SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

OCTOBER 22, 2019

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Acosta, P.J., Manzanet-Daniels, Mazzarelli, Webber, Moulton, JJ.

9906-
9906A-
9906B USI Systems AG, Index 152870/16
Plaintiff-Respondent,

-against-

Alexander Gliklad,
Defendant-Appellant.

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Winston & Strawn, LLP, New York (W. Gordon Dobie of the bar of the State of Illinois, admitted pro hac vice, of counsel), for appellant.

Becker, Glynn, Muffly, Chassin & Hosinski LLP, New York (Jordan E. Stern of counsel), for respondent.

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Appeals from orders, Supreme Court, New York County (Gerald Lebovits, J.), entered June 13, 2017, September 26, 2017, and July 26, 2018, which, to the extent appealed from as limited by the briefs, granted plaintiff's motion for summary judgment recognizing, under CPLR article 53, a Swiss judgment issued against defendant, awarded plaintiff a money judgment, dismissed defendant's counterclaims, and denied defendant's motion for leave to renew, deemed appeals from the judgment, same court and

Justice, entered July 6, 2017, as amended, October 10, 2017, and, so considered, said judgment unanimously affirmed, with costs.

In arguing that the Swiss judgment may not be enforced in New York, defendant relies on CPLR 5304(a)(2), which bars recognition of a foreign judgment if the foreign court lacked personal jurisdiction over the defendant. He claims that this section applies because he was not properly served, and because the consent to jurisdiction of the Swiss courts relied on by plaintiff was contained in an allegedly fraudulent loan agreement. Plaintiff counters by pointing to CPLR 5305(a)(2), which provides that a lack of personal jurisdiction is not an impediment to a foreign judgment if "the defendant voluntarily appeared in the proceedings, other than for the purpose of protecting property seized or threatened with seizure in the proceedings or of contesting the jurisdiction of the court over him." Defendant, in turn, contends that section 5305(a)(2) does not apply because he voluntarily appeared in the Swiss proceeding solely for the purpose of contesting jurisdiction.

We apply New York, not Swiss, law, to our analysis of whether the Swiss court had personal jurisdiction over defendant (*see CIBC Mellon Trust Co. v Mora Hotel Corp.*, 296 AD2d 81, 96

[1st Dept 2002], *affd* 100 NY2d 215 [2003], *cert denied* 540 US 948 [2003]). In other words, the question is whether, under our jurisprudence, it would be abhorrent to notions of due process to hold that defendant was fairly made to stand before the Swiss court (*id.*). We find that it would not be. Notwithstanding defendant's claim that service on his attorney in Israel of pleadings in the Swiss proceeding was inadequate because he did not reside in Israel at the time, he cannot avoid the fact that the attorney appeared in the proceeding. Accordingly, defendant had notice of the claims against him sufficient to satisfy due process (*see Landauer Ltd. v Joe Monani Fish Co., Inc.* (22 NY3d 1130, 1131-1132 [2014]). Further, the underlying agreement contains defendant's consent to jurisdiction in Switzerland, and we decline to revisit the Swiss court's factual finding, based in part on the testimony of two witnesses under oath about defendant's participation in the loan, that the agreement was genuine.

In any event, whether the Swiss court had jurisdiction over defendant in the first instance is academic, since we find that he voluntarily submitted to the court's jurisdiction over him insofar as his appearance was not limited to that question. We reject defendant's argument that he had no choice but to address

the merits in his filings. That position is based on two letters sent to his attorney by the clerk of the Swiss court, after his initial objection to the court's jurisdiction, directing him to assert his substantive response to the complaint. Defendant relies on an affidavit by a Swiss professor of law, which ostensibly supports his claim that he had no choice but to abide by the directive. However, at no point does the professor assert that defendant would waive his jurisdictional objection if he failed to interpose a pleading addressing the merits of the complaint. Indeed, the plain language of the two letters from the clerk to defendant does not suggest that such was the case. Moreover, defendant's jurisdictional objection did not fit hand in glove with his substantive defense, thus undermining his "double relevance" argument. While his defense that the loan agreement was fabricated was certainly relevant to the jurisdictional defense insofar as the agreement contained the consent to litigation in the Swiss court, the answer went beyond that theory, venturing into defenses that assumed the validity of the loan agreement.

Defendant's assertion of counterclaims that were unrelated to plaintiff's claim and to his own affirmative defenses effected a waiver of his argument that he was not subject to personal

jurisdiction in New York (*Textile Tech. Exch. v Davis*, 81 NY2d 56, 58-59 [1993]; *Bell v Little*, 250 AD2d 485 [1st Dept 1998]). Accordingly, the requisite jurisdiction was established for purposes of this article 53 proceeding, in which defendant raised substantive challenges to recognition of the Swiss judgment (*see AlbaniaBEG Ambient Sh.p.k. v Enel S.p.A.*, 160 AD3d 93 [1st Dept 2018]). The facts and issues that underlie the affirmative defenses are wholly distinct from the facts and issues from which the counterclaims arise, in particular, alleged breach of contract, and alleged torts by Kristy AG and its co-director, Nikolai Makurin, in connection with the transfer of Kristy Oil's business to Kristy AG.

Given that the counterclaims do not arise out of the same transaction as alleged in the complaint, and they seek distinct damages, the doctrine of equitable recoupment, codified by CPLR 203(d), is unavailable to defendant (*see California Capital Equity, LLC v IJKG, LLC*, 151 AD3d 650 [1st Dept 2017]).

Finally, as the counterclaims concern circumstances, transactions, and corporate relationships that occurred or arose in Switzerland or Russia, and defendant alleges no facts to indicate any relationship between the counterclaims and New York, they are subject to dismissal on the basis of forum non

conveniens (*see Shin-Etsu Chem Co., Ltd. v ICICI Bank Ltd.*, 9 AD3d 171, 175-176 [1st Dept 2004]).

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: OCTOBER 22, 2019

CLERK

Acosta, P.J., Richter, Mazzarelli, Webber, Kern, JJ.

10136 In re Tyrone Nichols, Index 101204/17
Petitioner-Appellant,

-against-

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

_____

Tyrone Nichols, appellant pro se.

Zachary W. Carter, Corporation Counsel, New York (Kevin Osowski of counsel), for respondents.

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Judgment, Supreme Court, New York County (Carmen Victoria St. George, J.), entered May 8, 2018, denying the petition to annul the determination of respondent New York City Department of Buildings, dated April 27, 2017, which denied petitioner's application for renewal of his Site Safety Coordinator certificate, and dismissing the proceeding brought pursuant to CPLR article 78, unanimously affirmed, without costs.

The denial of petitioner's application to renew his Site Safety Coordinator (SSC) certification (*see* Administrative Code of City of NY § 3310.5) on the ground that petitioner made material false statements and demonstrated poor moral character in his original application for certification (*see* Administrative Code § 28-401.19[2], [13]) has a rational basis (*see Matter of*

Cambridge v Commissioner of N.Y. City Dept. of Bldgs., 14 AD3d 373 [1st Dept 2005]*; Matter of Peckham v Calogero*, 12 NY3d 424, 431 [2009]). In his initial application, petitioner was required to disclose whether any "licenses/certifications/registrations issued to [him]" had ever been revoked. Petitioner failed to report that he had been authorized as an OSHA outreach trainer and that his authorization had been revoked because he failed to comply with OSHA requirements and falsified safety certificates. While petitioner's OSHA credentials may not have been labeled a license, certification, or registration, his OSHA responsibilities were substantially similar to those of an SSC (*see* Administrative Code §§ 3310.8.1-8.6). Therefore, respondent rationally concluded that petitioner was required to disclose the revocation of those credentials. Moreover, respondent rationally concluded that petitioner exhibited poor moral character by failing to disclose OSHA's determination that he falsified agency documents (*see e.g. Matter of Fronshtein v Chandler*, 150 AD3d 552 [1st Dept 2017], *lv denied* 30 NY3d 910 [2018]).

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

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

ENTERED: OCTOBER 22, 2019

CLERK

Acosta, P.J., Richter, Mazzarelli, Webber, Kern, JJ.

10137 In re Anthony J.,
Petitioner-Appellant,

-against-

Bayyinah G.,
Respondent-Respondent.

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

Kenneth M. Tucillo, Hastings on Hudson, attorney for the child.

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Order, Family Court, Bronx County (Jeanette Madrid, Referee), entered on or about August 14, 2018, which dismissed the petition to modify custody, unanimously affirmed, without costs.

Family Court properly dismissed the petition upon finding that it did not possess exclusive continuing jurisdiction pursuant to Domestic Relations Law § 76-a. It was clear from the record that petitioner did not reside in New York, that the child did not reside in New York and had not for at least a year and a half, that the child had been in the care and custody of a person acting as his parent (his grandmother) in Minnesota before the court's ruling, and that neither petitioner nor the child had any substantial connections to the state.

Family Court properly analyzed whether the child maintained a significant connection with New York as well as whether there is evidence in New York concerning the child's "'care, protection, training, and personal relationships'" (*Matter of Brinkley v Flood*, 173 AD3d 858, 859 [2d Dept 2019], quoting Domestic Relations Law § 76-a[1][a]).

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

ENTERED: OCTOBER 22, 2019

CLERK

Acosta, P.J., Richter, Mazzarelli, Webber, Kern, JJ.

10138 Kerlin De Los Santos, Index 23329/16E
Plaintiff-Appellant,

-against-

Ramon Pena Basilio,
Defendant-Respondent.

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Alpert, Slobin & Rubenstein, LLP, Bronx (Morton Alpert of counsel), for appellant.

Robert D. Grace, Brooklyn, for respondent.

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Order, Supreme Court, Bronx County (John R. Higgitt, J.), entered October 3, 2018, which, to the extent appealed from as limited by the briefs, granted defendant's motion for summary judgment dismissing the claims of "permanent consequential" and "significant" limitation of use of the right shoulder, cervical spine, and lumbar spine (Insurance Law § 5102[d]), unanimously modified, on the law, to deny the motion as to the claims of "significant limitation of use," and otherwise affirmed, without costs.

Defendant established prima facie that plaintiff did not sustain a serious injury as a result of the accident through the affirmed report of an emergency medicine physician, who opined that plaintiff's EMT and emergency room hospital records were

inconsistent with the claimed injuries to plaintiff's right shoulder and spine (*see Streety v Toure*, 173 AD3d 462 [1st Dept 2019]; *Hayes v Gaceur*, 162 AD3d 437, 438 [1st Dept 2018]).

In opposition, plaintiff raised an issue of fact by submitting affirmed medical reports of his treating physicians, who opined that the injuries were causally related to the accident (*see Yuen v Arka Memory Cab Corp.*, 80 AD3d 481, 482 [1st Dept 2011]; *Lavali v Lavali*, 89 AD3d 574, 575 [1st Dept 2011]). The physicians' reports, documenting symptoms such as spasms, and providing quantified range of motion restrictions as compared to normal, are sufficient to demonstrate continuing limitations, notwithstanding that the doctors did not specify the instrument used to measure range of motion (*see Frias v Son Tien Liu*, 107 AD3d 589, 589 [1st Dept 2013]; *Lavali*, 89 AD3d at 575).

Plaintiff's physicians were not required to explain the findings of a No Fault examiner who concluded that plaintiff's causally related injuries had resolved (*compare Nicholas v Cablevision Sys. Corp.*, 116 AD3d 567, 568 [1st Dept 2014] [no issue of fact raised where treating physician failed to explain inconsistency in his own earlier findings and his present findings]). The physicians' reports detailing continuous treatment for continuing pain and persistent limitations for more

than a year after the accident raise an issue of fact as to whether the injuries were "significant" within the meaning of Insurance Law § 5102(d) (*see Kone v Rodriguez*, 107 AD3d 537, 538 [1st Dept 2013]). However, because he did not submit evidence of a recent examination finding limitations in range of motion, plaintiff failed to raise an issue of fact as to limitations of a permanent nature.

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

ENTERED: OCTOBER 22, 2019

CLERK

Acosta, P.J., Richter, Mazzarelli, Webber, Kern, JJ.

10139 Muhammed Cromedy, Index 309450/12
Plaintiff-Appellant,

-against-

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

_____

Sivin & Miller, LLP, New York (Glenn D. Miller of counsel), for appellant.

Georgia M. Pestana, Acting Corporation Counsel (Ingrid R. Gustafson of counsel), for respondents.

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Order, Supreme Court, Bronx County (Fernando Tapia, J.), entered on or about April 15, 2019, which denied plaintiff's motion pursuant to CPLR 4404 to set aside a directed verdict in favor of defendants and for a new trial on his denial of a fair trial claim under 42 USC § 1983, unanimously reversed, on the law, without costs, and the motion granted.

The denial of a fair trial claim is a stand alone cause of action (*see e.g. Garnett v Undercover Officer C0039*, 838 F3d 265, 278-279 [2d Cir 2016]), which should not have been dismissed prior to the conclusion of plaintiff's case in chief. CPLR 4401 permits a party to move for a directed verdict "after the close of the evidence presented by an opposing party with respect to such cause of action or issue." "[I]t is reversible error to

grant a motion for a directed verdict prior to the close of the party's case against whom a directed verdict is sought" (*Griffin v Clinton Green S., LLC*, 98 AD3d 41, 44 [1st Dept 2012]), even if the ultimate success of a plaintiff's cause of action is unlikely (*see 11 Essex St. Corp. v Tower Ins. Co. of N.Y.*, 153 AD3d 1190, 1195 [1st Dept 2017]).

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

ENTERED: OCTOBER 22, 2019

CLERK

Acosta, P.J., Richter, Mazzarelli, Webber, Kern, JJ.

10140 Jose Bautista, Index 21446/18E
Plaintiff-Respondent,

-against-

Hach & Rose, LLP,
Defendant-Appellant,

Hach Rose Schirripa & Cheverie LLP,
et al.,
Defendants.

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

Massimo & Panetta, P.C., Mineola (Nicholas J. Massimo of counsel), for respondent.

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Order, Supreme Court, Bronx County (Lucindo Suarez, J.), entered October 26, 2018, which, to the extent appealed from as limited by the briefs, denied defendant Hach & Rose, LLP's (defendant) motion to dismiss plaintiff's cause of action for legal malpractice against it, unanimously affirmed, without costs.

We decline to entertain defendant's arguments, which were improperly raised for the first time on appeal.

Were we to reach those arguments, we would nevertheless find that plaintiff's allegations supported an inference of proximate causation and the documentary evidence did not refute those

allegations (CPLR 3211[a][1], [7]; *Brooks v Lewin*, 21 AD3d 731, 734 [1st Dept 2005], *lv denied* 6 NY3d 713 [2006]; *cf. Somma v Dansker & Aspromonte Assoc.*, 44 AD3d 376, 377 [1st Dept 2007]; *Alden v Brindisi, Murad, Brindisi, Pearlman, Julian & Pertz ["The People's Lawyer"]*, 91 AD3d 1311, 1311 [4th Dept 2012]).

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

ENTERED: OCTOBER 22, 2019

CLERK

Acosta, P.J., Richter, Mazzarelli, Webber, Kern, JJ.

10141 The People of the State of New York, Ind. 405/16
Respondent,

-against-

Isaiah Iyasere,
Defendant-Appellant.

_____

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

Darcel D. Clark, District Attorney, Bronx (Ryan J. Foley of counsel), for respondent.

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Judgment, Supreme Court, Bronx County (Shari R. Michels, J.), rendered December 1, 2017, convicting defendant, upon his plea of guilty, of menacing in the second degree, and sentencing him to a term of six months, with three years' probation, unanimously modified, on the law, to the extent of vacating the term of probation, and otherwise affirmed.

The People concede that defendant could not be lawfully sentenced on a misdemeanor conviction to both a term of imprisonment in excess of 60 days and a term of probation (Penal Law § 60.01[2][d]). Accordingly, we vacate the probation

component of the sentence. We decline to remand for a new sentencing, as requested by the People, in light of the fact that defendant has already been incarcerated for 11 months, which is close to the maximum sentence for this offense.

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

ENTERED: OCTOBER 22, 2019

CLERK

Acosta, P.J., Richter, Mazzarelli, Webber, Kern, JJ.

10143 Craig Crovato, Index 304191/10
Plaintiff, 83792/11
83835/12

-against-

H&M Hennes & Mauritz, L.P., et al.,
Defendants-Appellants,

Diversified Construction Corp., also known as Grandview Contracting Corp., et al.,
Defendants-Respondents.

- - - - -

JKT Construction, Inc.,
Third-Party Plaintiff-Appellant,

-against-

Superior Site Work, Inc., et al.,
Third-Party Defendants-Respondents,

Colony Insurance Company, et al.,
Third-Party Defendants.

- - - - -

H&M Hennes & Mauritz, L.P.,
Second Third-Party Plaintiff-Appellant,

-against-

Signature Floors, Inc.,
Second Third-Party Defendant-Respondent,

Colony Insurance Company, et al.,
Second Third-Party Defendants.

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Carol R. Finocchio, New York, for appellants.

Gordon Rees Scully Mansukhani, LLP, Harrison (Allyson A. Avila of counsel), for Diversified Construction Corp., and Superior Site Work, Inc., respondents.

Camacho Mauro Mulholland, LLP, New York (Anthony J. Buono of counsel), for Signature Floors, Inc., respondent.

Order, Supreme Court, Bronx County (Wilma Guzman, J.), entered on or about September 12, 2018, which, to the extent appealed from as limited by the briefs, denied the motion of defendants H&M Hennes & Mauritz (H&M) and JKT Construction, Inc (JKT) for summary judgment on their third-party claims and cross claims for contractual indemnity against Signature Floors, Inc. (Signature) and Superior Site Work, Inc. (Superior), unanimously modified, on the law, to grant JKT and H&M conditional summary judgment against Superior, and otherwise affirmed, without costs.

Questions of fact exist as to whether the signatory of the contract between JKT and Signature had authority, actual or apparent, to bind Signature, and, if not, whether Signature ratified the contract through subsequent behavior (*see Matter of Cologne Life Reins. Co. v Zurich Reins. [N. Am.]*, 286 AD2d 118 [1st Dept 2001]). There is conflicting deposition testimony regarding whether the individual who signed the contract had actual or apparent authority to bind Signature to the indemnity clause (*see DeSario v SL Green Mgt. LLC*, 105 AD3d 421 [1st Dept 2013]). Nor is Signature's conduct in performing the contract work dispositive evidence of ratification where Signature's

principal testified that the work was performed in accordance with a purchase order and specifications, which together contained the same scope of work and price (*cf. Mulitex USA, Inc. v Marvin Knitting Mills, Inc.*, 12 AD3d 169 [1st Dept 2004]).

However, the validity of Superior's indemnification contract with JKT and H&M is not contested. This agreement provides that Superior is obligated to indemnify JKT and H&M, but that indemnity is limited to Superior's negligence. As there are disputed issues of fact as to Superior's and JKT'S alleged negligence, JKT & H&M are entitled to conditional summary judgment on their claim for contractual indemnification against Superior (see *Giancola v Yale Club of New York City*, 168 AD3d 539 [1st Dept 2019]; *Auliano v 145 E. 15th St. Tenants Corp.*, 129 AD3d 469 [1st Dept 2015]).

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

ENTERED: OCTOBER 22, 2019

CLERK

Acosta, P.J., Richter, Mazzarelli, Webber, Kern, JJ.

10144 Yefri Arias, Index 302530/14
Plaintiff-Appellant,

-against-

Alexander Martinez, et al.,
Defendants-Respondents.

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Bergman, Bergman, Fields & Lamonsoff, LLP, Hicksville (Michael E. Bergman of counsel), for appellant.

Law Offices of Moira Doherty, P.C., Bethpage (Charles R. Gueli of counsel), for Alexander Martinez, respondent.

Robert D. Grace, Brooklyn, for DTG Enterprise Inc. and Luis A. Marcial, respondents.

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Order, Supreme Court, Bronx County (John R. Higgitt, J.), entered on or about September 25, 2018, which granted defendants' motion and cross motion for summary judgment dismissing the complaint for lack of a serious injury within the meaning of Insurance Law § 5102(d), unanimously modified, on the law, to deny the motions as to plaintiff's claim of significant limitation of use of the lumbar spine, and otherwise affirmed, without costs.

Plaintiff alleges that he sustained serious injuries to his lumbar spine and right knee as the result of a motor vehicle accident. Defendants established prima facie that plaintiff did not suffer either a permanent consequential limitation of use or

a significant limitation of use of either claimed body part through the affirmed reports of their expert radiologist, who opined that the MRIs of those body parts showed no evidence of injury (*see Pastora L. v Diallo*, 167 AD3d 424, 424 [1st Dept 2018]; *Hernandez v Marcano*, 161 AD3d 676, 677 [1st Dept 2018]), and their emergency medicine physician, who opined that plaintiff's emergency room records were inconsistent with his claimed traumatic injuries (*see Hayes v Gaceur*, 162 AD3d 437, 438 [1st Dept 2018]; *Moore-Brown v Sofi Hacking Corp.*, 151 AD3d 567, 567 [1st Dept 2017]). Defendants also demonstrated that plaintiff effectively ceased all treatment for his claimed injuries following a discectomy several months after the accident, which shifted the burden to plaintiff to provide a reasonable explanation (*see Pommells v Perez*, 4 NY3d 566, 574 [2005]; *Jackson v Doe*, 173 AD3d 505, 506 [1st Dept 2019]).

In opposition, plaintiff failed to raise a triable issue of fact as to his claimed right knee injury since he submitted no admissible medical evidence concerning that body part (*see Pouchie v Pichardo*, 173 AD3d 643, 644 [1st Dept 2019]). As to his claimed lumbar spine injury, plaintiff offered no explanation for his cessation of treatment after undergoing surgery on his lumbar spine, which interrupts the chain of causation and renders

his treating physician's finding of permanency speculative (*see Holmes v Brini Tr. Inc.*, 123 AD3d 628, 628-629 [1st Dept 2014]; *see also Jackson*, 173 AD3d at 506; *Alverio v Martinez*, 160 AD3d 454 [1st Dept 2018]).

However, plaintiff raised a triable issue of fact as to whether he suffered a "significant limitation" of use of the lumbar spine through the affirmation of his treating physician, who documented limitations in range of motion at an examination after the accident, opined that plaintiff's MRIs showed disc bulges and a herniation for which surgery was indicated, and causally related the conditions to the accident (*see Hayes*, 162 AD3d at 438; *Holmes v Brini Tr. Inc.*, 123 AD3d at 628-629; *Paulling v City Car & Limousine Servs., Inc.*, 155 AD3d 481, 481 [1st Dept 2017]; *Mejia v Ramos*, 124 AD3d 449, 450 [1st Dept 2015]; *see generally Vasquez v Almanzar*, 107 AD3d 538, 539 [1st Dept 2013] ["a significant limitation . . . need not be permanent in order to constitute a serious injury"]).

Should a jury determine that plaintiff has met the threshold for serious injury, it may award damages for any other "injuries causally related to the accident, even those not meeting the serious injury threshold" (*Pouchie*, 173 AD3d at 645; *see Rubin v SMS Taxi Corp.*, 71 AD3d 548, 549 [1st Dept 2010]).

Finally, defendants established their prima facie entitlement to dismissal of plaintiff's 90/180-day claim through the submission of plaintiff's deposition testimony, in which he testified that he missed only one week of work following the accident (*see Pouchie*, 173 AD3d at 645). In opposition, plaintiff did not submit any evidence sufficient to raise an issue of fact (*see id.; Rosa-Diaz v Maria Auto Corp.*, 79 AD3d 463, 464 [1st Dept 2010]).

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

ENTERED: OCTOBER 22, 2019

CLERK

Acosta, P.J., Richter, Mazzarelli, Webber, Kern, JJ.

10145 In re Cindy F.,
Petitioner-Respondent,

-against-

Aswad B.S.,
Respondent-Appellant.

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The Law Offices of Salihah R. Denman, PLLC, Harrison (Salihah R. Denman of counsel), for appellant.

Larry S. Bachner, New York, for respondent.

Leslie S. Lowenstein, Woodmere, attorney for the child.

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Order, Family Court, Bronx County (Aija M. Tingling, J.), entered on or about September 21, 2018, which, following a hearing, granted the petition to relocate with the parties' child from the Bronx to Edison, New Jersey, unanimously affirmed, without costs.

While the petition is styled in terms of "modification," petitioner mother actually seeks permission to relocate with the child pursuant to the terms of the initial order of custody, which provides that she will be permitted to move outside of New York City if she obtains respondent father's consent or a court order. Family Court correctly found that therefore petitioner did not have to show a change of circumstances (*see Matter of Sergei P. v Sofia M.*, 44 AD3d 490 [1st Dept 2007]), as respondent

urges, and that in any event such a change has occurred, namely, that the child, who was two when the original order was entered, is now of school age, with new needs related thereto.

Upon consideration of the relevant facts and circumstances, and placing predominant emphasis on what is most likely to serve the child's best interests (*see Matter of Tropea v Tropea*, 87 NY2d 727, 739 [1996]), the court providently granted petitioner permission to relocate. There is no reason for us to disturb the court's credibility determinations (*see Matter of Mildred S.G. v Mark G.*, 62 AD3d 460 [1st Dept 2009]). The hearing evidence establishes that the move to Edison will serve the child's best interests. Petitioner and the child are presently living in a cramped one-bedroom apartment with petitioner's mother, in an area that petitioner believes is not child-friendly and is potentially dangerous. The move to Edison will provide the opportunity for the child to attend a good public school that provides busing, and petitioner will be able to maintain full-time employment without having to transport the child to and from school.

Respondent argues persuasively that he will be deprived of some contact with the child if she moves and that FaceTime contact is not an equal substitute for physical contact.

However, while the rights of the custodial and noncustodial parents are significant factors that must be considered in a relocation case, "it is the rights and needs of the child that must be accorded the greatest weight" (*Matter of Tropea*, 87 NY2d at 739). The child has indicated that she wishes to move the short distance to Edison, and petitioner testified that she would assume the burden of transporting the child to and from visits with respondent, who will not be deprived of "meaningful access" (*id.*).

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

ENTERED: OCTOBER 22, 2019

CLERK

Acosta, P.J., Richter, Mazzarelli, Webber, Kern, JJ.

10148 Alvogen Group Holdings LLC, et al., Index 653930/18
Plaintiffs-Appellants,

-against-

Bayer Pharma AG, et al.,
Defendants-Respondents.

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Baker Botts L.L.P., New York (Earl B. Austin of counsel), for appellants.

Hughes Hubbard & Reed LLP, New York (Robb W. Patryk of counsel), for respondents.

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Order, Supreme Court, New York County (Jennifer G. Schecter, J.), entered on or about December 21, 2018, which, insofar as appealed from, granted defendants' motion to dismiss the first and third causes of action pursuant to CPLR 3211, unanimously affirmed, without costs.

The first cause of action, seeking rescission of the Asset Sale and Purchase Agreement (APA), was correctly dismissed because section 9.10 of the APA states that, except in cases of fraud, willful misconduct, or intentional misrepresentation – which plaintiffs do not allege – "the indemnification provisions of this Article 9 shall be [plaintiffs'] sole and exclusive remedy . . . for all matters arising under or in connection with this Agreement and the Transaction Documents" (*see Rubinstein v*

Rubinstein, 23 NY2d 293, 298 [1968]; *L.K. Sta. Group, LLC v Quantek Media, LLC*, 62 AD3d 487, 493 [1st Dept 2009]); *U.S. Bank N.A. v DLJ Mtge. Capital, Inc.*, 42 Misc 3d 1213[A], 2014 NY Slip Op 50029[U], *4-5 [Sup Ct, NY County 2014], *affd on other grounds* 121 AD3d 535 [1st Dept 2014]).

The third cause of action, which alleges breach of the Manufacturing and Supply Agreement (MSA), was correctly dismissed because the forum selection clause in the MSA says, "Exclusive place of jurisdiction under this Agreement shall be Berlin" (all-caps omitted]) (*see e.g. Sterling Natl. Bank v Eastern Shipping Worldwide, Inc.*, 35 AD3d 222 [1st Dept 2006]). Plaintiffs' argument that Alvogen Malta Operations, Ltd. (Alvogen Malta), the only plaintiff who is a party to the MSA, should be allowed to litigate the breach of the MSA claim in New York because the MSA is incorporated into the APA, which chooses New York as a forum, is without merit and would lead to two contradictory forum selection clauses. Such a result should be avoided (*see generally Matter of Lipper Holdings v Trident Holdings*, 1 AD3d 170, 171 [1st Dept 2003]). Furthermore, Alvogen Malta is not a party to the APA, and it is not a third-party beneficiary of that contract's forum selection clause, so it may not make use of the clause.

While the order does not specify whether the dismissal is with or without prejudice, defendants' briefs to the motion court indicate that they sought dismissal of the rescission cause of action with prejudice and dismissal of the breach of the MSA cause of action without prejudice.

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

ENTERED: OCTOBER 22, 2019

CLERK

Acosta, P.J., Richter, Mazzarelli, Webber, Kern, JJ.

10150 The People of the State of New York, Ind. 1736/15
Respondent,

-against-

Elliot Carter,
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 (Susan Gliner of counsel), for respondent.

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Judgment, Supreme Court, New York County (Roger S. Hayes, J.), rendered September 16, 2016, convicting defendant, after a jury trial, of rape in the first degree, and sentencing him to a term of 15 years, unanimously affirmed.

The court properly admitted the victim's 911 call as an excited utterance (*see generally People v Johnson*, 1 NY3d 302, 306 [2003]). While the victim made two brief intervening phone calls, neither suggested fabrication or any indication that she was no longer under the stress of the event. The violent and shocking nature of the incident, the short amount of time that passed between the incident and the 911 call, the fact that the victim was still in the vicinity and still feared her attacker when she made the call, and the court's observation as to her

agitated state during the call, justify the conclusion that her statements during the 911 call were not made under the impetus of studied reflection (*see People v Brown*, 70 NY2d 513, 520-522 [1987]). In any event, we find that any error was harmless. The victim testified at trial, and her credibility was thoroughly tested through cross-examination (*People v Ludwig*, 24 NY3d 221, 230 [2014]).

Finally, we find the testimony of an analyst that linked defendant's DNA to DNA found on the victim did not violate defendant's right of confrontation. The testimony of the analyst demonstrated her own "independent analysis on the raw data" to make the comparison, and the analysis was not merely "a conduit for the conclusions of others" (*People v John*, 27 NY3d 294, 315 [2016]). Regardless of whether DNA evidence should have been admitted, any error was harmless. Defendant's identity, which was established by other evidence, was not in dispute since defendant argued that the case turned primarily on the issue of consent and not identity. The DNA evidence had no bearing on any contested issue at trial. We find unpersuasive defendant's present assertion that his strategy might have been different had the DNA evidence not been admitted.

We perceive no basis for reducing the sentence.

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

ENTERED: OCTOBER 22, 2019

CLERK

Acosta, P.J., Richter, Mazzarelli, Webber, Kern, JJ.

10151 The People of the State of New York, Ind. 5346/16
Respondent,

-against-

James Canty,
Defendant-Appellant.

_____

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

Cyrus R. Vance, Jr., District Attorney, New York (Katherine Kulkarni 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 (Anthony Ferrara, J.), rendered August 21, 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: OCTOBER 22, 2019

CLERK

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

Acosta, P.J., Richter, Mazzarelli, Webber, Kern, JJ.

10152 The People of the State of New York, Ind. 572/17
Respondent,

-against-

Eliezel Diaz,
Defendant-Appellant.

_____

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

Darcel D. Clark, District Attorney, Bronx (Jennifer Lee of counsel), for respondent.

_____

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, Bronx County (Shari Michels, J.), rendered February 6, 2018,

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

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

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

ENTERED: OCTOBER 22, 2019

CLERK

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

Acosta, P.J., Richter, Mazzarelli, Webber, Kern, JJ.

10153 Martin Topoli, et al., Index 150062/16
Plaintiffs-Respondents,

-against-

77 Bleecker Street Corp.,
Defendant-Respondent-Appellant,

Greenlight Construction Management Corp.,
Defendant-Appellant-Respondent.

- - - - -

77 Bleecker Street Corp.,
Third-Party Plaintiff-Respondent-Appellant,

-against-

Rebecca Dixon, et al.,
Third-Party Defendants-Respondents.

_____

Carol R. Finocchio, New York (Marie R. Hodukavich of counsel), for appellant-respondent.

Mischel & Horn, P.C., New York (Lauren E. Bryant of counsel), for respondent-appellant.

Lurie, Ilchert, MacDonnell & Ryan, LLP, New York (George W. Ilchert of counsel), for Martin Topoli and Dagmara Topoli, respondents.

Mead, Hecht, Conklin & Gallagher, LLP, White Plains (Elizabeth M. Hecht of counsel), for Rebecca Dixon and Adam Dixon, respondents.

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Order, Supreme Court, New York County (Carol R. Edmead, J.), entered January 29, 2019, which, to the extent appealed from as limited by the briefs, denied defendants-appellants' motions for summary judgment dismissing the complaint as against them,

unanimously reversed, on the law, without costs, and the motions granted. The Clerk is directed to enter judgment accordingly.

Because plaintiff Martin Topoli's work installing window shades at the time of the accident does not constitute "altering" within the meaning of Labor Law § 240(1), that claim is dismissed (*Amendola v Rheedlen 125th St., LLC*, 105 AD3d 426, 426-427 [1st Dept 2013]).

The Labor Law § 241(6) claim is also dismissed, since plaintiff's work is separate and distinct from the larger construction project (*id.* at 427). Third-party defendants and apartment owners, Rebecca Dixon and Adam Dixon, modified the contract with general contractor Greenlight Construction Management Corp. to remove the provision and installation of window treatments from the scope of its work. The Dixons directly contracted with plaintiff's employer for the installation of the window shades after the construction work was completed and they had moved in to the apartment. Greenlight's return to the work site after the completion of construction, done to accommodate the Dixons' new desire for larger window valances, was limited in nature and separate from plaintiff's work.

The claims for violation of Labor Law § 200 and common-law negligence are dismissed. Plaintiff failed to establish, prima facie negligence on the part of Greenlight or the co-op, 77 Bleecker Street Corp.

Since the underlying claims against the co-op are dismissed, we need not address its alternative argument concerning its contractual indemnification claim asserted against the Dixons.

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

ENTERED: OCTOBER 22, 2019

CLERK

Acosta, P.J., Richter, Mazzarelli, Webber, Kern, JJ.

10155N-
10155NA Burton S. Sultan,
Plaintiff-Appellant,

-against-

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

Index 101077/17

Burton S. Sultan, appellant pro se.

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

Order, Supreme Court, New York County (Verna L. Saunders, J.), entered August 21, 2018, which granted the Department of Finance defendants' (Finance) motion to dismiss the complaint for the alleged wrongful release of funds which were held on deposit in connection with another related case, unanimously affirmed, without costs. Appeal from order, same court and Justice, entered December 4, 2018, unanimously dismissed, without costs, as abandoned.

CPLR 2608 states in relevant part that "[n]o liability shall attach to a custodian of property paid into court because of a payment made by him in good faith in accordance with the direction of an order of the court or as provided in rule 2607." The subject undertaking was made in connection with a December

2012 order, an entirely different matter from this litigation against Finance. As the court correctly observed, all appeals in that matter had been exhausted by the time of the April 16 order (*see Connery v Sultan*, 129 AD3d 455 [1st Dept 2015], *lv dismissed in part and denied in part* 26 NY3d 1080 [2015]). Thus, Finance complied with the April 16 order in "good faith" since the order was proper on its face, and there was no record evidence that showed improper procurement or fraud (Weinstein-Korn-Miller, NY Civ Prac CPLR ¶ 2608.02; *Matter of McNulty*, 68 Misc 92, 95 [Sup Ct, NY County 1910], *affd* 144 App Div 894 [1st Dept 1911]). Thus, the motion to dismiss was correctly granted based on statutory immunity pursuant to CPLR 2608 and for failure to state a cause of action based on Sultan's vague conclusory allegations (*see BDCM Fund Adviser, L.L.C. v Zenni*, 98 AD3d 915, 916 [1st Dept 2012]).

The December 4, 2018 order denying reargument was not appealable (*see Christian v Health & Hosps. Corp.*, 197 AD2d 481, 481 [1st Dept 1993]), and in any event was abandoned on appeal (*see McCabe v 148-57 Equities Co.*, 305 AD2d 231, 232 [1st Dept 2003]).

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

ENTERED: OCTOBER 22, 2019

CLERK

Friedman, J.P., Renwick, Tom, Gesmer, Oing, JJ.

9922 Raphael Haddock, Index 652781/15
Plaintiff-Respondent,

-against-

Idle Media Inc.
Defendant-Appellant.

_____

Adelman Matz, P.C., New York (David Marcus of counsel), for appellant.

Schlam Stone & Dolan LLP, New York (Joshua D. Wurtzel of counsel), for respondent.

_____

Order, Supreme Court, New York County (Melissa A. Crane, J.), entered on or about July 8, 2018, which denied defendant's motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

Summary judgment was properly denied in this breach of contract action. The record presents a number of outstanding issues of fact, including whether plaintiff was terminated for cause by virtue of defendant's May 8th letter or whether that letter merely served to notify plaintiff of defendant's contractual rights not to renew the parties' employment agreement and whether plaintiff was constructively terminated due to defendant's actions (*see S.J. Capelin Assoc. v Globe Mfg. Corp.*,

34 NY2d 338, 341 [1974]; *see also Doumbia v Moonlight Towing, Inc.*, 160 AD3d 554 [1st Dept 2018]).

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: OCTOBER 22, 2019

CLERK

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

10157 Clarence Williams, Index 25778/14E
Plaintiff-Appellant,

-against-

Laura Livery Corporation, et al.,
Defendants-Respondents.

_____

Ikhilov & Associates, Brooklyn (Ryan F. Blackmer of counsel), for appellant.

Robert D. Grace, Brooklyn, for respondents.

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Order, Supreme Court, Bronx County (John R. Higgitt, J.), entered April 17, 2019, which granted defendants' motion for summary judgment dismissing the complaint on the ground that plaintiff did not sustain a serious injury as defined in Insurance Law § 5102(d), unanimously affirmed, without costs.

Plaintiff alleges that he was riding his bicycle through an intersection when defendants' vehicle struck him in the right knee and knocked him to the ground. He complains of injuries to his right shoulder, right knee, neck, and lower back.

Defendants demonstrated prima facie that plaintiff did not sustain any serious injury causally related to the accident through the expert reports of a radiologist who found that plaintiff's X-rays and MRIs showed degenerative conditions and of an orthopedist who reviewed plaintiff's medical records and

opined they showed longstanding chronic conditions, not causally related to the accident, without any evidence of acute or traumatic injury (*see Rivera v Fernandez & Ulloa Auto Group*, 123 AD3d 509, 509-510 [1st Dept 2014], *affd* 25 NY3d 1222 [2015]; *Alvarez v NYLL Mgt. Ltd.*, 120 AD3d 1043, 1044 [1st Dept 2014], *affd* 24 NY3d 1191 [2015]). Contrary to plaintiff's argument, defendants' orthopedist could rely on plaintiff's unsworn medical records to satisfy their initial burden of showing that the plaintiff did not sustain a serious injury causally related to the accident (*see Newton v Drayton*, 305 AD2d 303, 304 [1st Dept 2003]; *see also Pommells v Perez*, 4 NY3d 566, 573 [2005]).

In opposition, plaintiff failed to raise an issue of fact. Some of the medical records and reports of his treating physicians contained a conclusory statement that the conditions were causally related to the accident, but none of them addressed the evidence of preexisting degenerative conditions shown in his own medical records or explained why they could not have been the cause of his conditions (*see Auquilla v Singh*, 162 AD3d 463, 464 [1st Dept 2018]; *Alvarez*, 120 AD3d at 1044; *cf. Fedorova v Kirkland*, 126 AD3d 624, 625-626 [1st Dept 2015] [plaintiff raised issue of fact through report of her surgeon who specifically addressed degenerative conditions of the knee and opined as to

causation]). Plaintiff's 90/180-day claim was correctly dismissed, given his deposition testimony that he was confined to his home for less than two weeks (*see Frias v Son Tien Liu*, 107 AD3d 589, 590 [1st Dept 2013]).

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

ENTERED: OCTOBER 22, 2019

CLERK

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

10158-
10158A-
10158B In re Jaheim B., and Others,

Children Under the Age of
Eighteen Years, etc.,

April M.,
Respondent-Appellant,

The Children's Village,
Petitioner-Respondent.

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

Rosin Steinhagen Mendel PLLC, New York (Douglas H. Reiniger of counsel), for respondent.

Karen Freedman, Lawyers for Children, Inc., New York (Shirim Nothenberg of counsel), attorney for the children.

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Orders, Family Court, New York County (Emily M. Olshanky, J.), entered on or about July 20, 2018, which, inter alia, upon findings of permanent neglect, terminated respondent mother's parental rights to the subject children and committed custody and guardianship of the children to petitioner agency and the Commissioner of Administration for Children's Services for the purpose of adoption, unanimously affirmed, without costs.

Clear and convincing evidence supports the findings of permanent neglect (Social Services Law § 384-b[7]). The agency

exerted diligent efforts to strengthen the mother's relationship with the children by referring her to parenting skills for special needs children, providing her with a child care voucher, offering assistance with submitting a public housing application, and scheduling and facilitating the mother's visitation with the children (*see e.g. Matter of Giulio D. [Sylvia L.]*, 150 AD3d 580, 581 [1st Dept 2017]).

Despite these diligent efforts, the mother failed to substantially plan for the children's future. The record shows that the mother failed to secure permanent housing, failed to gain insight into her parenting problems, continued to minimize the extent of the children's special needs and remained incapable of de-escalating the children's tantrums when they occurred (*see Matter of Justice N.L.J. [Ebony J.]*, 157 AD3d 461, 462 [1st Dept 2018]; *Matter of Angelina Jessie Pierre L. [Anne Elizabeth Pierre L.]*, 114 AD3d 471 [1st Dept 2014], *lv denied* 23 NY3d 901 [2014]).

A preponderance of the evidence supports the determination that termination of the mother's parental rights was in the best interests of the children (*see generally Matter of Star Leslie W.*, 63 NY2d 136, 147-148 [1984]). The children were in the same stable foster home for eight years, where their extensive special

needs were addressed, and the foster mother wished to adopt them (*see Matter of Karin R. [Delinda R.]*, 146 AD3d 526, 527-528 [1st Dept 2017], *lv denied* 29 NY3d 903 [2017]).

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

ENTERED: OCTOBER 22, 2019

CLERK

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

10159 21st Century Fuel, LLC, Index 24443/17E
Plaintiff-Appellant,

-against-

1945 Bartow Ave. Corp., et al.,
Defendants-Respondents.

_____

Nicholas J. Damadeo, P.C., Huntington (Nicholas J. Damadeo of counsel), for appellant.

Sperber Denenberg & Kahan, P.C., New York (Jacqueline Handel-Harbour of counsel), for respondents.

_____

Order, Supreme County, Bronx County (Alison Y. Tuitt, J.), entered March 12, 2019, which denied plaintiff's motion for summary judgment, unanimously affirmed, with costs.

Summary judgment was properly denied in this action for specific performance of an option to purchase premises under a commercial lease. We are unable to determine at this point in the litigation whether the 1994 or the 2009 lease controls the parties' relationship. The contradictory nature of the agreements at issue, as well as evidence that plaintiff had forged another agreement purportedly signed by defendants and defendants' statement that the signature of its principal on certain of the agreements was a forgery, sufficiently raised an

issue of fact (*cf. Zuckerman v City of New York*, 49 NY2d 557, 562-563 [1980]).

Defendants' averments and submissions that plaintiff had forged the documents in connection with a scheme to deceive Sunoco into paying a fuel credit and also to avoid paying a share of that credit to defendants were sufficiently related to the litigation to raise a triable issue on the defense of unclean hands (*see Levy v Braverman*, 24 AD2d 430 [1st Dept 1965]). Furthermore, a triable issue exists with respect to whether plaintiff's subletting of the premises constituted a material breach of the alleged lease.

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

ENTERED: OCTOBER 22, 2019

CLERK

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

10160 In re Euralee Childs, Index 101688/17
Petitioner-Appellant,

-against-

The Board of Education of the City School District of the City of New York, et al.,
Respondents-Respondents.

_____

Giles Law Firm LLC, New York (Joshua Parkhurst of counsel), for appellant.

Georgia M. Pestana, Acting Corporation Counsel, New York (Ashley R. Garman of counsel), for respondents.

_____

Judgment, Supreme Court, New York County (Carol R. Edmead, J.), entered August 20, 2018, denying the petition seeking, inter alia, to annul respondents' determination, dated June 1, 2017, which discontinued petitioner's probationary employment, and granting respondents' cross motion to dismiss the proceeding brought pursuant to CPLR article 78, unanimously affirmed, without costs.

The court did not apply an incorrect standard in determining the cross motion (*see Matter of Swinton v Safir*, 93 NY2d 758, 762-763 [1999]). A probationary employee may be terminated without a hearing for any reason or no reason at all, as long as the dismissal was not unlawful or in bad faith (*see e.g. Matter of Duncan v Kelly*, 9 NY3d 1024 [2008]). Here, petitioner alleged

no facts to show that his termination was for an improper reason and, absent such allegations, his characterization of his termination as retaliation and having been made in bad faith is speculative (*see e.g. Matter of Brown v Board of Educ. of the City Sch. Dist. of the City of N.Y.*, 156 AD3d 451, 452 [1st Dept 2017]). In fact, the record shows that petitioner's employment was terminated based on two incidents, which petitioner did not dispute, and an "Unsatisfactory" rating.

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

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

ENTERED: OCTOBER 22, 2019

CLERK

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

10161 Nasir Ali, Index 311165/11
Plaintiff-Appellant,

-against-

Sloan-Kettering Institute for
Cancer Research, et al.,
Defendants-Respondents,

Turner Construction Company,
Defendant.

- - - - -

Sloan-Kettering Institute for
Cancer Research, et al.,
Third-Party Plaintiffs,

-against-

CM Air Conditioning Contractors, Inc.,
Third-Party Defendant-Respondent.

_____

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

Dopf, P.C., New York (Martin B. Adams of counsel), for Sloan-Kettering Institute for Cancer Research, Memorial Hospital for Cancer and Allied Diseases, JGN Construction Corp., JGN Construction Management, LLC, Memorial Sloan Kettering Cancer Center, and Memorial Sloan Kettering Institute for Cancer Research, respondents.

Lester Schwab Katz & Dwyer, LLP, New York (Paul M. Tarr of counsel), for CM Air Conditioning Contractors, Inc., respondent.

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Order, Supreme Court, Bronx County (Kenneth L. Thompson, Jr., J.), entered on or about August 21, 2018, which, to the extent appealed from, granted defendants-respondents' and third-

party defendant's motions for summary judgment dismissing the Labor Law §§ 240(1) and 241(6), claims and denied plaintiff's motion for partial summary judgment on the section 240(1) claim, unanimously modified, on the law, to deny defendants-respondents' and third-party defendant's motions as to the Labor Law § 240(1) claim, and grant plaintiff's motion, and otherwise affirmed, without costs.

Plaintiff was injured when an air conditioning system coil that weighed at least 300 pounds and was being transported secured to two dollies fell on his leg as he and three coworkers unloaded it from a truck. After plaintiff and his coworkers had brought the coil to ground level on the truck's lift gate and were attempting to move it off the lift gate, a wheel of a dolly became caught in a gap on the lift gate, and the coil tipped over.

In view of the weight of the coil and the amount of force it was able to generate, even in falling a relatively short distance, plaintiff's injury resulted from a failure to provide protection required by Labor Law § 240(1) against a risk arising from a significant elevation differential (*see Runner v New York Stock Exch., Inc.*, 13 NY3d 599, 604-605 [2009]; *Wilinski v 334 E. 92nd Hous. Dev. Fund Corp.*, 18 NY3d 1, 10 [2011]; *Marrero v 2075*

Holding Co. LLC, 106 AD3d 408, 409 [1st Dept 2013]). Moving the coil safely required either hoisting equipment or a device designed to secure the coil against tipping or falling over (*see Suwareh v State of New York*, 24 AD3d 380, 380-381 [1st Dept 2005]; *Grant v Solomon R. Guggenheim Museum*, 139 AD3d 583, 584 [1st Dept 2016]; *see also Runner*, 13 NY3d at 604). No such equipment was provided.

The Labor Law § 241(6) claim was correctly dismissed. Industrial Code (12 NYCRR) § 23-1.7(e)(1) is inapplicable as a predicate for liability under the statute because the lift gate of the truck was not a passageway (*see Quigley v Port Auth. of N.Y. & N.J.*, 168 AD3d 65, 67 [1st Dept 2018]; *DePaul v NY Brush LLC*, 120 AD3d 1046, 1047 [1st Dept 2014]). Industrial Code § 23-1.7(e)(2) is inapplicable because the accident was not caused by an accumulation of dirt or debris, scattered tools or materials, or a sharp projection. Industrial Code § 1.28(b) is inapplicable because the accident was not caused by a defect in the dolly

wheel, which the evidence shows was in good working order (*see* *Garcia v 95 Wall Assoc., LLC*, 116 AD3d 413 [1st Dept 2014]).

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

ENTERED: OCTOBER 22, 2019

CLERK

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

10162 The People of the State of New York, Ind. 5339/15
Respondent,

-against-

Robert Hammond,
Defendant-Appellant.

_____

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

Cyrus R. Vance, Jr., District Attorney, New York (Luis Morales 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 (Charles H. Solomon, J.), rendered September 15, 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: OCTOBER 22, 2019

CLERK

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

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

10163 Domingo Feliz Terc, Index 302163/16
Plaintiff-Appellant-Respondent,

-against-

535 Coster Realty Inc.,
Defendant-Respondent-Appellant.

_____

Chirico Law PLLC, Brooklyn (Vincent Chirico of counsel), for appellant-respondent.

Weiner, Millo, Morgan & Bonanno, LLC, New York (Bryan Lipsky of counsel), for respondent-appellant.

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Order, Supreme Court, Bronx County (Kenneth L. Thompson, Jr., J.), entered on or about May 7, 2018, which denied plaintiff's motion for partial summary judgment on his causes of action under Labor Law §§ 240(1) and 241(6), denied defendant's motion for summary judgment dismissing the complaint, and granted plaintiff summary judgment to the extent of dismissing defendant's tenth affirmative defense, unanimously affirmed, without costs.

Plaintiff's deposition testimony, that he was hired to dismantle portions of a 25-foot tall dust collecting tank on defendant's rooftop, which necessitated use of a ladder to access an opening in the tank that was approximately 14 feet above the roof's surface, established prima facie that he was engaged in an

activity protected under Labor Law § 240(1) at the time he fell off the ladder (*see Montalvo v J. Petrocelli Connstr., Inc.*, 8 AD3d 173, 175 [1st Dept 2004]; *Wasilewski v Museum of Modern Art*, 260 AD2d 271 [1st Dept 1999]). However, summary resolution of the Labor Law § 240(1) claim is precluded by the testimony of defendant's coworker, who raised factual issues as to whether plaintiff's assigned work entailed only nonstatutorily-protected cleaning or maintenance of a dust collecting tank (*see Soto v J. Crew, Inc.*, 21 NY3d 562, 568-569 [2013]; see *Luebke v MBI Group*, 122 AD3d 514, 515 [1st Dept 2014]).

Plaintiff's request for partial summary judgment on his Labor Law § 241(6) claims, which are founded on an alleged non-compliance with Industrial Code sections 23-1.21(b)(4)(i) and (iv), is unavailing. Plaintiff's evidence does not support a finding that the ladder at issue warranted being nailed or otherwise securely fastened or affixed due to use as a "regular means" of access between two levels of either a building or structure (12 NYCRR 23-1.21[b][4][i]). Further, it is unclear whether plaintiff was standing on a rung of the ladder that was at least 10 feet off the ground at the time of his fall, precluding a finding, as a matter of law, that 12 NYCRR 1.21(b)(4)(iv) was violated.

Defendant's affirmative defense that plaintiff was either its general employee or special employee, entitling it to dismissal of the complaint based on application of the exclusivity provisions in Workers' Compensation Law §§ 11 and 29(6), was properly dismissed. Plaintiff established that he was hired and paid by a nonparty building supply company, and injured while working under the direction and supervision of that building supply company. There is no evidence that defendant had a working relationship with plaintiff sufficient in kind and degree to support its contention that plaintiff had been transferred to serve as its special employee for this task (*see Gonzalez v Lovett Assoc.*, 228 AD2d 342 [1st Dept 1996]; *see Cardona v Ho-Ro Trucking Co., Inc.*, 83 AD3d 428, 429 [1st Dept 2011]; *Fung v Japan Airlines Co., Ltd.*, 9 NY3d 351, 358-360 [2007]).

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: OCTOBER 22, 2019

CLERK

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

10165 In re Doreen F.,
Petitioner-Appellant,

-against-

Fabricio M.,
Respondent-Respondent.

_____

The Law Offices of Salihah R. Denman, Harrison (Salihah R. Denman of counsel), for appellant.

Larry S. Bachner, New York, for respondent.

Kenneth M. Tuccillo, Hastings on Hudson, attorney for the children.

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Order, Family Court, New York County (Carol Goldstein, J.), entered on or about May 9, 2017, which, denied petitioner mother's request to relocate to Florida with the subject children, and dismissed her petition with prejudice, unanimously affirmed, without costs.

The Family Court's determination that relocation to Florida would not be in the children's best interests has a sound and substantial basis in the record (*see Matter of Tropea v Tropea*, 87 NY2d 727, 736 [1996]). The parties stipulated to the mother having primary physical custody of the children, and the father having visits every other weekend, and week-long visits during the winter and summer breaks. The record shows that the father

exercised every single weekend visit for over three years. It also shows that he exercised the week-long visits when the children were available. He testified that he and the children have a strong, loving relationship.

Petitioner mother seeks to relocate to Florida because her mother lives there and could provide some child care assistance. She testified that she has a part-time job in New York as a substitute daycare teacher. While the mother testified that she wanted to get a better paying job in Florida, enroll in college classes, and place the children in a charter school, she was unable to provide details regarding the steps she has taken or planned to take to accomplish those goals (*see Matter of Salena S. v Ahmad G.*, 152 AD3d 162, 163-164 [1st Dept 2017]).

Respondent father provided sound reasons for opposing the relocation, as it would limit the amount and quality of his contact with his children, even with liberal vacation visitation. The record shows that the mother had prevented the children from communicating with the father via phone calls, texts, or video calls in between visits. As such, any quality-of-life advantage realized by the relocation would not necessarily outweigh the disruption in the children's relationship with their father (*see Matter of Yamilly M.S. v Ricardo A.S.*, 137 AD3d 459, 459 [1st

Dept 2016]). While the attorney for the children asserts that the children wish to relocate, the preference of the children is not determinative, but rather a factor to be considered (*id.*; *Matter of Chery v Richardson*, 88 AD3d 788, 789 [2d Dept 2011]).

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

ENTERED: OCTOBER 22, 2019

CLERK

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

10166 The People of the State of New York, Ind. 4883/15
Respondent,

-against-

Frederick Carter,
Defendant-Appellant.

_____

Justine M. Luongo, The Legal Aid Society, New York (David Crow of counsel), and Malvina Nathanson, New York, for appellant.

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

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Judgment, Supreme Court, New York County (Anthony J. Ferrara, J.), rendered March 23, 2017, as amended June 14, 2017, convicting defendant, after a jury trial, of criminal possession of a weapon in the third degree and attempted grand larceny in the fourth degree, and sentencing him, as a second felony offender, to an aggregate term of 3½ to 7 years, unanimously affirmed.

The verdict was based on legally sufficient evidence and was not against the weight of the evidence. The evidence established that defendant possessed a razor "with intent to use it unlawfully against another" (Penal Law § 265.01[1]) when he used it to cut the sleeping victim's pocket in order to effectuate a larceny, thus using it "against another," that is, against the

clothed person of the victim. Defendant's arguments to the contrary are similar to arguments this Court rejected on a separately tried codefendant's appeal (*People v Brown*, 164 AD3d 1180 [1st Dept 2018], *lv denied* 32 NY3d 1169 [2019]), and we find no reason to reach a different result.

The court properly responded to a jury note when, after rereading the statutory elements and the requirement of proof beyond a reasonable doubt, it effectively charged the jury that the use of a razor as a tool to cut the victim's pocket would satisfy the "against another" requirement. This was in accordance with law, as this Court articulated on the codefendant's appeal (164 AD3d at 1180). The court also correctly informed the jury that clothing actually being worn is considered part of one's "person" (*see People Cheatham*, 168 AD2d 258 [1st Dept 1990]). Neither of these instructions usurped the jury's fact-finding function.

The challenged portions of the prosecutor's summation do not warrant reversal. To the extent the comments at issue could be viewed as shifting the burden of proof, any prejudice was avoided by the court's thorough curative instructions.

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

ENTERED: OCTOBER 22, 2019

CLERK

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

10168 USB Leasing LT, Index 25876/18E
Plaintiff-Appellant,

-against-

Maritza Altagracia Urena, et al.,
Defendants,

JR Inwood Parking & Dealer Corp.,
Defendant-Respondent.

_____

RAS Boriskin, LLC, Westbury (Joseph F. Battista of counsel), for appellant.

Anton Antomattei, Carmel, for respondent.

_____

Order, Supreme Court, Bronx County (Ruben Franco, J.), entered on or about June 19, 2018, which denied plaintiff's application for a stay of the auction of an automobile and for an order releasing the automobile to plaintiff, unanimously affirmed, without costs.

Although plaintiff, which was ordered to make personal service on or before May 29, 2018, may have complied with the strict terms of the interim stay order based its on nail-and-mail service in the afternoon of May 22, 2018 and its service on the Secretary of State on May 29, 2018, the court correctly denied the motion for a stay of the auction. Plaintiff was admittedly on notice that the auction was scheduled for 9:00 a.m. on May 22,

and it appears that any service on defendant JR Inwood of notice of the entry of a temporary stay of the auction, including the service on all defendants on May 22 at 1:36 p.m., was effectuated after the valid auction took place at 9:00 a.m., at the parking lot. There is no claim from plaintiff that it attempted to serve the papers on JR Inwood prior to the sale, even though it had knowledge of the noticed time, and thus, an order vacating the sale would be inequitable under the circumstances (*see e.g. Currier v First Transcapital Corp.*, 190 AD2d 507, 508 [1st Dept 1993]; *Town of Oyster Bay v New York Tel. Co.*, 75 AD2d 598 [2d Dept 1980]).

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

ENTERED: OCTOBER 22, 2019

CLERK

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

10169 Index 650234/14
595171/16

Billy Chicago Limited,
Plaintiff-Respondent,

-against-

Chicago China Tour, LLC, et al.,
Defendants-Appellants.

- - - - -

Chicago China Tour, LLC,
Third-Party Plaintiff-Appellant,

-against-

National Artists Management
Company, Inc., et al.,
Third-Party Defendants-Respondents.

- - - - -

Zhang Liang professionally known as
Jurek Zhang, et al.,
Third-Party Plaintiffs-Appellants,

-against-

National Artists Management Company, Inc.,
Third-Party Defendants-Respondents.

_____

Dunnington Bartholow & Miller LLP, New York (Raymond J. Dowd of counsel), for appellants.

Judd Burstein, P.C., New York (Judd Burstein of counsel), for respondents.

_____

Judgment, Supreme Court, New York County (Charles E. Ramos, J.), entered June 29, 2018, dismissing, with prejudice, the second amended counterclaims and third-party complaint of defendant/third-party plaintiff Chicago China Tour, LLC (CCT),

and bringing up for review an order, same court and Justice, entered June 8, 2018, which denied the motion of defendants/third-party plaintiffs Jurek Zhang, Beijing Bec Performing Arts Co., Ltd., Beijing Joyway Culture & Media Co., Ltd. and Across-China Productions (the Zhang defendants) to compel acceptance of their answer and third-party complaint, and granted the motion of plaintiff and third-party defendants for partial summary judgment with respect to liability on plaintiff's first cause of action for breach of contract against CCT and for summary judgment dismissing all of CCT's counterclaims against plaintiff and its third-party complaint, unanimously affirmed, with costs.

The court providently exercised its discretion in denying the Zhang defendants' motion to compel acceptance of their pleadings (*see* CPLR 3012[d]). They failed to offer a reasonable excuse for answering over two years after the time they were served and four years after the action was commenced, especially since their attorneys also represented CCT, which had timely answered. In any event, they failed to demonstrate the potential merits of their claims, most of which were barred by the applicable statutes of limitations.

The court properly granted plaintiff partial summary judgment on its breach of contract cause of action against CCT and dismissing CCT's breach of contract counterclaim. Plaintiff established that it performed its obligations under the operable agreement to provide a cast and crew for a tour of plaintiff's musical in China and that CCT breached the agreement by failing to perform its obligations to provide for the technical aspects for the tour, entitling plaintiff to retain the money paid to it under the agreement (*see e.g. Morris v 702 E. Fifth St. HDFC*, 46 AD3d 478 [1st Dept 2007]). CCT failed to raise any issues of fact. CCT's remaining counterclaims and third-party claims also failed as a matter of law. Contrary to CCT's argument, the court did not improperly assess the credibility of the claims asserted by the parties rather than limiting itself to determining whether material issues of fact existed.

We have considered the remaining arguments of CCT and the Zhang defendants and find them unavailing.

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

ENTERED: OCTOBER 22, 2019

CLERK

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

10170 Walla Mohamed, Index 159585/16
Plaintiff-Respondent,

-against-

Abdallah Mohamed,
Defendant-Appellant.

_____

Stern & Stern, Brooklyn (Lawrence M. Stern of counsel), for appellant.

Sperber Denenberg & Kahan, P.C., New York (Jacqueline Handel-Harbour of counsel), for respondent.

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Order, Supreme Court, New York County (Barbara Jaffe, J.), entered on or about January 2, 2018, which granted plaintiff's motion for a default judgment, unanimously affirmed, with costs.

Plaintiff met her burden of showing that a default judgment was warranted pursuant to CPLR 3215. Plaintiff's complaint was verified, and she offered an in-depth account of the facts in the form of an affidavit, as well as supporting documentation to show that she alone paid for the subject property. Proof of service with an additional proof of mailing was also provided to the court.

Defendant failed to properly oppose the motion. Defendant's failure to submit an affidavit, standing alone, provided a basis for granting the motion (*Morrison Cohen LLP v Fink*, 81 AD3d 467

[1st Dept 2011]), since the attorney's affirmation submitted was not based on personal knowledge and therefore could not "demonstrate a reasonable excuse for the default and a meritorious defense" (*id.*). While counsel claims that defendant was traveling in Egypt for a three-month period, including when the papers were served, neither counsel's affirmation nor any of the uncertified exhibits attached to it established this fact in opposition. Defendant did not submit an affidavit attesting to being out of the country during this time, nor did he submit a complete copy of his passport, which would have shown if he had entered and re-entered the country on more than one occasion during the relevant period. It is not evident that the two pages in the record are from defendant's own passport, nor did anyone with personal knowledge provide an explanation as to why the date stamps conflict with the dates of travel on the copies of flight information attached as exhibits to counsel's affirmation, some of which also failed to identify a passenger.

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

ENTERED: OCTOBER 22, 2019

CLERK

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

10171 The People of the State of New York, Ind. 2820/17
Respondent,

-against-

Kristopher Francisco,
Defendant-Appellant.

_____

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

_____

Judgment, Supreme Court, New York County (Curtis J. Farber, J.), rendered April 16, 2018, 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: OCTOBER 22, 2019

CLERK

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

10172 Tanaya Jenkins, Index 21588/14E
Plaintiff-Appellant,

-against-

Livo Car Inc., et al.,
Defendants-Respondents.

_____

Mitchell Dranow, Sea Cliff, for appellant.

Robert D. Grace, Brooklyn, for respondents.

_____

Order, Supreme Court, Bronx County (John R. Higgitt, J.), entered on or about November 15, 2018, which granted defendants' motion for summary judgment dismissing the complaint on the threshold issue of serious injury within the meaning of Insurance Law § 5102(d), unanimously modified, on the law, the motion denied as to plaintiff's claims of permanent consequential and significant limitations of use of her cervical spine and lumbar spine, and otherwise affirmed, without costs.

Plaintiff alleges that she sustained serious injuries to her knees, cervical spine and lumbar spine and was unable to return to work for a year, as the result of a motor vehicle accident that occurred while riding in defendants' taxi. Defendants demonstrated prima facie that plaintiff did not sustain any serious injury causally related to that accident by submitting a

radiologist's opinion that she had preexisting degenerative conditions (*see Fathi v Sodhi*, 146 AD3d 445 [1st Dept 2017]) and an emergency medicine physician's opinion that her post-accident emergency room records were inconsistent with the injuries claimed (*see Streety v Toure*, 173 AD3d 462, 462 [1st Dept 2019]). In addition, with respect to plaintiff's claims that she sustained bilateral knee injuries, defendants relied on their orthopedist's review of plaintiff's doctors' operative and MRI reports, which acknowledged degenerative conditions, as well as her testimony concerning a prior left knee injury (*see Alvarez v NYLL Mgt. Ltd.*, 120 AD3d 1043, 1044 [1st Dept 2014], *affd* 24 NY3d 1191 [2015]).

Plaintiff raised a triable issue of fact as to her lumbar and cervical spine conditions through the reports of her treating physician, who opined that those conditions were causally related to the accident. Since plaintiff's own medical records did not reveal any degenerative conditions in her spine, she was not required to submit evidence from a medical expert detailing why degenerative conditions were not the cause of her reported symptoms (*see Fathi v Sodhi* at 446; *Bonilla v Vargas-Nunez*, 147 AD3d 461 [1st Dept 2017]; *Yuen v Arka Memory Cab Corp.*, 80 AD3d 481 [1st Dept 2011]). Her physician found limitations in range

of motion shortly after the accident and on subsequent and recent examinations (*see Perl v Meher*, 18 NY3d 208 [2011]; *Rosa v Mejia*, 95 AD3d 402 [1st Dept 2012]). In response to defendant's argument, plaintiff also raised a triable issue of fact about whether a gap in treatment occurred (*see Ramkumar v Grand Style Transp. Enters. Inc.*, 22 NY3d 905, 907 [2013]). She claimed that her no-fault benefits ended and she was now on Medicaid, but her current doctors did not accept it (*see Swift v New York Tr. Auth.*, 115 AD3d 507, 508 [1st Dept 2014] [gap explained because plaintiff was seeking doctors who accepted Medicaid]).

However, as to her claimed knee injuries, plaintiff failed to submit medical evidence addressing the findings of degeneration in her own medical records and explaining why the knee conditions were causally related to the accident (*see Alvarez* at 1044). Further, as to the left knee, plaintiff's doctor failed to address the effect of a prior motor vehicle accident, in which plaintiff's left knee was injured and required surgery (*id.*; *see also Pines v Lopez*, 88 AD3d 545 [1st Dept 2011]).

Defendants made a prima facie showing of entitlement to summary judgment on plaintiff's 90/180 claim by submitting evidence that plaintiff's injuries were not causally related to

the accident (*see Henchy v VAS Express Corp.*, 115 AD3d 478, 480 [1st Dept 2014]). In light of plaintiff's failure to raise a triable issue of fact concerning her claimed knee injuries, as well as the evidence that she was ambulatory in the period after the accident, her doctor's medical notes and disability certificates were too general to support a 90/180 day claim (*see Morris v Ilya Cab Corp.*, 61 AD3d 434 [1st Dept 2009]; *see also Gorden v Tibulcio*, 50 AD3d 460, 463 [1st Dept 2008]).

We have considered the remaining arguments and find them unavailing.

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

ENTERED: OCTOBER 22, 2019

CLERK

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

10173 David Soltanpour, Index 310823/12
Plaintiff-Appellant,

-against-

Christine Koch,
Defendant-Respondent.

_____

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

Schwartz Sladkus Reich Greenberg Atlas LLP, New York (Barry Abbott of counsel), for respondent.

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Order, Supreme Court, New York County (Douglas E. Hoffman, J.), entered November 28, 2017, which, to the extent appealed from, awarded defendant wife $135,000 in interim counsel fees, unanimously affirmed, without costs.

It was a provident exercise of the court's discretion to direct plaintiff husband to pay $135,000 of the wife's requested attorneys' fees (Domestic Relations Law § 237[b]), given the husband's failure to rebut the statutory presumption that fees shall be awarded to the less monied spouse (*id.*). Cognizant of the high fees that had accrued in this case, pre-trial, the court did not award the wife 100% of what she sought. We find its determination to award the wife 90% of the requested $150,000, subject to reallocation after trial, a sound exercise of

discretion (*see DeCabrera v Cabrera-Rosete*, 70 NY2d 879 [1987]). The court was not required to accept or adjudicate, in advance of trial, the husband's claims of a change in financial circumstances. The decision to award the wife fees at this time was a provident exercise of discretion, especially because the husband had failed to support his claim that he was no longer the more monied spouse with, at a minium, a completed updated net worth statement and recent tax returns.

We reject the husband's argument that the fee waiver in the parties' prenuptial agreement precludes the attorneys' fee award (*Maddaloni v Maddaloni,* 163 AD3d 794 [2d Dept 2018]). The circumstances weigh against enforcement of the agreement at this juncture, given the disparity in the parties' finances, and the hearing which revealed a potentially meritorious challenge to the terms of the parties' prenuptial agreement (*Maddaloni,* 163 AD3d 795-796; *see Anonymous v Anonymous,* 123 AD3d 581, 584-585 [1st Dept 2014]).

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

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

ENTERED: OCTOBER 22, 2019

CLERK

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

10175 The People of the State of New York, Ind. 2584/15
Respondent,

-against-

Michele Gantt,
Defendant-Appellant.

_____

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

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

_____

Judgment, Supreme Court, New York County (Gregory Carro, J.), rendered April 12, 2017, as amended July 31, 2017, convicting defendant, upon her plea of guilty, of identity theft in the first degree, scheme to defraud in the first degree, grand larceny in the second degree and four counts of grand larceny in the third degree, and sentencing her to an aggregate term of 4 to 12 years, unanimously modified, as a matter of discretion in the interest of justice, to the extent of directing that all sentences be served concurrently, resulting in a new aggregate term of 2 to 6 years, and otherwise affirmed.

We find the sentence excessive to the extent indicated.

This determination renders academic defendant's arguments regarding specific performance of an alleged sentence promise,

and the legality of the imposition of consecutive sentences for the convictions of identity theft and second-degree grand larceny.

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

ENTERED: OCTOBER 22, 2019

CLERK

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

10176N Rosa Pichardo, Index 153561/18
Plaintiff-Appellant,

-against-

969 Amsterdam Holdings, LLC,
Defendant-Respondent,

The City of New York,
Defendant.

_____

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

O'Toole Scrivo, LLC, New York (Joseph E. Hopkins of counsel), for respondent.

_____

Order, Supreme Court, New York County (Verna L. Saunders, J.), entered April 30, 2019, which denied plaintiff's motion for a default judgment and directed plaintiff to accept defendant 969 Amsterdam Holdings, LLC's answer, unanimously modified, on the law and the facts, to the extent of striking the jurisdictional defenses from the answer, and otherwise affirmed, without costs.

Under the circumstances of this case, the court properly denied plaintiff's motion for a default judgment and directed plaintiff to accept defendant 969 Amsterdam Holdings, LLC's answer. The delay in answering was relatively short, plaintiff suffered no prejudice, there is no evidence of willfulness and there is a strong public policy in favor of resolving cases on

the merits (*see Marine v Montefiore Health Sys., Inc.*, 129 AD3d 428 [1st Dept 2015]; *Chevalier v 368 E. 148th St. Assoc., LLC*, 80 AD3d 411, 413 (1st Dept 2011]); *Lamar v City of New York*, 68 AD3d 449 [1st Dept 2009]).

Given that no default judgment had been entered, defendant was not required to demonstrate a meritorious defense (*see Marine*, 129 AD3d at 429; *Lamar,* 68 AD3d at 449; *Nason v Fisher*, 309 AD2d 526 [1st Dept 2003]; CPLR 3012[d])

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

ENTERED: OCTOBER 22, 2019

CLERK

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

10177N- Index 657460/17
10177NA Dr. Joon Song,
Plaintiff-Appellant,

-against-

MHM Sponsors Co., et al.,
Defendants-Respondents.

_____

Desiderio, Kaufman & Metz, PC, New York (Massimo F. D'Angelo of counsel), for appellant.

Cullen & Dykman LLP, Garden City (Ryan Soebke of counsel), for MHM Sponsors Co., MHM Sponsors Inc., The Olnick Organization, Inc. and Denise Martorana, respondents.

Braverman Greenspun P.C., New York (Maria Boboris and Tracy Peterson of counsel), for Chesapeake Owners Corp., Firstservice Residential New York, Inc., Joshua Friedman, Keith Allone and Roger Ancona, respondents.

_____

Order, Supreme Court, New York County (Margaret Chan, J.), entered July 25, 2018, which granted defendants' motions to dismiss the complaint and denied plaintiff's cross motion to amend, and order, same court and Justice, entered July 30, 2018, which denied plaintiff's motion for a preliminary injunction, unanimously affirmed, without costs.

The motion court properly granted defendants' respective motions to dismiss the complaint and denied plaintiff's motion to amend as futile (*Okoli v Paul Hastings LLP*, 117 AD3d 539, 540 [1st Dept 2014]). Plaintiff's failure to allege specific

irreparable harm was fatal to his request for an injunction (*Weaver v Essex Owners Corp.*, 235 AD2d 369, 370 [1st Dept 1997], *lv dismissed in part, denied in part* 89 NY2d 1073 [1997]). As for his substantive claims, plaintiff failed to state a cause of action for tortious interference with business relations because he did not substantiate how he was injured as a result of defendants' alleged interference (*Aramid Entertainment Fund Ltd. v Wimbledon Fin. Master Fund, Ltd.*, 105 AD3d 682 [1st Dept 2013], *lv denied* 22 NY3d 858 [2013]). Likewise, plaintiff's claim for civil assault based on screaming, threats, and having a door slammed in his face failed to allege facts that would establish that physical contact was reasonably imminent (*Holtz v Wildenstein & Co.*, 261 AD2d 336 [1st Dept 1999]). Defendants correctly assert that plaintiff abandoned his breach of the covenant of quiet enjoyment claims (*see Carey & Assoc. LLC v 521 Fifth Ave. Partners, LLC*, 130 AD3d 469, 470 [1st Dept 2015]), and we decline to reach the issue. Were we to reach it, we would agree with the motion court that plaintiff's failure to plead that he actually abandoned the premises extinguished any claim of constructive eviction (*127 Rest. Corp. v Rose Realty Group, LLC*, 19 AD3d 172, 173 [1st Dept 2005]). As for a determination that the lease was void, based on a lack of corporate filings, we

agree with the motion court that this allegation, standing alone, fails to state a claim.

We have considered the remaining contentions, and find them unavailing.

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

ENTERED: OCTOBER 22, 2019

CLERK

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

10263N In re Cave Creek Investments, Inc., et al., Petitioners-Respondents, Index 161999/18

-against-

Urban FT Group, Inc., et al., Respondents-Appellants.

_____

The Mintz Fraade Law Firm, P.C., New York (Alan P. Fraade of counsel), for appellants.

The Tsang Law Firm, P.C., New York (Michael Tsang of counsel), for respondents.

_____

Order, Supreme Court, New York County (Carol R. Edmead, J.), entered on or about February 20, 2019, which granted petitioners' application for post-judgment disclosure to the extent of directing respondents to produce documents responsive to the subpoena, as clarified and narrowed by the four categories of documents articulated on page 6 of petitioner's memorandum of law, unanimously affirmed, with costs.

Respondents' argument that they should not have to produce documents unrelated to the subject matter of the underlying lawsuit misconstrues the law. CPLR 5223, the relevant provision, speaks to the production of documents and materials relevant to the enforcement of the judgment. There is no requirement thereunder that the produced documents be relevant to the subject

of the underlying lawsuit. Petitioners' requests, as redrafted, narrowed, and defined on page 6 of their memorandum of law in support of the motion and adopted by the motion court, are relevant to petitioners' enforcement of the judgment (*see Gryphon Dom. VI, LLC v GBR Info. Servs., Inc.* 29 AD3d 392 [1st Dept 2006]; *see also U.S. Bank N.A. v APP Intl. Fin. Co., B.V.*, 100 AD3d 179, 183 [1st Dept 2012]). They are as follows:

- Documents detailing the Urban FT entities' organizational structure, such as organizational charts, which shed light on how the Urban FT entities relate to one another.

- Urban FT's communications with Digiliti during the merger period, communications with third-parties relating to the Digiliti merger, and documents and public statements relating to the merger that are relevant to how the merger failed to be consummated, why Urban FT nevertheless retained Digiliti's assets, or where those assets might now be located.

- Documents relating to Urban FT's appropriation, possession, or disposition of Digiliti's assets, where Digiliti's assets might now be located, and the extent to which Urban FT realized revenue from its use or sale of such assets.

- Executed copies of the Intercreditor Agreement dated as of September 1, 2017 and the Security Agreement dated as of September 1, 2017.

This clarification and narrowing of the request in the subpoenas will ensure that each is tailored to aid petitioners in enforcing the judgment, rather than for some other purpose.

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

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

ENTERED: OCTOBER 22, 2019

CLERK