent.

_____

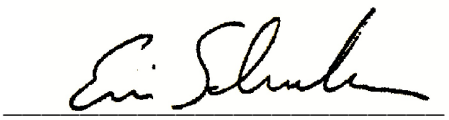
An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, Bronx County (Steven Barrett, J.), rendered March 27, 2017,

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: NOVEMBER 19, 2019



DEPUTY CLERK

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

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

10365 Catherina Park, et al., Index 156500/17
Plaintiffs-Appellants,

-against-

27 Washington Sq. North Owners LLC,
Defendant-Respondent.

_____

Sokolski & Zekaria, P.C., New York (Mark Davies of counsel), for appellants.

Rosenberg & Estis, P.C., New York (Deborah E. Riegel of counsel), for respondent.

_____

Order, Supreme Court, New York County (Barbara Jaffe, J.), entered January 8, 2018, which granted defendant's motion to dismiss the action pursuant to CPLR 3211(a)(5), unanimously affirmed, with costs.

Contrary to plaintiffs' contention, the rent regulatory status of their apartment was litigated and decided in a prior proceeding (*see Matter of Park v New York State Div. of Hous. & Community Renewal*, 150 AD3d 105 [1st Dept 2017]).

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

ENTERED: NOVEMBER 19, 2019

DEPUTY CLERK

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

10366 Richard Wolodin, et al., Index 154020/12
Plaintiffs-Respondents,

-against-

Lehr Construction Corp., et al.,
Defendants-Appellants.

_____

Camacho Mauro Mulholland, LLP, New York (Eric Malinowski of counsel), for appellants.

Bailly & McMillan, LLP, White Plains (Cian McGeever of counsel), for respondents.

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Order, Supreme Court, New York County (Nancy M. Bannon, J.), entered August 9, 2017, which, to the extent appealed from as limited by the briefs, denied defendants' motion for summary judgment dismissing plaintiffs' Labor Law § 241(6) claim premised on 12 NYCRR 23-1.13(b)(4), and granted plaintiffs' cross motion for summary judgment on the issue of liability on that claim, unanimously affirmed, without costs.

Plaintiff Richard Wolodin, an electrician, was injured while preparing a commercial office space for demolition. Plaintiff was standing on an A-frame ladder when he cut into a wire that he believed, based on his testing, was not carrying electricity, but was in fact electrified with high voltage. As a result, he received a shock and fell from the ladder to the ground.

Industrial Code § 23-1.13(b)(4) provides:

> "Protection of employees. No employer shall suffer or permit an employee to work in such proximity to any part of an electric power circuit that he may contact such circuit in

> the course of his work unless the employee is protected against electric shock by de-energizing the circuit and grounding it or by guarding such circuit by effective insulation or other means."

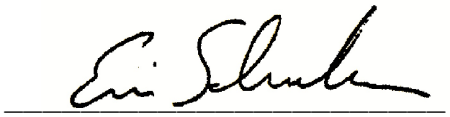
Defendants argue that this provision uses the word "or" to establish that a circuit can be rendered safe for workers by de-energizing and grounding it OR guarding it by effective insulation or other means. Thus, defendants contend that because the wiring was insulated and housed in a splice box with a screwed in cover, they complied with the provision and were not obligated to also de-energize and ground the wiring. However, the evidence clearly showed that while performing his work, plaintiff was permitted to come into contact with an electrical circuit that had not been de-energized (12 NYCRR 23-1.13[b][4]; *DelRosario v United Nations Fed. Credit Union*, 104 AD3d 515, 516 [1st Dept 2013]). He was asked to disconnect the electrical wiring throughout the office, and to do so, he needed to cut through the wires directly. As such, the degree of insulation is not relevant under these circumstances, and the circuit was not

"guard[ed]. . . by other means" (12 NYCRR 23-1.13[b][4]).

The Court notes that the parties stipulated to withdraw the issue of comparative negligence.

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

ENTERED: NOVEMBER 19, 2019



DEPUTY CLERK

**CORRECTED ORDER - NOVEMBER 20, 2019**

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

10367-
10367A The People of the State of New York,
Respondent,

Ind. 3603/15
5369/11

-against-

Lamarr Gaskin,
Defendant-Appellant.

_____

**Janet E. Sabel, The Legal Aid Society, New York (Kristina Schwarz of counsel), for appellant.**

_____

Judgments, Supreme Court, New York County (Jill Konviser, J.), rendered October 27, 2015, unanimously affirmed.

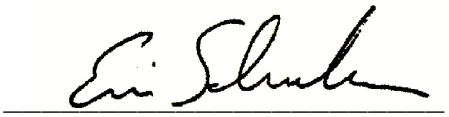
Application by defendant's counsel to withdraw as counsel is granted (*see Anders v California*, 386 US 738 [1967]; *People v Saunders*, 52 AD2d 833 [1st Dept 1976]). We have reviewed this record and agree with defendant's assigned counsel that there are no non-frivolous points which could be raised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

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

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

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

ENTERED: NOVEMBER 19, 2019



DEPUTY CLERK

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

10369-
10369A Santos Colon,
Plaintiff-Appellant,

-against-

Woolco Foods Inc., et al.,
Defendants-Respondents.

Index 304899/15

_____

Law Offices of Ephrem J. Wertenteil, New York (Ephrem J. Wertenteil of counsel), for appellant.

Gambeski & Frum, Elmsford (Donald L. Frum of counsel), for respondents.

_____

Order, Supreme Court, Bronx County (Wilma Guzman, J.), entered on or about July 13, 2018, which denied plaintiff's renewed motion for partial summary judgment on the issue of liability, unanimously affirmed, without costs. Appeal from order, same court and Justice, entered on or about December 28, 2018, which, upon granting reargument, adhered to the original determination, unanimously dismissed, without costs as academic.

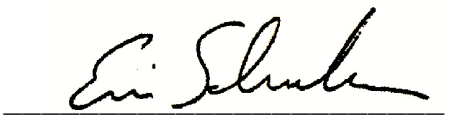
In this action for personal injuries arising out of a motor vehicle accident, the question of whether the accident occurred as plaintiff and the uncertified August 26, 2015 police report described it, or whether it occurred as defendant Diaz described it in his 2016 affidavit and subsequent deposition testimony, is a classic factual dispute, and the statement attributed to Diaz, which he denies making, in the aforementioned police report cannot serve as grounds to render his 2016 affidavit and subsequent deposition testimony describing the accident

incredible as a matter of law (*see Ramos v Rojas*, 37 AD3d 291, 292 [1st Dept 2007]). Instead, these conflicting versions as to how the accident occurred demonstrate that there exist triable issues of fact that preclude summary judgment on the issue of defendants' liability (*see Huerta-Saucedo v City Bronx Leasing Inc.*, 147 AD3d 695 [1st Dept 2017]).

Contrary to plaintiff's contention, Diaz's 2016 affidavit submitted in opposition to his original motion for summary judgment does not conflict with his subsequent deposition testimony.

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

ENTERED: NOVEMBER 19, 2019



DEPUTY CLERK

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

10370-
10370A Kimberly Knight, Index 305657/14
83859/16
Plaintiff-Appellant,

-against-

Acacia Network, Inc., et. al.,
Defendants-Respondents.

- - - - -

Acacia Network, Inc., et. al.,
Third-Party Plaintiffs,

-against-

Platinum Care, Inc.,
Third-Party Defendant.

_____

Peña & Kahn, PLLC, Bronx (Jonathan O. Michaels of counsel), for appellant.

Law Office of Daniel J. McCarey, LLC, New York (Daniel J. McCarey of counsel), for Acacia Network, Inc., Stadium Center LLC and Deegan Motel Corp., respondents.

Gallo Vitucci Klar, LLP, Woodbury (Jacqueline S. Kim of counsel), for Distinctive Maintenance Company, Inc., respondent.

Law Office of Tromello & Fishman, Tarrytown (Christine D. Hanlon of counsel), for Platinum Care Inc., respondent.

_____

Order, Supreme Court, Bronx County (Julia I. Rodriguez, J.), entered July 30, 2018, which, to the extent appealed from as limited by the briefs, denied plaintiff's motion pursuant to CPLR 5015(a) to vacate a prior order entered on her default insofar as it granted defendants' motions for summary judgment dismissing the complaint as against them, unanimously reversed, on the law and the facts, without costs, the motion granted, and the complaint reinstated. Appeal from the Order, same court and

Justice, entered on or about October 10, 2018, which denied plaintiff's motion to reargue and renew her motion to vacate her default, unanimously dismissed, without costs, as academic.

We disagree with the motion court that plaintiff failed to demonstrate both a reasonable excuse for her default and a meritorious cause of action (*see Mutual Mar. Off., Inc. v Joy Constr. Corp.*, 39 AD3d 417, 419 [1st Dept 2007]). We find that the law office failure that resulted in plaintiff's two-week delay in filing opposition to defendants' motions was not willful and that a meritorious cause of action as to both incidents has been set forth (*see id.*).

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

ENTERED: NOVEMBER 19, 2019

DEPUTY CLERK

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

10371N Justin Rivera, Index 305933/13
Plaintiff-Respondent,

-against-

New York City Housing Authority,
Defendant-Appellant.

_____

Herzfeld & Rubin, P.C., New York (Miriam Skolnik of counsel), for appellant.

Burns & Harris, New York (Judith S. Steinberg of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (Llinet M. Rosado, J.), entered on or about June 13, 2018, which, to the extent appealed from, denied defendant's motion to preclude plaintiff's engineering expert from offering his report and to direct plaintiff to provide all materials used by his expert in the preparation of his report, unanimously affirmed, without costs.

"Preclusion of expert evidence on the ground of failure to give timely disclosure, as called for in CPLR 3101(d)(1)(i), is generally unwarranted without a showing that the noncompliance was willful or prejudicial to the party seeking preclusion" (*Martin v Triborough Bridge & Tunnel Auth.*, 73 AD3d 481, 482 [1st Dept 2010], *lv denied* 15 NY3d 713 [2010]). "Prejudice can be shown where the expert is testifying as to new theories, or where the opposing side has no time to prepare a rebuttal" (*Haynes v City of New York*, 145 AD3d 603, 606 [1st Dept 2016]; *see Krimkevitch v Imperiale*, 104 AD3d 649 [2d Dept 2013]).

Here plaintiff withheld information about an expert he retained and who performed a comprehensive inspection and report before the demand for expert disclosure was served, failed to disclose this in response to such demand, and continued to withhold such information over the course of many court conferences and the years that the case was pending. He offers no excuse for his delay or for having served a response to defendant's expert disclosure demand that was arguably misleading.

However, when plaintiff eventually did disclose the expert, it was not on the eve of trial (*see Haynes*, 145 AD3d at 604; *Ramsen A. v New York City Hous. Auth.*, 112 AD3d 439 [1st Dept 2013]; *see also* Patrick M. Connors, Practice Commentaries, McKinney's Cons Laws of NY, CPLR C3101:29A[B]). His disclosure was made on or about March 9, 2018, about six weeks before the originally-scheduled trial date of April 30, 2018, a lead time further expanded with the court's 60-day adjournment (*cf. Kassis v Teachers Ins. & Annuity Assn.*, 258 AD2d 271 [1st Dept 1999]). Moreover, notwithstanding defendant's claims to the contrary, plaintiff's expert did not advance a different theory of liability from that which plaintiff had previously advanced.

The engineer did invoke statutes while plaintiff previously alleged common law negligence, but the underlying alleged conduct is consistent with plaintiff's broad allegations as to defendant's failure to maintain a safe staircase. The notice of

claim and bill of particulars encompass a host of possible defects or dangerous conditions, and the complaint, also written broadly, further includes a catch-all "otherwise" in describing the ways in which defendant was negligent. The engineer's findings, moreover, were consistent with plaintiff's deposition testimony about a broken stair, a slippery surface, and poorly-lit area; and even while citing statutory violations, he frames defendant's conduct as constituting negligence (*see Hughes v Concourse Residence Corp,* 62 AD3d 463 [1st Dept 2009]). In turn, defendant does not show prejudice due to the untimely disclosure, and the trial court properly denied the motion to preclude (*see e.g. Alcantara-Pena v Shanahan*, 168 AD3d 550 [1st Dept 2019]).

Defendant also fails to show grounds to disturb the court's denial of its motion to direct plaintiff to turn over materials relied on by his expert. Defendant claims it is entitled to these materials because, given the passage of time, any expert it would retain now would not be inspecting premises that resemble the premises at the time of the accident. However, defendant does not adequately explain its failure to timely retain an expert of its own.

It asserts, in its reply brief, that it did not do so because the case was initially framed as having resulted from a broken step and experts are not typically retained in broken step cases. Even were we to consider this newly-raised point, we would reject it. Plaintiff, from the outset, described his

injuries as having resulted from a combination of factors including but not limited to a broken step. Moreover, defendant does not explain the basis for its claim that experts are not typically retained in personal injury matters involving only broken steps, and case law suggests otherwise (*see e.g. Brandwein v New York City Tr. Auth.*, 14 AD3d 396 [1st Dept 2005]). Lastly, defendant fails to specify the nature of the changes to the premises over time. To the extent such changes were due to repairs at the site, such changes would have presumably been made by defendant itself, the owner, and plaintiff should not be penalized for defendant's decision to have done so.

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

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

ENTERED: NOVEMBER 19, 2019

DEPUTY CLERK

Friedman, J.P., Renwick, Richter, Mazzarelli, Oing, JJ.

10373 Terezina Kalaba, et al., Index 160667/17
Plaintiffs-Respondents,

-against-

Macy's, Inc.,
Defendant-Respondent.

_____

Lester Schwab Katz & Dwyer, LLP, New York (Daniel S. Kotler of counsel), for appellant.

Doyle & Broumand, LLP, Bronx (Michael B. Doyle of counsel), for respondents.

_____

Order, Supreme Court, New York County (James Edward D'Auguste, J.), entered March 13, 2019, which, in this action for personal injuries, granted plaintiffs' motion to vacate their default in opposing defendant's motion to strike the complaint, unanimously affirmed, without costs.

The motion court providently exercised its discretion in granting plaintiffs' motion pursuant to CPLR 5015 to vacate their default in opposing defendant's motion. Plaintiffs demonstrated that they were unaware that their former counsel had failed to respond to defendant's initial discovery demands and to oppose the motion to strike the complaint (*see Hamilton v National Amusements, Inc.*, 167 AD3d 431 [1st Dept 2018]). Furthermore, the injured plaintiff's affidavit set forth a potentially

meritorious negligence claim at this stage of the proceedings and, given the absence of any prejudice to defendant, plaintiffs' claims should be resolved on the merits (*see Yea Soon Chung v Mid Queens LP.*, 139 AD3d 490 [1st Dept 2016]).

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

ENTERED: NOVEMBER 19, 2019

DEPUTY CLERK

Friedman, J.P., Renwick, Richter, Mazzarelli, Oing, JJ.

10374 In re Raquelina V.,
Petitioner-Appellant,

-against-

Cristian J.N.,
Respondent-Respondent.

_____

Geoffrey P. Berman, Larchmont, for appellant.

Law and Mediation Office of Helene Bernstein, PLLC, Brooklyn (Helene Bernstein of counsel), for respondent.

_____

Order, Family Court, New York County (J. Machelle Sweeting, J.), entered on or about July 9, 2018, which, after a fact-finding hearing, dismissed with prejudice the petition seeking an order of protection against respondent, unanimously affirmed, without costs.

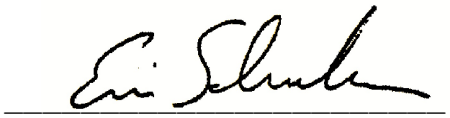
Petitioner failed to establish by a preponderance of the evidence that respondent had committed acts constituting disorderly conduct or harassment in the second degree (*see Matter of Everett C. v Oneida P.*, 61 AD3d 489 [1st Dept 2009]; Penal Law §§ 240.20 and 240.26[3]). Petitioner's hearing testimony plainly contradicted the facts alleged in the family offense petition.

Even crediting petitioner's testimony, the offense of disorderly conduct was necessarily dismissed since there was no evidence that respondent intended to cause a public inconvenience, annoyance or alarm, or recklessly created such a risk, by threatening her over the telephone (*see Matter of Janice M. v Terrance J.*, 96 AD3d 482, 483 [1st Dept 2012]). As for the

offense of harassment in the second degree, petitioner failed to adduce evidence that would support a finding that respondent engaged in a course of conduct or repeatedly committed acts that alarmed or seriously annoyed petitioner and that served no legitimate purpose (*see* Penal Law § 240.26[3]). There exists no basis to disturb the court's credibility determinations (*see Matter of Peter G v Karleen K.*, 51 AD3d 541 [1st Dept 2008]).

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

ENTERED: NOVEMBER 19, 2019



DEPUTY CLERK

Friedman, J.P., Renwick, Richter, Mazzarelli, Oing, JJ.

10375 Michele Caruso Roeser, et al., Index 805393/14
Plaintiffs-Appellants,

-against-

Mitchell N. Essig, M.D., et al.,
Defendants-Respondents.

_____

Pollack, Pollack, Isaac & DeCicco, LLP, New York (Brian J. Isaac of counsel), for appellants.

Gerspach Sikoscow, LLP, New York (Alexander Sikoscow of counsel), for respondents.

_____

Order, Supreme Court, New York County (Eileen A. Rakower, J.), entered January 26, 2018, which, to the extent appealed from as limited by the briefs, granted the motion of defendants Mitchell M. Essig, M.D. (Essig) and Midtown Reproductive Medicine, P.C. (Midtown) for summary judgment dismissing the complaint as against them, unanimously reversed, on the law, without costs, and the motion denied.

Essig and Midtown failed to make a prima facie showing that they adhered to good and accepted standards of medical practice when they did not advise plaintiff that her chances of conception by in vitro fertilization (IVF) would increase if she first had corrective surgery for her uterine condition. Their expert did not address uterine didelphys, and Essig's testimony about that condition was inconclusive and did not address the standard of care (*see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]).

Essig and Midtown further failed to make a prima facie showing that their failure to advise plaintiff that surgical correction of her uterine anomoly could increase her chances of a successful pregnancy with IVF did not cause her chances of achieving a successful pregnancy with IVF to decrease. Although defendants' expert opined that corrective surgery of plaintiff's uterine septate would not have changed her chances of success through IVF, that opinion was predicated on the finding that plaintiff's chance of achieving a successful pregnancy was less than 5%, regardless of whether her uterine septum was corrected. Such a finding improperly assumes that because plaintiff's chances were already less than 5%, any further decrease was inconsequential. However, it is for a jury to determine whether any reduction in plaintiff's chances of achieving a successful pregnancy was "substantial" (*Stewart v New York City Health & Hosps. Corp.*, 207 AD2d 703, 704 [1st Dept 1994], *lv denied* 85 NY2d 809 [1995]).

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

ENTERED: NOVEMBER 19, 2019

DEPUTY CLERK

Friedman, J.P., Renwick, Richter, Mazzarelli, Oing, JJ.

10376 Bank of America, N.A., Index 304320/14
Plaintiff-Respondent,

-against-

Kenneth Adolphus,
Defendant-Appellant.

_____

Solomon Zabrowsky, New York, for appellant.

Fidelity National Law Group, New York (Terence D. Watson of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (Lucindo Suarez, J.), entered on or about July 20, 2018, which granted plaintiff's motion for summary judgment declaring that it holds a valid and enforceable mortgage lien on the subject property in the original principle amount of $360,000, unanimously affirmed, without costs.

Plaintiff sufficiently established the chain of title to the subject premises through its affidavits and records from the Automated City Register Information System (*see Fan-Dorf Props., Inc. v Classic Brownstones Unlimited, LLC*, 103 AD3d 589, 590 [1st Dept 2013]).

Defendant failed to raise an issue of fact as to whether plaintiff was on notice of any alleged fraud in the prior conveyances of the property. Given that defendant had sought no discovery prior to the note of issue and could not articulate a basis for why relevant evidence existed in support of any defense, he was not entitled to further discovery (*see Smith v*

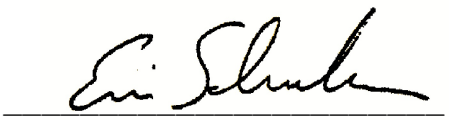
*Andre*, 43 AD3d 770, 771 [1st Dept 2007]).

Furthermore, since there was no issue of fact as to plaintiff's notice of fraudulent inducement, defendant was required to raise an issue of fact as to fraud in the factum with regard to the conveyances at issue. This involves forgery, or fraud with regard to the effect of the actual document being signed (*see Carney v Gil*, 125 AD3d 559, 559-560 [1st Dept 2015]; *Solar Line, Universal Great Bhd., Inc. v Prado*, 100 AD3d 862, 863-864 [2d Dept 2012]; *Wells Fargo Bank, NA v Edsall*, 22 Misc 3d 1113[A], 2009 NY Slip Op 50112[U] [Sup Ct, Suffolk County 2009]). Here, there was no allegation of any such fraud in the factum.

Plaintiff's claims were not barred by res judicata. Plaintiff was not a party to the prior proceedings and as such, did not have a full and fair opportunity to litigate the claims asserted in defendant's prior action (*compare Marx v Mack Affiliates*, 265 AD2d 202 [1st Dept 1999]).

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

ENTERED: NOVEMBER 19, 2019



DEPUTY CLERK

Friedman, J.P., Renwick, Richter, Mazzarelli, Oing, JJ.

10377 The People of the State of New York, Ind. 2175/15
Respondent,

-against-

Theodore Shearin,
Defendant-Appellant.

_____

Janet E. Sabel, The Legal Aid Society, New York (Harold V. Ferguson, Jr. of counsel), for appellant.

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

_____

Judgment, Supreme Court, New York County (Gilbert C. Hong, J.), rendered October 13, 2016, as amended November 4, 2016, convicting defendant, after a jury trial, of robbery in the third degree and criminal possession of a controlled substance in the seventh degree, and sentencing him, as a second felony offender, to an aggregate term of three to six years, unanimously affirmed.

Defendant's claim that the evidence failed to establish the physical injury element of robbery in the second degree was rendered moot by his acquittal of that charge (*see People v Flores*, 284 AD2d 123 [1st Dept 2001], *lv denied* 98 NY2d 710 [2002]; *People v Reynoso*, 262 AD2d 102, 103 [1st Dept 1999], *lv denied* 93 NY2d 1025 [1999]; *see also People v Brown*, 83 NY2d 791, 794 [1994]). Defendant requested submission of the lesser offense of robbery in the third degree, and he failed to preserve his argument that he was prejudiced by the court's denial of his motion to dismiss the greater charge in that it left him an

inadequate opportunity to prepare a defense to the lesser charge. We decline to review this claim in the interest of justice. As an alternative holding, we find that the record does not establish any prejudice. Furthermore, although the only robbery charge in the indictment was second-degree robbery, defendant could not have prevented the submission of the lesser included offense (*see* CPL 300.30[1]) even if the trial court had accepted his argument.

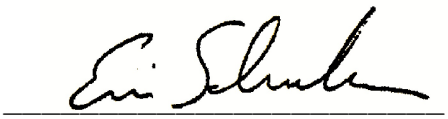
Defendant failed to preserve, and ultimately waived, his challenge to the court's purported failure to give him an opportunity to exercise a peremptory challenge to a prospective juror, who was seated as the twelfth juror (*see People v Moreno*, 15 AD3d 225 [1st Dept 2005], *lv denied* 5 NY3d 792 [2005]), and we decline to review it in the interest of justice. Unlike the situation in prior rounds of jury selection, the court, after asking whether either side had a cause challenge, did not ask if either side had a peremptory challenge, and concluded "we have a jury." Defense counsel did not object at that time. Instead, shortly afterwards, defense counsel confirmed that he was satisfied with the composition of the jury, thus waiving the claims he now raises, and defendant's claim that there was a mode of proceedings error exempt from preservation requirements is without merit. In any case, the record does not support defendant's claim that the court failed to "permit" him to peremptorily challenge the twelfth juror (*see* CPL 270.15[2]).

Moreover, it gave counsel a final opportunity to voice any objections or exercise a challenge when it asked whether everyone was "on the same page" before swearing in the jury.

We perceive no basis for reducing the sentence.

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

ENTERED: NOVEMBER 19, 2019



DEPUTY CLERK

Friedman, J.P., Renwick, Richter, Mazzarelli, Oing, JJ.

10378 Deutsche Bank National Trust Company Index 380671/08
as Trustee for Morgan Stanley ABS Capital
I Inc. Trust 2007-HE5 Mortgage Pass-Through
Certificates, Series 2007-HE5,
Plaintiff-Respondent,

-against-

Percival Williams, et al.,
Defendants,

Hilda Williams,
Defendant-Appellant.

_____

Hilda Williams, appellant pro se.

Parker Ibrahim & Berg LLP, New York (Christopher P. Spina of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (Doris M. Gonzalez, J.), entered on or about February 26, 2019, which denied defendant Hilda Williams's motion to vacate an order, same court (Wilma Guzman, J.), entered October 19, 2016, upon her default, granting plaintiff's motion for summary judgment and the appointment of a referee, and a judgment of foreclosure and sale, same court (Ben R. Barbato, J.), entered on or about April 11, 2018, unanimously affirmed, without costs.

Defendant's motion, brought in January 2019, for vacatur on the ground of newly discovered evidence of fraud or misrepresentation (CPLR 5015[a][2], [3]) was properly denied, as defendant submitted no such evidence. The evidence on which she relies, i.e., federal and state agencies' public announcements of their settlements with plaintiff's former counsel's law firm in

connection with abuses in its foreclosure-related legal work made in October 2011 and March 2012, could have been timely submitted in opposition to plaintiff's motion for summary judgment (*see Olwine, Connelly, Chase, O'Donnell & Weyher v Valsan, Inc.*, 226 AD2d 102, 103 [1st Dept 1996]). Defendant submitted no evidence in support of her contention that the law firm manufactured an assignment of mortgage and backdated it; her assertions in this regard are "bare accusation with no evidentiary proof" (*see Wells Fargo Bank N.A. v Ho-Shing*, 168 AD3d 126, 131 [1st Dept 2019]; *Thakur v Thakur*, 49 AD3d 861 [2d Dept 2008]). Moreover, defendant failed to allege fraud within a reasonable time after the entry of the judgment (*see Mark v Lenfest*, 80 AD3d 426 [1st Dept 2011]; *see also Deutsche Bank Natl. Trust Co. v Lopez*, 148 AD3d 475 [1st Dept 2017]).

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: NOVEMBER 19, 2019

DEPUTY CLERK

Friedman, J.P., Renwick, Richter, Mazzarelli, Oing, JJ.

10379 Emilio B. Carino, et al., Index 305535/10
Plaintiffs-Appellants,

-against-

Friendly Fruit, Inc., et al.,
Defendants-Respondents.

_____

Pollack, Pollack, Isaac & DeCicco, LLP, New York (Brian J. Isaac of counsel), for appellants.

Burke, Conway & Stiefeld, White Plains (Michael G. Conway of counsel), for respondents.

_____

Order, Supreme Court, Bronx County (Alison Y. Tuitt, J.), entered on or about August 15, 2018, which denied plaintiffs' motion to set aside the jury verdict on damages, unanimously affirmed, without costs.

Ample evidence supports the award to each plaintiff of damages for past and future pain and suffering and medical expenses, and the awards do not deviate materially from what would be reasonable compensation (CPLR 5501[c]; *see Singh v Catamount Dev. Corp.*, 21 AD3d 824 [1st Dept 2005]; *Donlon v City of New York*, 284 AD2d 13 [1st Dept 2001]).

As the trial court noted, the photographs of the damaged van and the repair bill indicated that the damage from the collision was minimal, from which the jury could reasonably have inferred that the impact was minimal as well. None of the plaintiffs complained of pain to the police at the scene and none immediately sought medical attention.

Plaintiff Carino admitted that his body did not strike the interior of the van at the time of the impact and that he told the police that he was "very well." He returned to work two days after the accident, and at his deposition 17 months later, he testified that he was still performing construction work and working overtime and that he had no medical appointments scheduled. Carino did not complain of neck pain following the accident or while receiving physical therapy from March to November 2010. Moreover, Dr. Isaac Cohen, defendants' expert, testified that the pathology report following Carino's neck surgery in September 2011 noted that the disc material that was removed was degenerative fibrocartilage. The jury was free to accept the testimony of Dr. Cohen and Dr. Scott Coyne, defendants' other expert, that Carino did not sustain a traumatic injury as a result of the accident, and awarded him no damages related to his neck or back surgery, both of which Dr. Cohen opined were unnecessary (*see Crooms v Sauer Bros. Inc.*, 48 AD3d 380, 382 [1st Dept 2008]). The jury's determination to award Carino nothing for future pain and suffering and future medical expenses was consistent with a determination that the injuries he sustained in the accident were not permanent and that his neck and back problems were not traumatically induced. On the issue of his past medical expenses, Carino presented no evidence.

Dr. Cohen testified that the back procedure performed on plaintiff Maldonado four years after the accident was not

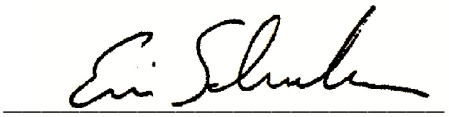
causally related to the collision and that his review of the MRIs of her right shoulder and lumbar spine did not reveal a traumatic condition. He opined that Maldonado did not sustain a permanent traumatic injury in the accident. Maldonado's primary care physician's medical records show that Maldonado made no complaints of back or shoulder pain during her annual physical examinations in 2011 through 2014 and that she continued to work. The jury was free to accept Dr. Cohen's testimony that Maldonado did not suffer any permanent traumatic injury in the accident and was therefore not entitled to an award for future pain and suffering.

The photographs from plaintiff Gonzalez's Facebook page from February 2016 through August 2016 undermine her claims by showing that she was in no apparent pain and was able to lift a heavy weight at a time when she was complaining to her doctor of extreme back pain. Other evidence shows that Gonzalez's body did not strike the interior of the van at the time of the accident and that she did not complain to her primary care physician about neck or back pain at her annual physical examinations in August 2010, January 2012 and January 2013. Moreover, Dr. Cohen testified that there was no evidence that Gonzalez sustained a pars fracture to her lower back, and he noted that her treating physician Dr. Mark Kramer found that she had a full range of motion in her shoulders. The jury was free to accept Dr. Cohen's

testimony that the accident was not a substantial factor in any of Gonzalez's conditions and that she would not require future surgery or treatment.

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

ENTERED: NOVEMBER 19, 2019



DEPUTY CLERK

Friedman, J.P., Renwick, Richter, Mazzarelli, Oing, JJ.

10381 The People of the State of New York, Ind. 4301/08
Respondent,

-against-

Auvryn Scarlett,
Defendant-Appellant.

_____

Janet E. Sabel, The Legal Aid Society, New York (Katheryne M. Martone of counsel), for appellant.

Cyrus R. Vance, Jr., District Attorney, New York (John T. Hughes of counsel), for respondent.

_____

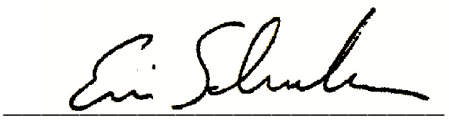
An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (James Burke, J. at resentencing), rendered March 9, 2016,

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

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

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

ENTERED: NOVEMBER 19, 2019



DEPUTY CLERK

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

Friedman, J.P., Renwick, Richter, Mazzarelli, Oing, JJ.

10382 In re Keith M.,
Petitioner-Respondent,

-against-

Tiffany S.S.,
Respondent-Appellant.

_____

Steven P. Forbes, Jamaica, for appellant.

Law Offices of Randall S. Carmel, Jericho (Randall S. Carmel of counsel), for respondent.

Dawne A. Mitchell, The Legal Aid Society, New York (John A. Newbery of counsel), attorney for the child.

_____

Order, Family Court, New York County (Jane Pearl, J.), entered on or about January 16, 2018, which, after a fact-finding hearing, found that respondent committed the family offenses of harassment in the second degree, disorderly conduct, grand larceny in the fourth degree, and identity theft, and found the existence of aggravating circumstances, and awarded petitioner a five-year order of protection directing respondent to, inter alia, stay away from him and the parties' child, except for supervised parenting time, unanimously modified, on the law, to vacate the findings of grand larceny in the fourth degree and identity theft, and otherwise affirmed, without costs.

Petitioner established by a preponderance of the evidence that respondent committed the family offenses of harassment in the second degree and disorderly conduct. Petitioner testified to physical altercations during which respondent choked him and

cut his nose with a water bottle. There is also evidence that respondent repeatedly made false accusations against petitioner with respect to his treatment of their child (Penal Law § 240.26[1], [3]; § 240.20; *see Matter of Doris M. v Yarenis P.*, 161 AD3d 502, 502-503 [1st Dept 2018]; *Matter of Erica R. v LaQueenia S.*, 139 AD3d 422 [1st Dept 2016]). There exists no basis to disturb the court's credibility determinations (*see Matter of Everett C. v Oneida P.*, 61 AD3d 489 [1st Dept 2009]).

However, the evidence does not support a finding that respondent committed the family offenses of identity theft or grand larceny in the fourth degree. The evidence failed to show that the amount of money taken from petitioner's account exceeded $1,000 (Penal Law § 155.30[1]; Penal Law § 190.78).

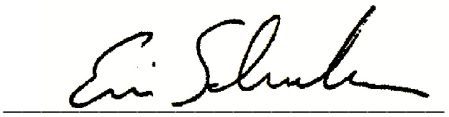
The determination that aggravating circumstances existed to warrant the imposition of a five-year order of protection against respondent is supported by the record, including respondent's violations of prior court orders (*see* Family Ct Act § 827[a][vii]; § 842; *Matter of Angela C. v Harris K.*, 102 AD3d 588, 589 [1st Dept 2013]).

Respondent's claim of ineffective assistance of counsel is unavailing (*see Matter of Devin M. [Margaret W.]*, 119 AD3d 435, 437 [1st Dept 2014]. The record shows that respondent was afforded "meaningful representation" throughout the proceedings (*People v Benevento*, 91 NY2d 708, 712-713 [1998]).

We have considered respondent's remaining arguments, including that the court was biased against her, and find them unavailing.

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

ENTERED: NOVEMBER 19, 2019



DEPUTY CLERK

Friedman, J.P., Renwick, Richter, Mazzarelli, Oing, JJ.

10384 Shamima Mohammed, Index 22924/15E
Plaintiff-Appellant,

-against-

St. Barnabas Hospital,
Defendant-Respondent,

Corporation "X", etc., et al.,
Defendants.

_____

Frekhtman & Associates, Brooklyn (Eileen Kaplan of counsel), for appellant.

Garbarini & Scher, P.C., New York (Thomas M. Cooper of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (Donna Mills, J.), entered August 28, 2018, which granted defendant hospital's motion for summary judgment dismissing the complaint, and order, same court and Justice, entered December 18, 2018, which denied plaintiff's motion for leave to reargue and renew, unanimously affirmed, without costs.

Defendant's motion for summary judgment was properly granted in this action where plaintiff was injured when, while working at defendant hospital as a per diem certified nursing assistant, she slipped and fell on the wet floor near the nurses' station. Defendant established prima facie that plaintiff was barred from maintaining this action, pursuant to the exclusivity provisions of the Worker's Compensation Law, because plaintiff was its special employee and had already accepted Workers' Compensation benefits from her general employer, Gotham Registry (Gotham) (*see*

Workers' Compensation Law § 29[6]; *Thompson v Grumman Aerospace Corp.*, 78 NY2d 553, 558 [1991]; *Warner v Continuum Health Care Partners, Inc.*, 99 AD3d 636 [1st Dept 2012]).

The record shows that defendant had exclusive control over the manner, details and ultimate work while plaintiff was working as a nursing assistant. Moreover, plaintiff herself testified that she was supervised and received her work activities on a daily basis from the charge nurse, who was defendant's employee. She also received training from defendant and wore a badge identifying her as defendant's employee (*see Warner* at 636-637). Although Gotham was informed of plaintiff's accident soon after it occurred, provided her weekly work schedule and paid her salary, there is no evidence that it exercised any control over her activities while she was on the job at defendant hospital (*see Gannon v JWP Forest Elec. Corp.*, 275 AD2d 231, 232-233 [1st Dept 2000]).

In opposition, plaintiff failed to raise a triable issue of fact. Contrary to plaintiff's contention, the motion court providently exercised its discretion in denying her request for a second adjournment during the August 2018 hearing on the motion for summary judgment, since she failed to show good cause for her delay in preparing her opposition papers (*see Matter of Steven B.*, 6 NY3d 888 [2006]; *Park Lane N. Owners, Inc. v Gengo*, 151 AD3d 874, 875 [2d Dept 2017]).

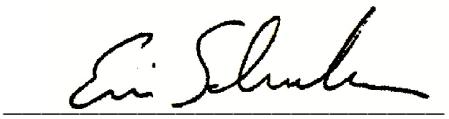
The court properly denied plaintiff's motion insofar as it

sought renewal. Plaintiff failed to present any new or additional facts that were unknown to her at the time of her opposition to summary judgment (*see Queens Unit Venture, LLC v Tyson Ct. Owners Corp.*, 111 AD3d 552 [1st Dept 2013]; *Reyes v Charles H. Greenthal & Co.*, 24 AD3d 131 [1st Dept 2005]). Furthermore, regarding reargument, although the court purported to simply deny the motion to reargue, it appears to have considered the merits of plaintiff's argument that she was not defendant's special employee and it is thus, appealable (*see Lewis v Rutkovsky*, 153 AD3d 450, 453 [1st Dept 2017]). Nevertheless, for the reasons provided above, upon reargument, the court properly adhered to its determination granting defendant summary judgment.

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

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

ENTERED: NOVEMBER 19, 2019



DEPUTY CLERK

Friedman, J.P., Renwick, Richter, Mazzarelli, Oing, JJ.

10385 Christopher Shewbaran, Index 22262/14E
Plaintiff-Appellant,

-against-

Marcel Laufer, M.D., et al.,
Defendants-Respondents.

_____

Hegge & Confusione, LLC, New York (Michael Confusione of counsel), for appellant.

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

_____

Order, Supreme Court, Bronx County (Joseph Capella, J.), entered October 3, 2018, which, insofar as appealed from as limited by the briefs, granted defendants' motion for summary judgment dismissing the medical malpractice and negligent hiring claims, unanimously modified, on the law, to deny the motion as to the medical malpractice claim, and otherwise affirmed, without costs.

Defendants established prima facie that they did not fail to timely diagnose and treat the colon perforation that developed during or after a routine colonoscopy they performed on plaintiff. Their experts opined that the perforation did not develop until hours after the surgery ended and thus could not have been diagnosed while plaintiff was still under defendants' care. The experts further opined that, regardless of when the perforation was discovered, plaintiff would still have had to undergo the same surgeries. In opposition, plaintiff's expert

opined that the perforation already existed and could have been diagnosed immediately after surgery and that an earlier diagnosis would have spared plaintiff hours of pain and suffering and the development of peritonitis.

The parties' conflicting expert opinions present issues of fact as to those questions. Contrary to defendants' argument, plaintiff's expert's opinion that the perforation existed and could have been diagnosed immediately after surgery is supported by plaintiff's and his daughter's testimony that he felt a burning pain, which he reported to hospital staff, and the indication in the medical records of a drop in blood pressure. Although defendants' expert asserted that plaintiff's blood pressure was normal, plaintiff's expert offered a conflicting assessment. The fact that plaintiff's complaints of pain are not recorded in the contemporaneous medical records, although suggestive, is not dispositive, as plaintiff and his daughter testified that he made those complaints.

The negligent hiring claim was correctly dismissed, as there

is no evidence that any of the persons involved in plaintiff's care was unqualified or had a history of negligent conduct (*see Gomez v City of NY*, 304 AD2d 374 [1st Dept 2003]).

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

ENTERED: NOVEMBER 19, 2019

DEPUTY CLERK

Friedman, J.P., Renwick, Richter, Mazzarelli, Oing, JJ.

10387 The People of the State of New York, Ind. 201/14
Respondent,

-against-

Leonard Narducci,
Defendant-Appellant.

_____

Aidala, Bertuna & Kamins P.C., New York (Diana Fabi Samson of counsel), for appellant.

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

_____

Judgment, Supreme Court, New York County (Maxwell Wiley, J.), rendered March 14, 2018, convicting defendant, after a jury trial, of grand larceny in the second degree, and sentencing him to a term of 1 to 3 years, and $490,000 in restitution, unanimously affirmed. The matter is remitted to Supreme Court for further proceedings pursuant to CPL 460.50(5).

The People met their burden of establishing by a preponderance of the evidence that venue was proper in New York County, based on the location of conduct establishing one or more elements of the crime of larceny by false pretenses (*see* CPL 20.40[1][a]). Defendant's arguments on this issue are generally similar to arguments this Court rejected on a codefendant's appeal (*People v Hurley*, 161 AD3d 687, 688 [1st Dept 2018], *lv denied* 32 NY3d 938 [2018]). A government agency located in Manhattan received defendant's application for benefits containing false statements, and those statements were

accordingly deemed to have been made in Manhattan (*see* CPL 20.60[1]). Although the evidence that defendant's application was received in Manhattan was circumstantial, the People presented "evidence in the record upon which the jury could have found jurisdiction" (*People v Cullen*, 50 NY2d 168, 173 [1980]). Accordingly, the element of making a false representation is deemed to have occurred in Manhattan, and the People were not required to prove that any other element occurred there. In any event, the evidence also supported the inference that the element of reliance occurred in Manhattan, as in *Hurley*.

Defendant did not preserve his challenges to the court's main and supplemental jury charges on the subject of venue, and we decline to review them in the interest of justice. As an alternative holding, we reject them on the merits.

The verdict was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348 [2007]). On the contrary, we find that the evidence overwhelmingly established larceny by false pretenses, in that defendant submitted numerous false statements to the government about his mental and physical condition that were contrary to the evidence of his actual behavior over the course of years. Defendant's fraudulent intent could be readily inferred from his conduct. Although he argues that his condition could have improved after he made various statements in 1998, he was obligated to update the government promptly of significant changes, and his failure to do so evinced

his fraudulent intent from the outset. Moreover, he submitted a 2013 follow-up form to the effect that his condition had not improved since 1998. In any event, defendant's own deposition testimony in lawsuits contradicted his representations about his activities around the time of his 1998 application. Furthermore, the evidence established that defendant was not entitled to the benefit at issue, based on either his mental or physical condition.

The court providently exercised its discretion in denying defense counsel's request for a missing witness charge as to a codefendant whose attorney appeared in court and stated that his client intended to invoke his Fifth Amendment right against self-incrimination if called to testify at trial. This rendered the witness unavailable for purposes of a missing witness inference (*see People v McAndris*, 300 AD2d 1, 2 [1st Dept 2002], *lv denied* 99 NY2d 630 [2003]). Although this codefendant had entered into a cooperation agreement with the People in which he had agreed to waive his privilege against self-incrimination, he could not be compelled to testify if he reneged on the agreement by invoking the privilege. At most, the witness risked losing the benefits of the agreement. In any event, any error in the court's denial of a missing witness charge was harmless.

The court properly admitted evidence of defendant's treatment by a psychiatrist. Defendant waived the physician-

patient privilege by disclosing records of this treatment to government employees who were not involved in treating defendant (*see People v Bierenbaum*, 301 AD2d 119, 141-42 [1st Dept 2002], *lv denied* 99 NY2d 626 [2003], *cert denied* 540 US 821 [2003]).

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

ENTERED: NOVEMBER 19, 2019

DEPUTY CLERK

Friedman, J.P., Renwick, Richter, Mazzarelli, Oing, JJ.

10388 WDF Inc., Index 450143/16
Plaintiff-Appellant,

-against-

Turner Construction Company,
Defendant-Respondent,

New York University, et al.,
Defendants.

_____

Pepper Hamilton LLP, New York (Ira M. Schulman of counsel), for appellant.

Peckar & Abramson, P.C., New York (Gregory H. Chertoff of counsel), for respondent.

_____

Order, Supreme Court, New York County (Jennifer G. Schecter, J.), entered July 26, 2018, as modified by order entered October 18, 2018, which, to the extent appealed from, granted defendant Turner Construction Company's motion for summary judgment dismissing the delay damages claim as against it with prejudice, unanimously affirmed, with costs.

Plaintiff subcontractor seeks delay damages in connection with a construction project for defendants New York University and New York University College of Nursing, Dentistry and BioEngineering, despite the fact that its subcontract with defendant Turner, the prime contractor on the project, contains a broad no-damages-for-delay clause. In opposition to Turner's motion for summary judgment dismissing the claim, plaintiff failed to raise an inference that the no-damages-for-delay clause is unenforceable (*see Corinno Civetta Constr. Corp. v City of New*

*York*, 67 NY2d 297, 309 [1986]).

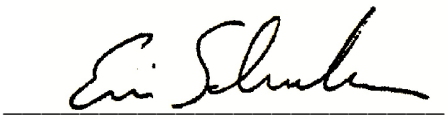
This case is factually strikingly similar to another action brought by plaintiff seeking delay damages in connection with another construction project (*WDF, Inc. v Trustees of Columbia Univ. in the City of N.Y.*, 170 AD3d 518 [1st Dept 2019]). In that case, we found that the allegations in plaintiff's proposed amended complaint established nothing more than "inept administration or poor planning," rather than the "bad faith or willful, malicious, or grossly negligent conduct" that brings a case within an exception to the rule that no-damages-for-delay clauses are enforceable (*id.* [internal quotation marks omitted]).

In this case, plaintiff's sole argument is that summary judgment is precluded by issues of fact raised by an internal Turner email assessing potential damages, which plaintiff contends constitutes a party admission of liability. It is apparent from the email that Turner was assessing the costs claimed by plaintiff, not the viability of plaintiff's claims under the terms of the subcontract, and, being an internal document, the email did not waive any of Turner's rights or raise any material issues of fact as to the viability of those claims. The fact that Turner evaluated whether plaintiff incurred delay damages is irrelevant to the enforceablity of the no-damages-for-

delay clause. Plaintiff failed to present evidence that Turner engaged in "bad faith or willful, malicious, or grossly negligent conduct" or that any other exception to the rule applies to render the clause unenforceable.

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

ENTERED: NOVEMBER 19, 2019



DEPUTY CLERK

Friedman, J.P., Renwick, Richter, Mazzarelli, Oing, JJ.

10389 & M-7514 Liberty Petroleum Realty, LLC, et al.,
Plaintiffs-Respondents,

-against-

Gulf Oil, L.P., et al.,
Defendants-Appellants.

Index 22163/15E

Law Office of Steven Kohn, P.C., Carle Place (Matthew Feinman of counsel), for appellants.

Harfenist Kraut & Perlstein, LLP, Lake Success (Neil Torczyner of counsel), for respondents.

Order, Supreme Court, Bronx County (Julia I. Rodriguez, J.), entered on or about April 9, 2019, which granted defendants' motion for reargument, and upon reargument, adhered to the court's decision, entered January 7, 2019, denying defendants' motion for summary judgment dismissing the complaint, unanimously affirmed, with costs.

We need not decide whether there is a procedural bar to this appeal because we find that the court correctly determined that

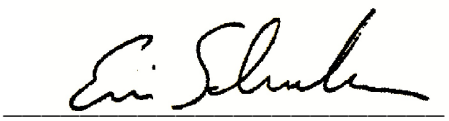
issues of fact exist to preclude the grant of summary judgment dismissing plaintiffs' claims.

**M-7514 - *Liberty Petroleum Realty, LLC v Gold Oil, L.P.***

Motion to vacate the dismissal of defendants' appeal from the order entered January 7, 2019 denied.

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

ENTERED: NOVEMBER 19, 2019



DEPUTY CLERK

Friedman, J.P., Renwick, Richter, Mazzarelli, Oing, JJ.

10390- Index 651250/17
10391- 652581/17
10392 Abdul Q. Malik, M.D., et al., 653870/16
Plaintiffs-Appellants,

-against-

Ultraline Medical Testing, P.C., et al.,
Defendants,

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

- - - - -

Abdul Q. Malik, M.D., et al.,
Plaintiffs-Appellants,

-against-

Excelsior Medical IPA, LLC
Defendant-Respondent.

- - - - -

Abdul Q. Malik, M.D., et al.,
Plaintiffs-Appellants,

-against-

Empire HealthChoice HMO, Inc., et al.,
Defendants-Respondents.

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Barclay Damon LLP, Albany (Linda J. Clark of counsel), for appellants.

Morrison Cohen LLP, New York (Howard S. Wolfson of counsel), for Healthfirst, Inc., Healthfirst Health Plan, Inc., and Healthfirst PHSP, Inc. respondents.

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

Nixon Peabody, LLP, Jericho (Thomas Mealiffe of counsel), for New York State Catholic Health Plan, Inc., respondent.

Dunnington, Bartholow & Miller LLP, New York (Olivera Medenica and Sixtine Bousquet-Lambert of counsel), for Excelsior Medical, IPA LLC, respondent.

Morrison Cohen, LLP, New York (Howard S. Wolfson of counsel), for Empire HealthChoice HMO, Inc., Empire HealthChoice Assurance, Inc. and HealthPlus HP, LLC, respondents.

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Order, Supreme Court, New York County (Shlomo Hagler, J.), entered July 20, 2018, which, insofar as appealed from as limited by the briefs, granted the motions of defendants Healthfirst, Inc., Healthfirst Health Plan, Inc., Healthfirst PHSP, Inc. (collectively Healthfirst), Metroplus Health Plan, Inc. (Metroplus) and New York State Catholic Health Plan, Inc. d/b/a Fidelis Care New York, Inc. (Fidelis) to dismiss the complaint as against them, and denied plaintiffs' motion for leave to amend the complaint, unanimously affirmed, without costs. Order, same court and Justice, entered July 19, 2018, which granted the motion of defendant Excelsior Medical IPA, LLC (Excelsior) to dismiss the complaint and denied plaintiffs' motion for leave to amend the complaint, unanimously affirmed, without costs. Order, same court and Justice, entered June 14, 2019, which granted the motion of defendants Empire HealthChoice HMO, Inc., Empire HealthChoice Assurance, Inc. and HealthPlus HP, LLC (collectively Empire) for summary judgment dismissing the complaint and denied plaintiffs' motion for leave to amend the complaint, unanimously affirmed, without costs.

The motion court properly dismissed the complaints as plaintiffs failed to set forth any cognizable legal theories or claims (*see generally Nonnon v City of New York*, 9 NY3d 825 [2007]). Defendants had accepted Dr. Malik onto their health care provider panel and had no duty to protect him from third parties harming him with fraudulent claims filed in his name by performing handwriting or other analyses of those claims (*see Purdy v Public Adm'r of County of Westchester*, 72 NY2d 1 [1988]; *see also Hamilton v Beretta U.S.A. Corp.*, 96 NY2d 222 [2001]). While Dr. Malik, who was incorrectly indicted and mistakenly assumed to be part of the scheme, was a victim of the perpetrator of the fraud, so were defendants, who paid for false claims. Since defendants were also damaged by that fraud, plaintiffs' claims of aiding and abetting fraud, which require knowledge of the fraud are untenable. Nor can defendants' routine processing of the fraudulent transactions be found to be substantial assistance (*see McBride v KPMG Intl.*, 135 AD3d 576 [1st Dept 2016]).

Defendants did not violate the notification provisions in Insurance Law § 4803(b) or Public Health Law § 4406-d(2) since those provisions do not apply where there has been a "determination of fraud." Here, the grand jury indictment and Dr. Malik's exclusion from the Medicaid program by New York State Office of the Medicaid Inspector General were determinations under the statutes and, if the legislature had wished to require

a conviction for that exclusion, it would have so stated (*see Kuzmich v 50 Murray St. Acquisition LLC*, 34 NY3d 84 [2019]).

Plaintiffs' breach of contract claims premised upon failure to provide notice and a hearing were also properly dismissed. The provisions in the relevant contracts with defendants provided for immediate termination, without further process, in the event of a determination of fraud, rendering any other procedures documented therein irrelevant. Plaintiffs' claims premised upon General Business Law §§ 349 and 350 fail since Dr. Malik's contracting with various HMOs to be included in their panels is not the type of transaction contemplated by the statutes (*see Medical Socy. of State of N.Y. v Oxford Health Plans, Inc.*, 15 AD3d 206 [1st Dept 2005]).

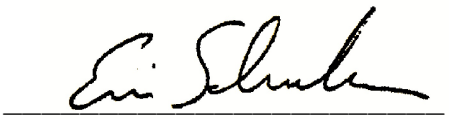
The motion court also properly declined to permit plaintiffs to amend the complaints. Any proposed amendments were based on the same defective and insufficient legal theories (*see Channel Chiropractic, P.C. v Country-Wide Ins. Co.*, 38 AD3d 294 [1st Dept 2007]). Regarding Empire, the cause of action for negligent training fails since that claim does not allege that any

employees of Empire acted outside the scope of their employment (*see Kerzhner v G4S Govt. Solutions, Inc.*, 160 AD3d 505 [1st Dept 2018]; *Leftenant v City of New York*, 70 AD3d 596 [1st Dept 2010]

We have considered plaintiffs' remaining arguments and find them.

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

ENTERED: NOVEMBER 19, 2019



DEPUTY CLERK

Friedman, J.P., Renwick, Richter, Mazzarelli, Oing, JJ.

10393N Carmen Lezcano Luna, etc., et al., Index 101340/15
Plaintiffs-Respondents,

-against-

Brodcom West Development Company LLC, et al.,
Defendants-Appellants.

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Brodcom West Development Company LLC, et al.,
Third-Party Plaintiffs-Appellants,

-against-

P.S. Marcato Elevator Co., Inc.,
Third-Party Defendant-Appellant.

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Black Marjieh & Sanford LLP, Elmsford (Lisa J. Black of counsel), for Brodcom West Development Company LLC, and The Brodsky Organization LLC, appellants.

Gottlieb Siegel & Schwartz, LLP, New York (Lauren M. Solari of counsel), for P.S. Marcato Elevator Co., Inc., appellant.

The Altman Law Firm, PLLC, Woodmere (Michael T. Altman of counsel), for respondents.

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Order, Supreme Court, New York County (Manuel J. Mendez, J.), entered August 29, 2018, which granted plaintiff's motion to renew and reargue defendants' and third-party defendant's motions to strike the complaint and, upon reargument, vacated its March 28, 2018 order striking the complaint and dismissing the matter, and restored the matter to the court calendar, unanimously affirmed, without costs.

The court did not abuse its discretion in granting plaintiff's motion for leave to renew and reargue and, upon renewal and reargument, vacating its order that had granted

appellants' motions to strike the complaint. Plaintiff sufficiently established that she substantially complied with the court's orders and did not engage in willful, contumacious or bad faith conduct (*see Hogin v City of New York*, 103 AD3d 419, 420 [1st Dept 2013] [defendant's recalcitrant or tardy compliance with discovery directives did not justify severe sanction of striking the answer]; *Sheridan v Very, Ltd.*, 56 AD3d 305, 306 [1st Dept 2008] [motion court providently exercised its discretion in granting reargument and reinstating the complaint after plaintiff clarified facts relating to the extent of her compliance with discovery]; *Frye v City of New York*, 228 AD2d 182, 182-183 [1st Dept 1996] [affirming denial of motion to strike answer where defendants were "less than diligent in meeting court deadlines," but their derelictions were not willful or contumacious]; *see also Vizcarrondo v Board of Educ. of City of N.Y.*, 17 AD3d 144, 145 [1st Dept 2005] [although derelict in complying with court's discovery orders, defendants substantially complied with majority of discovery demands and explained that initial noncompliance was the result of a mistaken belief]; CPLR 2221). Plaintiff also proffered a reasonable excuse, in the form of law office failure, for not providing an authorization to obtain the Medical Examiner's records (CPLR 2005).

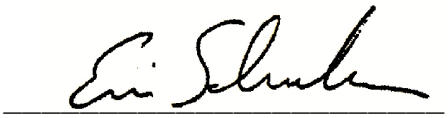
Plaintiff was deprived of a fair opportunity to respond to appellants' oral motions to strike the complaint, which raised new arguments that she had not complied with the January 31, 2018

order, and should have been brought on by notice of motion (*see Ran v Weiner*, 170 AD3d 425, 426 [1st Dept 2019] ["footnote request" to amend the complaint should have been raised by notice of motion]; *see also Vaynshelbaum v City of New York*, 140 AD3d 406 [1st Dept 2016] [defendants' eve-of-trial motion to dismiss did not provide plaintiffs with notice and a fair opportunity to respond]).

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

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

ENTERED: NOVEMBER 19, 2019



DEPUTY CLERK

**CORRECTED ORDER - FEBRUARY 18, 2020**

Friedman, J.P., Renwick, Richter, Mazzarelli, Oing, JJ.

10390- Index 651250/17
10391- 652581/17
10392 653870/16

Abdul Q. Malik, M.D., et al.,
Plaintiffs-Appellants,

-against-

Ultraline Medical Testing, P.C., et al.,
Defendants,

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

- - - - -

Abdul Q. Malik, M.D., et al.,
Plaintiffs-Appellants,

-against-

Excelsior Medical IPA, LLC
Defendant-Respondent.

- - - - -

Abdul Q. Malik, M.D., et al.,
Plaintiffs-Appellants,

-against-

Empire HealthChoice HMO, Inc., et al.,
Defendants-Respondents.

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The motion court properly dismissed the complaints as plaintiffs failed to set forth any cognizable legal theories or claims (*see generally Nonnon v City of New York*, 9 NY3d 825 [2007]). Defendants had accepted Dr. Malik onto their health care provider panel and had no duty to protect him from third parties harming him with fraudulent claims filed in his name by performing handwriting or other analyses of those claims (*see Purdy v Public Adm'r of County of Westchester*, 72 NY2d 1 [1988]; *see also Hamilton v Beretta U.S.A. Corp.*, 96 NY2d 222 [2001]). While Dr. Malik, who was incorrectly indicted and mistakenly assumed to be part of the scheme, was a victim of the perpetrator of the fraud, so were defendants, who paid for false claims. Since defendants were also damaged by that fraud, plaintiffs' claims of aiding and abetting fraud, which require knowledge of the fraud are untenable. Nor can defendants' routine processing of the fraudulent transactions be found to be substantial assistance (*see McBride v KPMG Intl.*, 135 AD3d 576 [1st Dept 2016]).

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Office of the Medicaid Inspector General were determinations under the statutes and, if the legislature had wished to require a conviction for that exclusion, it would have so stated (*see Kuzmich v 50 Murray St. Acquisition LLC*, 34 NY3d 84 [2019]).

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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: NOVEMBER 19, 2019

DEPUTY CLERK