SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

SEPTEMBER 26, 2019

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

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

9766 Allan Landis, Index 653847/15
Plaintiff-Appellant, File 1388/17B

-against-

383 Realty Corp., et al.,
Defendants-Respondents,

Sally Carrubba,
Defendant.

_____

Knox Law Group, P.C., New York (Daniel Knox of counsel), for appellant.

Ganfer Shore Leeds & Zauderer LLP, New York (Mark A. Berman of counsel), for respondents.

_____

Order, Surrogate's Court, New York County (Nora Anderson, S.), entered on or about December 6, 2018, which denied plaintiff's motion for summary judgment, unanimously affirmed, without costs.

This action was commenced in Supreme Court and transferred to Surrogate's Court upon the death of defendant Bunita L. Weiner (s/h/a Wiener). Before the transfer, plaintiff had moved for summary judgment, and Supreme Court (Ostrager, J.), had denied the motion in an order entered July 31, 2017. That ruling, which

plaintiff did not appeal, remained law of the case insofar as Surrogate's Court was concerned and could not be contravened by that court, a court of coordinate jurisdiction (*Grossman v Meller*, 213 AD2d 221, 224 [1st Dept 1995]). Contrary to plaintiff's argument, his motion before Surrogate's Court failed to demonstrate the applicability of any exception to the general rule that "[s]uccessive motions for summary judgment should not be entertained" (*Jones v 636 Holding Corp.*, 73 AD3d 409, 406 [1st Dept 2010]). Plaintiff's successive motion was entirely based on evidence available to him at the time he filed his initial motion and the Surrogate correctly determined that "the substance of [plaintiff's] motion was already squarely decided against him" by Supreme Court.

In any event, even considering the merits of his later motion, plaintiff failed to establish his prima facie entitlement to judgment on his breach of contract and related claims. Plaintiff's evidence in support of his successive motion failed to establish, as a matter of law, that a brokerage agreement was in effect at the time of defendant's sale, nor did the evidence establish the existence of a valid property management agreement between plaintiff and defendants or what services plaintiff provided.

The Surrogate also providently exercised its discretion in

denying plaintiff's alternative request for leave to replead the fraudulent conveyance cause of action (*see Pasalic v O'Sullivan*, 294 AD2d 103, 104 [1st Dept 2002]). Plaintiff was granted leave to replead in an order of Supreme Court (Ostrager, J.), entered May 10, 2017, and the repleaded cause of action was subsequently dismissed by the court in the same order that denied plaintiff's motion for summary judgment.

The Decision and Order of this Court entered herein on June 27, 2019 (173 AD3d 636 [1st Dept 2019]) is hereby recalled and vacated (*see* M-3684 decided simultaneously herewith).

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

ENTERED: SEPTEMBER 26, 2019

CLERK

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

9460N In re John Peterec-Tolino, et al., Index 151874/17
Petitioners-Appellants,

-against-

New York City Transit Authority doing
business as New York City Transit, et al.,
Respondents-Respondents.

_____

An appeal having been taken to this Court by the above-named appellants from an order of the Supreme Court, New York County (Manuel J. Mendez, J.), entered on or about December 27, 2017,

And said appeal having been argued by counsel for the respective parties; and due deliberation having been had thereon, and upon the stipulation of the parties hereto dated August 27, 2019,

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

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

ENTERED: SEPTEMBER 26, 2019

CLERK

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

9915 The People of the State of New York, Ind. 5454N/14
Respondent,

-against-

Fiore Caruso,
Defendant-Appellant.

_____

Christina Swarns, Office of The Appellate Defender, New York (Stephen R. Strother of counsel), for appellant.

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

_____

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (James M. Burke, J.), rendered October 7, 2015,

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: SEPTEMBER 26, 2019

CLERK

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

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

9916 HSBC Bank USA, etc., Index 32127/17E
Plaintiff-Respondent,

-against-

Joseph Zillitto also known as
Joseph F. Zillitto, et al.,
Defendants-Appellants,

JP Morgan Chase Bank, N.A., et al.,
Defendants.

_____

The Law Offices of Lawrence Katz, Valley Stream (Lawrence Katz of counsel), for appellants.

Reed Smith LLP, New York (David G. Murphy of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (Kenneth L. Thompson, Jr., J.), entered on October 30, 2018, which granted plaintiff's motion for summary judgment, unanimously affirmed, without costs.

Plaintiff bank established its standing to foreclose on the mortgage by attaching a copy of the consolidated note, the dispositive instrument conveying standing, at the time it commenced the action (*see* Wells Fargo Bank N.A. v Ho-Shing, 168 AD3d 126, 131-132 [1st Dept 2019]). The relevant documents make clear that the consolidated note superseded the original notes, and there is no dispute that the Bank held and sought foreclosure based on that consolidated note.

Defendants' argument regarding plaintiff's alleged non-

compliance with RPAPL 1304 is unpreserved for review (*see Albany Eng'g. Corp. v Hudson Riv./Black Riv. Regulating Dist.*, 110 AD3d 1220, 1223 [3d Dept 2013]).

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

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

ENTERED: SEPTEMBER 26, 2019

CLERK

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

9917-
9917A In re Sariyah L. J.,

A Child Under the Age of
Eighteen Years, etc.,

Antonio J.,
Respondent-Appellant,

The Children's Village,
Petitioner-Respondent.

_____

Andrew J. Baer, New York, for appellant.

Rosin Steinhagen Mendel, PLLC, New York (Melissa Wagshul of counsel), for respondent.

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

_____

Order, Family Court, New York County (Emily M. Olshansky, J.), entered on or about October 9, 2018, which denied respondent's motion to vacate an order, same court and Judge, entered on or about August 20, 2018, upon his default, which determined that respondent was a notice-only father, unanimously affirmed, without costs. Appeal from August 20, 2018 order unanimously dismissed, without costs, as taken from a nonappealable order (CPLR 5511).

Respondent failed to provide a reasonable excuse for his default and a meritorious defense to the proceeding (*see Matter of Amirah Nicole A. [Tamika R.]*, 73 AD3d 428 [1st Dept 2010], *lv*

dismissed 15 NY3d 766 [2010]). Respondent asserted that he was late because he chose to attend a meeting with his shelter worker, but he failed to provide any substantiating evidence or to explain why he made no attempt to contact his attorney, the Family Court, or the agency about his inability to appear at the hearing (*see Matter of Ashley Marie M.*, 287 AD2d 333 [1st Dept 2001]). As for a meritorious defense, respondent's affidavit does not show that he maintained substantial and continuous or repeated contact with his child or provided the child with financial support according to his means (*see* Domestic Relations Law § 111[1][d]; *Matter of Jonathan Logan P.*, 309 AD2d 576 [1st Dept 2003]; *see also Matter of Heaven A.A. [Tyrone W.]*, 130 AD3d 10, 15 [2d Dept 2015]).

Respondent's contention that he was denied due process because the court dispensed with a dispositional hearing is unpreserved for review and, in any event, unavailing.

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

ENTERED: SEPTEMBER 26, 2019

CLERK

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

9918 M.M., an Infant by His Parent and Natural Guardian, Tesser A., Plaintiff-Appellant, -against- New York City Health and Hospitals Corporation, et al., Defendants-Respondents. Index 27080/16E

Akin Law Group, PLLC, New York (Gulsah Senol of counsel), for appellant.

Zachary W. Carter, Corporation Counsel, New York (Jonathan A. Popolow of counsel), for respondents.

Order, Supreme Court, Bronx County (Douglas E. McKeon, J.), entered November 14, 2017, which denied plaintiff's motion for leave to file a late notice of claim pursuant to General Municipal Law § 50-e, and granted defendants' cross motion to dismiss the complaint, unanimously affirmed, without costs.

The motion court did not abuse its discretion in denying plaintiff leave to file a late notice of claim, because defendant's records alone, on their face, do not evince that its acts or omissions inflicted plaintiff's injuries (*see Webb v New York City Health & Hosps. Corp.*, 50 AD3d 265 [1st Dept 2008]). Contrary to plaintiff's contention, there is nothing in the record that supports the assumption that he should have been delivered by Caesarian section, including the fact that he was

considered large for his gestational age, and he did not submit an affidavit from a medical expert (*see Wally G. v New York City Health & Hosps. Corp. [Metro. Hosp.]*, 27 NY3d 672, 677 [2016]; *Matter of Kelley v New York City Health & Hosps. Corp.*, 76 AD3d 824, 828 [1st Dept 2010]).

Furthermore, plaintiff failed to meet his burden to show that defendants would not be substantially prejudiced, as a result of his nine-year delay in seeking leave to file a late notice of claim, in defending against the action on the merits. The hospital records available to defendants did not alert them to a claim of malpractice and thus could not, ipso facto, establish a lack of prejudice (*see Kelley*, 76 AD3d at 828). Plaintiff also does not dispute that the handwritten records pertaining to the events that give rise to his medical malpractice claims, including the prenatal care record, labor and delivery notes, the recovery notes and the obstetrics physicians post-partum progress notes, were destroyed in a fire on January 31, 2015 (about one year, 10 months before the instant leave application was filed) (*see Matter of Sica v Board of Educ. of City of N.Y.*, 226 AD2d 542, 543 [1996]). Under these circumstances, Supreme Court did not abuse its discretion in finding defendants have been substantially prejudiced, despite the availability of electronic records, because there is no

dispute that those records do not set forth who provided medical treatment to plaintiff and his mother or what treatments were rendered.

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

ENTERED: SEPTEMBER 26, 2019

CLERK

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

9919 West Village Houses Renters Union, Index 118482/06
Plaintiff-Appellant,

Jessica Tomb, et al.,
Plaintiffs,

-against-

WVH Housing Development
Fund Corporation,
Defendant,

BRG West Village LLC,
Defendant-Respondent.

_____

Desiderio Kaufman & Metz, P.C., New York (Jeffrey R. Metz of counsel), for appellant.

Rosenberg & Estis, P.C., New York (Jeffrey Turkel of counsel), for respondent.

_____

Order, Supreme Court, New York County (Barbara Jaffe, J.), entered October 22, 2018, which granted the motion of defendant BRG West Village LLC (BRG) for summary judgment declaring that plaintiff West Village Houses Renters Union's (plaintiff) members' apartments are not rent-stabilized and otherwise dismissed plaintiffs' action, denied plaintiff's cross motion for summary judgment, and granted BRG's cross claim for attorneys' fees, unanimously modified, on the law, to dismiss BRG's cross claim, and otherwise affirmed, without costs.

Plaintiff renters union consists of tenants in a housing

complex who did not purchase shares in the resident-owned cooperative that became the landowner following withdrawal from the Mitchell-Lama program and conversion under article XI of the Private Housing Finance Law to cooperative ownership. Plaintiff brought the instant action for a declaration that the units of nonpurchasing tenants are rent-stabilized.

The complex did not become rent-stabilized upon its withdrawal from the Mitchell-Lama program on June 25, 2004, as the units were both "financed by loans from" the New York City Housing Development Corporation (HDC), a "public benefit corporation" (NYC Administrative Code § 26-504[a][1][a]; *see* Private Housing Finance Law § 653), and "subject to rent regulation under the private housing finance law" article XII (NYC Administrative Code § 26-504[a][1][b]). Contrary to plaintiff's contention, HDC was empowered by statute to regulate rents (Private Housing Finance Law §§ 651[1], 654[3],[4], 654[25]; *see Matter of Shankman v Axelrod*, 73 NY2d 203, 206 [1989]). Thus, the receipt by the previous owner of J-51 tax benefits did not trigger applicability of the Rent Stabilization Law.

Similarly, the complex did not become rent-stabilized upon its conversion to cooperative ownership on March 9, 2006. Rent stabilization does not apply to multiple dwellings "owned as a

cooperative or condominium," regardless of whether the owner receives J-51 benefits (NYC Administrative Code §§ 26-504[a], [c]). Moreover, even if the complex had been rent-stabilized during the time between withdrawal from Mitchell-Lama and conversion to a cooperative, the conversion did not require continuation of such regulation. "General Business Law § 352-eeee, by its terms, does not apply to cooperative conversions under Private Housing Finance Law article XI" (*Walsh v Wusinich*, 32 AD3d 743, 744 [1st Dept 2006], citing General Business Law § 352-eeee[1][a]). We find plaintiff's arguments to the contrary unavailing.

Finally, paragraph 19(A)(5) of the lease authorizes BRG to recover legal fees from a tenant only where BRG brings the action based on the tenant's default or incurs costs in defending lawsuits because of a tenant's actions. As "[t]his action does not fit into either category," the award of fees must be reversed

and the counterclaim for fees dismissed (*Dixon v 105 W. 75th St. LLC*, 148 AD3d 623, 630 [1st Dept 2017]).

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

ENTERED: SEPTEMBER 26, 2019

CLERK

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

9920 The People of the State of New York, Respondent, Ind. 5992/96

-against-

Jose Aguilar, 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 (Katherine Kulkarni of counsel), for respondent.

_____

Judgment, Supreme Court, New York County (Ruth Pickholz, J.), rendered November 3, 2016, as amended January 18, 2017, convicting defendant, upon his plea of guilty, of manslaughter in the second degree, and sentencing him to a term of 1 to 3 years, unanimously modified, on the law, to the extent of vacating the DNA databank fee, and otherwise affirmed.

"By pleading guilty while his constitutional speedy trial motion remained undecided, defendant abandoned that claim and forfeited any appellate review" (*People v Cappelan*, 142 AD3d 923, 923 [1st Dept 2016], *lv denied* 28 NY3d 1123 [2016]; *see also People v Alexander*, 19 NY3d 203, 219 [2012]). "Moreover, since defendant's attorney declined to adopt this pro se motion, the court had no duty to entertain it" (*Cappelan*, 142 AD3d at 923).

Defendant also failed to preserve his argument concerning

the 16-year period during which he remained a fugitive under an outstanding bench warrant, and we decline to review it in the interest of justice. In any event, that period is entirely attributable to defendant.

To the extent the record permits review, we find, after reviewing the factors set forth in *People v Taranovich* (37 NY2d 442, 445 [1975]), that defendant has not established a violation of his constitutional right to a speedy trial (*see e.g. People v Desselle*, 167 AD3d 418 [1st Dept 2018], *lv denied* 32 NY3d 1203 [2019]).

The People concede that the DNA databank fee does not apply, because defendant committed the offense before the effective date of the statute imposing the fee.

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

ENTERED: SEPTEMBER 26, 2019

CLERK

CORRECTED ORDER - OCTOBER 2, 2019

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

9921 The People of the State of New York, Ind. 4853/14
Respondent,

-against-

Anthony Tirado,
Defendant-Appellant.

_____

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

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

_____

Judgment, Supreme Court, New York County (Laura A. Ward, J.), rendered June 29, 2015, as amended August 7, 2017, convicting defendant, upon his plea of guilty, of attempted burglary in the second degree, and sentencing him to a term of two years, unanimously affirmed.

Supreme Court properly exercised its discretion in **declining** to adjudicate defendant a youthful offender (*People v Pacherille*, 25 NY3d 1021, 1023 [2015]).

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

ENTERED: SEPTEMBER 26, 2019

CLERK

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

9923 Mohammed Ahsanuddin, Index 30571/17E
Plaintiff-Respondent,

-against-

Joseph Addo, et al.,
Defendants-Appellants,

Morris Fateha,
Stakeholder.

_____

Law Offices of Morris Fateha, Brooklyn (Morris Fateha of counsel), for appellants.

Richard J. Soleymanzadeh, P.C., Carle Place (Richard J. Soleymanzadeh of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (Donald A. Miles, J.), entered September 11, 2018, which, inter alia, denied defendants' motion to dismiss the complaint and to vacate a notice of pendency, unanimously modified, on the law, to the extent of dismissing plaintiff's causes of action for misrepresentation, fraud, breach of the implied covenant of good faith and fair dealing, and punitive damages, and otherwise affirmed, without costs.

Defendants failed to establish entitlement to summary dismissal of the claims for breach of contract and specific performance. Plaintiffs' contention that defendants' unexplained ability to sell the property to a third-party, despite their

claimed inability to comply with the Bankruptcy Code, support the claimed breach of the parties' contract of sale. The timing of the sale to the third-party, coupled with the representations by defendants' attorney and real estate agent on November 1, 2017 and November 6, 2017 that they were still waiting for an extension of the short sale approval from the bank, despite the fact that defendants had already signed a contract to sell the property to the third-party on October 31, 2017, bolster these causes of action.

The claims for misrepresentation and fraud are dismissed as duplicative of the breach of contract claim (*see Cronos Group Ltd. v XComIP, LLC*, 156 AD3d 54, 62-63 [1st Dept 2017]), as is the claim for breach of the implied covenant of good faith and fair dealing (*see Berkeley Research Group, LLC v FTI Consulting, Inc.*, 157 AD3d 486, 489 [1st Dept 2018]; *Mill Fin., LLC v Gillett*, 122 AD3d 98, 104 [1st Dept 2014]). Plaintiff's claim for punitive damages is also dismissed, since no separate cause of action for punitive damages lies for pleading purposes (*Rocanova v Equitable Life Assurance*, 83 NY2d 603, 616 [1994]; *Prote Contracting Co., Inc. v Board of Education*, 276 AD2d 309, 310 [1st Dept 2000]). Even if it were properly pleaded, a claim for punitive damages would not be appropriate in this case as this action is grounded upon private breach of contract, and does

not seek to vindicate a public right or deter morally culpable conduct (*Halpin v Prudential Ins. Co. of Am.*, 48 NY2d 906, 907 [1979]).

Defendants have not demonstrated that paragraph 39 of the parties' contract requires forfeiture of plaintiff's $20,000 down payment. In the context of the entire agreement, the remedy set forth in paragraph 39 applies to situations where the seller is unable to satisfy explicit obligations set forth in the contract, not where the seller transfers property to a third-party pending closing (*see W.W.W. Assoc. v Giancontieri*, 77 NY2d 157, 162 [1990]). Moreover, interpreting the contract as proposed by defendants would produce the absurd result of permitting a seller to make a duplicitous transfer of property to a third-party, while also allowing them to retain the purchaser's down payment should the purchaser seek to enforce its rights (*Macy's Inc. v Martha Stewart Living Omnimedia, Inc.*, 127 AD3d 48, 54 [1st Dept 2015]).

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

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

ENTERED: SEPTEMBER 26, 2019

CLERK

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

9924 Elvera Stewart, Index 805445/13
Plaintiff-Respondent,

-against-

Jeffrey Goldstein, M.D. et al.,
Defendants-Appellants,

NYU Hospital Center, et al.,
Defendants.

_____

Koster, Brady & Nagler, LLP, New York (Louis Badolato of counsel), for Jeffrey Goldstein, M.D., appellant.

Gerspach Sikoscow, LLP, New York (Alexander Sikoscow of counsel), for Jason Gallina, M.D., appellant.

La Sorsa & Beneventano, White Plains (Gregory M. La Sorsa of counsel), for respondent.

_____

Order, Supreme Court, New York County (Eileen A. Rakower, J.), entered on or about March 6, 2018, which, insofar as appealed from, denied defendants Jeffrey Goldstein, M.D.'s and Jason Gallina, M.D.'s motions for summary judgment dismissing all claims as against them, unanimously modified, on the law, to grant the motions as to the claim of lack of informed consent, and otherwise affirmed, without costs.

Defendants' motions for summary judgment were correctly denied as to the claim that plaintiff suffered injuries during spinal surgery as a result of defendant doctors' negligently "permitting a guide-wire to break off in the L4 vertebral body"

and "failing to recognize and retrieve" the guide-wire "in a timely fashion."

As an initial matter, the affidavit by plaintiff's expert was properly considered. Although the affidavit as initially submitted was not notarized and did not qualify as an affirmation under CPLR 2106, plaintiff corrected this defect by submitting a notarized version of the affidavit at oral argument.

It is not possible to determine as a matter of law what caused the subject guide-wire to break and advance anteriorly. The parties' experts offered conflicting opinions on this issue, but all of their opinions are largely speculative. The most these experts can do is suggest possible causes of the surgical complication, and none can state with reasonable certainty what the actual cause was.

Factual questions also exist as to when, whether, and how the tap placed over the subject guide-wire became defective, whether the defect was just another side effect of improper surgical technique, and whether defendants should have noticed the defect before surgery.

Moreover, even if the guide-wire retrieval was performed perfectly, it required an incision that would not have been necessary had the guide-wire not broken and advanced anteriorly. This is sufficient to constitute injury. If defendants are

ultimately found to have caused the guide-wire complication, then they must also be found to have caused this injury, which resulted from their attempt to correct the complication.

The claim of lack of informed consent should be dismissed as abandoned. Plaintiff's expert affidavit makes clear that this claim was not directed at Gallina, and plaintiff failed to address Goldstein's arguments regarding this issue on appeal.

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

ENTERED: SEPTEMBER 26, 2019

CLERK

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

9925 The People of the State of New York, Respondent, Ind. 4203/10

-against-

Lateff Strother, Defendant-Appellant.

_____

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

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

_____

Order, Supreme Court, New York County (Robert M. Mandelbaum, J.), entered on or about May 21, 2018, which adjudicated defendant a level two sex offender pursuant to the Sex Offender Registration Act (Correction Law art 6-C), unanimously affirmed, without costs.

The court providently exercised its discretion in declining to grant a downward departure (*see People v Gillotti*, 23 NY3d 841 [2014]). Defendant did not establish any significant mitigating factors that were not adequately accounted for by the risk assessment instrument, and those considerations were outweighed

in any event by the egregiousness of defendant's repeated sexual offenses against a child, which defendant videotaped.

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

ENTERED: SEPTEMBER 26, 2019

CLERK

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

9927 The People of the State of New York, Respondent, Ind. 257/16

-against-

Benjamin Brown, Defendant-Appellant.

_____

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

_____

Judgment, Supreme Court, New York County (Abraham Clott, J.), rendered March 9, 2016 , unanimously affirmed.

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

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

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

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

ENTERED: SEPTEMBER 26, 2019

CLERK

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

9928-
9928A In re Elizabeth Bartle, et al.,
Petitioners-Appellants,

-against-

Andrew Bartle,
Respondent-Respondent.

Index 655077/17

_____

Saul Ewing Arnstein & Lehr, New York (Steven C. Reingold of counsel), for appellants.

Hoguet Newman Regal & Kenney, LLP, New York (Laura B. Hoguet of counsel), for respondent.

_____

Judgment, Supreme Court, New York County (Saliann Scarpulla, J.), entered May 17, 2018, in favor of respondent and against petitioners, unanimously affirmed, without costs. Appeal from order, same court and Justice, entered on or about February 1, 2018, which denied the petition to modify the underlying arbitration award and granted the cross petition to confirm the award, unanimously dismissed, without costs, as subsumed in the appeal from the judgment.

The arbitrator properly addressed the issue of valuation of the subject building despite respondent's failure to raise the issue specifically in his arbitration demand. Respondent could not have challenged the appraisal and valuation of the building in his demand, filed in June 2016, because at that time the

appraisal and valuation had not been completed. However, he placed the fair market value of his partnership interest at issue in the demand as specifically as he could by stating that he would be forced "to sell at a reduced price," reflecting his concern that the valuation would ultimately be to his disadvantage (*compare Goldberg v Nugent*, 85 AD3d 459 [1st Dept 2011] [vacating arbitration award where arbitrator awarded relief on claims not asserted in arbitration demand]; *see* CPLR 3026, 402).

Nor did the arbitrator exceed his authority in reviewing the valuation arrived at by petitioners' appraisal and valuation experts. Contrary to petitioners' contention that the language of the "call provision" of the partnership agreement (section 18.02) is controlling, it is the language of the arbitration clause that governs the scope of the arbitrator's authority (*Matter of Silverstein [Benmor Coats*, 61 NY2d 299, 307 [1984] ["any limitation upon the power of the arbitrator must be set forth as part of the arbitration clause itself"). The arbitration clause at issue contains no such limitation. To the contrary, it provides broadly that "[a]ll disputes arising out of or in connection with this Agreement or any transaction hereunder shall be finally settled ... by an arbitrator." Nor did the arbitrator disregard the experts' valuation; it was the experts,

not the arbitrator, who arrived at the $12.75 million figure.

The arbitrator's determination that neither party prevailed in the arbitration – and thus that neither party should be awarded attorneys' fees – was also within his authority (*see e.g. Matter of RAS Sec. Corp. [Williams]*, 251 AD2d 98 [1st Dept 1998]), and cannot be considered, as petitioners urge, "totally irrational." The arbitrator provided a thorough and logical explanation for his finding that there was no prevailing party in the arbitration. While petitioners succeeded in having the petition dismissed, they were adversely affected by the arbitrator's valuation of respondent's limited partnership interest.

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

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

ENTERED: SEPTEMBER 26, 2019

CLERK

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

9929 In re Lloyd Gibbs, Index 260345/17
Petitioner,

-against-

New York State Department of
Motor Vehicles, et al.,
Respondents.

_____

Lloyd Gibbs, petitioner pro se.

Letitia James, Attorney General, New York (David Lawrence III of counsel), for respondents.

_____

Determination of respondents, dated August 21, 2017, which found, after a hearing, that petitioner violated Vehicle and Traffic Law §§ 1111(d)(1) and 1124, and imposed a fine, unanimously confirmed, the petition denied, and the proceeding brought pursuant to CPLR article 78 (transferred to this Court by order of Supreme Court, Bronx County [Mary Ann Brigantti, J.] entered on or about June 6, 2018), dismissed, without costs.

The determination that petitioner violated Vehicle and Traffic Law §§ 1111(d)(1) and 1124 is supported by substantial evidence (*see Matter of Nelke v Department of Motor Vehs. of the State of N.Y.*, 79 AD3d 433 [1st Dept 2010]). The police officer testified that he had a clear, unobstructed view of petitioner and that petitioner failed to stop at a stop line that preceded a red traffic signal, crossed over the double yellow line, and

drove into oncoming traffic, causing the traffic moving in that direction to stop. This testimony is not incredible as a matter of law and is sufficient to sustain a determination that petitioner failed to stop at a red signal and interfered with safe motor vehicle operation. Petitioner's contention that the Administrative Law Judge (ALJ) should have credited his testimony that he was not controlled by the traffic signal and that there were no cars coming from the opposite direction is unavailing (*see Matter of Berenhaus v Ward*, 70 NY2d 436, 443-444 [1987]).

Petitioner failed to demonstrate that the ALJ's findings resulted from bias (*Matter of Warder v Board of Regents of Univ. of State of N.Y.*, 53 NY2d 186, 197 [1981], *cert denied* 454 US 1125 [1981]).

The record does not support petitioner's contention that the ALJ did not pay attention during his testimony and failed to review photographs introduced into evidence. Nor does the record show that the ALJ improperly interfered in the conduct of the hearing or questioned witnesses excessively (*see People v Jamison*, 47 NY2d 882 [1979]). Moreover, the ALJ properly directed petitioner to testify in response to questions, so as to focus

the testimony on material and relevant evidence (*see* People v Hansson, 162 AD3d 1234, 1236 [3d Dept 2018], *lv denied* 32 NY3d 1004 [2018]).

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

ENTERED: SEPTEMBER 26, 2019

CLERK

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

9930 The People of the State of New York, Ind. 635/14
Respondent,

-against-

Robert Grant,
Defendant-Appellant.

_____

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

_____

Judgment, Supreme Court, New York County (Patricia Nunez, J.), rendered May 5, 2016, unanimously affirmed.

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

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

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

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

ENTERED: SEPTEMBER 26, 2019

CLERK

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

9931-
9931A Index 654774/17

Remora Capital S.A., et al.,
Plaintiffs-Respondents,

-against-

Dr. Pierre Dukan, et al.,
Defendants-Appellants.

_____

Kellner Herlihy Getty & Friedman, New York (Thomas Vandenabeele of counsel), for appellants.

Boies Schiller Flexner LLP, New York (Leigh M. Nathanson of counsel), for respondents.

_____

Order, Supreme Court, New York County (Gerald Lebovits, J.), entered on or about July 20, 2018, which denied defendants' motion pursuant to CPLR 3211(a)(1) and (7) to dismiss the complaint, unanimously modified, on the law, to grant the motion as to the claims for fraud, fraudulent inducement, breach of the implied covenant of good faith and fair dealing, unjust enrichment and conversion, and otherwise affirmed, without costs. Order, same court and Justice, entered on or about November 27, 2018, which denied the motion by defendants Dr. Pierre Dukan, Marie Dukan, Sacha Dukan, Maya Dukan, Duvalec S.A.R.L. and SEDAD, S.A.S. to dismiss the complaint as against them pursuant to CPLR 306-b, unanimously affirmed, without costs.

The motion court correctly sustained the claim of breach of

the DDR Loan Agreement upon its finding that defendants' documentary evidence failed to demonstrate that defendants performed under the agreement (CPLR 3211[a][1]; *see J.P. Morgan Sec. Inc. v Vigilant Ins. Co.*, 21 NY3d 324, 334 [2013]). The fact that plaintiffs' contribution was booked as "paid in capital" does not show that any shares were allocated to plaintiffs, much less the number of shares allocated, or their valuation. Defendants contend that stock certificates are not determinative, but there is no record evidence that defendants furnished plaintiffs with alternate proof of their ownership.

Plaintiffs adequately pleaded damages, alleging that they lost the funds they contributed, which were neither converted to shares, as agreed, nor otherwise repaid. Even if the loan agreement did not contemplate repayment of the loaned amounts in cash, plaintiffs' allegations of damages are adequate, since they have nothing to show for their capital contribution to defendant Diet Coaching (*cf. Noryb Ventures, Inc. v Mankovsky*, 47 Misc 3d 1220[A], 2015 NY Slip Op 50715[U], *6-7 [Sup Ct, NY County, May 7, 2015] [while no stock certificates were issued, the parties' letter agreement contemplated memorialization of plaintiffs' ownership status by other means]).

The court correctly sustained the claim for breach of the Advisory Loan Agreement (CPLR 3211[a][7]). Defendants do not

deny that they failed to fulfill their conceded obligation of converting €60,000 to shares. Rather, they argue that they never had access to the €60,000 that was to be converted. However, that is not the way the transaction is described in the complaint (*see Sokoloff v Harriman Estates Dev. Corp.*, 96 NY2d 409, 414 [2001]). Defendants may not have had a new infusion of money in that amount from plaintiffs, but they would have had access to the funds in the form of moneys that they would otherwise have been obligated to pay to plaintiff Remora Partners S.A. for advisory services rendered, which payment was made instead, on their behalf, by plaintiff Remora Capital S.A. To the extent defendants dispute that Remora Capital rendered the requisite advisory services, that is an issue of fact not resolvable on a motion to dismiss for failure to state a cause of action.

The complaint fails to provide a sufficient factual basis for piercing the corporate defendants' veil to impose liability on defendants Dr. Pierre Dukan, his wife Marie, son Sacha, and daughter Maya (*see Teachers Ins. Annuity Assn. of Am. v Cohen's Fashion Opt. of 485 Lexington Ave., Inc.*, 45 AD3d 317, 318 [1st Dept 2007]). Plaintiffs' conclusory assertions of domination and control by the family defendants, unity of interest, shell framework, and use of the companies as a conduit for the family's personal business are not supported by factual allegations

related to "the transaction attacked" (*id.*), namely, the DDR and Advisory Loan Agreements.

In any event, the fraud claims must be dismissed as duplicative of the breach of contract claims because they rest on allegations that the family defendants did not intend to meet their contractual obligations (*see e.g. ID Beauty S.A.S. v Coty Inc. Headquarters*, 164 AD3d 1186 [1st Dept 2018]; *Cronos Group Ltd. v XComIP, LLC*, 156 AD3d 54, 62-63 [1st Dept 2017]). Nor do the family defendants' alleged statements about their companies' financial situation support a fraud claim; those statements are non-actionable expressions of hope (*RKA Film Fin., LLC v Kavanaugh*, 171 AD3d 678 [1st Dept 2019]; *Zaref v Berk & Michaels*, 192 AD2d 346, 349 [1st Dept 1993]).

The claim for breach of the implied covenant of good faith and fair dealing must be dismissed as redundant of the breach of contract claims (*see Tillage Commodities Fund, L.P. v SS&C Tech., Inc.*, 151 AD3d 607, 608-609 [1st Dept 2017]). Plaintiffs allege that they suffered reputational harm in the investment community, in addition to the injury flowing from defendants' breaches of contract, but they do not allege that this separate harm stemmed from additional wrongdoing by defendants.

The unjust enrichment claim must be dismissed because it arises from matters covered by the contracts (*Kickertz v New York*

Univ., 110 AD3d 268, 276-277 [1st Dept 2013]). Given the inadequacy of the allegations of alter ego liability, we reject plaintiffs' argument that those allegations support extending contractual liability to the non-signatory family defendants (*see Randall's Is. Aquatic Leisure, LLC v City of New York*, 92 AD3d 463 [1st Dept 2012], *lv denied* 19 NY3d 804 [2012]). The conversion claim is duplicative of the breach of contract claims (*see Kopel v Bandwidth Tech. Corp.*, 56 AD3d 320 [1st Dept 2008]). Plaintiffs' arguments to the contrary are based on their now dismissed alter ego theory.

The motion court correctly denied the motion to dismiss pursuant to CPLR 306-b on the ground that the moving defendants waived the defense of lack of jurisdiction by failing to assert it in their CPLR 3211 motion (CPLR 3211[a][8]; 3211[e]; *Addesso v Shemtob*, 70 NY2d 689 [1987]; *Montcalm Publ. Corp. v Pustorino*, 125 AD2d 188 [1st Dept 1986]).

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

ENTERED: SEPTEMBER 26, 2019

CLERK

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

9932 Deutsche Bank National Trust Company, etc., Plaintiff-Respondent, Index 850251/13

-against-

Anthony Craig Desilva also known as Anthony De Silva, Defendant-Appellant,

Washington Mutual Bank, FA, et al., Defendants.

_____

Mark M. Horowitz, Great Neck, for appellant.

Eckert Seamans Cherin & Mellott, LLC, White Plains (Sarah J. Greenberg of counsel), for respondent.

_____

Order, Supreme Court, New York County (Judith N. McMahon, J.), entered on or about May 8, 2018, which granted plaintiff's motion for summary judgment on its mortgage foreclosure claim, unanimously affirmed, without costs.

Plaintiff established prima facie its right to foreclosure by submitting the unpaid note, the mortgage, and defendant's answer in which he does not dispute his failure to pay and the plaintiff's service on him of the notice required by RPAPL 1304 (*see Bernstein v Dubrovsky*, 169 AD3d 410 [1st Dept 2019]). Contrary to plaintiff's contention, defendant Desilva's failure to plead affirmative defenses in his answer did not preclude him from raising them in opposition to summary judgment if he

submitted documents which raised questions of fact (*JP Morgan Chase Bank, N.A. v. Salmon*, 154 AD3d 603 [1st Dept 2017]); however, he failed to do so.

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

ENTERED: SEPTEMBER 26, 2019

CLERK

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

9933 The People of the State of New York, Respondent, Ind. 536/12

-against-

Alberto Rosario, Defendant-Appellant.

_____

Robert S. Dean, Center for Appellate Litigation, New York (Brittany N. Francis of counsel), for appellant.

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

_____

Judgment, Supreme Court, New York County (Bruce Allen, J.), rendered May 1, 2015, convicting defendant, after a jury trial, of criminal possession of a weapon in the second and third degrees, and sentencing him, as a second felony offender, to an aggregate term of six years, unanimously affirmed.

The verdict was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). There is no basis for disturbing the jury's credibility determinations. The evidence supports the conclusion that defendant simultaneously possessed a pistol and a magazine loaded with ammunition, thereby possessing a "loaded firearm" (Penal Law § 265.00[15]).

The court properly denied defendant's application pursuant to *Batson v Kentucky* (476 US 79 [1986]). We find that the record supports the court's finding that the nondiscriminatory reasons

provided by the prosecutor for the challenges in question were not pretextual. "Step three of the *Batson* inquiry involves an evaluation of the prosecutor's credibility" (*Snyder v Louisiana*, 552 US 472, 477), and the court's finding in this regard is entitled to great deference (*see People v Hernandez*, 75 NY2d 350 [1990], *affd* 500 US 352 [1991]).

The court providently exercised its discretion in denying defendant's mistrial motion, made when the court, in apologizing to the jury for a delay, made a brief reference to defendant's incarceration. Although the court should have explained the delay without mentioning defendant's jail status, this did not warrant a mistrial, because the court provided suitable curative instructions (*see People v Jenkins*, 88 NY2d 948, 950-951 [1996), and because the jury was already aware, by way of evidence, that defendant had been incarcerated for at least part of the pendency of the case.

We perceive no basis for reducing the sentence.

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

ENTERED: SEPTEMBER 26, 2019

CLERK

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

9934- Ind. 4442/15
9934A- 4612/15
9934B The People of the State of New York, 1051/16
Respondent,

-against-

David Walker,
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 (Ross D. Mazer of counsel), for respondent.

_____

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

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

ENTERED: SEPTEMBER 26, 2019

CLERK

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

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

9935- Ind. 4083/14
9935A The People of the State of New York, 979/15
Respondent,

-against-

Jenetta Ferguson,
Defendant-Appellant.

_____

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

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

_____

An appeal having been taken to this Court by the above-named appellant from judgments of the Supreme Court, New York County (Charles Solomon, J.), rendered March 28, 2017,

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

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

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

ENTERED: SEPTEMBER 26, 2019

CLERK

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

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

9936 The People of the State of New York, Ind. 821/15
Respondent,

-against-

Joshua Monsanto,
Defendant-Appellant.

_____

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

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

_____

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Robert M. Stolz, J.), rendered August 5, 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: SEPTEMBER 26, 2019

CLERK

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

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

9937N Chanmattie Persaud, Index 27041/17E
Plaintiff-Respondent,

-against-

Transdev Services, Inc., et al.,
Defendants-Appellants.

_____

Lewis Brisbois Bisgaard & Smith LLP, New York (Meredith Drucker Nolen of counsel), for appellants.

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

_____

Order, Supreme Court, Bronx County (Donald A. Miles, J.), entered on or about May 8, 2018, which, to the extent appealed from as limited by the briefs, denied defendants' motion pursuant to CPLR 504(1) for a change of venue from Bronx County to Nassau County, unanimously affirmed, without costs.

CPLR 504(1) provides, in pertinent part, that the place of trial of an action against a county shall be in that county. As Nassau County is not a named defendant, and defendants are not officers of Nassau County and were not named in a representative capacity, defendants' motion pursuant to CPLR 504(1) for a change of venue from Bronx County to Nassau County was properly denied (*see Swainson v Clee*, 261 AD2d 301 [1st Dept 1999]; *Theofanis v Liberty Lines Tr.*, 266 AD2d 385 [2d Dept 1999]; *Beaufort v Liberty Lines Tr.*, 270 AD2d 297 [2d Dept 2000]). CPLR 504(1)

exists for the benefit of a county or other government entity named as a defendant, not for the benefit of individual litigants such as the instant defendants (*Swainson* at 301; *Cabreja v Rose*, 50 AD3d 457, 458 [1st Dept 2008]).

General Municipal Law § 50-b(1) does not entitle defendants to the benefit of CPLR 504(1). Even assuming that defendant Transdev Services, a private company which contracted to operate Nassau County buses, is deemed an employee of Nassau County pursuant to General Municipal Law § 50-b(1) (*see Hothan v Metropolitan Suburban Bus Auth.*, 289 AD2d 448, 449 [2d Dept 2001], *lv dismissed* 98 NY2d 671 [2002]), it is deemed an employee "for the purpose of this section" (General Municipal Law § 50-b[1]). The facts that Transdev Services may be deemed an employee for the purposes of General Municipal Law § 50-b(1) and that Nassau County may be required to indemnify defendants do not entitle defendants to the benefit of CPLR 504 (*Beaufort*, 270 AD2d at 297; *see also Cabreja*, 50 AD3d 457).

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

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

ENTERED: SEPTEMBER 26, 2019

CLERK

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

9938 In re Haji Duncan, Ind. 4657/16
[M-2750] Petitioner, OP 182/19

-against-

Hon. Neil Ross, etc., et al.,
Respondents.

- - - - -

Cyrus R. Vance, Jr.,
Nonparty Respondent.

_____

Haji Duncan, petitioner pro se.

Letitia James, Attorney General, New York (Melissa Ysaguirre of counsel), for Hon. Neil Ross and Hon. Ellen Biben, respondents.

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

_____

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

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

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

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

ENTERED: SEPTEMBER 26, 2019

CLERK

Friedman, J.P., Sweeny, Richter, Mazzarelli, Webber, JJ.

10017 In re Nicholas G. A.,
Petitioner-Respondent,

-against-

Lillian A.,
Respondent-Appellant.

_____

Paul, Weiss, Rifkind, Wharton & Garrison LLP, New York (David W. Brown of counsel), for appellant.

Kenneth M. Tuccillo, Hastings on Hudson, for respondent.

_____

Order, Family Court, New York County (Carol Goldstein, J.), entered on or about January 17, 2019, which, after a fact-finding hearing, found that respondent sister had violated an order of protection in favor of petitioner brother by committing family offenses of harassment in the first and second degrees and menacing in the second degree, extended the order of protection for one year, and modified it to exclude the sister from their shared residence, unanimously modified, on the law, to strike the exclusion provision of the extended order of protection, and otherwise affirmed, without costs.

The Family Court's determination regarding the credibility of witnesses must be given great weight on appeal unless it is clearly unsupported by the record, because the court has the best vantage point for evaluating the credibility of the witnesses (*see Matter of Irene O.*, 38 NY2d 776, 777 [1975]; *Matter of*

Victoria P. [Victor P.], 121 AD3d 1006, 1006 [1st Dept 2014]; *Matter of Everett C. v Oneida P.*, 61 AD3d 489 [1st Dept 2009]). We find no basis to alter Family Court's determination.

While a one-year extension of the order of protection is appropriate to prevent a recurrence of the sister's behavior, under all the circumstances, good cause has not been shown to warrant an order excluding the sister from the apartment (Family Court Act § 842; *see Matter of Ironelys A. v Jose A.*, 140 AD3d 473, 474 [1st Dept 2016], *lv dismissed* 28 NY3d 953 [2016]; *see also Matter of Carmen L. v Rafael R.*, 163 AD3d 436, 437 [1st Dept 2018]).

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

ENTERED: SEPTEMBER 26, 2019

CLERK

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

10058 Joel Del Rosario, Index 305351/14
Plaintiff,

-against-

Lexington Building Co., LLC, et al.,
Defendants.
- - - - -
Lexington Building Co., LLC, et al.,
Third-Party Plaintiffs,

-against-

DPC New York, Inc.,
Third-Party Defendant.
- - - - -
Lexington Building Co., LLC, et al.,
Second Third-Party Plaintiffs-Appellants,

-against-

DPC New York, Inc.,
Second Third-Party Defendant-Respondent.

_____

Ahmuty, Demers & McManus, Albertson (Kevin J. Murtagh of counsel), for appellants.

Stonberg Moran LLP, New York (Kevin A. Hickman of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (Lucindo Suarez, J.), entered on or about December 13, 2018, which granted second third-party defendant's motion to dismiss the second third-party complaint, unanimously reversed, on the law, without costs, and the motion denied.

The motion brought by second third-party defendant (DPC) to

dismiss the second third-party complaint was based on a stipulation, dated April 8, 2015, that discontinued the third-party action with prejudice. Third-party and second third-party plaintiffs (Lexington and Winter) opposed the motion on the ground that the stipulation was void, because it was entered into without their knowledge, and the attorneys who signed it did not represent either them or DPC at the time (*see* CPLR 2104).

In response to DPC's argument that the stipulation is a complete defense to Lexington and Winter's claims against it, there are issues raised about the validity of the stipulation, including whether the attorneys who signed the stipulation had authority to do so. A consent to change attorneys executed before the stipulation was signed is sufficient to preclude dismissal of the claim at this time. At trial, the circumstances of the execution of the stipulation can be explored. The affidavits submitted by Lexington and Winter do not provide any information about what happened when the stipulation was signed, and there is no affidavit in the record by either of the attorneys who signed the stipulation and no explanation of the fact that the attorney who signed on Lexington and Winter's behalf had signed a consent to change attorneys approximately four months earlier.

We note that issues regarding whether the stipulation should

be enforced, based on estoppel or ratification arising from Lexington and Winter's subsequent actions in continuing to litigate the matter, should also be resolved at trial.

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

ENTERED: SEPTEMBER 26, 2019

CLERK